The Failed GE/Honeywell Merger: The Return of Portfolio-Effects Theory?

Thomas L. Ruffner

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol52/iss4/12
THE FAILED GE/HONEYWELL MERGER: THE RETURN OF PORTFOLIO-EFFECTS THEORY?

INTRODUCTION

Along with the increasing globalization of world markets, the convergence of antitrust enforcement policy has become an important issue to antitrust regulators, scholars, and international corporations. The recent General Electric/Honeywell International merger proposal illustrates that differences in enforcement philosophies between the United States Department of Justice (DOJ) and European Commission (EC or the Commission) can cause uncertainty in the area of merger regulation and highlight the importance of harmonized antitrust policies in the world market.

On July 3, 2001, the Commission announced that it was blocking the proposed merger between General Electric and Honeywell International. General Electric (GE) is a diversified corporation active in several fields, including aircraft engines and financial services. Within the airline industry, GE's focus is on the manufacturing of large commercial and regional jet engines. Honeywell International (Honeywell) is an advanced technology and manufacturing company that produces small regional and corporate aircraft engines as well as a range of aviation products known as avionics and non-avionics. Honeywell is a direct competitor of GE in the market for small regional jet engines, but for the most part, Honeywell's products com-

---

1. EU Commission Bars Acquisition of Honeywell by General Electric, 81 Antitrust & Trade Reg. Rep. (BNA) No. 2015, at 4 (July 6, 2001) [hereinafter Commission Bars Acquisition].
3. EU Opens Full Investigation of General Electric, Honeywell Deal, 80 Antitrust & Trade Reg. Rep. (BNA) No. 1998, at 216-17 (Mar. 9, 2001) [hereinafter EU Opens Full Investigation]. See GE/Honeywell, 2001 O.J. (C 46), ¶¶ 230-235. Avionics products are the ranges of equipment used to control the aircraft in such areas as navigation, communication, and assessing flying conditions. Id. ¶ 231. Non-avionics products handle the operation of an aircraft [such as auxiliary power units, environmental control systems, electric power, wheels and brakes, landing gear, and aircraft lighting.] Id. ¶ 234. Honeywell reported revenues of approximately $25 billion in 2000. GE, Honeywell Merger Cleared, supra note 2, at 432. For more information about Honeywell International and its services, visit its website at http://www.honeywell.com.
plement those sold by GE in the airline industry. The merger agreement between the two corporations stated that Honeywell was to become a wholly-owned subsidiary of GE.

The GE/Honeywell decision illustrates what American companies had feared since the inception of merger regulation in the EC: it was the first time that the EC blocked a merger between two American companies after the merger was cleared by its home regulator. Despite the emerging presence of the European Union (EU) as a leader in competition regulation in recent years, the EC’s decision to block the GE/Honeywell merger was unexpected. With the growing international economy, this action by the EC is forcing more and more American companies to take the European regulators seriously. The decision has created an unpredictable environment for companies as well as investment bankers to obtain regulatory approval outside of their home regulator. The decision also called attention to the need to increase dialogue within the international antitrust community to further re-evaluate whether merger regulation laws created at the national level continue to be effective in regulating the increasing amount of international mergers taking place and whether they need to create an international set of antitrust regulations, specifically for merger control.

4. Francesco Guerrera, GE and Honeywell Decision Challenged, FIN. TIMES (London), Sept. 13, 2001, at 23. The home regulator that cleared the merger was the Department of Justice (DOJ). This is the second time that the EC has blocked a merger between two American companies. However, the first merger it blocked between MCI/Worldcom and Sprint was also blocked by the Department of Justice. See also Barry E. Hawk, The EEC Merger Regulation: The First Step Toward One-Stop Merger Control, 59 ANTITRUST L.J. 195, 210 (1990) (predicting that the EC’s “broad remedial powers under the Regulation may raise jurisdictional and comity issues if the EC attempts to invoke them in transactions involving non-Community firms”) (citing Sondra Roberto, The Boeing/McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers, 24 BROOK. J. INT’L L. 593, 593 (1998)).

5. Jean Eaglesham & Francesco Guerrera, Brussels Takes Tougher Line than US on Mergers, Claims Research, FIN. TIMES (London), Jan. 9, 2002, at 3. Cf. Francesco Guerrera & Guy de Jonquieres, Unfair Competition: Mario Monti’s Proposals to Modernise European Merger Regulation are Already Viewed by Some Critics as a Missed Opportunity, FIN. TIMES (London), Dec. 11, 2001, at 16 (stating that past merger cases reviewed by the Commission have alerted companies to the long arm of the EU law, most notably the recent decision to block the GE/Honeywell merger, especially after the DOJ cleared it).


7. Id.

Part II of this Note will discuss the emergence of the Commission's competition laws and the recently enacted Merger Regulation. Part III will compare the EU's competition laws and policies with the United States' antitrust laws. Special attention will be focused on the Boeing/McDonnell-Douglas merger, which highlights important differences between the two powerhouse antitrust regulators. Part IV will cover the analysis of the blocked merger between GE and Honeywell, illustrate how the United States and EC came to differing conclusions, and explain the possible reasoning for the divergent views. Part V will discuss the effects of this decision, short and long term, and whether there is a need for increased dialogue to jump-start an international set of agreements for antitrust regulations, specifically for merger control.

II. BACKGROUND

When the EU competition laws were formed, there was no mention of merger guidelines at the Community level. To facilitate the growing need at the time the common market was nearly completed, the courts attempted to interpret Articles 81 and 82 broadly to cover certain types of mergers. Finally, when it became clear that a more comprehensive approach was necessary, the EC adopted the Merger Regulations in 1989.

A. Merger Regulation in the European Commission

The Treaty of Rome, which created the EC, contains two major provisions dealing with competition policies: Articles 81 and 82. Article 81 states:

[Article 81] prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which

9. See infra notes 14-91 and accompanying text.
10. See infra notes 92-120 and accompanying text.
11. The Boeing/McDonnell-Douglas merger was the closest that the EC came to blocking a merger between two United States-based corporations after it had been cleared by either the FTC or the DOJ. It was not until Boeing agreed to certain key concessions that the deal was able to get EC clearance. Amy Ann Karpel, The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field, 47 AM. U. L. REV. 1029, 1045-46 (1998).
12. See infra notes 121-261 and accompanying text.
13. See infra notes 262-330 and accompanying text.
may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the common market.\textsuperscript{15}

Article 82 of the Treaty of Rome prohibits "any abuse by one or more undertakings with a dominant position within the Common Market, or in a substantial part of it, as unlawful insofar as it may affect trade between Member States."\textsuperscript{16} The language of Article 82 expressly focuses on "undertakings with a dominant position."\textsuperscript{17} A dominant position is defined by EU case law as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave independently of its competitors, its customers and ultimately of the consumers."\textsuperscript{18} This concept of a dominant position is comparable to the United States' concept of market power.\textsuperscript{19} Article 82 prohibits "any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, in so far as it might affect trade between Member States."\textsuperscript{20}

During the drafting of the Treaty of Rome, there were no specific provisions proposed for merger regulation. Although there was no formal explanation for this, several arguments have been put forth to account for that omission. One possibility was that merger regulation was not considered vital at the time of the Treaty's drafting.\textsuperscript{21} At that


\textsuperscript{16} Waller, supra note 15, at 68. Article 82 was originally titled Article 86.

\textsuperscript{17} See id. (stating that "[a] dominant position is defined as the ability to act independently of competitive forces"); see also Case 27/76, United Brands v. Commission, 1978 E.C.R. 207; Case 85/76, Hoffman-LaRoche v. Commission, 1979 E.C.R. 461.


\textsuperscript{19} Kolasky, supra note 18.

\textsuperscript{20} WESSELING, supra note 14, at 16. Abuse was later defined by the Court of Justice as: an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

\textsuperscript{21} 3 ADVOKATERNE BREDGÆDE ET AL., MERGER CONTROL IN THE EEC: A SURVEY OF EUROPEAN COMPETITION LAWS 222 (1988) [hereinafter MERGER CONTROL IN THE EEC]. Indeed, at that time none of the Member States themselves had the power to regulate mergers, nor found it important to have such provisions. Id.
time, the European Economic Community (EEC) (as it was known at that time before changing its name to the EC) was more concerned with creating a common market than with restricting the concentration of corporations. To facilitate the creation of a common market, the EEC felt it was essential for corporations to merge to create market efficiencies. With each nation protecting its own industry, merging corporations within the same industry facilitated a movement toward a unified common market. Thus, merger control was not a major priority during the initial stages of the creation of the common market because the EEC did not want to regulate what it felt was necessary to achieve a common market.

Another reason why a merger regulation provision was not incorporated into the Treaty of Rome might have been the belief that merger control was highly susceptible to politicization. The Member States were not willing to relinquish authority over merger control because they wanted to protect their own markets. This was a logical stance for Member States to take, as the notion of a common market was relatively new and no State was willing to relinquish power for the sake of the Community. Each nation was accustomed to protecting its own interests, and the notion of a common borderless market was daunting. Therefore, the power to regulate mergers remained in the jurisdiction of each of the Member States.

With the growth of an international economy, the need for a Community-wide merger regulation grew. It seemed contradictory to have the goal of a single, harmonized market while at the same time

22. Id. at 222-23. See WESSELLING, supra note 14, at 33. Starting in the early 1980s, the “second generation” of EC competition law decisions emerged. The focus shifted away from creating a unified common market toward regulating processes in the market. Id.
24. Id. The desire to achieve a fully integrated, common market discounted the fear that these mergers would create anticompetitive effects in the market. Id.
26. See id. Indeed, looking at the Merger Regulation that was eventually adopted in 1989, it is abundantly clear that major negotiations went on to satisfy both the EC and the Member States. See WESSELLING, supra note 14, at 136.
27. See generally DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 499 (3d ed. 1993) (illustrating that in order for all of the Member States to agree on a Community-level merger regulation, there was a compromise that any merger that did not meet a specified threshold determined in the Merger Regulation would then be reviewed by the individual Member States).
28. See DORIS HILDEBRAND, THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES 83 (1998) (relating that Europe did not have an adequate system for reviewing mergers
tolerating widely diverging State laws regulating mergers. It was realized that in order to have a unified common market, it was vital to have one set of merger regulations implemented at the Community level. Having to deal with the merger regulations of each Member State in the Community would be a great expense of time and money, and would create possible inconsistencies. A merger regulation at the Community level would create a "one-stop shop" for merging companies because having to deal with only one authority would make the process more efficient. Thereafter in 1973, there was a push to create a merger regulation for the EC. Needing unanimous approval by the Member States, it was not well received and thus, was consequently shelved until it became evident after the Court of Justice’s opinion in BAT and Reynolds v. Commission in 1987 that such a regulation was necessary.

The Community courts alleviated the situation by interpreting Articles 81 and 82 to give the Commission authority to regulate mergers after they were consummated, but the Commission desired legislation that expressly addressed regulating mergers before they were consummated. Articles 81 and 82 dealt with competition law, but lacked specific language concerning merger regulations. Article 81 deals mainly with cartel behavior and prohibits “agreements . . . decisions . . . and concerted practices” between companies that affected markets across Member States, and expressing a need for one at the Community level).
that "prevent, restrict, or distort" competition in the common market.\textsuperscript{37} The main activities that it prohibits include the following: colluding to fix prices, dividing markets or territories, and discriminating in prices between customers.\textsuperscript{38} The Community courts found Article 81 was inapplicable to mergers because when a full merger occurs, the two corporations cease to exist and a single entity remains.\textsuperscript{39} In the Phillip Morris cases,\textsuperscript{40} the courts extended Article 81 to prohibit certain types of mergers, but only in a very narrow sense. Thus, the attempt to liberally interpret Article 81 to cover certain mergers did not resolve the Commission's desire for a merger regulation at the Community level.

When the courts determined that Article 81 did not authorize full merger regulations, its attention turned toward Article 82, which dealt with the abuse of a "dominant position."\textsuperscript{41} The seminal case establishing Article 82 as applicable to merger control was Europemballage and Continental Can v. Commission,\textsuperscript{42} where a firm with a dominant position acquired a direct competitor.\textsuperscript{43} In that case, the EC argued that the elimination of a direct competitor helped to strengthen Continental Can's dominant position.\textsuperscript{44} However, even though this case started a shift in merger control in the EC, it had a limited scope. For Article 82 to apply, the EC had to show that one of the merging parties had an existing dominant position in a relevant market before it could successfully challenge the merger.\textsuperscript{45} Therefore, if neither party to the merger had a dominant position, Article 82 could not be used to block it, even if the merger created a dominant position for the newly created corporation.

\textsuperscript{37} Article 81(1) (former Article 85) provides that: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision 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 common market . . . ." Korah, supra note 14, at 2.


\textsuperscript{39} O'Toole, supra note 25, at 212-13.

\textsuperscript{40} Joined Cases 142/84 & 156/84, BAT and Reynolds v. Commission, 1987 E.C.R. 4487 (CJ).

\textsuperscript{41} Article 82 (former Article 86) states: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states." See Korah, supra note 14, at 3.


\textsuperscript{43} See id. The court held that Continental Can violated Article 86 by acquiring Thomassen, a potential rival in the German market. See also O'Toole, supra note 25, at 213-14.

\textsuperscript{44} Europemballage, 1973 E.C.R. 215, ¶ 18.

