GE/HONEYWELL: A THEORETIC BUNDLE ASSESSING CONGLOMERATE MERGERS ACROSS THE ATLANTIC*

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This Article addresses the comparison of merger control policy in the European Union ("EU") and the United States, and attempts to demonstrate the very significant extent of convergence between the approaches being adopted by the United States and the EU antitrust agencies. It inevitably refers to the very exceptional instances of divergence and explores the substantive, procedural, and other structural issues that may be held responsible for potentially different outcomes in the assessment of mergers. A large part of this analysis refers to the assessment of conglomerate mergers, particularly in light of the GE/Honeywell case.1

1. MERGER CONTROL POLICY

EU competition law and U.S. antitrust law, while phrased in quite different language and with very different historical antecedents, largely pursue the same objectives. No attempt to harmonize these laws has been made, yet the application of EU and U.S. competition law—notably in the field of merger control—has seen a marked convergence in recent times.

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Complex economic concepts are difficult to enshrine in straightforward legal tests. In Europe, using language that was drafted only a decade ago, mergers can be declared unlawful when they carry a risk to "create or strengthen a dominant position."2 In the words of a U.S. statute dating from 1914, mergers can be enjoined if they risk acting "to substantially lessen competition" or "tend to create a monopoly."3 It does not require any great legal or economic insight to see that these are tests that could, in the hands of creative interpreters, result in sometimes widely differing outcomes. The fact that this has not happened is a credit to the sophistication of the enforcement authorities and courts in both jurisdictions. The more than ten-year-old body of precedent built up by the Commission of the European Community ("Commission") and the European courts regarding the interpretation of the Dominance Test4 has shown a remarkable coincidence of analysis with the considerably longer wealth of interpretative precedent that has been built up in the United States with regard to the Clayton Act.5 A European practitioner who picks up the U.S. Merger Guidelines,6 or who delves into one of the Supreme Court's recent merger judgments, will be struck by the extent to which these seemingly different tests are used in such strikingly similar ways.

That being said, one must acknowledge that the different tests can potentially lead to differing outcomes in certain cases. The EU Dominance Test is still relatively young, and the extent to which it might ultimately amount to a somewhat differing standard to that used in other jurisdictions, notably the one used in the United States, is not yet completely clear. To address this concern, the Competition Commissioner, Mario Monti, recently proposed to the Commission that the Commission "Green Paper" on the review of merger legislation, a document which proposes reform options for

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4 EU Merger Regulation, supra note 2, art. 2.

5 Clayton Act, supra note 3.

public comment, should open a public debate on the merits of the Dominance Test, and in particular on how its effectiveness compares with the "substantial lessening of competition" standard used in some other jurisdictions.

1.1. Horizontal Mergers

For obvious reasons, convergence is particularly beneficial with regard to the assessment of large transnational mergers requiring clearance on both sides of the Atlantic. The record clearly points to a pattern of increasing convergence. First, let us look at the most straightforward category of cases, "horizontal" mergers, where it is widely acknowledged that the EU and the United States are reading from the same song sheet. The MCI WorldCom/Sprint and Alcoa/Reynolds cases are good examples of substantive convergence in relation to major global transactions despite different laws. In the former case, both the Commission and the Department of Justice ("DOJ") concluded that a prohibition was warranted. Regarding the latter transaction, both agreed that there were competition problems requiring serious remedial action and that the market was worldwide in geographic scope, but that the transaction produced different effects in the United States and in the EU. In the two oil mega-mergers, BP Amoco/Arco and Exxon/Mobil, the Commission and the Federal Trade Commission ("FTC") cooperated, and in most respects, saw eye-to-eye in their respective investigations of the effects of these transactions on competition. For those markets that have a global dimension, this enabled the two agencies to reach similar conclusions and, where

8 The United States assesses mergers under the so-called "substantial lessening of competition" test.
11 MCI WorldCom/Sprint, supra note 9, at 82.
12 Alcoa/Reynolds, supra note 10.
14 Id.
relevant, to identify similar remedies to their competition concerns. Just recently, the Commission and FTC reached similar conclusions about the likely competitive impact of the Metso/Svedala\textsuperscript{15} merger, also a horizontal case involving close transatlantic cooperation.

When the EU and the United States reach different conclusions about whether a particular transaction should be allowed to go ahead, it is generally because the effects of the merger are likely to be different in the two jurisdictions. This occurs notably when the markets have a more regional scope. For example, while the major competitors in such industries as pharmaceuticals and chemicals are present throughout the world, the competition effects of mergers in these industries have often differed as between the United States and the EU. For example, this happened in the recent cases of AstraZeneca/Novartis\textsuperscript{16} and Dow Chemical/United Carbide.\textsuperscript{17} As a result, the remedies that were accepted by the EU and U.S. authorities were customized to meet the specific problems identified in the respective jurisdictions.

In Air Liquide/BOC,\textsuperscript{18} another case where EU/U.S. cooperation was extremely close throughout the proceedings, the geographic market was worldwide in scope. Yet, the competitive effects and, as a result, the remedies required, were quite different for the EU and U.S. markets. This divergence did not occur because of different laws or different analytical approaches, but because of different competition concerns resulting from different market realities. In the European Community, the Commission found that the competition concerns raised by the combination of two competitors, one with a dominant position in France, and the other with a dominant position in the United Kingdom ("U.K."), could be resolved by a remedy requiring BOC's divestiture of its twenty-five percent share in the U.K. market, thereby immediately introducing a new

\textsuperscript{17} Case COMP/M.1671, Dow Chemical/Union Carbide v. Commission, 2001 O.J. (L 254) 1.
competitor to outweigh the loss of potential competition.\textsuperscript{19} In the United States, however, the issue was one of elimination of actual—not potential—competition, consequently reducing the market players from four to three in a highly concentrated market. As a result, the type of remedy that was satisfactory in the EU was not considered to be adequate in the United States. The FTC sought more far-reaching commitments from the parties, ultimately leading the parties to abandon the deal altogether.

1.2. Conglomerate Mergers

In light of the Commission’s decision to block the GE/Honeywell deal, much has been made of the divergent approach being taken by the Commission and the U.S. antitrust agencies toward conglomerate mergers. However, as a member of the Commission’s Merger Task Force, I believe that the gap between the two jurisdictions is not as wide as some would make it seem. This becomes apparent with a clarification of the Commission’s policy in relation to conglomerate mergers.

Conglomerate mergers are mergers between firms that have no existing or potential competitive relationship either as direct competitors or as suppliers and customers. Most frequently, conglomerate mergers involve suppliers of complementary products or of products belonging to a range that is generally sold to and requested by the same set of intermediate or final customers.

It is generally claimed that because conglomerate mergers do not result either in direct horizontal overlaps or in vertical relationships, they should be viewed as having a positive, or at least neutral, effect on competition.\textsuperscript{20} While it can be reasonably accepted that conglomerate mergers may not be anticompetitive per se, the conglomerate aspects of mergers may constitute an additional aggravating or mitigating factor to existing horizontal and/or vertical effects. A careful approach needs to be taken by antitrust authorities in the assessment of the possible exclusionary effects of conglomerate mergers on competitive conditions.

It is the Author’s view that conglomerate mergers may raise concerns when they make the leverage of market power possible, thus effectively foreclosing the market to effective competition. In

\textsuperscript{19} Id. at 66-69.

\textsuperscript{20} See, e.g., William J. Kolasky, Conglomerate Mergers and Range Effects: It’s a Long Way from Chicago to Brussels, Address before the George Mason University Symposium (Nov. 9, 2001).
such a case, the resulting competitive harm may stem from the accumulation of substantial market power across complementary products or product ranges which, not being based on normal business performance or competition on the merits, may substantially reduce consumers' choice, and ultimately lead to higher prices and a loss of welfare. Therefore, conglomerate analysis has to proceed with the subtle distinction between competition on the merits and market exclusion based on anticompetitive aims. As far as the exclusionary effects of conglomerate mergers are concerned, there is a clear parallel to vertical effects because, in economic terms, the exclusion mechanism in the context of vertical integration functions in a similar way as in the context of a merger of complements.

1.2.1. Assessing Conglomerate Mergers

Although there is no explicitly stated framework for the analysis of conglomerate mergers existing under either the EU Merger Regulation\(^2\) or in other jurisdictions, there is a general agreement that the analysis of conglomerate effects has to undergo a certain number of steps. Several conditions, among others, relating to the nature of the products concerned, the nature of the industry in question, and the degree of market power held by the merging parties pre-merger, have to be examined.

First, the definition of the individual products and/or services as well as their evaluation in the combined product range are key elements in the analysis of conglomerate mergers. The products markets in conglomerate mergers are usually neighboring or related markets—a concept which is intended to describe a demand-side linkage between markets (e.g., a significant degree of commonality in terms of buyers served). The clearest example of such a linkage would be complementary or slightly substitutable products. Under certain circumstances, the combination of such products alters the structure of the markets concerned, thus giving the merged firm the ability and the economic incentive to change its pricing behavior. This so-called Cournot Effect\(^2\) of conglomerate

\(^{21}\) EU Merger Regulation, supra note 2.

\(^{22}\) See, e.g., Nicolas Economides & Steven C. Salop, Competition and Integration Among Complements, and Network Market Structure, 40 J. Indus. Econ. 105, 106 (1992) (showing that joint ownership by a single integrated monopolist reduces the sum of two prices, relative to the equilibrium prices of the independent monopolists).
mergers stems from the fact that the mergers enable the merged entity to internalize price externalities arising from the fact that the combined products are technical complements (e.g., products that cannot function without the other), economic complements (e.g., products that are consumed together), or commercial complements (e.g., products that form part of a range that downstream agents need to carry).

Second, the Author believes that when the merging firm enjoys market power in one or more of the complementary products in the range, a change in its pricing behavior may be motivated by the possibility to leverage its existing market power into one or more of the products in the combined product range. Complementary products sold to the same customers that are viewed as constituting an essential part of their requirements are more likely to make leveraging more profitable. In this case, leveraging may translate into various types of practices, including: (1) product tying, which may be based on pressure or incentives vis-à-vis downstream agents; (2) commercial tying, in the form of a refusal to supply; (3) mixed bundling, based on the variation in the pricing structure in the product range; and (4) technical tying. Furthermore, where the merger brings an accumulation of financial strength, cross-subsidization and predation may facilitate the pricing flexibility in the product range and thus constitute an additional motivation for the leveraging of market power.

Third, the assessment of conglomerate aspects also involves an examination of the specific characteristics of the markets concerned. For instance, the existence of buyer power may act as a constraining factor to the leveraging of market power. The same applies to the existence of competing suppliers capable of proposing alternative and equally attractive product ranges. Moreover, in industries displaying high entry barriers, high sunk costs, long payback or break-even periods, imperfect capital markets, intensive research and development, and high investment costs, the constraints coming from competitors may not be sufficient to counter the incentive and ability of the merged firm to leverage its pre-merger market power. In this case, the existence of significant financial strength on behalf of the merged firm may be an aggravating factor. However, financial strength has to be analyzed.

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23 Id.
24 Id.
25 Id.
on a case-by-case and on an industry-by-industry basis to determine whether it is an important element of the overall conglomerate analysis. The assessment of financial strength has nothing to do with a "big is bad" argument; indeed, the Commission has never pursued any policy in this direction and has never challenged mergers on the basis of the size of the merging companies.\textsuperscript{26}

Fourth, the existence of market power or dominance in at least one of the pre-merger complementary products is a necessary condition for the likelihood and the profitability of leveraging practices.\textsuperscript{27} This is more so when both merging firms have strong market positions in their respective markets, such as in the recent GE/Honeywell case, where a dominant firm in one of the complementary markets proposed to acquire the leading supplier in the other market.\textsuperscript{28} To date, the European Commission has challenged the leveraging effects of conglomerate mergers only when market power has pre-existed before the merger in at least one of the markets composing the combined product range.\textsuperscript{29}

Some forms of post-merger pricing in conglomerate mergers may act in favor of downstream agents.\textsuperscript{30} For instance, mixed bundling can create incentives to customers in the form of rebates and other advantages. However, such advantages can be short-lived and take the form of strategic pricing. To the extent that pro-competitive efficiencies may constitute one of the reasons to approve a merger, antitrust authorities have to proceed with a critical analysis of the possible efficiencies that they are likely to produce. When significant efficiencies are claimed, antitrust authorities will have to establish in particular whether such efficiencies are real, that is, whether they are likely to be structural and permanent and ultimately reduce the marginal costs of producing/distributing the products and/or services in a sustainable way so that the benefits can be passed on to the consumers.\textsuperscript{31} They will then have to ana-

\textsuperscript{26} Id.


\textsuperscript{28} GE/Honeywell, supra note 1, at 25, 59-60.

\textsuperscript{29} See supra note 1; see also infra notes 45, 47.

\textsuperscript{30} Portfolio Effects, supra note 27, at 20.

\textsuperscript{31} See Secretary General of the OECD, in COMPETITION POLICY ROUNDTABLE, at 19-20 (Organisation for Economic Co-operation and Dev. Competition Comm.,
lyze whether the claimed efficiencies are merger-specific and sufficient to counter the effect on price that the potential foreclosure effects of market power leveraging are likely to produce. Finally, they will have to make the trade-off between efficiency gains and losses from the restriction of competition and ascertain that the initial efficiencies are not later extinguished through the elimination of competition and subsequent price increases.

1.2.2. Types of Leveraging Effects

As mentioned before, conglomerate mergers raise competitive concerns when they can afford the supplier of a range of complementary products the ability and the economic incentive to leverage its market power in one of the complementary products into another. For a better understanding of the discussion of conglomerate mergers and the related theories of foreclosure, it is useful to remind oneself of the main concepts that play a role in this discussion: tying, bundling, mixed bundling, complementary goods, and the Cournot Effect.

Tying is the practice of requiring customers to whom goods or services are supplied to acquire other goods or services as a condition of that supply. Ties may be implemented through contractual obligations, but may also be arranged through the use of various discounts and rebates or customization tending to force a buyer to buy complementary products from the same supplier. Tying and bundling are sometimes used synonymously, though bundling is more often used to refer to situations where the seller determines the proportions in which two products are purchased. Mixed bundling refers to the situation in which a company not only offers the bundle of products, but also the individual components separately.

A distinction that appears to be particularly relevant for the discussion on conglomerate mergers is that between complementary products and non-complementary products. Two products

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32 Id. at 19-20, 41.
33 For a definition of these terms, see the remainder of Section 1.2.2.
34 See Case IV/30.787, Eurofix-Bauco v. Hilti, 1988 OJ, (L 65) 19 [hereinafter Hilti]. The distinction between mixed bundling and pure bundling is not necessarily clear-cut. Mixed bundling may come close to pure bundling when the prices charged for the individual offerings are high.
are economic complements if they are more valuable to the buyer when consumed, or used, together (e.g., computer software and hardware, aircraft avionics and engines, etc.). Whereas a merger between producers of substitute products can be expected to lead to an increase in prices (if they have considerable market positions), the opposite is true, in principle, for a merger between producers of complementary goods (with considerable market positions). The reason is that when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. A merged firm will internalize this effect and will have, therefore, an incentive to decrease prices because this leads to higher profits. This effect has become known as the Cournot Effect. In most cases, the merged firm will make the most of the Cournot Effect by means of mixed bundling, i.e., by making the price drop conditional upon whether or not the customer buys both products from the merged entity.