\textsuperscript{45} See Bertolini & Parisi, supra note 23, at 20.
Although the extensions of Articles 81 and 82 through case law were limited in scope, they did help swing the balance of merger regulation control to the EC away from the Member States. A combination of events, including these legal developments, helped ensure that a merger regulation would be adopted by the EC. They played a part in strengthening not just the argument that merger regulation would better serve the new common market at the supranational, European level, but also that the EC was capable of handling this area of antitrust law.

In 1989, the Member States and Council struck an accord and created Regulation 4064/89 (Merger Regulation). The effect of this regulation was to create "one-stop shopping," which would allow parties attempting to merge to seek approval only from the Commission, instead of from all concerned Member States. It allowed the Commission to avoid having to meet the requirements of Articles 81 and 82 to regulate mergers. It also took the EC one step closer to a unified common market. The Merger Regulation gave the Commission the power to prohibit any "concentration which creates or strengthens a

---

46. Wesseling, supra note 14, at 45. The other events that helped make merger regulation control possible at the Community level included the finalization of the Internal Market program, which drastically changed the business dynamic in the internal market. Id. The program forecasted that when the internal market would be completed in 1992, the amount of mergers would increase dramatically. Id. The other event was that these mergers, or concentrations, on a Community scale, logically required a set of merger guidelines at the Community level. Id. It would be insufficient and ineffectual to apply the merger control rules of each Member State to these mergers. Id. These developments helped strengthen the Commission's argument that merger control guidelines should be created at the Community level. Id.

47. See Wesseling, supra note 14. With the tension of the merger regulation enforcement procedure between the EC and the Member States, these events helped enforce the argument that it would be possible to implement a merger regulation policy at the national level without any of the Member States being adversely affected. Id. Eventually with the unification of the common market, it seemed inevitable that the EC would need to implement its own policy, but once current events strengthened the EC's argument, the Member States were more willing to play along. Id.


49. O'Toole, supra note 25, at 216-17. See Wesseling, supra note 14, at 137. The EC made "one-stop shopping" possible by its idea of mutual exclusivity of Community and national merger control jurisdiction. Id. If the proposed merger falls within the Community dimension, the Commission has exclusive control. Id. The usual parallel applicability of Community and national competition laws was abandoned. Id. Compare this with the double-barrier theory which governs the relationship between the Community and national competition laws in the area of Articles 81 and 82. Id. at 138.

50. O'Toole, supra note 25, at 217. See also Derek Ridyard, An Economic Perspective on the EC Merger Regulation, 6 EUR. COMPETITION L. REV. 247 (1990). As the borders are broken down, the market is more likely defined as European rather than national. Id.
dominant position . . . .” To fall within the scope of the Merger Regulation, the proposed merger must satisfy a two-pronged test: First, it must be a concentration, and second, it must have a Community dimension. The Merger Regulation applied to concentrations that included “traditional mergers and acquisitions, but also cover[ed] certain joint ventures . . . that are ‘concentrative’ rather than ‘cooperative’ in nature.”

Once the Commission finds that the proposed merger is a concentration within the meaning of Article 3 of the Merger Regulation, the concentration then must have a “Community dimension” in order for the EC to have jurisdiction. A Community dimension is found where:

(1) Combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2500 million, (2) In each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million, (3) In each of at least three Member States . . . the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million, and (4) The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 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.

51. EC Merger Regulation, supra note 48, at art. 2, ¶ 3. Article 2, paragraph 3 of the Merger Regulation, states: “A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.” Id.


53. Waller, supra note 15, at 73. See EC Merger Regulation, supra note 48, at art. 3, ¶ 1 (stating that a merger shall be considered to be a concentration when either: 1) two or more previously independent undertakings merge; or 2) one or more persons, already controlling at least one undertaking or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings); see also EC Merger Regulation, supra note 48, at art. 3, ¶ 2 (the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)); JOSE RIVAS, THE EU MERGER REGULATION AND THE ANATOMY OF THE MERGER TASK FORCE 4 (1999).

54. EC Merger Regulation, supra note 48, at art. 1, ¶ 2.

55. Id. at art. 1, ¶ 3. Concentrations will be notifiable to the Commission if the parties’ combined global turnover exceeds ECU 2.5 billion; if each of at least two parties has Community-wide turnover exceeding ECU 100 million; if in each of at least three Member States the parties’ combined turnover exceeds ECU 100 million; and if in each of the same three states, each of at least two parties has turnover exceeding ECU 25 million. Id. As with the normal threshold rule, the transaction is not reportable if each of the parties achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Id.
The financial thresholds in the original Merger Regulation were high. This was acknowledged at the time of its adoption, and to continually review its merger regulation jurisdiction, the EC drafted Article 1 to create automatic review of the Community threshold within the fourth year following the adoption of the Merger Regulation. In fact, the original threshold was so high that it only encompassed mergers between corporate giants. The EU amended the Merger Regulation to a lower threshold to ensure that a "one-stop shop" system applied. If a merger meets or exceeds this threshold, it falls within the jurisdiction of the EC, and the Commission applies its Merger Regulation. If a merger does not meet the threshold, then the regulation of the merger falls to the individual Member States.

56. Council Regulation (EEC) 4064/89, 1990 O.J. (L 257). Under the original threshold requirements, there would be a Community dimension if:
   (a) the combined aggregate worldwide turnover of the undertakings concerned is more than ECU 500 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 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.

57. Id. at art. 1, ¶ 2. See also WESSELING, supra note 14, at 132.

58. WESSELING, supra note 14, at 136. The thresholds were set high as a compromise with the Member States by the EC in exchange for a Community-level merger control regulation. William Elland, The Mergers Control Regulation (EEC) No. 4064/89, 11 EUR. COMPETITION L. REV. 111, 111 (1990). Not all Member States advocated high thresholds however. Smaller Member States were for low thresholds because they had no effective merger control and so the Community Merger Regulation would have greatly helped them. It was the larger Member States with highly developed merger controls that sought high threshold levels in order to protect themselves from losing domestic control. Id.


60. EC Merger Regulation, supra note 48, at art. 1, ¶ 3. See also WESSELING, supra note 14, at 133-35. There are four exceptions to this mutually exclusive jurisdictional division to avoid allowing all mergers that exceed the threshold requirement from falling into the Community’s jurisdiction. Id. The first exception is expressly stated in the Merger Regulation itself, where if the merger involves companies that achieve two-thirds of their turnover in one Member State, then it does not have a Community dimension. Id. The second exception occurs when the merger does not have a Community dimension, but a Member State may request that the Commission examine that particular merger. Id. If the request is made, then the Commission may proceed to examine the proposed merger as if the merger had a Community dimension. Id. The third exception is the reverse of the second, where the Commission may refer a proposed merger that has a Community dimension to a Member State to examine. Id. And the final exception can be found in Article 21(3) of the Merger Regulation, which allows Member States to take appropriate measures to protect legitimate interests not expressly mentioned in the Merger Regulation itself. WESSELING, supra note 14, at 133-35; EC Merger Regulation, supra note 48, at art. 1, ¶ 2(b); art. 22, ¶ 3; art. 9; art. 21, ¶ 3.

61. EC Merger Regulation, supra note 48, at art. 21, ¶ 3.
When the Commission finds that the proposed merger falls within the scope of the Merger Regulation and concludes it does not “raise serious doubts as to its compatibility with the common market,” the Commission will allow the merger to proceed.\(^6\) If however, the Commission finds that the merger falls within the scope and “raises serious doubts as to its compatibility with the common market,” the Commission shall proceed to enter a Phase II investigation and evaluate whether the merger will create or strengthen a dominant position.\(^6\) If after the investigation the Commission determines that the merger is incompatible with the common market, it has the power to deny the merger,\(^6\) or demand undertakings\(^6\) to allow the merger to proceed.\(^6\) \(\textit{De Havilland}\)\(^6\) and \(\textit{Boeing/McDonnell Douglas}\)\(^6\) are two examples of how the EC implemented the Merger Regulation. The two cases also illustrate the progression of the EC’s merger regulation policy.

1. The \textit{de Havilland Case}\(^6\)

In 1991, shortly after the EC adopted its Merger Regulation, the Commission flexed its newly-formed muscles to block a merger between two companies that did not maintain a presence within the EC. The merger involved combining Avions de Transport Regional (ATR) with de Havilland, a Canadian division of the Boeing Company.\(^7\) In 1982, ATR was created primarily to design, develop, manufacture, and sell regional transport aircraft.\(^7\) The Commission, pursuant to Article 6(1)(c) of the Merger Regulation, initiated proceedings because it found legitimate concerns that the merger raised anticompetitive effects in the common market.\(^7\)

First, the Commission examined whether the proposed merger satisfied the first prong of the Merger Regulation, that it was in fact a concentration. The Commission held that the merger fell within the

---

\(^6\) Id. at art. 6, ¶ 1(b).

\(^7\) Id. at art. 6, ¶ 1(c).

\(^8\) Id. at art. 8, ¶ 3.

\(^9\) Undertakings are equivalent to concessions or divestitures of business operations or assets in the United States.

\(^6\) EC Merger Regulation, \textit{supra} note 48, at art. 8, ¶ 2.


\(^6\) \textit{De Havilland}, 1991 O.J. (C 128) 42.

\(^1\) Id. ¶ 1. ATR is jointly controlled by Aerospatiale SNIA (Aerospatiale), a French aerospace company, and Alenia-Aeritalia e Silna SpA (Alenia), an Italian aerospace company. \textit{See} id. ¶ 3. De Havilland manufactures regional turbo-prop aircraft. \textit{Id.} ¶ 4.

\(^1\) Id. ¶ 3. ATR, controlled by Aerospatiale and Alenia, at the time of the merger was the leading European and world manufacturer of regional aircraft.

\(^1\) \textit{See} id. ¶ 2.
scope of the Merger Regulation since de Havilland would be run by an operating company, which would be jointly controlled by Aerospatiale and Alenia, and the activities of Aerospatiale and Alenia in regional turbo-prop aircraft (commuters) was already concentrated in the GIE ATR in 1982.\textsuperscript{73}

Applying the Community dimension test, the Commission found that the combined aggregate worldwide turnover of the merging companies exceeded ECU 5 billion, each party had a Community-wide turnover exceeding ECU 250 million, and neither company achieved more than two-thirds of its Community-wide turnover within the same Member State.\textsuperscript{74} Thus, the concentration had a Community dimension. Because the proposed merger was considered a concentration with a Community dimension, it fell within the exclusive jurisdiction of the Commission.

After examining the potential effects of the proposed merger on the market, the Commission concluded that the new entity ATR/de Havilland would have a very strong position in the market.\textsuperscript{75} That strong position, combined with weak competition in the market and the limited bargaining power of customers, forced the Commission to conclude that the merger would create a dominant position.\textsuperscript{76} The Commission felt that because this dominant position was not temporary and barriers to post-merger entry were substantial, the merger would “significantly impede[e] effective competition,” and therefore, it decided to prohibit the merger.\textsuperscript{77}

\subsection*{2. The Boeing/McDonnell Douglas Case\textsuperscript{78}}

Six years after de Havilland, the EC investigated the proposed merger between Boeing Company (Boeing) and McDonnell Douglas Corporation (MDC).\textsuperscript{79} Applying the Merger Regulation to determine

\begin{itemize}
\item \textsuperscript{73} De Havilland, 1991 O.J. (C 128) 42.
\item \textsuperscript{74} Id. \textsuperscript{7} 6. The Commission examined this proposed merger in 1991, while the old Community dimension threshold was still in effect.
\item \textsuperscript{75} The merger would strengthen ATR’s position in the commuter markets because of: (1) high combined market share; (2) elimination of de Havilland as a competitor; (3) the new entity would be the sole commuter manufacturer in the commuter markets; and (4) ATR would have a significantly larger customer base. Id. \textsuperscript{7} 27. For more in-depth analysis of the Commission’s conclusions, see id. \textsuperscript{7} 28-33.
\item \textsuperscript{76} See id. \textsuperscript{7} 51. The Commission stated that “the combination of these factors leads to the conclusion that the new entity could act to a significant extent independently of its competitors and customers, and would thus have a dominant position on the commuter markets.” Id.
\item \textsuperscript{77} De Havilland, 1991 O.J. (C 128), \textsuperscript{7} 53.
\item \textsuperscript{78} Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59) 16.
\item \textsuperscript{79} Id. \textsuperscript{7} \textsuperscript{7} 1. Boeing operates in two major areas: commercial aircraft, and defense and space. Id. \textsuperscript{7} \textsuperscript{7} 3. McDonnell Douglas Company (MDC) operates in four principal areas: military aircraft: missile. space and electronic systems: commercial aircraft: and financial services. Id. \textsuperscript{7} \textsuperscript{7} 4.
whether it fell within the exclusive jurisdiction of the EC, the Commission found that the merger constituted a concentration within the meaning of Article 3 of the Merger Regulation because Boeing was to acquire entire control of MDC. The merger also had a Community dimension because Boeing and MDC had a combined aggregate worldwide turnover above the minimum threshold of ECU five billion. Each had a Community-wide turnover in excess of ECU 250 million, and neither had more than two-thirds of their aggregate Community-wide turnover within a single Member State. Thus, the Commission held that the proposed merger fell within the Merger Regulation and subsequently concluded that it raised the prospect of possible anticompetitive effects within the common market. Therefore, it initiated proceedings pursuant to Article 6(1)(c).

This merger dealt with two major markets, the commercial aviation market and U.S. defense market. The Commission examined only the civil side of the operation because it determined in its initial proceedings that no dominant position was established in the defense sector in the wake of the merger.

Because this merger would require review in the United States, the Federal Trade Commission (FTC) reviewed the merger. After an extensive investigation, the FTC declared that it would not challenge the merger. The EC took a different view, announcing that the proposed merger raised serious competition concerns for the common market. After performing its entire analysis, the EC concluded that Boeing held a dominant position in the overall market for large com-

---

80. Id. ¶ 6. Pursuant to the merger, MDC would become a wholly-owned subsidiary of Boeing. Id. ¶ 5.
81. Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59), ¶ 7. Boeing’s turnover was approximately ECU 17 billion, and MDC’s ECU 11 billion.
82. Id.
83. See id. ¶ 2. After examining the notification of the merger, the Commission concluded that it raised serious doubts as to its procompetitive effects on the market. Thus, it decided to open up a more full investigation to determine whether the merger should be blocked. See also EC Merger Regulation, supra note 48, at art. 6, ¶ 1(c).
84. See Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59), ¶ 12. There was also the concern voiced by the Americans that the EC should not intervene in the national defense market for national security reasons. It would add an intriguing twist to international antitrust enforcement if the EC could regulate how the U.S. government hands out military contracts and research and development grants.
Boeing’s merger with MDC would thus strengthen this dominant position, in contravention of the Merger Regulation. The merger would strengthen Boeing’s position in the large commercial aircraft market, and there would be significant spillover effects on to Boeing’s position in large commercial aircraft resulting from the increase in Boeing’s overall resources and defense and space business. After the Commission declared that it intended to block the merger, a settlement was struck at the eleventh hour between Boeing and the Commission in which Boeing agreed to concessions to allow the merger to proceed. Thus, before Boeing agreed to various concessions, the Commission declared that the “proposed concentration would lead to the strengthening of a dominant position through which effective competition would be significantly impeded . . . .” However, because Boeing agreed to the concessions, the EC decided that the merger would not strengthen a dominant position and therefore, it could proceed.

87. Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59), ¶ 52. For more analysis see id. ¶¶ 21-51. There were several reasons why the Commission came to this conclusion. The most important included the current market shares of Boeing, the size of its fleet in service, the recent conclusion of long-term exclusivity supply deals with major customers, and lack of potential entrants. Id. ¶ 52. There are only three major competitors in the large commercial jet aircraft market, Boeing, MDC, and Airbus Industrie, a consortium of European companies. The Commission found that Boeing’s market share during the 1990s was approximately 60%, and combined with MDC it increased to approximately 70%. These high market shares indicated a strong position in the overall market. Examining Airbus’s difficulty to improve its position in the past decade while at the same time noticing that Boeing was able to continually increase its market share, the Commission felt Boeing’s market share indicated a position of dominance, where it was able to behave independently of its rivals. Id. ¶¶ 21-38.

88. Id. ¶ 53.

89. Before the Commission made its decision, a fifteen member advisory panel, consisting of the chiefs of Member States’ antitrust enforcement agencies, recommended to the Commission to block the merger. See Anne Swardson, EU Panel Urges Rejection of Boeing-McDonnell Merger, WASH. POST, July 5, 1997, at F9. Even the day before the Commission was to announce its decision, Karel Van Miert, the EU’s Commissioner for competition at the time, declared that the Commission was going to block the deal. Id.

90. Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59), ¶ 113. Cf. Karpel, supra note 11, at 1040 (discussing the FTC’s investigation of the merger, which concluded that the merger could continue because MDC no longer was a “meaningful competitive force in the commercial aircraft market,” and that there was nothing that MDC could do, alone or otherwise, to change its position). Id. (citing In re Boeing Company/McDonnell Douglas Corp., FTC, file no. 971-0051 (July 1, 1997), at 3).

91. Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59), ¶ 124. Three major concessions accepted by Boeing were: agreeing to not enter any future exclusive agreements until August 2007, as well as not enforcing its current exclusivity deals with American, Delta, and Continental airlines, running MDC’s commercial division as a separate legal entity for a period of ten years; and licensing of nonexclusive “government-funded” patents to other jet aircraft manufacturers. Id. ¶¶ 114-119. See also. Karpel, supra note 11, at 1045.
III. COMPARING THE UNITED STATES' AND THE EC'S MERGER REGULATIONS

In order to understand the diverging results of this merger analysis, it is important to examine both U.S. and EC antitrust agencies and how both are structured. Understanding the different structures and historical developments of the agencies helps illustrate how each agency functions and how merger cases are initially approached.

In the United States, the two primary agencies dealing with and enforcing competition laws are the DOJ and FTC. The DOJ, under the direction of the Attorney General of the United States, has an antitrust division, which is headed by an assistant attorney general. It enforces the Sherman Act and, jointly with the FTC, the Clayton Act.

The FTC is an independent regulatory agency that was created by the Federal Trade Commission Act, and it is in charge of enforcing the Robinson-Patman Act as well as, along with the DOJ, the Clayton Act. The FTC, headed by five commissioners appointed by the President, has full authority to investigate, prosecute, and adjudicate applications for merger approval. If the administrative law judge, who presides over the adjudicatory process, decides in favor of the FTC, the adverse party may appeal to the full commission, and then subsequently to the federal appellate court.

Both U.S. antitrust agencies play more of a “prosecutorial” role, in terms of the procedural structure, than the EC. The DOJ cannot


93. The acting Attorney General at the time of this case was John Ashcroft, and the Assistant Attorney General of the Antitrust Division was Charles A. James.


96. Stock, supra note 92, at 828.

block a merger on its own. It must take the parties to court and convince a federal judge, acting as an independent fact-finder, to do so.\textsuperscript{98} The FTC acts in a more regulatory role where it investigates proposed mergers, and if it concludes that a merger will create anticompetitive effects in the market, it will challenge it in front of an administrative law judge.\textsuperscript{99} However, in both procedures, neither agency acts as both investigator and fact-finder.

The EC, in comparison, plays more of an "administrative" role in that it not only investigates and reviews mergers, but it has decision-making powers over the mergers.\textsuperscript{100} There is an avenue for the merging companies to get to the European Community courts, but it is strictly an appellate review process.\textsuperscript{101} "This right of appeal does not provide the same discipline in the review process as" that found in the U.S. system.\textsuperscript{102} There is a fundamental difference between judicial review after the merger has been prohibited, and a system where the antitrust agency must persuade a court in order to prohibit the merger in the first place.\textsuperscript{103}

A general difference also exists between the scope of competition laws, or the concerns the intent of which the regulations are trying to curb. In the United States, merger law "focuses on insuring a market structure that will prevent oligopolistic coordination and preserve competition to keep the leading firm or firms in line, while EU merger law focuses on preventing the leading firm from strengthening and abusing its position . . . "\textsuperscript{104} While EU merger regulations seem to be mainly concerned with unilateral actions by a dominant firm, U.S. law focuses on preventing collusion between competitors.\textsuperscript{105} This is most likely a result of differing cultures and purposes for creating such legislation.\textsuperscript{106}

To illustrate why the U.S. view focuses on preventing oligopolistic coordination, Robert Pitofsky summarized the three dangers of allowing mergers to occur that result in enhanced market power:

\textsuperscript{98} Kolasky, \textit{supra} note 18.
\textsuperscript{99} Stock, \textit{supra} note 92, at 828.
\textsuperscript{101} Kolasky, \textit{supra} note 18.
\textsuperscript{102} Donna E. Patterson & Carl Shapiro, \textit{Transatlantic Divergence in GE/Honeywell: Causes and Lessons. Antitrust.} Fall 2001., at 18, 22.
\textsuperscript{103} Id.
\textsuperscript{104} Stock, \textit{supra} note 92, at 833-34.
\textsuperscript{105} Id. at 830-31.
\textsuperscript{106} See infra note 110.
Mergers can provide a convenient route to monopoly as firms buy out rivals and then raise prices to consumers. Mergers are also a matter of concern because when only a few firms account for all or most sales of a product, they may be able to behave like monoplists and more easily coordinate their sales policies to extract higher prices and earn greater profits at the expense of consumers. Beyond these specific concerns... there is a generalized view that, in noncompetitive markets, incentives to achieve efficiency, to innovate and to drive down prices will diminish.107

Thus, the three dangers of mergers include: monopoly creation, cartel facilitation, and lethargic enterprise.108

In the United States, all three concerns are somewhat addressed in Section 7 of the Clayton Act, “which prohibits mergers whose effects ‘may be substantially to lessen competition, or to tend to create a monopoly.’”109 However, despite the equal emphasis on the three dangers, it seems that the enforcement of the statute has been mainly focused on cartel facilitation, or collusion.110 One example highlighting this focus was the 1984 Horizontal Merger Guidelines, which concentrated mostly on the problems of market collusion and barely touched on the problems of unilateral activity that created anticompetitive effects.111

Conversely, the EC is seemingly geared more to focus on preventing “anticompetitive conduct committed by the leading firm of an industry.”112 Indeed, the language of Article 2 of the Merger Regulation states a merger is “incompatible with the common market if it ‘creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.’”113 One member of the FTC has stated, “It is fair to say that the EC focuses more on single firm dominance and the United States focuses more on oligopoly coordination.”114

108. Stock, supra note 92, at 830.
109. Id. at 831 (quoting 15 U.S.C. § 18 (1994)).
110. Stock, supra note 92, at 831. A possible explanation for this could be that historically, antitrust policy began as an attempt to prevent industrial trusts from colluding and raising prices. Id. Collusion is when two or more competitors agree to restrict output or to raise prices in order to increase their profitability at the expense of efficiency and consumers.
112. Stock, supra note 92, at 832.
113. Id. (citing EC Merger Regulation, supra note 48, at art. 2, ¶ 3).
114. Stock, supra note 92, at 834 (quoting Debra A. Valentine, Building a Cooperative Framework for Oversight in Mergers—The Answer to Extraterritorial Issues in Merger Review. 6 GEO. MASON L. REV. 525, 528 (1998)).
A final distinction between the two major merger regulations hinges on the factors taken into consideration during the analysis. The EU considers non-economic factors, such as political and social considerations.\textsuperscript{115} Although economics play a major role in analysis, the EU is more vocal about these other factors.\textsuperscript{116} The former EC Competition Commissioner Karel Van Miert has stated:

The aims of European Community's competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties . . . . To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power.\textsuperscript{117}

The EC has been known to protect competition, even at the expense of the consumer.\textsuperscript{118} For example, "when considering factors in addition to market share, [EU merger-review authorities] are likely to find damning those qualities, such as excellent technology or customer service, that generally would win praise in the American courts."\textsuperscript{119} The United States, on the other hand, relies almost solely on economic analysis.\textsuperscript{120}

IV. \textbf{Analysis: The EC's Decision to Block the GE/Honeywell Merger}

On October 22, 2000, GE agreed to acquire Honeywell in a proposed $45 billion merger.\textsuperscript{121} The deal stated that GE would purchase Honeywell in an all-stock transfer where Honeywell would become a wholly-owned subsidiary.\textsuperscript{122} At the time of the merger, GE was active in the market for supplying jet engines for large commercial and regional aircraft.\textsuperscript{123} Honeywell was heavily involved in the markets for jet engines for large and small regional aircraft, avionics and non-avi-

\textsuperscript{115} Id. at 835.
\textsuperscript{116} Id.
\textsuperscript{117} Per Jebsen & Robert Stevens, Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union. 64 Antitrust L.J. 443, 450 (1996).
\textsuperscript{118} Stock, supra note 92, at 836.
\textsuperscript{119} Id. (quoting Jebsen & Stevens, supra note 117, at 479).
\textsuperscript{120} Stock, supra note 92, at 834. In the past, the United States factored in social and populist ideals, but has since moved away from relying on those factors. Id.
\textsuperscript{122} GE/Honeywell, 2001 O.J. (C 46), ¶ 5. On October 22, 2000, GE and Honeywell agreed to merge Honeywell with GE 2000 Merger Sub, Inc., a wholly-owned subsidiary of GE. The result would have made Honeywell a wholly-owned subsidiary of GE. Id.
\textsuperscript{123} Id. ¶¶ 14-29.
THE FAILED GE/HONEYWELL MERGER

onics products, and engine-starters. These aerospace markets are made up of a few very large and powerful competitors. The market can sustain only a small number of very large firms because each needs a large plant capacity to achieve the necessary economies of scale, as well as access to large amounts of capital. This is due to the extremely high fixed costs that dominate this type of industry.

On May 2, 2001, the DOJ gave its conditional clearance of the proposed merger. The DOJ stated that the merger could proceed as long as the newly merged companies divested Honeywell’s military helicopter engine business, and authorized an additional U.S.-based third-party service provider for certain models of Honeywell aircraft, engines, and auxiliary power units. The parties’ agreement to these conditions quelled concerns by the DOJ that the merger “would have reduced competition in the market for the production of U.S. military helicopter engines and the market for the provision of heavy maintenance, repair, and overhaul services for certain Honeywell aircraft engines and auxiliary power units.”

However, the EC did not agree. Upon undertaking its investigation, the Commission held up the merger and stated that it would open a full investigation of the deal. The Commission’s reason for further review was that there were three possible anticompetitive ef-

124. Id. ¶ 19-33, 230-340. Engine starters are vital to the operation of the aircraft engine, and Honeywell is a major independent distributor to several engine manufacturers. See id. ¶ 331-340.

125. Each product market has only about three to four major competitors, with some, the large regional aircraft jet engine market, only having two major competitors. See id. ¶ 9-35 (discussing the Commission’s analysis of the jet aircraft markets that GE competes in). See also GE/Honeywell, 2001 O.J. (C 46), ¶ 241-275 (discussing the Commission’s analysis of the avionics and non-avionics markets that Honeywell competes in).