1.2.2.1. Commercial Tying Based on Pressure to Downstream Agents

A conglomerate merger may enable the merged firm to pressure customers through the threat of refusal to supply one of the products in the range unless they also buy other products in the range or through the obligation imposed on customers to buy the whole range (i.e., full-line forcing). The possible anticompetitive effect of this type of product tying relies on the ability and the incentive of the merged firm enjoying market power in one market (the tying market) to leverage this market power into another market (the tied market), with the view of excluding rivals in these markets.

The concept of the creation or strengthening of market power in non-horizontally or non-vertically related markets as a result of this type of product tying is not novel in the Commission antitrust analysis. Product tying has been analyzed in the practice of the European Commission (“EC”) and the case law of the European Court of Justice on various occasions, either under Article 82 of the

35 See Economides & Salop, supra note 22, at 106 (analyzing the effect of the merger of two monopolists in complementary goods).
36 Id.
37 See, e.g., Portfolio Effects, supra note 27, at 24 (discussing how a merger between Guinness and Grand Metropolitan could have anticompetitive effects).
ASSESSING CONGLOMERATE MERGERS

EC Treaty (abuse of dominant position) or under the EC Merger Regulation. 38

Article 82(d) of the EC Treaty provides that an abuse may assist in "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." 39 This provision refers to situations where a firm that holds a dominant position in one product forces its customers to purchase this product together with other products in which it is not necessarily dominant. Its objective is to prevent the distortion of competition in the tied product market, which reduces the competitive thrust of competing suppliers active in this market, eventually forcing them to exit that market. The classic example of product tying under Article 82 is found in the Hilti case. 40 The case concerned a company trading in nail guns and their accessories (cartridge strips and nails) that attempted to eliminate independent producers of nails compatible with its guns by first selling its cartridge strips only to those customers who agreed to buy its own nails, and then reducing the discounts to the customers who bought its cartridge strips and compatible nails from competing suppliers. The Commission considered that this form of product tying constituted an anticompetitive exclusionary practice. 41

In another case, Tetra Pak II, 42 the Court of First Instance and the Court of Justice confirmed the Commission's finding that Tetra Pak had committed abuses in the markets for non-aseptic packag-


41 Hilti, supra note 34, paras. 74-75.

ing machines and non-aseptic cartons (the tied markets), through Tetra Pak’s dominant position in the markets for aseptic packaging machines and aseptic cartons (the tying markets). Preventing the leverage of market power from the tying markets to the neighboring tied markets through product tying was justified by a series of factors, such as the fact that Tetra Pak held a leading position in the tying markets, the strong links existing between the two markets, the fact that the products in both markets were used for the same purposes (i.e., packaging the same final products), and that a substantial number of Tetra Pak’s customers and competitors operated in both markets. Under the EC Merger Regulation, the Commission has challenged mergers on the basis of leveraging of market power through product tying in several cases concerning consumer goods. For example, in its decision in the case Coca-Cola/Amalgamated Beverages GB, the Commission examined whether the possession of a broad range or portfolio of soft drink brands would confer on the Coca-Cola Company the possibility to use its beverage portfolio to its advantage, for instance by leveraging its strong position in Coca-Cola (the tying market) into other products of the portfolio. In the same sector, the Commission examined whether the constitution of a portfolio of carbonated soft drinks, packaged water, and beer might give “each of the brands in the portfolio greater market power than if they were sold on a ‘stand-alone’ basis,” and subsequently concluded that such a portfolio would strengthen the existing dominant position of one of the firms in the tying market.

In the Guinness/Grand Metropolitan case, the merger analysis focused on the non-horizontal effects resulting from the formation of a wide portfolio of product brands across various categories of spirits, which constituted separate but closely-related product

43 Id.
44 Id. paras. 43-123.
The assessment was based on the finding that when elements of market power are combined, the whole may be greater than the sum of the parts. Therefore, although individual leverage possibilities might have existed prior to the merger, the combined leverage possibilities post-merger, through product tying, became greater than the sum of the individual possibilities pre-merger. The decision outlined some of the advantages that a comprehensive portfolio of goods may grant to the merged firm. For instance, the bargaining position of the merged firm in relation to customers would become stronger. This is due to the fact that the broader offering of its products would account for a substantial part of the customers’ requirements, thus making the implicit or explicit threat of a refusal to supply more potent. The Guinness decision set out certain conditions under which a combined product portfolio may result in the creation or reinforcement of dominance, such as: whether downstream agents purchased a range of products among which the combined portfolio accounts for a significant proportion; whether market power existed in one or more tying markets (i.e., leading brands of spirits, also referred to as “must stock” brands) among the products constituting the portfolio; the market shares of the various other products of the portfolio, in relation to the shares of competitors; the relative importance of the individual product markets in the portfolio in terms of sales in the total sales of spirits; the relative strength of competitors’ individual products or portfolios; and finally, the prospects for the exercise of countervailing buyer power and for potential competition through entry or expansion.

In all of these cases, the Commission considered the ability and incentive of firms to leverage power in one market to the benefit of a product in another complementary, non-competing but closely related market. The main criticism of product tying as a profitable exclusionary practice has been based on the theory developed in the so-called Chicago School of thought, i.e., that there is only one monopoly profit to be made and the firm active in the tying market can make this profit simply through its pricing in this market. This line of thinking is, however, based on theoretical assumptions.

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48 Id. paras. 38-78.
49 Portfolio Effects, supra note 27.
that are not always met in real life. These assumptions include the belief that the tied market is purely competitive or that the two products are used in fixed quantities.

The most recent line of thinking is that if competition in both markets is imperfect, tying can, under certain conditions, change the market structure of the tied market by excluding or eliminating rivals.\textsuperscript{50} These conditions have generally been met in the Commission's assessment of product tying under either Article 82 of the EC Treaty or the Merger Regulation.\textsuperscript{51} Thus, the condition of the existence of market power in the tying market has been met with the finding of a dominant position (e.g., in nail guns in \textit{Hilti} or in Coca-Cola Classic in the \textit{Coca Cola} cases) or the existence of a must-stock brand (e.g., in \textit{Guinness} and in the \textit{Coca Cola} cases). Indeed, it can reasonably be argued that a firm that lacks market power in the tying market may not have the ability to leverage such market power to the tied market.

Another condition is that the firm must have the economic incentive and ability to commit to a tying strategy. For instance, the Commission may assess the credibility of the threat to refuse to supply customers unless they buy both the tying and the tied products, or the threat to impose full-line forcing on them. In general, the refusal to supply the tied product separately from the tying product may not be credible where the firm faces a disproportionate risk of failing to sell both products, thus losing profits in both product markets. In contrast, in the presence of "must-stock" products, the Commission considered that the inelasticity of customers' demand vis-à-vis such products makes that threat credible.

In merger cases, the Commission also assesses a third condition, namely whether tying has as a consequence the reduction of competition in the markets, as a result of the foreclosure, marginalization, or elimination of competing suppliers. For instance, in the \textit{Guinness} and \textit{Coca Cola} cases, the Commission found that competing suppliers would be permanently foreclosed from a substantial amount of market outlets as a result of tying practices on behalf of the merged firm.


\textsuperscript{51} See supra notes 40, 42 \& 45-46.
1.2.2.2. Commercial Tying Based on Pricing Incentives

Conglomerate mergers may also change the pricing behavior of the merged firm as a result of the constitution of a wide range of product offering. In such a case, complementary products may be sold together at a price which, due to the flexibility of the merged firm in structuring discounts across the combined product range, is lower than the price charged when they are sold separately. As a result of the combination of a broad range of complementary products, the merged firm may have the financial ability and incentive to cross-subsidize discounts across the products of the range, thus granting rebates which are conditional on the purchase of all products of that range. Such a practice enables the firm to lock-in its customers, notably through the possibility to price discriminate vis-à-vis those who reveal their preference to buy the whole range or separate products thereof.