126. The fixed costs that arise in the aerospace markets include heavy spending on research and development in new technology and the manufacturing of complex and expensive products. Id. ¶ 423. The engine starters market is an example of the high fixed costs involved. Id. To compete in the manufacturing of engine starters, a manufacturing company would need to invest giant amounts of money in research and development, a worldwide product support network, and the latest technology to have the capability to manufacture such products. Id.

127. GE, Honeywell Merger Cleared, supra note 2, at 431.

128. Id.

129. Id. There were fears that without the divestiture, the market for the next generation of advanced U.S. military helicopter engines would have experienced higher prices, lower quality, and less innovation. Id. at 432.

130. EU Opens Full Investigation, supra note 3, at 217. This report is also available at http://europa.eu.int/rapid/start/ceg/guesten.ksh. After an initial investigation, the Commission initiates a full investigation only when there are “serious doubts” that the merger will not create anticompetitive effects. See EC Merger Regulation, supra note 48, at art. 6; ¶ 1(c). A full investigation extends the Commission’s need to make a final decision for four months and allows it to scrutinize and make a detailed assessment of the impact of the transaction on competition. Id. at art. 10; ¶ 3.
fects stemming from the transaction. The first effect was a possible horizontal overlap between the two parties in the large regional jet engine market, which could lead to a significant reduction in the degree of competition. The only two competitors in that market were GE and Honeywell. The second effect was a possible vertical effect due to Honeywell supplying parts to competing engine manufacturers. Finally, the third effect was a conglomerate effect resulting from possible product bundling of engines with avionics and non-avionics parts. The full investigation focused on whether a dominant position would be created or strengthened by the merger, and whether anticompetitive effects in the market would result.

After the full investigation, the Commission expressed its concerns that the merger would strengthen GE’s existing dominant position in the manufacturing of jet engines for large commercial and large regional jets, as well as create a dominant position for Honeywell in the market of supplying avionics, non-avionics, and corporate jet engines. The Commission felt that Honeywell would assume a dominant position in the markets of supplying avionics and non-avionics products by vertically integrating with GE’s financial arms in GE Capital and GE Capital Aviation Services (GECAS), which handle financial services and aircraft purchasing and leasing, respectively.

---

131. EU Opens Full Investigation, supra note 3, at 217.

132. Id. The Commission separated the regional jet engine market into large and small product markets. The large regional jet engine market consisted of seventy to ninety or more seats, and the small regional jet engine market consists of planes with thirty to fifty seats. GE/Honeywell, 2001 O.J. (C 46), ¶ 20. GE and Honeywell were the only current engine manufacturers in the large regional jet engine market. Id. ¶ 21. A horizontal merger can have anticompetitive effects because it eliminates a competitor and may enable the merged firm to restrict output and raise price. Kolasky, supra note 18.

133. EU Opens Full Investigation, supra note 3, at 217. Vertical mergers are challenged when they eliminate a supplier in the vertical chain in the industry, and it results in the new entity’s ability to restrict output and raise prices. Kolasky, supra note 18. Honeywell is currently the leading supplier of engine starters to engine manufacturers. GE/Honeywell, 2001 O.J. (C 46), ¶ 331. And with GE having a dominant position in the jet engine market, the merger creates a vertical relationship with Honeywell. Id. The Commission felt that this vertical relationship could create anticompetitive effects because GE would then have control over supplying vital engine parts to its direct competitors. Id. ¶ 420.

134. EU Opens Full Investigation, supra note 3, at 217. Although GE and Honeywell are not, for the most part, direct competitors, they manufacture complementary products in the jet engine markets. See GE/Honeywell, 2001 O.J. (C 46), ¶ 412. Given these complementary products and each party’s leading market positions there would be a conglomerate effect: the newly merged entity would have the ability to create packaged product deals. Id. The effect of these packaged deals would be a strengthening of GE’s existing dominant position. Id. See also id. ¶ 355. This also leads to a creation of a dominant position for Honeywell. Id.

135. EU Opens Full Investigation, supra note 3, at 217.

136. GE/Honeywell, 2001 O.J. (C 46), ¶ 341.

137. Id. ¶ 344.
Commission felt that Honeywell would immediately be able to take advantage of GE Capital’s financial strength as well as its ability to get Honeywell’s products placed exclusively on new platforms. Through this financial strength and ability to leverage into new platforms, the Commission thought Honeywell would be able to get its products placed on new platforms at the expense of its competitors. Honeywell would also have an advantage over its competitors with its alliance with GECAS, a major aircraft purchaser. The Commission felt that GECAS would extend its GE-only policy to Honeywell products, thus locking out Honeywell’s rivals. The effects of Honeywell using GE Capital’s financial strength and GECAS’s purchasing power would not only give Honeywell an advantage over its competitors in the short term, resulting in its rivals’ loss of revenues, but it would in turn affect its rivals’ future investments in research and development due to a lack of capital. These long-term effects of diminishing revenues earmarked for research and development would cause Honeywell’s rivals to be unable to develop future generation products, ultimately resulting in foreclosure from the market.

The Commission also felt that through bundling of the new entity’s complementary goods, this merger would create a dominant position in the market for supplying avionics and non-avionics products, as well as strengthen GE’s dominant position in the large commercial and regional aircraft engine markets. The new entity’s ability to bundle its engines with its avionics and non-avionics products would allow it to create more attractive package offers and lower prices than

138. Id. ¶ 344.
139. Id. ¶ 347. This would impact Honeywell’s rivals by delaying revenues that would have resulted from placing products on these platforms, and thus reducing their ability to fund their future research and development. Id.
140. Id. Being owned by GE, GECAS has a GE-only purchase policy. The Commission concluded that the combination of GECAS’s influential buying power and its likely extension to purchase airplanes equipped only with Honeywell products would have anticompetitive effects in the market and would eventually lead to market foreclosure of Honeywell’s rivals, Rolls Royce and Pratt & Whitney. GE/Honeywell, 2001 O.J. (C 46). ¶ 344.
141. Id. ¶ 347.
142. Id. ¶¶ 347-348.
143. Id. ¶ 355. Through bundling its products with GE’s products, Honeywell will be able to offer packaged deals that its competition will not be able to match, and thus will lose market share as well as experience immediate damaging profit shrinkage. Id. As a result, Honeywell’s rivals will not able to effectively compete and will be eliminated from the market. Id. See also GE/Honeywell, 2001 O.J. (C 46), ¶ 412. With the new ability to package offers of engines, avionics, and non-avionics products as well as the related services, GE will be able to retain its customers and gain new ones in the market for engines. Id. The effect of the product bundling will be that its rivals will be forced to raise costs. Id. The product bundling will force GE’s rivals to either match prices, or attempt to find a partner to come up with a competitive bundled package. Either way, the rivals’ costs are likely to rise as a result. Id.
DEPAUL LAW REVIEW

[Vol. 52:1285

its competition.\textsuperscript{144} These attractive package deals would induce price-conscious customers to purchase GE engines and Honeywell products over the competition's.\textsuperscript{145} Although the effect of this might result in lower prices in the short term, forcing rivals to cut prices and forego higher revenues, by foregoing these revenues, the rivals would not be able to invest as heavily in research and development for future generation projects, eventually leading to their marginalization and exit from the market.\textsuperscript{146} Despite the recognized short-term efficiencies that would result, the Commission felt that the long-term effects of market foreclosure and exit by the competition outweighed the likely efficiencies.\textsuperscript{147} The Commission refuted the argument of GE/Honeywell that rivals would respond to the merger by getting together to offer similar, competing packages.\textsuperscript{148} Absent integration, the Commission stated, prices cannot be expected to be lower than those of the merged entity.\textsuperscript{149} It concluded that teaming was not a viable alternative.

\textsuperscript{144} Id. ¶ 353. The merged entity will be able to price its package deals in such a way due to its financial ability to cross-subsidize discounts across its product lines. Id.

\textsuperscript{145} GE/Honeywell, 2001 O.J. (C 46), ¶ 353. The Commission’s market analysis indicated that GE’s and Honeywell’s customers, airframe manufacturers and airlines, are price-sensitive customers. Id.

\textsuperscript{146} Id. ¶ 355. If a rival company attempts to compete in the short term, it would need to cut its prices to match those of GE/Honeywell. Id. By cutting its costs, it chooses to forego revenue streams that would be used primarily to fund its research and development for future generation products. Id. By constantly bleeding revenues in the short term, the rival company will have less and less capital for its long-term projects, thus progressively becoming marginalized from the market. Id. Eventually in the long term, the rival company will not have enough capital to constantly innovate and keep up with its competition, thus becoming foreclosed in the market. GE/Honeywell, 2001 O.J. (C 46), ¶ 355.

\textsuperscript{147} See Kolasky, supra note 18. The Commission believed that the lower prices that resulted from bundling GE and Honeywell products were not real efficiencies, but were “strategic pricing” that could not be sustained for a long period of time. But see Gotz Drauz, Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law. Address Presented at the Fordham Corporate Law Institute (Oct. 2001), at 15. It is suggested that the Commission can not have it both ways. Either the Cournot effect is small or great. If it is small, it does not seem likely that any rivals will leave the market. If the Cournot effect is great, the prices stay low and consumers ultimately benefit. The ‘Cournot effect’ is the effect that occurs after a conglomerate merger takes place, and there is incentive for the new entity to lower prices because “it causes the firm to internalize the negative externalities associated with higher prices.” Kolasky, supra note 18.

\textsuperscript{148} GE/Honeywell, 2001 O.J. (C 46), ¶ 378. The Commission concluded that even if customers found these competing bundles attractive, they would not be viable alternatives because in the absence of integration, they would not be able to match the prices of GE/Honeywell. Id. The Commission also felt that teaming, as opposed to integration through merger, was much more fragile because it involves having to coordinate two different entities and trying to avoid conflicts of interest. Id. ¶ 379. The Commission also felt that teaming was not always desirable for the consumer, because the effect of getting multiple firms together could create major additional administrative and managerial costs. Id. ¶ 380.

\textsuperscript{149} Id. ¶ 378.
One major concern that the Commission focused on was GE/Honeywell's ability to "pure" bundle, or "technical" bundle, its products. This kind of bundling restricts the individual components from working with rivals' components, allowing them to function only as part of a bundled system of its own products. By technical bundling, GE/Honeywell would make future replacement parts incompatible with the existing products, forcing the airplane owner to continue using GE/Honeywell parts. Not only was the Commission concerned by the incompatibility problem, but also the problem was compounded with the fact that GE/Honeywell would be the only integrated company in the industry. Thus, with no other integrated companies in the market, no one would be able to effectively counter this bundling strategy with its own technical bundling.

The Commission also felt that GE could strengthen its dominant position through vertically integrating with Honeywell's engine starters. Honeywell is the major producer of engine starters for engine manufacturers in direct competition with GE. By acquiring Honeywell, GE would have a financial interest in disrupting the flow of these engine starters to its direct competitors, ultimately foreclosing competition.

In an attempt to address these concerns and salvage the merger, GE proposed concessions, which were deemed insufficient. On June 28,
2001, after the deadline to submit undertakings, GE proposed further concessions. However, the Commission refused to accept them because they did not sufficiently resolve the problems identified at such a late stage in the procedure.

With the failure of negotiations between the parties, the EC blocked the proposed merger. The EC based its decision to block the merger on the fact that the merger would create or strengthen dominant positions in several markets and "would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines." The combination would have resulted in creation of dominant positions in markets for the supply of avionics, non-avionics, and corporate jet engines, as well as strengthening GE's existing dominant position in jet engines for both commercial and large regional jets.

Honeywell's engine starter business, fifty percent of Honeywell's stake in its joint venture, Vericor, where it markets its small marine gas turbines, and two engines that power current and future Avro airplanes. Id. ¶¶ 489-496. The proposal also included a non-compete agreement where GE will not purchase corporate jet aircraft for operating leasing purposes, keeping GE-CAS as a separate legal entity and conducting its business with Honeywell at a distance, and commitments to not bundle GE products with Honeywell products, with certain exceptions. Id. ¶¶ 497-499.

158. Id. ¶ 534. After several failed attempts at negotiating acceptable concessions with the EC, GE/Honeywell's final deal offered to divest $2.2 billion in revenue in Honeywell's aerospace business. Honeywell Home Page, at http://www.honeywell.com/mediakit/announcement.jsp (last visited Feb. 18, 2003). This divestiture included a new business regional jet engine, air turbine starters, and certain avionics and non-avionics products. Id. Despite what GE/Honeywell felt was a major concession, the EC demanded further divestitures.

159. Dimitri Giotakos et al., General Electric/Honeywell—An Insight Into the Commission's Investigation & Decision, COMPETITION POL'Y NEWSL., Oct. 2001, at 5, 13. available at http://europa.eu.int/comm/competition/speeches/index_2001 (last visited Jan. 30, 2003). The deadline for GE/Honeywell to submit its proposed undertakings was June 14, three months after the Commission's decision to open further proceedings. GE/Honeywell. 2001 O.J. (C 46), ¶ 547. According to the requirements set out in the Merger Regulation and the Commission's Notice on remedies acceptable under Council Regulation Number 4364/89 and under Community Regulation Number 447/98, the only way a submission of undertakings can be accepted after its deadline is if it properly resolves the issues raised and allows the Commission sufficient time to evaluate the undertakings, and to consult the Member States. Id. ¶¶ 546-548.