The Court of Justice examined under Article 82 of the EC Treaty, the grant of discounts which were conditional on the customer's purchasing the whole range of the firm's products (i.e., vitamins) and considered them as constituting an exclusionary abuse when preformed by a dominant undertaking. In the same spirit, the Court in Michelin stated that "no discount should be granted (by a dominant firm) unless linked to a genuine cost reduction in the manufacturer's costs." The Court pointed out that competing suppliers of automobile tires may be foreclosed as a result of such practices owing to the fact that customers would be unlikely to switch suppliers or deal with other suppliers at any point during the reference period (one year) for fear of not qualifying for the rebate. As in the case of product tying, the underlying concern of mixed bundling is that such a practice may have a tying effect on customers, thereby considerably foreclosing the market to competing suppliers.

This is particularly true in the case of conglomerate mergers, where competing suppliers of individual, stand-alone products are unable to replicate the post-merger behavior of the merged entity due to the limited number of products in their portfolio. Thus, in

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Guinness, the Commission considered that the constitution of a broad portfolio of spirits would give the merged firm the flexibility to structure prices, promotions and discounts and have a reasonably greater potential for product tying. In a more recent decision in the spirits industry, the Commission identified portfolio concerns stemming from the fact that:

[Post-merger, if one or more additional leading brands are added to an existing range this may strengthen the overall position of the brand owner. Greater diversity of the product range offered including leading brands improves the position of the brand owner by giving him a series of leading products which may be sold together and used to promote his secondary brands.55]

Under this type of commercial tying, the general level of demand for products in the product range can be expected to increase in the sense that a decrease in the price of one of the complementary products may increase the demand for the other complements in the range. For such an increase in demand to be profitable, the merged firm may render the price reduction contingent on customers buying the whole range of complementary products. This type of commercial tying may produce a short-term welfare increase for those customers who choose to buy the range at a reduced price and a welfare reduction for those who prefer to buy stand-alone products at higher prices. However, in the long term, consumer welfare may be adversely affected when competitors are foreclosed, marginalized, or eliminated from the market and when the merged firm subsequently has the ability to raise prices later without fearing re-entry. The Commission considered such concerns in the Pernod Ricard decision as stemming from the fact that a "[g]reater portfolio diversity and the subsequent listing of the parties' weaker brands reduce the opportunities for competing suppliers whose products may be then delisted by retailers."56

Conglomerate mergers may render this type of tying possible as a result of cross-subsidization between the different products in

56 Id. para. 24.
the combined product range. In addition, where the merger brings about significant financial strength, the ability of the merged firm to cross-subsidize discounts across the complementary products in the product range may also come from profits made on products outside that range.

1.2.2.3. Technical Tying

Conglomerate mergers may also produce anticompetitive effects when they enable the merged firm to engage in technical tying. Technical tying may become possible when, as a result of the merger, complementary products become available only as an integrated system incompatible with competing individual components. Such a practice may be found in industries that manufacture intermediate products that are subsequently assembled either by the final buyer or by intermediate downstream agents (e.g., in the automotive, aerospace, or computer industries).

When the merging parties enjoy market power in one or more of their complementary products, technical tying can have the effect of foreclosing competing suppliers of individual components by denying them the possibility to sell their intermediate products alongside the other products of the merged firm. This can potentially reduce a firm’s profitability and adversely affect their incentives to compete. In a recent case, the Commission examined whether the merged entity could engage in technical tying by making its complementary products (i.e., satellite interfaces and launchers) incompatible with competing products. The Commission found that, in the absence of market power in either of the complementary products and in the presence of buyer power, the merged firm would not have the ability to engage in technical buying.

On the basis of the above description of the various forms of leveraging practices, one can conclude that conglomerate mergers may produce anticompetitive effects under certain well-defined circumstances.

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57 Drauz, supra note 52, at 12.
58 Id.
59 Id.
61 Id.
Conglomerate mergers may result in the creation or strengthening of a dominant position through the leverage of market power from one product market into another closely related product market, where market power does not necessarily exist before the merger.\(^6\)

The extent of the competitive harm of conglomerate mergers depends on the industry concerned. Thus, conglomerate mergers in industries that display imperfect competition, high sunk costs, high entry or expansion barriers, or imperfect capital markets are more likely to lead to the permanent exclusion of competitors and the subsequent monopolization of the market by the merged firm.\(^6\)

Conversely, conglomerate mergers may not lead to competitive harm when the merging firms lack sufficient market power or when the quality and immediacy of the competitive response of rivals can make the merged firm's leveraging practices unprofitable. Finally, conglomerate mergers may fall short of competitive harm when buyers possess a sufficient amount of countervailing power and when, on balance, the benefits from significant and substantial efficiency gains clearly and unconditionally outweigh the potential competitive harm.

1.2.3. Economic Theories of Competitive Harm Relating to Market Power Leveraging and the Resulting Foreclosure

The main anticompetitive concern traditionally associated with tying and bundling is that it may enable a company having power in one market to leverage its market position to monopolize a second market by foreclosing sales of other companies in that market.\(^6\)

An influential critique on leverage concerns came from Chicago School economists in the 1960s.\(^6\) Their critique is often summarized by the statement "there is only one monopoly profit to be made," implying that bundling/tying can be expected to bring no extra profits to a monopolist and, therefore, should not be a concern.\(^6\) The critique shifted the debate from the question of whether a monopolist firm is able to engage in bundling/tying to

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\(^6\) Drauz, supra note 52, at 13.

\(^6\) Id.

\(^6\) Id.

\(^6\) Alfaro & Ridyard, supra note 50, at 151 (discussing when tying and vertical integration can be a legitimate source of concern).

\(^6\) Id.

\(^6\) Id.
exclude rivals to the question of whether a firm would find it profitable to do so.

Interestingly, the issue of classifying products as complements also plays a role in the Chicago critique because the logic of the critique is different depending on the nature of the products involved. In the case of unrelated products, Chicago economists point out that when the market for the tied product is competitive (many suppliers and low barriers to entry), the market will put a constraint on the price that the monopolist in the tying good market can charge for the bundle product it plans to offer. In such a setting, the price that the monopolist can charge is unlikely to exceed the sum of the price that the monopolist can charge absent bundling. This will, on the whole, not bring additional benefit to the monopolist.

In the case of complements, the logic is different. When the tying goods and the tied goods are perfectly complementary to each other (i.e., the products have no value on their own but only in combination with the other product), the monopolist can choose to offer its products as a bundle. As a result, the monopolist can automatically exclude its competitors from the tied good market. The question remains whether a monopolist gains by excluding competitors. Chicago economists would point out that when products are perfectly complementary and a company holds a monopoly position in one of the markets, the company essentially holds a dominant position in the market. If so, this company can use its position to eliminate all profits made by its competitors in the tied goods market by charging a high enough price for the supply of the monopoly good. Consequently, if these competitors are more efficient or provide products that are differentiated from the tied product offered by a monopolist, the monopolist will benefit by not bundling. If the monopolist allows these competitors to operate in the tied goods market, he or she will benefit by increasing the price of his or her monopoly product.

While the Chicago arguments put the business rationale of bundling and tying and the likelihood that these practices will be used by companies into doubt, economists later pointed out that

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67 When making the choice between purchasing the bundle or purchasing only the tied product from a competing supplier, customers will just compare the price difference between the two with their valuation of the tying product. This means that there is an "implicit" price for the tying good in the bundle (the price difference just described) and an "implicit" price for the tied product (the price level in the market for the tied product). Id.
the Chicago argument lacked completeness because it focused on a demand-side notion of leverage, extracting greater consumer surplus by tying and taking the prices charged by the tied good competitors as a given. The Chicago economists underestimated the potential impact on the supply side of a market and were specific to particular settings.

Michael D. Whinston has, importantly, shown that tying may be an effective and profitable means for a monopolist to affect the market structure of the tied goods market by making continued operation unprofitable for tied goods rivals. With both complementary goods and unrelated goods, Whinston stressed that tying may be a strategic instrument in order to deter competitors from entering or staying in the tied goods market as it forces the incumbent to compete fiercely in the tied goods market. This incentive arises because, once the monopolist has committed to offering only tied sales, it can only profit from the monopolized product by making a significant number of sales of the tied good. This strategy can be profitable when it sufficiently reduces the revenue prospects for the competitors, deterring them from entering or continuing in the market. For such a strategy to work, the tied goods market is imperfectly competitive and competitors must be willing to make sufficient sales to remain in operation.