162. Id.
The first major divergence in reasoning between the EC and DOJ was the Commission's finding that GE already maintained a dominant position in the large commercial and regional jet engine markets. As stated earlier, the EC's concept of a "dominant position" is analogous to that of the U.S. concept of market power. The differing conclusions resulted not from differing procedures involved in merger regulation, but from basic doctrinal differences. The Commission based its reasoning upon GE's current market share. The Commission, using the methodology from its prior aerospace cases, calculated the market share on the basis of the installed base of aircraft in production and the firm orders to date for aircraft that are currently manufactured. On the opposite side of the spectrum, U.S. antitrust experts and economists focused on examining the competition. The result of these opposing doctrines is that the EC is able to find dominance in the market for a firm that aggressively discounts, whereas in the United States, dominance is only found if the competition cannot

---

163. Patterson & Shapiro, supra note 102, at 18. In fact, although the merger has since been abandoned, both GE and Honeywell have appealed the Commission's decision to the Court of First Instance to challenge its conclusions including the finding that GE already had a dominant position in the large commercial and regional jet engine markets. Francesco Guerrera, How "Dominance" Became Europe's Dirty Word in Takeovers: GE and Honeywell Lobbied as Best They Could to Complete Their Deal, But Brussels Commissioner Would Have None of it, Fin. Times (London), Oct. 4, 2001, at 18.

164. See supra notes 17-18 and accompanying text. Both assert that a firm is "dominant" or has "market power" when it can act independently of its competitors and is able to stifle competition. Kolasky, supra note 18.


166. GE/Honeywell, 2001 O.J. (C 46), ¶ 38. These include all deliveries to date and orders placed but not yet delivered, and exclude aircraft no longer in production.

167. Patterson & Shapiro, supra note 102, at 20. It is undisputed that the large jet engine market is a bidding market. Id. The three major players, GE, Rolls Royce, and Pratt & Whitney engage in a bidding process to win engine orders from airlines or airframe manufacturers. Id. In evaluating competition in these markets, the fundamental question that is raised is: are the bidding events highly competitive or does one firm dominate? Id. Economists have come up with some questions to answer this:

(1) Do multiple suppliers typically enter the bidding competition? (2) Do customers consider these suppliers capable of offering good alternatives? (3) Have suppliers historically preserved their strengths and capabilities despite setbacks? (4) Is bidding vigorous? Are there multiple rounds of bidding in which the bids move significantly? Do suppliers offer major concessions to win the bidding? (5) Have multiple suppliers shown the ability actually to win bids with regularity? and (6) Are multiple suppliers positioned technically to remain capable and attractive for upcoming bidding events?

Id.
offer similar, alternative products, thus allowing the firm to win the bid without having to compete aggressively.\textsuperscript{168}

Examining the EC's methodology of focusing on current market share, it becomes clear why it found GE to have an existing dominant position. In the large commercial jet aircraft market, GE had over a 52\% market share for the installed base of aircraft in production, and a 65\% market share for large commercial jet engines that had been ordered as of January 2000.\textsuperscript{169} In the large regional jet aircraft market, GE had between 60\% and 70\% of the market share for the installed base of aircraft in production, and between 90\% and 100\% of the market for firm orders.\textsuperscript{170} With such giant market shares in both jet engine markets, the Commission concluded that a dominant position already existed prior to the merger.\textsuperscript{171}

General Electric and Honeywell both criticized this market share approach. Both companies argued that this methodology gave a "static snapshot" of the current market and failed to take into consideration the past and future markets, thus, illustrating its highly competitive nature.\textsuperscript{172} The Commission disagreed, however, and stated that its reasons for choosing this methodology included the installed base and order backlog of aircraft was "the best proxy to measure and to interpret the position of competitors in the industry,"\textsuperscript{173} and that revenue gained from aircraft no longer in production was negligible.

\textsuperscript{168} Id.

\textsuperscript{169} GE/Honeywell, 2001 O.J. (C 46), ¶¶ 70, 77. The “installed base of engines” on large commercial aircraft constitutes all aircraft that are currently in production where the engine has already been installed. Id. ¶ 38. The engines that have been ordered constitute all recent orders by airlines for engines that have yet to be installed on aircraft in current production. Id.

\textsuperscript{170} Id. ¶¶ 84-85.

\textsuperscript{171} Id. ¶¶ 83, 87. The Commission explained that in the large commercial aircraft engine market, GE enjoyed a “strong position.” Id. ¶ 83. However, GE displayed several features of having a dominant position: a market share far ahead of its competitors, an increase in market share over the past couple years, its large order backlog gives it a leg up on future market penetration, and it expects to generate a large amount of revenue from its overall installed base, and thus will be in a strong position to compete in the future. GE/Honeywell, 2001 O.J. (C 46), ¶ 83.

\textsuperscript{172} See id. ¶ 39; see also United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974). The Court concluded that market share may not necessarily predict the future strength of the company. Examining the firm’s current market share may be illusory. By using “static law,” the Court takes a snapshot of the two firms’ market share. Merging parties argue that this snapshot is not an accurate picture because it does not indicate the future of the merger. It merely takes a look at the present state of the merger. Id.

\textsuperscript{173} GE/Honeywell, 2001 O.J. (C 46), ¶ 41. This conclusion is based on the role that incumbency plays in the future purchasing decisions of the airlines. When airlines decide to expand or replace its existing fleet, their costs are affected by fleet commonality. Thus, an engine supplier can expect to increase sales as its incumbency grows and airlines are more familiar with its products.
compared to ones in current production.\textsuperscript{174} For these reasons, the Commission decided that the installed base and order backlog of engines on aircraft currently being produced were the "main indicators for the assessment of future competition in the industry."\textsuperscript{175}

Notwithstanding the methodology that the Commission employed to evaluate GE's current market share, the DOJ's disagreement stemmed from its interpretation. Believing the Commission weighed the market share derived from firm orders outstanding (65\%) more than the market share in the installed base in its decision, the DOJ dismissed those numbers as "weakly indicative" of the current competitive conditions in the market.\textsuperscript{176} The majority of that market share stemmed from a single sole-source contract with Boeing for the 737, considered the most popularly selling commercial aircraft ever.\textsuperscript{177} Without this contract, the market shares even out at GE with 44\%, Pratt & Whitney\textsuperscript{178} with 23\%, and Rolls Royce with 27\%.\textsuperscript{179} This more accurate picture of market shares illustrated a fiercer and more competitive market.\textsuperscript{180} This new landscape drastically altered the idea that GE commands the market.

The DOJ also did not agree with the Commission's assertion that GE's main competitors, Pratt & Whitney and Rolls Royce, were no longer powerful enough to compete effectively with GE.\textsuperscript{181} For example, the new engine awards given as of November 2001 illustrate that Rolls Royce and Pratt & Whitney were doing well against GE, with GE winning 42\% of the new contracts, Pratt & Whitney with 32\%, and Rolls Royce with 27\%.\textsuperscript{182} These numbers refute the theory that GE had a dominant position. The relatively evenly-balanced market shares combined with a highly competitive market for new contracts tend to make GE's supposed "dominant" position less dominant.\textsuperscript{183}

Another fundamental problem that the DOJ found with the Commission's decision that the merger would strengthen GE's dominant
position in both engine markets was that it was based entirely on the bundling of GE and Honeywell products and services. The Commission felt that the complementary nature of the GE and Honeywell product offerings would give GE the incentive, as well as the ability, to engage in bundling the products or “cross-subsidization” between the two markets. The bundling could arise in various forms, including mixed bundling or pure bundling. Mixed bundling entails selling the complementary products together at a price that, owing to the discounts that apply across the product range, is lower than the price charged when they are sold separately. The other form, pure bundling, occurs when products are sold only in a bundle and not separately. Pure bundling may also include technical bundling, where the components can only function as part of the bundled system, which effectively makes the components incompatible with the products from the other suppliers.

With these bundled products, GE/Honeywell would be able to aggressively discount its prices because it would have the financial ability to cross-subsidize discounts across the products in the bundle. As a result, its rivals would not be able to compete effectively because the customers in the market, the airframe manufacturers and airlines, are considered price-sensitive consumers. Competition could choose either to drop its prices to compete in the short term at the risk of losing future revenues for research and development, or not drop prices and lose market share. However, the Commission never stated anything beyond mere speculation that these would be the effects of bundling. Because it never quantified these effects, there is

---

184. See GE/Honeywell, 2001 O.J. (C 46), ¶ 412. Because the merged entity can package complementary products, engines, and avionics and non-avionics products, the effect will be to strengthen GE’s existing dominance. Id. Rivals will be forced to respond by either cutting prices or creating joint ventures which would likely raise costs. Id.

185. See id. ¶ 349.

186. Id. ¶ 351.

187. Id.

188. GE/Honeywell, 2001 O.J. (C 46), ¶ 351.

189. Id.

190. Id. ¶ 353.

191. Id. The Commission’s market investigation found that the market of purchasing jet engines and supply parts are price-sensitive. Id.

192. Id. ¶ 354. Either way, the results would lead to marginalization of the company and eventual exit from the market. The competition can either exit in the short term from loss of market share, or in the long term from no longer having enough capital to be able to keep up with research and development for future products. GE/Honeywell, 2001 O.J. (C 46), ¶ 354.

193. The Commission stated that although it examined economic analyses of mixed bundling, it concluded that it did not need to rely on any economic models to conclude that the packaged deals that GE/Honeywell would offer would foreclose competition in the engine and avionics/non-avionics markets. Id. ¶ 352; see also Kolasky, supra note 18.
no knowledge to what degree GE’s and Honeywell’s rivals will actually be harmed.  

General Electric and Honeywell refuted this conclusion by claiming that bundling does not, for the most part, exist in this industry, and if it does exist, it does not create any significant advantages for the integrated firm. In an industry that is characterized by highly differentiated products, powerful buyers, and individually negotiated transactions, product bundling does not create an advantage. General Electric and Honeywell pointed to evidence showing that customers purchase products based on their individual merits as opposed to a bundled package. It was also shown that integrated firms that have broader product lines do not necessarily translate into market power or dominant positions.

Despite studies illustrating this point, the Commission ignored them and concluded without any empirical evidence that the bundling would create advantages for GE/Honeywell at the expense of its rivals and thus would lead to the exit of the competition from the market. This conclusion is contradictory to the Commission’s previous finding in the Allied Signal/Honeywell Merger case in 1999, where it stated, “although packages of non-avionics and avionics have existed, they nevertheless are rare.” To emphasize the weakness of this argument, the EC, in later press statements, downplayed the significance of the effects that mixed bundling had in its decision. It claimed that the GE/Honeywell case was concerned more with the transfer of GE’s financial strength to Honeywell, than with it being a portfolio effects case. This led William Kolasky, the Deputy Assistant Attorney General of the DOJ Antitrust Division, to comment, “If that is so, it is hard to understand the finding that the merger would strengthen GE’s—not Honeywell’s—dominant position in large jet engines.”

194. Patterson & Shapiro, supra note 102, at 19. (stating “[a]dverse effects on customers would allegedly arise because the feared discounts would weaken rivals and ultimately lead to their exit[ ]” without articulating how much harm would actually occur).
195. GE/Honeywell, 2001 O.J. (C 46), ¶ 361. Indeed, prior to this proposed merger, Honeywell was in a position to offer bundled packages with its engines and component parts, and there is no evidence that Honeywell engaged in bundling. But see id. ¶¶ 356-397 (discussing the Commission’s response to GE’s and Honeywell’s arguments that bundling is not advantageous in aerospace markets). See also Barry Nalebuff & Shihua Lu, A Bundle of Trouble—Bundling and the GE/Honeywell Merger (Oct. 2001) (on file with author).
196. Kolasky, supra note 18.
197. Patterson & Shapiro, supra note 102, at 19.
198. Id.
201. Id.
202. Id.
B. The Commission’s Finding That the Merger Created a Dominant Position for Honeywell in the Avionics and Non-Avionics Product Market

The second major divergence in reasoning between the EC and DOJ was the Commission’s finding that Honeywell would establish a dominant position in the market for avionics and non-avionics products. This conclusion sparked major disagreements based on the Commission’s reasoning: that a dominant position would be created by the “range effects” from the combination of GE and Honeywell products. The Commission felt that Honeywell’s current position in the avionics and non-avionics markets combining with GE’s “toolkit for dominance”—GE Capital and GECAS—would create anticompetitive effects.

This argument raised by the EC strikes everyone, including antitrust agencies, economists, and academics, as eerily familiar. Indeed, this is the very same argument that was once raised in the United States by antitrust agencies and believed by the courts to be valid. Before antitrust law experienced its revolution in the 1970s, mostly in part due to the emergence of the “Chicago School,” the antitrust agencies and the courts were opposed to “conglomerate mergers”—mergers between companies that were not direct competitors but sold complementary products—and sought to restrict them with arguments that included deep pockets, reciprocal dealing, and entrenchment. However, through the Chicago School, the courts and agencies learned that these arguments did not hold water, and in fact, conglomerate mergers tended never to eliminate the competition. That the EC would rely on this theory to block a merger in the twenty-first century effectively throws away years of research and experience.

Focusing on the first of the two “toolkits for dominance,” GE Capital, the Commission stated that Honeywell would benefit from GE Capital’s ability to leverage its financial power to secure its products on new platforms, thereby denying Honeywell’s competition the ability to place its own products on these platforms. In addition to this leveraging advantage, GE Capital would be able to provide Honey-
well with cheaper financing, allowing it to cross-subsidize its different business segments and thus, be able to effectively force out its rivals. The effects of these advantages are similar to that of the effects of the bundling of GE and Honeywell products. Short-term loss of revenues by its rivals will in the long term deprive them of being able to invest in the future and thus, the companies will be marginalized until they exit the market.