In the case of complementary products, Whinston showed that the Chicago argument breaks down when the incumbent's monopoly in one of the products is not uncontested. In this case, the possibility to extract all consumer surplus by charging high prices for the supply of this monopoly product is limited in such a way that the option not to bundle/tie becomes less attractive. Then it may be profitable to resort to bundling/tying strategies in order to deter competitors from entering or continuing in the tied goods market by reducing their revenue prospects.

Carbajo, de Meza, Seidman, and Nalebuff provide several variations on the above subject. One aspect that the authors

68 Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 839-59 (1990) (theorizing that tying can make continued operation by a monopolist's tied market rival unprofitable by leading to the foreclosure of tied good sales).

69 Id.

70 Jose Carbajo, David de Meza & Daniel J. Seidman, *A Strategic Motivation for Commodity Bundling*, 38 J. INDUS. ECON. 283, 283-98 (showing that the monopolist may bundle with the product of an imperfectly competitive industry because, in the presence of imperfect competition, bundling induces rivals to compete less
highlight is the relevance of consumer valuations for the products being positively correlated. When consumer valuations for products are positively correlated, consumers who highly value one product also highly value the other. As a result, the customers who buy the two products are usually the same, and a demand-side link in the form of a common pool of customers exists. This Article indicates that this instance may render bundling/tying more effective and profitable in foreclosing competitors from the tied goods market.

As for mixed bundling, Choi's model, which is based on Economides and Salop, is particularly relevant. It highlights that a firm offering complementary products will make the most out of the Cournot effect by mixed bundling, i.e., by making the price drop conditioned upon whether the customer buys both products from the merged entity. In the case scenarios studied by Choi, it was possible that mixed bundling may be effective and profitable in foreclosing single-product competitors from the market.

Apart from the insights on bundling, there have also been advances in the theory of vertical foreclosure. As far as the possible exclusionary effect of conglomerate mergers between complements is concerned, a parallel can be drawn to vertical mergers because the upstream and downstream activities are complementary to each other. The model of Ordover, Saloner and Salop is well known. The model identifies circumstances in which vertical integration can be used to raise the costs faced by rivals in the market and, consequently, to raise the price level in the market. Rivals' costs may rise after the merger when they are faced with a more aggressively competitive firm.

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71 The Choi model was submitted in the context of the GE/Honeywell case. Jay Pil Choi, A Theory of Mixed Bundling Applied to the GE-Honeywell Merger, 16 Antitrust Mag. (2001); Economides & Salop, supra note 22, at 105-23 (showing that parallel pair-wise vertical integration generalizes Cournot's effect that mergers amongst complements reduce prices).

concentrated market of input suppliers. The same reasoning may apply to conglomerate settings when a merger between two producers of complementary products reduces the independent supply of complementary products available to rivals.

2. THE ASSESSMENT OF CONGLOMERATE EFFECTS IN THE GE/HONEYWELL CASE

Against the aforementioned theoretical and policy background, one must address the GE/Honeywell transaction, which focuses on the assessment of conglomerate effects. In the midst of intense press coverage and political debate on both sides of the Atlantic, the European Commission declared the proposed GE and Honeywell merger incompatible with the common market.\(^3\) The decision came on the 3rd of July 2002, following an in-depth investigation which found that the combination of the leading aircraft engine maker with the leading avionics/non-avionics manufacturer would create and/or strengthen dominant positions on the relevant markets in which the merging companies are active.\(^4\)

2.1. The Commission’s Case in a Nutshell

The core factor of the Commission’s competitive assessment of the merger is the combination of GE’s financial strength and vertical integration into aircraft purchasing, financing, and leasing with Honeywell’s leading positions on various product markets (i.e., corporate jet engines, avionics, and non-avionics products). The main focus of the Commission’s analysis was on the foreclosure of rivals. Such foreclosure of rivals was considered possible in a post-merger setting through the reduction of the rivals’ ability to compete, thereby inducing exit through marginalization. The instruments that could be used by the merged firm to achieve a reduction in the rivals’ ability to compete were as follows: (1) bundling (or mixed bundling) of complementary products; (2) financial predation through GE Capital and cross-subsidization; and (3) exclusion of rivals through vertical foreclosure (GE Capital Activation Series (“GECAS’’)). These factors reinforce each other in harming the ability of rivals to compete, and in a dynamic setting, they lead to foreclosure.

\(^3\) GE/Honeywell, supra note 1.
\(^4\) Id.
The investigation made by the Commission revealed that GE is dominant in jet engines for large commercial aircraft, while Honeywell is a leading manufacturer in most avionics and non-avionics markets.\textsuperscript{75} Furthermore, GE has a leading position in project financing (GE Capital) and as a leasing and customer company (GECAS).\textsuperscript{76} In this respect, the proposed merger is a conglomerate merger. The Commission’s case is based on an argument of foreclosing rivals in these markets, i.e., engines and avionics/non-avionics.\textsuperscript{77} The effect of foreclosure is to eliminate or marginalize rivals from complementary markets, such that the merged firm would be in a position to raise prices ex post, to the detriment of consumers. Once foreclosure has been achieved, re-entry in this industry is difficult, if not impossible, assuring that prices continue to be high and the quality of the products will be low. Thus, the argument put forward by the Commission is intrinsically dynamic in nature, focusing explicitly on the benefit to consumers, not to competitors.

2.1.1. Factors Contributing to GE’s Dominance

GE’s current dominant positions in the markets for engines for both large commercial and large regional jet aircraft result from the combination of a series of factors that, following the transaction, would have been made directly available to Honeywell. Together with GE’s consistently high and increasing market shares for engines, the factors that contribute to GE’s dominance are: its vertical integration into aircraft purchasing, financing, and leasing; its financial strength through GE Capital, GE’s financial arm; and its strong position in the aftermarket services.\textsuperscript{78}

\textsuperscript{75} As of January 1, 2001, GE has secured 65%, compared to 35%, for its competitors, of the total volume of large commercial aircraft. See id. para. 78. Honeywell has secured around 50-60% of the avionics market. See id. para. 242. In non-avionics, Honeywell has secured around 30-40% of both environmental control systems and wheels and brakes markets. See id. paras. 268-75.

\textsuperscript{76} “GE’s financial arm contributes around half of the GE Corporation consolidated revenues and manages over USD 370 billion,” enabling GE to take more risks in product development programs than any of its competitors. Id. paras. 107-08. “GECAS is one of the two leading leasing companies buying aircraft on a speculative basis with around 40% of the market for large commercial aircraft and 100% of the market for large regional jet aircraft.” Id. para. 123.

\textsuperscript{77} Id. para. 341.

\textsuperscript{78} Id. para. 163.
2.1.2. GE Capital

GE, which has the world's largest market capitalization,\(^79\) can be characterized as a rather unique company. Indeed, GE is not only a leading industrial conglomerate active in many areas including aerospace and power systems, but is also a major financial organization through GE Capital, which contributes around half of the GE Corporation's consolidated revenues and manages over $370 billion, which is more than eighty percent of GE's total assets.\(^80\)

GE Capital offers GE enormous financial means almost instantaneously and enables GE to take more risk in product development programs than any of its competitors. This ability to absorb product failures in an industry characterized by long-term investments is critical.

The importance of financial strength in this industry, through heavy discounts on the initial sales of engines resulting in moving the break-even point of an engine project further away from the commercial launch of an aircraft platform, helped GE, thanks to its enormous balance sheet, to establish its dominant position. Indeed, by increasing this delay in the inception of cash flows and, consequently, by increasing its competitors' needs to resort to external financial means, further raising their leverage\(^81\) and resulting borrowing costs,\(^82\) GE made its competitors—most of whom are specialized single-product companies—extremely vulnerable to down cycles or strategic mistakes.