This argument did not make sense to the DOJ. First, the Commission relied on the fact that GE has the world’s largest market capitalization, which allows GE to be able to take greater risks as well as give greater discounts to its customers. The DOJ views market capitalization as completely irrelevant while analyzing proposed mergers. To illustrate this point, during the “dot-com” craze of the late 1990s, Microsoft and Cisco Systems both had market caps in excess of GE.

Second, merely because Honeywell would be joining GE and its ability to generate large amounts of capital, there was no reason to believe that Honeywell would be able to get capital any more cheaply than its rivals. General Electric has several divisions that require capital, and foregoing one division to give capital to another entails opportunity costs because that capital is no longer available. With these opportunity costs in mind, GE is forced to be efficient with its capital. Thus, Honeywell will not have the advantage of cheaper capital over its rivals.

Third, even if it can be proven that Honeywell has access to cheaper capital than its rivals, the DOJ regards this as an efficiency. And if this is viewed as an efficiency, then the Commission’s decision to block this merger is akin to the Commission blocking a merger be-

---

208. Id. ¶ 345.
209. Id. ¶ 347.
210. Market capitalization is defined as the share value of the company’s public stock multiplied by the shares outstanding.
211. Kolasky, supra note 18.
212. Id.
213. Id. According to William Kolasky, it is the first time that he has seen a AAA bond rating as an “antitrust no-no.” Id.
214. Id. This difference in view can be attributed to the United States’ vast experience in its markets and its long-standing belief that markets are self-correcting. Id. This is not the case in Europe, where they are new to deregulated markets and do not have the necessary experience to believe that its markets will correct themselves without the need of government intervention. Kolasky, supra note 18.
215. Id.
216. Id. The DOJ regards cheaper capital the same as any valuable asset, including machinery and superior management skills. Id.
cause one of the companies has superior management or better resources that will lead to innovation and ultimately cheaper prices.\textsuperscript{217}

Finally, the DOJ refutes the Commission’s argument that the competition will be forced to exit the market because they will no longer be able to cover their fixed costs associated with the industry.\textsuperscript{218} The DOJ compares this argument with the “ruinous competition” arguments of the early cartel cases, where economists at the time felt firms with high fixed costs could not recover these costs in highly competitive markets, thus causing ruinous competition, which would result in bankruptcy and destruction of assets.\textsuperscript{219} These arguments did not hold water in the 1890s in the United States, but they seem to still be treading water in the EC.\textsuperscript{220}

Examining the second tool in the “toolkit of dominance”—GECAS—the Commission concluded this vertical integration of Honeywell’s parts with a significant purchaser of aircraft in GECAS would lead to creation of a dominant position.\textsuperscript{221} By extending its GE-only policy to include Honeywell products, GECAS will secure Honeywell’s products on new platforms.\textsuperscript{222} Thus, Honeywell’s rivals will be excluded entirely from these new platforms, ultimately hurting consumers.

The DOJ is hard-pressed to agree with this assessment by the EC because the numbers do not support the conclusions. Aircraft purchases by GECAS are less than ten percent, which is not nearly enough for what the courts deem necessary to conclude that there are anticompetitive effects.\textsuperscript{223} Lack of market power precludes GECAS from being able to command market foreclosure of its rivals. In fact, it was shown that other leasing companies are intentionally purchasing non-GE engines in order to differentiate themselves.\textsuperscript{224}

\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Kolasky, supra note 18. See, e.g., United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897).
\textsuperscript{220} See Trans-Missouri Freight, 166 U.S. at 372-73. “Ruinous competition defense would force the court to decide what a reasonable rate of profit in a particular industry should be,” and this was not the appropriate role of the courts. Id.
\textsuperscript{221} GE/Honeywell, 2001 O.J. (C 46), ¶ 343.
\textsuperscript{222} Id. ¶ 344.
\textsuperscript{223} Kolasky, supra note 18. Typically courts require a market share above 30-35%. See United States v. Phila. Nat’l Bank, 374 U.S. 321, 364 (1963) (holding that 30% market share was high enough to be considered undue concentration).
\textsuperscript{224} Kolasky, supra note 18.
C. Diverging Results Between the DOJ and the Commission

There have been several arguments raised in attempts to reconcile the diverging results between the two merger regulation authorities. One argument for the contrary results of the merger that has been repeatedly dismissed by involved regulatory members on both sides of the Atlantic is the theory that this case was politicized, meaning that its conclusion was based on politics between the EC and the United States and not matters of law and economics.225 Neither Mario Monti, the European Competition Commissioner, nor Charles A. James, the Assistant Attorney General of the Antitrust Division at the DOJ, discussed this as a possible reason for the failure of both regulatory agencies to come to an agreement.226 Also rejected early on were complaints that the EC had no business inserting itself into an all-American deal, claiming that European protectionism was behind the decision.227 The Merger Regulations expressly state that the EC has jurisdiction to analyze any merger that meets the concentration test and Community dimension tests.228 The focus is placed on the competitive effects in the EC market and not which country the merging companies are from.229 Moreover, analyzing a merger between two foreign firms is not uncommon to the DOJ or FTC. In a recent case involving two offshore companies in the pharmaceutical field, the

225. Press Release, The European Union On-Line, Commissioner Monti Dismisses Criticism of GE/Honeywell Merger Review and Rejects Politicisation of the Case (June 18, 2001). at http://europa.eu.int/rapid/start/cgi/guesten.ksh (last visited Jan. 30, 2003). “I deplore attempts to misinform the public and to trigger political intervention. This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics, not politics.” Id.


227. See Monti Discusses Merger Control, supra note 226. Monti stated that the EC, as its policy, focuses its reviews of mergers and acquisitions on the “market dominance” test, without regard to the nationality of the companies involved. Id.; see also Thomas B. Leary, A Comment on Merger Enforcement in the United States and in the European Union, Prepared Remarks Before the Transatlantic Business Dialogue Principals Meeting (Oct. 11. 2001). at http://www.ftc.gov/speeches/leary/tabd010111.htm (last visited Jan. 30, 2003). The EC was well within its power to review and, ultimately block, a merger involving two U.S.-based companies. Id. Nationality does not play a role in merger control laws. Id. In comparison, the United States has not hesitated to review mergers involving non-U.S.-based companies, but which affect its economy. Id.

228. See EC Merger Regulation. supra note 48.

229. Id.
FTC had the power to analyze the proposed merger.\textsuperscript{230} The language of the EC’s Merger Regulation “Community dimension” threshold is broad enough to enforce the Merger Regulation in acquisitions between two non-Community firms “where they each have substantial operations in the Community, thus triggering Commission review and potential invalidation of transactions outside the Community.”\textsuperscript{231} Thus, the Commission can enforce its Merger Regulation against European and non-European companies when worldwide and Community-wide turnovers exceed the required threshold amounts.\textsuperscript{232}

The differing conclusions between the two regulators did not result from an inability to come up with the same facts and analysis, but stemmed from basic procedural and doctrinal differences.\textsuperscript{233} With the continued attempts to work closely together during the investigation of the proposed merger, the DOJ and Commission came to the same results in terms of facts, market division, and product divisions.\textsuperscript{234} Where they did diverge was in defining the scope of antitrust enforcement.\textsuperscript{235} The DOJ believed that the merger would create better products at lower prices, the very purpose of competition.\textsuperscript{236} The Commission, on the other hand, believed that the merger would create an unfair disadvantage to GE’s competitors and that the short-term efficiencies would ultimately lead its rivals to exit from the market and was thus anticompetitive.\textsuperscript{237} Focusing on the role of GE Capital and its leasing program, the Commission feared that through

\textsuperscript{230} See In re Ciba-Geigy Limited, 123 F.T.C. 842 (1997). The FTC reviewed a merger between two Swiss pharmaceutical firms that would have had effects in the United States market. Other case examples where the FTC regulated mergers between foreign firms include Glaxo/Wellcome (In re Glaxo/Wellcome, FTC, file no. 951-0054 (Sept. 6, 1996), at http://business.cch.com/primesrc/bin/highwire.dll) and Glaxo Wellcome/SmithKline Beecham (In re Glaxo Wellcome plc/SmithKline Beecham plc., FTC, file no. 001-0088 (Jan. 26, 2001), at http://business.cch.com/primesrc/bin/highwire.dll).

\textsuperscript{231} Waller, supra note 15, at 74; see also James S. Venit, European Merger Control, the First Twelve Months, 60 Antitrust L.J. 981, 981-85 (1991).

\textsuperscript{232} Jones-Starr, supra note 52, at 153.


\textsuperscript{234} See Muris, supra note 92 (stating that GE/Honeywell was the only case where the EC and the United States disagreed after examining the same facts in the same market context and the merger was prohibited).

\textsuperscript{235} James, supra note 233.

\textsuperscript{236} Id.

\textsuperscript{237} Id.; see also Eleanor M. Fox, Antitrust and Competitiveness: Efficiencies, Failing Firms, and the World Arena, Global and Innovation-Based Competition Hearings Before the F.T.C. (Dec. 13, 1994), at http://www.ftc.gov/opp/global/fox.htm (last visited Jan. 30, 2003). “EC law is much more concerned than U.S. law with protecting smaller firms against abuses of dominance, merger and other decisions are much more subject to politics and (therefore) national industrial policies.” Id.
providing targeted financial solutions, it would be able to leverage its financial strength to market its own products. This would have put the competition at a major disadvantage, and most likely would have caused it to fail.

This fundamental difference can be attributed to the EC’s emphasis on long-term harm over short-term efficiencies when analyzing these kinds of mergers. United States antitrust thinkers do not attempt to guess at the long-term effects and presume that the market will find a way to fix itself, be it through competing mergers or a shift in strategy. Perhaps this is because the United States has faith in its markets, whereas the EC is still trying to break from its history of government regulations and is not willing to depend on the markets as much.

Another fundamental difference between the two systems involves the procedural framework within which each operates. In the United States, neither the DOJ nor FTC has the power to block a deal. In order for the government to challenge the proposed merger, it must take the merging corporations to court. This is not the case in the EC. Unlike the DOJ and FTC, which act in a law enforcement capacity, the EC is seen as the “investigator, prosecutor, judge, [and] jury.” Thus, it does not have to face an independent court to argue that a merger will create anticompetitive effects in the market. The EC is also the final defense to a proposed merger; once it allows the merger to take place, it cannot challenge it in the court of first instance. This fundamental difference radically alters the EC’s

239. Id.
240. Press Release, F.T.C., FTC Chairman Muris Stresses Commitment to Cooperation With European Commission (Nov. 14, 2001), at http://www.ftc.gov/opa/2001/11/euus.htm (last visited Jan. 30, 2003) (stating that “in contrast to the U.S. approach, the EC appears to have emphasized the possibility of long-term harm over the near-term efficiencies and consumer benefits that the transaction likely would have produced”).
242. Id.; see also Sikora, supra note 238 (commenting that the EC was concerned that, although no competition in the aerospace market was failing, if it cleared the GE/Honeywell merger, the competition would have failed, unlike the United States that allows the market to decide their fate).
243. Guerrera & Ratner, supra note 6, at 3.
244. Id. “[T]he Commission has to ensure that the competitive structure on the relevant markets is not harmed as a result of the merger.” Id.
245. Kolasky, supra note 18.
246. See Guerrera & Ratner, supra note 6, at 3. See also Dominick Lasok & K.P.E. LASOK, LAW & INSTITUTIONS OF THE EUROPEAN UNION 324 (2001). The Court of First Instance, similar
merger regulations as compared to the United States. With the ability to challenge the merger in court, the United States has the latitude to clear a merger that is borderline in having anticompetitive effects. If the merger ultimately creates anticompetitive effects, it can then remedy the situation in federal court. However, the EC does not have this buffer zone. Because it is the final defense to blocking a merger that has possible anticompetitive effects, it must make certain to do its homework thoroughly.

This procedural divergence alters merger regulations between the two agencies another way by changing the role of fact-finder. The DOJ and FTC know that they must take the companies to court to block a merger. By taking the merger to court, the court plays the role of fact-finder, and the antitrust agency must prove by a preponderance of the evidence that the merger will substantially lessen competition. Having to present a case to an independent fact-finder forces the agency to bring only those cases that it truly feels create anticompetitive effects. Thus, a separation between the investigators and judge creates a strong checks and balances system in the merger control process. By contrast, in the EU, the Commission does not have such tight judicial oversight. Not only does it play the role of the merger regulation enforcer, but it also has the role of fact-finder. Because it plays the role of “investigator, prosecutor, judge, and jury,” there is no effective system of checks and balances to ensure that the EC is making final decisions on merger cases that will survive judicial scrutiny. Thus, under these differing procedural

to U.S. lower federal courts, hears and determines cases at first instance, and is subject to appeal to the Court of Justice. Id. The Court’s jurisdiction includes all actions brought by natural or legal persons, including competition cases. Id. at 325.


248. Id.

249. Kolasky, supra note 18.

250. See id. (stating that proving a case to an independent fact-finder disciplines an agency’s decision-making).

251. Id. Knowing that one will have to prove one’s case to an independent fact-finder forces one to bring only one’s strongest cases and most persuasive arguments. Id. The cross-examination mechanism alone creates a threshold which makes the burden of persuasion all that more difficult to overcome. Id.

252. Id.

253. See generally Kolasky, supra note 18 (pointing out that the EC procedure makes the final decision on merger cases, and that the judicial review that does exist is slow and highly deferential to the Commission’s factual conclusions). But see Monti Discusses Merger Control. supra note 226, at 40. Monti argues that there is effective judicial oversight of the Commission’s merger control decisions. Id. Of the mergers that have been prohibited, which is less than one
frameworks, there are possible divergences between the two agencies, not only as a result of differing abilities to redress mergers that will create anticompetitive effects, but also because one agency has more of a law enforcement role, whereas the other has more of a regulatory role.