More importantly, the Commission's investigation revealed that, due to its financial strength and incumbency advantages as an engine supplier, GE can afford to provide significant project financing support to airframe manufacturers under the form of platform-program development assistance.\(^83\) GE has indeed used this

\(^79\) "Market capitalization of USD 480 billion as of 1 June 2001 (far greater than any other company active in the commercial aircraft market such as Boeing with around USD 56 billion, UTC with USD 39 billion and RR with USD 5 billion)." Id. para. 107 & n.28.

\(^80\) "If GE Capital were an independent company, it would, on its own, rank in the Top 20 of the Fortune 500 largest corporations." Id. para. 107.

\(^81\) Here, leverage refers to the debt/equity ratio. Id. para. 111.

\(^82\) "One illustration of this significant competitive advantage enjoyed by GE over its industrial rivals resides in its AAA credit rating which extends to all its subsidiaries and enables them to raise finance cheaper and quicker than competitors." Id. para. 111 & n.32.

\(^83\) Id. para. 114.
direct financial support to obtain exclusivity for its products on those airframes that it has financially assisted, thereby permanently depriving competitors of access to such airframes.

GE's enormous financial capacities also contribute to further growth and strengthen its position in the very lucrative part of the engine business by investing large amounts of money into the aftermarket for several years through the purchase of a significant number of repair shops all over the world.

2.1.3. GECAS

Another key factor contributing to GE's dominance is its vertical integration into aircraft purchasing, financing and leasing activities through GECAS. GECAS is the largest purchaser of new aircraft ahead of any individual airline or other leasing company and is reported to have the largest single fleet of aircraft in service, as well as the largest share of aircraft on order and options.

Unlike any other independent leasing company, GECAS does not select equipment on the aircraft that it purchases in accordance with market demand. As a result of GECAS's policy of selecting only GE engines when purchasing new aircraft, ninety-nine percent of the large commercial aircraft ordered by GECAS is GE-powered.

GECAS has the incentive and the ability to enhance the market position of GE Aircraft Engine division (“GEAE”) through various means. As a launch customer, GECAS can influence the selection of aircraft equipment by airframe manufacturers and, therefore, in combination with other GE features, tilt the balance in favor of GE being retained as the exclusive equipment and service supplier.

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84 GE has secured a total of ten exclusive positions out of the last twelve that were granted by airframe manufacturers. GE did not take part in the other two. See id.

85 As far as large commercial aircraft are concerned, GECAS accounted for a little over ten percent of Boeing's order book with 135 aircraft on order at the time of the Commission's investigation. The figure was equivalent for Airbus with a total GECAS backlog of some 138 aircrafts. Southwest Airlines was reported to have the largest backlog of all individual airlines with a total of 144 large commercial aircrafts. The next largest order backlog from an airline was that of Delta with 108 aircrafts on order. See id. para. 129.

86 "The remainder is accounted for by 8 Boeing 757's for which GE has no engine on offer." Id. at n.41.

87 GECAS is one of the two leasing companies that operate as launch customers by ordering multiple aircraft at one time while waiting the extra time for delivery of a new airframe. Id. para. 133.
Unlike other engine manufacturers, GE can afford to pay upfront to obtain exclusivity and hence capture aftermarket, leasing, and financial revenues. From an airframe manufacturer’s perspective, selecting GE can give access to the largest customer base of airlines and secure a significant either launch or boost order of its aircraft by GECAS.

GEAE’s competitors have been unable to offer comparable launch or boost orders and purchases to airframe manufacturers. The role of GECAS as a launch or boost customer has proven particularly effective in obtaining access/exclusivity to new aircraft platforms, as illustrated by GE’s exclusive position on the Boeing 777X. In addition, GECAS has also proven to be a very effective tool in strengthening GE’s position with airlines on those platforms where there is engine choice.

In addition, GECAS has the ability to standardize airlines’ fleets around GE-powered aircraft, hence persuading airlines that would not otherwise have leased a GE-powered aircraft to accept such an aircraft. Finally, the ability of GECAS to shift market shares by seeding airlines with GE-powered aircraft has, due to the constraints of fleet and equipment commonality, a multiplying effect: these airlines will continue to purchase GE engines in the future, therefore multiplying GE’s share of the market.

No other engine manufacturer has the vertical integration, size, and financial strength to respond to such offers based only on competition on the merits. As a result, by using the purchasing leverage of GECAS, GE has been able to shift jet engine market shares to the benefit of GEAE.

The Commission could not accept the contention that the influence of GECAS could be replicated easily and rapidly by GE’s competitors through, inter alia, the establishment of their own aircraft leasing subsidiaries. The Commission’s investigation confirmed that such a counter-move on behalf of competing engine manufacturers could not constrain GE’s leadership in the engines markets.

The ability of GECAS to shift market shares in favor of GE engines is not predicated on the level of its market share in aircraft leasing. Such a shift would occur even if the downstream leasing market share was small. In particular, the ten percent market share

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88 Id. paras. 140-41.
89 Id. para. 145.
of GECAS may be pivotal in shifting market share from rivals to integrated firms. The main conditions under which this may occur are the following: first, a vertical relationship that is non-adjacent in the sense that it involves two stages, i.e., equipment system supply and distribution, financing or market making, which indirectly interacts through an intermediate (aircraft manufacture) stage; second, systems that are embedded into the intermediate product (aircraft) where, typically, only one system is chosen by the intermediate producer for the life of its product; third, product price that exceeds incremental cost both for producers of the intermediate products and for system suppliers—these quasi-rents create incentives for exclusionary conduct by the merged firm. Overall, these factors enable a downstream purchaser of aircraft such as GECAS to leverage a relatively small presence in the aircraft leasing market into significant power in the upstream equipment supply market.

2.1.4. Interim Conclusion on GE's Dominance

Given the nature of the jet engines market, which is characterized by high barriers to entry and to expansion, GE’s incumbent position with many airlines, its incentive to use GE Capital’s financial power with customers, its ability to leverage its vertical integration through GECAS, the limited countervailing power of customers, and the comparatively weaker position of its rivals, GE was considered to be in a position to behave independently of its competitors, customers and, ultimately, consumers. Thus GE became a dominant firm in the markets for large commercial and regional jet aircraft engines.

2.1.5. The Effects on Honeywell, at the Core of the Commission Decision

By extending the above GE features to Honeywell’s aerospace products, the proposed merger would have led to the creation of dominant positions on several markets as a result of the combination of Honeywell’s leading market positions with GE’s financial strength and vertical integration in aircraft purchasing, financing, leasing, and aftermarket services.

Supplier-Furnished Equipment ("SFE") are products selected on an exclusive basis by the airframe manufacturer and supplied as standard equipment for the life cycle of an aircraft. Consequently, for a supplier of SFE, its initial selection on a platform can
guarantee a long-term source of revenues. Following the proposed merger, Honeywell would have immediately benefited from GE Capital’s incentive and capability to secure exclusive supply positions for its products, thereby permanently excluding rivals from a large share of the market.

In addition, and similarly to GE engines, Honeywell’s products would have also benefited from the role of GECAS as a significant purchaser of aircraft and from its business practices to promote GE products and services. Post-merger, GECAS would indeed have had a strong incentive to extend its GE-only policy from engines to avionics and non-avionics.

Furthermore, due to GE’s strong generation of cash flows resulting from the conglomerate’s leading positions in several markets, following the merger, Honeywell would have been in a position to benefit from GE’s financing surface and ability to cross-subsidize across its various business segments, including the ability to engage in temporary predatory behavior.

In light of these elements, the strategic use by GE of the considerable market access enjoyed by GECAS and of the financial strength of GE Capital in favor of the products of Honeywell would have positioned Honeywell as the dominant supplier in the markets for SFE avionics and non-avionics where it already enjoyed leading positions with high market shares.

By the same token, rival avionics and non-avionics manufacturers would have been deprived of future revenue streams generated by the sales of the original equipment and spare parts. Future internally generated financial means are key to this industry, as they are needed to fund development expenditures for future products, foster innovation, and enable possible leapfrogging. By being progressively marginalized as a result of the integration of Honeywell into GE, Honeywell’s competitors would have been deprived of a vital source of revenue, and their ability to invest for the future and develop the next generation of aircraft systems substantially reduced to the detriment of innovation, competition, and consumer welfare.

2.2. Related Elements

Having gained better insight into the Commission’s analysis, one must examine several further elements that are important to understanding the Commission’s case.
2.2.1. Exit of Competitors

Much has been said about GE and Honeywell’s competitors throughout the entire review process of this case by the Commission. One particular feature that was extensively debated had to deal with their so-called “exit” or “disappearance” from the market. While straight exit is not a remote or impossible event in this market, exit of competitors, in the sense the Commission has interpreted it, does not require a general shut-down of the competitors’ activities or a total disappearance of their corporate existence.

Exit, as it must be read in the Commission’s GE/Honeywell decision, may indeed occur in relation to specifically identified product markets rather than to a broader industry, such as aerospace, as it has often been advanced by critics. The Commission did not argue that rivals would vanish shortly after the implementation of the merger, but rather that some of them would make rational economic decisions to no longer invest in some segments of the industry where they had been active. Such decisions are not unusual in the business world. Companies re-orient their activities as a general response to evolving market conditions. They pull back from specific segments of the markets and re-focus on other markets where they can still make a reasonable living. This is precisely what the Commission has shown in its analysis of the GE/Honeywell merger by establishing a high likelihood that GE and Honeywell rivals would withdraw from specific segments (e.g., engines for large commercial aircraft or specific avionics and non-avionics) because of their inability to compete on the merits in those specifically identified markets. From an antitrust perspective, these specifically identified markets constitute our relevant product markets. Eventually, such withdrawal would result in a substantial reduction of competition.

2.2.2. Antitrust Protects Competition, Not Competitors

It would be misleading to accept unconditionally such overly simplistic positions that competitors should never be the focus of antitrust worries and that if inefficient competitors were driven out of the market, even then, consumers would be better off overall.

Most will agree that the purpose of merger control is to prevent the accumulation of excessive market power by one firm or a small number of firms. Most should also agree that merger control needs to be concerned with the preservation of competitive market structures that may benefit the consumer.
Where competitors are squeezed out, marginalized or driven out of the market, they cannot oppose any credible competitive constraint to the dominant merged firms. In other words, subject to exceptional cases such as natural monopolies, there is no effective competition without competitors. This is the reverse side of the frequently heard adage: "antitrust is not about protecting competitors."

There is nothing wrong in admitting that the competitive process is about encouraging the most efficient firm to grow at the expense of the less efficient. However, it might be prudent for antitrust authorities not to unconditionally adopt a Darwinian theory, where competitors that are unable or unwilling to meet the new competitive environment created through a conglomerate merger are better off leaving the market. This generalized argument suggests that in every single industrial sector, inefficient competitors are driven out of the market and are subsequently replaced by more efficient competitors. This alternation between inefficient and efficient competitors leaves no room for the merged firm to increase its prices profitably enough to sustain business. However, this argument disregards the realities of certain markets, where market exit may not necessarily be followed by new entry. In such a case, the idea of protecting the competitive structure of an industry should not be confused with that of protecting inefficient competitors. This was precisely the case with the GE/Honeywell merger, where high entry barriers and very long industrial cycles did not favor entry. Once rivals are marginalized or expelled from the market, they remain in that position on a continuous basis. These results were analyzed and confirmed during our in-depth investigation.

2.2.3. The Efficiency Debate

The Commission has been criticized for looking at the creation of market power as the only result of the proposed GE/Honeywell merger. The Commission did not take into account increased efficiencies that would have been brought about by the combination of GE and Honeywell.90

The United States, for instance, emphasizes that there is a potential for efficiencies being present in the context of conglomerate mergers, i.e., in the form of economies of scale or scope. Further-

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90 GE/Honeywell, supra note 1.
more, conglomerate mergers are likely to exhibit a Cournot effect; when producers of complementary goods are pricing independently, they do not take into account the positive effect of a drop in the price of their product on the sales of the other product. A merged firm internalizes this effect, and thus has an incentive to decrease prices because it leads to higher profits.

The United States makes a clear distinction between conglomerate mergers leading to short-term price drops due to "efficiencies" and those that may involve anticompetitive practices, such as predatory behavior or tying. The U.S. OECD paper refers to the two categories as "efficiencies-based" and "non-efficiencies-based foreclosure."\(^91\) According to the United States, there is little basis for presuming that the efficiency advantages a firm may gain from acquiring the producer of a complementary product will lead to market power detrimental to consumer welfare in the foreseeable future. The United States further argues that only under very limited conditions would this even be a hypothetical possibility.\(^92\) Such hypothetical possibilities do not support a challenge under Section 7 of the Clayton Act, which requires a showing of a substantial probability that the merger will lessen competition.\(^93\) An effort to assess and weigh anticipated near-term efficiency benefits against more speculative longer term market power possibilities would carry a high risk of enforcement errors and of deterring economically desirable transactions. Even in cases where the initial price drop is due to exclusionary strategic behavior, such as predatory pricing rather than efficiencies, the United States sees the harm as too remote and speculative and would not normally intervene ex ante.

As a result, in the balancing of short-term benefits and long-term speculative harm, the short-term benefits should be given priority. The United States considers that such mergers, where efficiencies or other factors such as a Cournot effect lead to lower

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\(^91\) Portfolio Effects, supra note 27, at 221.

\(^92\) See id.

In the unusual event that narrow-line firms are unable to replicate these efficiencies [i.e., lower prices] through teaming arrangements, internal growth or counter-merger, they could contribute to the foreclosure of these firms. To the extent that rivals are foreclosed from the market due to efficiencies, it is conceivable that a merger creating these efficiencies could end up harming consumers.

\(^93\) Clayton Act, supra note 3.
prices, should fall within a safe harbor. Hence, the mergers should not be challenged ex ante because it is difficult to assess whether the long-term harm will materialize.

As for the EU position on this issue, it is rather far-reaching to unconditionally accept that conglomerate mergers promote efficiency and aggressive competition that benefit consumers. While conglomerate mergers may have the potential to generate efficiency gains in individual cases—as may be the case with any other type of merger—there can be no presumption that such mergers generally and automatically generate such efficiencies. A comparison between real, merger-specific efficiencies and medium- to long-term damage to the market has to be undertaken—and, of course, there is a judgment call here, which antitrust authorities have to make.

Based on that, we must reject the criticism that the Commission does not recognize an efficiency defense. More specifically, in the GE/Honeywell case, the merging parties have consistently argued that the merger would not create the type of efficiencies that antitrust authorities have to rely upon: a long-term, structural reduction in the marginal cost of production and distribution. These types of efficiencies come as a direct and immediate result of the merger, and cannot be achieved by less restrictive means that will allow the consumer to benefit from lower prices and/or increased quality.

On the contrary, the merging parties explained that the merger, as a result of the elimination of duplication, would create cost savings. However, cost savings should not be equated to merger-related efficiencies. They do not automatically lead to sustainable and structural price reductions. Rather, cost savings lead to increased margins for the firm that cannot be expected to be automatically passed on to consumers. Thus, when assessing efficiency claims in conglomerate mergers, it is vital to make the right trade-off, as such mergers may give rise to leveraging practices that may result in product bundling.

This type of leveraging practice may involve an element of temporary price reduction which, under certain circumstances and market settings, may be used to carry out predating strategies, with the objective to drive rivals out of the market. The trap here is the first element of bundling—voluntary price reductions. While some would like to call and to treat such price decreases as structural and sustainable efficiencies, they may actually be no more
than strategic pricing behavior that is made possible through cross-subsidization and price discrimination.