Another difference, and possibly the most problematic one, is the fundamental disagreement about the so-called “portfolio-effects” theory. The portfolio-effects theory, or range-effects theory, states that a merger should be blocked if it creates a stronger competitor that will ultimately foreclose competition in the market because the new company will reduce prices and raise output, driving everyone out of the market.254 This theory once had a major stranglehold in U.S. antitrust theory until the antitrust revolution of the 1970s.255 Since then, it has been criticized by U.S. scholars and antitrust experts as “anti-consumer” and is no longer subscribed to in the United States.256 However, it seems, as this case highlights, that the theory is still alive and well across the Atlantic. In GE/Honeywell, the Commission believed that with the merging of the companies, the efficiencies created would allow GE to gain a stranglehold on the market to supply large commercial and regional jet aircraft engines ultimately forcing disinvestment and exit of the competition in the market.257 The EC wanted to protect the competition from such short-term efficiencies to keep the

percent of all mergers scrutinized, over forty percent of them have been examined by the courts on review. Id. This amount of judicial scrutiny “is largely sufficient to ensure that the commission takes jurisdictional control seriously and that it does not prohibit a merger without being very convinced that its decision would stand a legal challenge.” Id.

254. Kolasky, supra note 18. See also Peter Spiegel & Francesco Guerrera. EU Defends Legal Case on Takeovers, FIN. TIMES (London). Oct. 16, 2001, at 16. “The so-called ‘portfolio effect’ theories ... hold that the wide range of offerings in a merged conglomerate can unfairly give the new company an ability to leverage a dominant position in one industry to gain market share in another . . . .” Id.

255. See Leary, supra note 227; see also Deborah Platt Majoras. GE-Honeywell: The U.S. Decision. Address Before the Antitrust Law Section State Bar of Georgia (Nov. 29, 2001), at http://www.usdoj.gov/atr/public/speeches/9893.htm (last visited Jan. 30, 2003). During the 1960s and 1970s where the United States experienced a wave of conglomerate mergers, the courts used the entrenchment doctrine to condemn mergers that “strengthened an already dominant firm through greater efficiencies or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals.” Id. The entrenchment doctrine was later eliminated in 1982 as a basis for challenging non-horizontal mergers by the DOJ’s Merger Guidelines and the FTC’s Statement on Horizontal Mergers. Id. It was eliminated because the agencies realized that efficiency and competition created lower prices, and that these benefits outweighed the harm to competition. Id.

256. Spiegel & Guerrera, supra note 254, at 16.

257. GE/Honeywell, 2001 O.J. (C 46), ¶¶ 427, 434.
market competitive in the long run. However, antitrust scholars in the United States feel that this theory goes against the central tenet of antitrust policy. As quoted in the Supreme Court case *Spectrum Sports, Inc. v. McQuillan*:

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

The EC is protecting competitors in the short term to prevent foreclosure of the market by a dominant firm in the future. However, U.S. antitrust policy argues that competition is not the ends, but the means, to get to a different end, market efficiency.

Therefore, the DOJ agreed to the merger for the very same reason that the Commission blocked it. The EC’s concern that Honeywell’s access to GE’s financial arms in GE Capital and GECAS will create a dominant position in the market of supplying corporate jet engines as well as avionics and non-avionics parts is not a concern at all for its U.S. counterparts.

V. Impact

The major lessons for American companies to take away from the Commission’s decision in *GE/Honeywell* are that not only is the EC examining proposed mergers with greater scrutiny, but also that merger regulation is now becoming very unpredictable. One major effect resulting from the failure of the GE/Honeywell merger was the realization that the EC is increasingly asserting its merger regulation laws. By blocking this merger, the “EC underscored the reality that combining firms of size inevitably must serve antitrust masters both in the U.S. and abroad and left companies groping for ways to navigate the dual regulatory tracks.” It signaled the end for companies believing that they need to focus only on the U.S. antitrust agencies when attempting to merge. Prohibiting the GE/Honeywell merger not only showed that mergers are being reviewed more and more by multiple jurisdictions, but also that the EC is no longer secondary to

---

258. *Id.* ¶¶ 427, 423, 442. Not being able to compete against the efficiencies created by the newly merged company, rivals would have to decide if they can remain competitive in the future with diminishing investment dollars. *Id.*


262. Sikora, *supra* note 238.

263. *Id.*
the U.S. antitrust agencies.\textsuperscript{264} Indeed, the number of investigations opened by the EC on proposed mergers increased by nearly a third in the past five years.\textsuperscript{265} In addition, Monti, who was named the European Competition Commissioner in 1999, has a reputation as a tough enforcer.\textsuperscript{266} He has lived up to this reputation by blocking eight deals in two years, as compared to the eighteen that the EC has blocked in its history.\textsuperscript{267}

Notwithstanding the sudden emergence of the EC as a major player in the merger regulations, few experts believe that this event will result in a chilling effect where companies will not merge for fear that it will be blocked by the EC.\textsuperscript{268} Instead, they feel the result of the failed GE/Honeywell merger will cause companies to change their attitudes toward merger regulation.\textsuperscript{269}

Despite the fact that this decision by the EC was the first time that there was a disagreement with a U.S. antitrust agency regarding an all-American company merger, some argue that the effects will be minimal.\textsuperscript{270} There have been major coordination efforts between the United States and EC for the past ten years, starting with the bilateral agreement between the two in 1992.\textsuperscript{271} Over these past ten years, there has been a significant amount of convergence between the two countries' antitrust agencies. According to Commissioner Monti, during those years the EC developed a "very constructive cooperation with the U.S. Justice Department and the Federal Trade Commission,\textsuperscript{264} Id.

\textsuperscript{265} See Guerrera & Ratner, supra note 6, at 3 (discussing a recent study that contends that the mergers subject to full-scale investigations by the Commission has risen by nearly a third in the past five years); see also Schaub, supra note 247, at 7 (commenting that the number of mergers reviewed in 2000 were up eighteen percent from the year before, and during the first couple of months in 2001, it appears that even more will be reviewed this year).

\textsuperscript{266} Guerrera & de Jonquieres, supra note 5, at 16.

\textsuperscript{267} Id.

\textsuperscript{268} See Guerrera & Ratner, supra note 6, at 3.

\textsuperscript{269} Id.

\textsuperscript{270} See generally Muris, supra note 92 (stating that based on the past ten years of bilateral cooperation between the EU and the United States along with similar competition policies, GE/Honeywell-type outcomes are the exception and not the norm); Leary, supra note 227 (stating that putting the GE/Honeywell case in context, the antitrust authorities in the United States and in the EU are a lot closer than the public believes them to be, and will only get closer); Commission Bars Acquisition, supra note 1, at 14 (indicating that Commissioner Monti stated that the GE/Honeywell case presented a rare case where the two agencies disagreed).

\textsuperscript{271} See Karel Van Miert, Globalization of Competition: The Need for Global Governance, Speech Before Vrije Universiteit Brussel (Mar. 25, 1998), at http://europa.eu.int/comm/competition/speeches/text/sp1998_052_en.html (last visited Jan. 30, 2003) (discussing the United States/EU agreement of 1991); see also Schaub, supra note 247. The EC's experience with its bilateral agreement with the United States is that it has been very effective, especially in merger cases where it helped reduce the risk of divergent outcomes. Id.
especially on mergers that require regulatory clearance on both sides.\textsuperscript{272} However, despite this extraordinary effort to ensure consistent results on both sides, there will be cases where there will be disagreement between the two sides.\textsuperscript{273} This case was merely the first time that the two agencies could not come to an agreement. It is argued that this prohibited merger was an anomaly that cannot be fixed with greater convergence; that it is just the nature of having two different jurisdictions examining the same merger.\textsuperscript{274}

Even though it may be that blocking the GE/Honeywell merger is considered a rare occurrence, nevertheless, it gives pause to a firm that relies on the U.S. belief that conglomerate mergers create no provable anticompetitive effects.\textsuperscript{275} At the very minimum, it definitely sends notice to international companies that deal heavily in European markets that the EC must be taken seriously or the company will face the consequences, the worst being similar to GE’s and Honeywell’s fate, a blocked merger. This creates a lot of uneasiness and a possible chilling effect on chief executive officers and investment bankers for fear that conglomerate mergers are now less predictable and involve bigger risks.\textsuperscript{276}

This case has also created fears in U.S. companies of unpredictability in gaining EC regulatory approval, and in turn has forced companies to increase their efforts to obtain such regulatory approval.\textsuperscript{277} As a result of the EC clearly applying a different theory than the DOJ,

\textsuperscript{272} Monti Discusses Merger Control, supra note 226, at 40.

\textsuperscript{273} See Muris, supra note 92. To illustrate the fact that different judgments will occur even when applying an identical legal standard to the same facts, Muris uses an example of a baseball game with two umpires standing at a base, each of whom has the ability to call the runner “out.” Id. Even though both umpires know the rules of the game, each umpire will call it as he sees it. Id. The majority of the calls will be the same, but for close plays, there can be differing calls. Id.; see also Boeing/McDonnell Douglas Corp., 1997 O.J. (C 59) (the DOJ and the EC disagreed as to what role MDC would play in the market, and this disagreement nearly resulted in one agency blocking the merger and the other one clearing it).

\textsuperscript{274} See Commission Bans Acquisition, supra note 1, at 14. Commissioner Monti stated that this case presented “a rare case where the transatlantic competition authorities have disagreed.” Id.

\textsuperscript{275} See Patterson & Shapiro, supra note 102, at 23. There is no proof that predicts that conglomerate mergers will reduce competition or harm consumers. Id.

There are two themes... on conglomerate mergers: (1) many of them work badly for the merging parties and are later unwound; and (2) they work best when they involve products that are complements in the same industry, rather than unrelated products, in which case established economic theory... predicts that some price reductions can arise from the merger.

\textsuperscript{276} Guerrera & Ratner, supra note 6, at 3.

"[t]he extent that there had been some predictability in terms of what regulators look to in deciding whether or not to challenge a deal, the GE/Honeywell case kind of throws in a curve ball." 278 This growing fear of unpredictability is rooted in the EC's application of the portfolio-effects theory to merger regulation, as well as its desire to block conglomerate mergers that it feels will make the market leader a stronger competitor and thus ultimately force its competition to exit the market. 279

The EC's application of the portfolio-effects theory is not restricted to this case. The EC has seen this issue in recent cases including Boeing/Hughes, 280 Guinness/Grand Metropolitan, 281 and Tetra Laval/Sidel. 282 Thus, it appears that the EC not only applies this theory, but also uses it with great frequency. The problem with the EC's belief in the anticompetitive effects of conglomerate mergers through "portfolio effects" is that it creates a situation where what may be considered in U.S. antitrust merger regulation as procompetitive will be seen as anticompetitive in the EC. 283 When one jurisdiction is analyzing it as procompetitive and another jurisdiction sees it as anticompetitive, the result, according to one antitrust lawyer is "[y]ou have to be aware that the very argument that gets you off the hook in one jurisdiction may put you on the hook in another." 284 According to James, the Assistant Attorney General of the Antitrust Division at the DOJ, the failure to correct these diverging theories could have harmful effects on future mergers. 285 One expert argues that a possible result of the prohibited GE/Honeywell merger is that some potential mergers "might die on the vine" if the EC demands several undertakings. 286 After GE/Honeywell, it will be highly speculative to determine what divestments will be required. 287

278. Sikora, supra note 238.
279. James, Reconciling Divergent Policies. supra note 226. Divergence "between the world's antitrust regimes on an issue this fundamental could undermine the growing consensus favoring competition over regulation." Id.
283. See supra notes 121–261 and accompanying text.
284. Sikora, supra note 238.
286. Sikora, supra note 238.
287. Id.
It is clear that there is a need for reaching consistent outcomes. Apart from the increased costs that would result from diverging outcomes because of the necessity to deal with each agency on its own, diverging outcomes would also have the effect of “undermining the public’s confidence in the work [antitrust agencies] do, and risk politicizing antitrust” to the detriment of creating the feeling of predictable antitrust enforcement.\textsuperscript{288}

It is highly unlikely that a policy disagreement of this nature between two nations can be adequately resolved directly.\textsuperscript{289} This was not a failure of communication between the two agencies during the investigative process, or even a failure of agreeing on the facts. What needs to be remedied in light of this recent event are the diverging views on certain substantive policies, including the validity of the portfolio-effects theory.\textsuperscript{290}

These disagreements can be corrected through increased bilateral cooperation between the United States and EU.\textsuperscript{291} However, both sides have emphasized the amount of discussions between the two, and discount the theory that the diverging conclusions were the result of lack of communication during the merger investigation process or understanding between the two.\textsuperscript{292} The focus, thus, should not be on the desire for increased communication, but should be more on the education of theories.\textsuperscript{293} A strong bilateral relationship is not restricted only to communicating on particular cases, but can also result in substantive convergence.\textsuperscript{294}

Seeing that the GE/Honeywell merger seems to have been blocked more for diverging policies than for lack of communication throughout the investigation, it seems that increased dialogue on how to work closer is not the optimal solution. The only solution that may work to avoid another GE/Honeywell collapse is through education and com-

\textsuperscript{288} James, supra note 233.
\textsuperscript{289} James, Reconciling Divergent Policies, supra note 226.
\textsuperscript{290} See Kolasky, supra note 18 (The EU’s view of conglomerate mergers is inconsistent with the U.S. antitrust laws); see also Muris, supra note 92 (“It appears that the EC is more inclined than the U.S. authorities to give credence to concern over potential long-term harm that could arise from range effects of a merger.”).
\textsuperscript{291} James, supra note 233: see also Muris, supra note 92 (noting that both antitrust agencies have stated they were committed to understanding each other’s stance on their divergent conclusions).
\textsuperscript{292} See James, supra note 233 (noting the “tremendous amount” of discussions among the DOJ and EC during the GE/Honeywell investigation).
\textsuperscript{293} James, supra note 233; Muris, supra note 92.
\textsuperscript{294} Id. An example of substantive convergence through bilateral agreements is that a number of jurisdictions are following the lead of the United States and are beginning to recognize that a leniency policy is a very helpful enforcement tool for combating cartel activity successfully. Id.
munication relating to the portfolio-effects theory and how conglomerate mergers' efficiencies outweigh their speculative long-term competitive harms. One solution that the EC can undertake to educate itself about the portfolio-effects theory is to hire more economists. Commissioner Monti did address this fact after GE/Honeywell when he mentioned that he was seeking to "increase the economic component of the Commission's work." This seems to be a legitimate answer to the DOJ's arguments that the theories that the Commission used in GE/Honeywell were not grounded in any economic theory. The other is for increased dialogue between the two agencies regarding portfolio effects and the effects of conglomerate mergers.

There is not much else the two agencies can do to avoid another GE/Honeywell mess. The major problem was based on the differing views on conglomerate mergers and whether they create anticompetitive effects. Through education, the two will achieve greater convergence in this area.

There are already signs that greater convergence is taking place as a result of this case. Most likely due to recent clamor by U.S. authorities, Commissioner Monti has recently offered new proposals to overhaul the EC's current system for reviewing mergers and acquisitions. The first of two proposals offered by Monti was a "cooling-off" period that would allow the merging companies the ability to stop the clock for two weeks to discuss and modify concessions. Under the current system, companies have until the end of the third month of the Commission's four-month inquiry to offer concessions to appease the regulators. Companies have complained that this leaves them little time to alter insufficient concessions and

295. Patterson & Shapiro, supra note 102, at 24. The United States sees adherence to established economic principles by both antitrust agencies to achieve substantive convergence. Id. at 23. One argument explaining the failure of convergence was that the EU failed to create a dialogue with its economists, or even outside economic experts, unlike the DOJ. Id. at 24.

296. Id. at 23.

297. Id. at 19-20. As compared to the "Big is Bad" doctrine, which has largely been discredited, both theories seem to be indistinguishable; both condemn large, financially strong firms who enter markets by merging with major firms in that industry, use their financial strength to engage in clearly procompetitive activity, and take advantage of economies of scope to meet their customers' needs. Id. at 20.

298. The United States can relate to the EC's belief in these theories, for it applied these theories only forty years ago. See Kolasky, supra note 18.


300. Id.

301. Id.
gives them little room to bargain with the EC. 302 The second proposal was to change the current test that the EC applies in merger cases to one more similar to the U.S. test. The Commission currently applies the “dominance test,” which states, “deals that create or strengthen a company’s dominant position in a market should be prohibited.” 303 The United States uses the “substantial lessening of competition test.” 304

However, these proposals may not prove to change anything. The EC’s adoption of the “substantial lessening of competition test” does not address the issues raised in GE/Honeywell because the EC’s current merger regulation already incorporates a substantial lessening of competition requirement into its dominance test. 305 It prohibits only those mergers that create or strengthen a dominant position “as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.” 306

Therefore, unless the U.S. antitrust regulators and the EC can come up with an agreement as to the validity of the portfolio-effects theory, and if the United States can educate the EC to understand the markets better and to have faith in their ability to self-correct, it seems that more decisions like GE/Honeywell will occur. 307 As a result, future conglomerate mergers may not bode well despite being given clearance by a home regulator.

In addition to the need for increased bilateral cooperation between the United States and EC, there is a need to have increased multilateral cooperation among all of the countries that currently have competition laws. In a time where there is not only an increasing amount of mergers with transnational characteristics, but also an increasing amount of countries that are enacting competition laws, the probability of potential multi-jurisdictional reviews of the same merger becomes a real dilemma, which raises the concern of possible diverging results. 308 Bilateral efforts at cooperation play a significant

302. Id.
303. Id.
304. Id.
305. Kolasky, supra note 18.
306. Id. (citing EC Merger Regulation, supra note 48, at art. 2, ¶ 3).
307. Muris, supra note 92. Having two diverging antitrust departments regulating mergers, the more restrictive regulator will win out and could therefore block mergers that seem procompetitive to the other regulator. Id.
308. Mario Monti, International Co-Operation and Technical Assistance: A View From the EU (July 4, 2001), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_auction.gettxt=gt&doc= SPEECH/01/328101RAPID&lg=EN (last visited Mar. 8, 2003). Antitrust enforcers are becoming aware of the increasingly international character of competition cases and that they are clashing with the traditional territorial scope of domestic antitrust rules. Id. They are now being
role of effective international antitrust enforcement, but in the future it is essential that they be supplemented by multilateral efforts.\textsuperscript{309} With over sixty countries that have enacted merger regulation controls, there will be an increasing number of cases where multiple jurisdictions will be reviewing the same mergers.\textsuperscript{310} Although the need for increased multilateral coordination may not have necessarily changed the result of this case, this event does address the concerns of the increasing possibility of diverging results entailed with multi-jurisdictional reviews.\textsuperscript{311}

This issue could effectively be dealt with through the newly created International Competition Network (ICN).\textsuperscript{312} The ICN’s purpose is to create a forum to enable countries to convene and discuss pertinent procedural and substantive issues in competition law.\textsuperscript{313} It will be devoted entirely to competition law enforcement.\textsuperscript{314} The ICN will not act in a rule-making capacity, but will merely attempt to influence procedural and substantive convergence in antitrust enforcement.\textsuperscript{315} The major advantage to the ICN is that it creates a forum where all countries interested in antitrust issues will have the opportunity to meet, discuss, and educate each other on current issues.\textsuperscript{316}

\begin{flushright}
\textsuperscript{309} James, supra note 233; see also Monti, supra note 308 (quoting a resolution by the Fourth United Nations Conference) (commenting that “while bilateral competition cooperation efforts are essential, there is [a] need to promote regional as well as multilateral competition initiatives. particularly for smaller and developing countries”).
\textsuperscript{310} James, supra note 233.
\textsuperscript{311} Cf. id. (commenting that the United States/EU bilateral agreement in 1991 was signed “because it was clear that the growth of European antitrust enforcement, particularly after the EC Merger Regulation went into effect in 1990. inevitably would mean that [the United States] would examine many of the same merger transactions and non-merger conduct”).
\textsuperscript{313} About the ICN, at http://www.internationalcompetitionnetwork.org/about.html (last visited Jan. 30, 2003).
\textsuperscript{314} Id.; see also James, Reconciling Divergent Policies. supra note 226. “It should be all antitrust, all the time.” Id.
\textsuperscript{316} Monti, supra note 308. “This venue should provide a forum where government officials . . . and others can ’exchange ideas and work toward common solutions of competition law and policy problems.”
\end{flushright}
With this newly created forum concentrating solely on competition issues, the United States and EC will be able to further discuss problems that resulted in the GE/Honeywell merger. Indeed, James is resolved on fixing the problem of the portfolio-effects theory with the EC at the ICN.\footnote{317}{Spiegel, supra note 285, at 11.} This forum will help to increase convergence in procedural and substantive areas of the law, where the problem in this case arose.\footnote{318}{See Monti, supra note 308.}

Having a forum such as the ICN will enable greater convergence of substantive competition issues, and in turn avoid divergent results between multi-jurisdictional reviews of future mergers.\footnote{319}{Competition authorities and other participants in the forum should strive to achieve a maximum of convergence and consensus on fundamental issues such as the substance and economics of competition policy, the enforcement priorities of competition authorities and a common understanding about best approaches or practices in addressing certain types of concerns or specific types of cases.}

In addition to the ICN, there was a proposal to create an international antitrust agency, possibly under the auspices of the World Trade Organization (WTO).\footnote{320}{See generally O'Toole, supra note 25 (examining the question of whether the WTO is an adequate forum to resolve international antitrust disputes); Andrew T. Guzman, Antitrust and International Regulatory Federalism, 76 N.Y.U. L. REV. 1142 (2001) (advocating that the WTO become the governing forum for international antitrust issues). But see Honorable Christine A. Varney, The Federal Trade Commission and International Antitrust, Address to the Fordham Corporate Law Institute (Oct. 17, 1996), at http://www.ftc.gov/speeches/varney/flci_96.htm (last visited Jan. 30, 2003) (arguing that an “international one-stop shop” is not an effective solution until the participating nations can create substantive convergence with antitrust regulations); International Competition Policy Advisory Commission to the Attorney General and Assistant Attorney General for Antitrust, Final Report 201-279 (2000), available at http://usdoj.gov/atr/icpac/finalreport.htm (last visited Jan. 30, 2003).} Heavily advocated by the EC, it would be a supplement to other international antitrust agencies, such as the ICN and the Organization for Economic Cooperation and Development (OECD).\footnote{321}{Schaub, supra note 247. The Commission, along with the support of all the member states of the EU, has been the principal advocate of a framework of competition policies under the WTO. ld. The OECD is an international organization created to help governments address the economic, social and governance challenges of a globalized economy. For more information on OECD, visit its website at http://www.oecd.org/EN/home/0,,EN-home-0-nodirectorate-no-no-no-0,FF.html.}

This idea, however, has been on the table for a long time and it does not seem to be the answer with which everyone agrees.\footnote{322}{See, e.g., Eleanor M. Fox, Competition Law and the Millennium Round, 2 J. INT’L ECON. L. 665 (1999) (discussing that there is a need to have international efforts at cooperation, but is hesitant to about placing these efforts within the WTO).} The advantages to having an international antitrust agency under the WTO are that it features universal membership and that it has a func-
tional dispute resolution mechanism already in place.\(^{323}\) Having a functional dispute resolution system, it ensures that all member countries will honor the agreements or decisions made regarding a dispute.\(^{324}\) It is also helpful to have developing and developed countries as members because it provides an arena where countries that are contemplating competition laws or recently enacted them to begin discussing and focusing on these issues.\(^{325}\)

A major concern of creating an international antitrust forum under the WTO is that an attempt to come up with one set of international regulations will only create a minimum set of standards, a "lowest common denominator," effectively watering down the regulations.\(^{326}\) With the multitude of countries that have active competition laws, a multilateral agreement on a set of competition principles will only end up legitimizing the weak and ineffective rules.\(^{327}\)

Another major concern with creating an international antitrust agency within the WTO is the fear of ceding sovereignty.\(^{328}\) In theory, creating an international forum to bring international antitrust regulation under a single set of regulations would be ideal. However, an attempt to bring the multitude of nations that currently have antitrust or competition law in their books together to agree on a single set of regulations would be a very difficult task.\(^{329}\)

Another downside to this solution would be that it might not take care of the problem of diverging conclusions based on doctrinal disagreements. In this case, what led the Commission to oppose the merger, that the combined firm of GE and Honeywell would be a more efficient competitor, was the same thing that led the DOJ to
Therefore, if the two major antitrust agencies diverge in this basic policy, then it only illustrates the difficulty that arises when all the nations try to agree on a single set of international merger regulations.

VI. Conclusion

With the increasing globalization of markets, mergers are constantly being reviewed in multiple jurisdictions. Along with this increase comes the problem of providing consistent results between jurisdictions. The failed GE/Honeywell merger is a good illustration of what happens when there are diverging results between the United States and EU.

The major disagreement between the United States and EC regarded the belief that conglomerate mergers could create anticompetitive effects within the market, mainly as the result of the portfolio-effects theory. Antitrust thought and policy in the United States has come to largely discredit portfolio effects because it had been proven through case studies and economic analyses that these effects almost never led to a lessening of competition in the market. What the United States did find was that conglomerate mergers created procompetitive effects, if any effect at all, where the merger resulted in lower prices for consumers. The EC, on the other hand, still believes that conglomerate mergers could strengthen the merged company allowing it to get a stranglehold on the market and ultimately force disinvestment and exit of its rivals from the market.

With the number of countries enforcing merger regulations climbing over sixty, GE/Honeywell is an example of when communication and convergence in policies fail between countries. This case shows that in order to maintain consistent results between jurisdictions, more effort needs to be made on unilateral cooperation between the United States and EU, as well as multilateral communications with other nations. The newly created ICN is the first step in creating substantial convergence in competition laws and policies. It will provide a forum for seasoned antitrust experts to discuss important topics to maintain consistent conclusions, and it will provide a forum for developing countries to begin discussing these issues and learn the optimal way of integrating them into their economies.

One short-term effect of GE/Honeywell is that companies now must realize that there are two merger regulations that they must cooperate with to ensure that the merger will be cleared. The EC, which has had

330. James, Reconciling Divergent Policies, supra note 226.
its merger regulation for slightly over a decade, is no longer secondary to the U.S. regulators. The other short-term effect is that there is a fear of unpredictability in gaining clearance for regulatory approval. Dealing specifically with conglomerate mergers, there is a possibility that in the United States, a conglomerate merger will be found to have procompetitive effects, but it will be the opposite finding in the EU. However, these effects will not turn into long-term fears if the two agencies are able to cooperate better and focus on the validity of portfolio effects. The greater the convergence of substantive competition issues, the more likely GE/Honeywell will be the exception to the rule.

Thomas L. Ruffner