This strong strategic element is incompatible with the structural element, which is a necessary condition for consumer-benefitting efficiencies. We should clearly distinguish between mergers leading to price reductions that are the result of strategic behavior on the part of a dominant firm to marginalize competitors and exploit consumers, and mergers that objectively lead to significant and durable efficiency gains that are likely to be passed on to the consumer.

In the first scenario, there are no significant efficiencies, but there is a significant threat of foreclosure. In this case, the competition authority should probably be more inclined to take action ex ante. In the second case, where there are clearly identified, quantifiable, and merger specific efficiencies, and there is a risk of anticompetitive effect, one must proceed with a careful balancing analysis as to what the net welfare effects will be. In that case, competition authorities should be careful not to discourage pro-competitive deals based on speculative threats of future anticompetitive behavior.

According to EU antitrust law, both predatory pricing and abusive pricing are illegal under Article 82 of the EC Treaty. This is an important legal difference between Europe and the United States, where pricing above the competitive level is not illegal.

This difference is important since one of the main tenets of the Chicago School of Economics with regard to vertical restraints—refusals to deal, tying, etc.—is that there is only one monopoly price to extract. Consequently, in assessing tying, if the tied market is competitive and the tying and tied products are used in fixed proportions, there is no real incentive to monopolize the tied product market since all the monopoly profits can be obtained on the tying market. Thus, there is a presumption that if tying is used, it is used for efficiency reasons and not for monopolization.

In Europe, dominant firms cannot apply unreasonably high prices, and thus have stronger incentives to extend their market power to other markets to spread the monopoly price over a wider number of mark-ups that are less likely to be characterized as "abusive pricing." This strategy is called price-shading. From a European antitrust law perspective, this means that we have to be particularly careful when examining the competitive effects of vertical and conglomerate mergers, given the increased incentives to leverage market power in Europe.
We have indeed seen predatory pricing, fidelity rebates, tying, other types of foreclosure strategies occurring in many markets in Europe, and the detrimental effects that these strategies have on consumer welfare. Our legal mandate is to stop the emergence of market structures likely to lead to such practices. Thus, we have a duty to investigate these cases.

When the merging parties do not provide a clearly articulated and quantified defense in terms of efficiencies, it is much harder for an antitrust authority to clear a transaction that is likely to lead to foreclosure effects. If foreclosure takes place, there is no guarantee that prices are going to be kept at the low level that the merged entity might have used strategically to foreclose competition. To set the record straight on the efficiency debate: the Commission does not challenge mergers simply because they bring efficiency gains. Rather, it challenges mergers when they consider their net effect anticompetitive.

2.2.4. Was Product Bundling an Efficiency or an Exclusionary Practice?

While the effects of the implementation of GE's financial strength and vertical integration into aircraft financing, leasing, and purchasing constitute the heart of the Commission's decision, the merged firm's incentive and ability to foreclose competition through leveraging practices (bundling and tying) also contribute to the creation and strengthening of dominant positions on several of the relevant product markets. This situation can be observed in the product markets for BFE- and SFE-option avionics and non-avionics.

Indeed, given GE and Honeywell's dominant or leading positions in their respective markets, and the wide combination of complementary products that the merged entity could have offered, it also could have engaged in a number of foreclosure practices on the markets for BFE- and SFE-option avionics and non-avionics. Sales of BFE- and SFE-option products are made to airlines each time an airline replaces or complements its fleet of aircraft. On each of these occasions, the merged entity could have foreclosed the selection of Honeywell's competing BFE- and SFE-option products by selling its own products as part of a broader package comprising engines and GE's ancillary services, i.e., maintenance, leasing, finance, training, etc.
As a result of the proposed merger, GE/Honeywell would have had the financial and technical ability, as well as the economic incentive to price its packaged deals to induce customers to buy GE engines and Honeywell BFE- and SFE-option products over those of competitors, increasing its combined share on both markets. This would have occurred as a result of, inter alia, the merged entity's ability to cross-subsidize strategic price reductions across the products composing the packaged deal.

In the short-term, the merger would have affected suppliers of BFE- and SFE-option products. Because BFE products are sold and purchased on a regular basis, the merged entity's packaged offers would manifest their effects immediately after the consummation of the merger. Because of their inability to match the bundled offers, rival component suppliers would lose market shares and experience an immediate damaging profit shrinkage to the benefit of the merged entity. As a result, the merger would have led to market foreclosure of those existing aircraft platforms and subsequently to the elimination, or a substantial lessening, of competition in these areas.

Furthermore, the parties' proposed undertakings to address the concerns raised by product bundling indicate that the parties themselves did not believe in bundling as an efficiency-enhancing element. The parties proposed a set of behavioral undertakings by which they committed not to engage in bundled offers, unless there was specific demand from customers. This confirms the idea that there were no real efficiencies stemming from bundling, but only a strategic incentive to use bundled offers where they would help to reduce the competition by winning platform exclusivity.

2.2.5. Is Ex Ante Control the Only Way to Deal with Leveraging of Market Power?

The cross-Atlantic debate that followed the Commission's rejection of the GE/Honeywell merger showed that the U.S. antitrust authorities are more reluctant to intervene on an ex ante basis in this type of merger. This position is based on the consideration that the exclusionary effects of conglomerate mergers are too remote and speculative, whereas the benefits of consumers, in the form of price reductions, are more immediate and certain.94

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94 See generally Portfolio Effects, supra note 27 (suggesting that the wisdom of adopting an ex post approach may depend on the differences in certainty among
The reluctance of the DOJ/FTC to intervene on an ex ante basis seems to be based on their understanding of the theoretical and empirical literature about conglomerate mergers outlined in the preceding section. The EU would agree that one needs to distinguish the different situations outlined in the economic literature. However, this should not factor in determining whether the theories are relevant in certain merger cases.

The United States feels that the likelihood of competitive harm is more remote in conglomerate mergers than in vertical mergers (where they already regard ex ante intervention as only exceptionally justifiable) or horizontal mergers. While the United States acknowledges that conglomerate cases pose similar issues, it has stated that it has not found any evidence of competitive harm in conglomerate cases. In vertical cases, according to the United States, the economic theories are clearer, and the immediate harm consists of the merged entity's possible foreclosure of access to essential inputs and networks, etc. In this situation, the United States would focus their attention on conglomerate mergers that impose direct costs upon rivals ("raising rivals' costs"), thereby causing foreclosure and significant consumer harm. Nonetheless, when the merger's primary impact is on the rivals' revenue prospects, the United States considers the foreclosure theories to be less persuasive.

The EU's response would be to equate vertical and conglomerate effects given that, to a large extent, intervention is often driven by similar theories of competitive harm. The EU would think it is possible and appropriate to make an assessment of the market structures that make detrimental effects possible.

Related to the perceptions about the theories themselves, the U.S. position seems to be that the EU is not "modest" enough in predicting future events. After all, there is a chain of causation in the reasoning behind the EU's concern about conglomerate mergers. For example, bundling/tying would have to hurt competitors; the continued operation of these rivals in the market would have to

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antitrust authorities concerning short- and long-term effects of conglomerate mergers).

95 See id. at 222 (expressing the DOJ concern about the rise of the "range effects" theory).

96 See id. at 214 (remarking that predictions about the future conduct of the merged firm with regard to net harm suffered by buyers are "beyond the capability of even the most prescient competition authority").
become endangered, leading to exit or marginalization; and prices would, inter alia, eventually rise. The United States concluded that proof that all these conditions have been met requires making guesses about the future conduct of the merged firm, its customers, and its rivals that are beyond the capability of even the most capable competition authority. In view of the range of possible motivations for and competitive consequences of bundling, the United States considers it hazardous to adopt a policy prohibiting mergers merely on the ground that the ability and incentive to engage in these practices might be increased by the merger.

According to the United States, the difficulty of gathering sufficiently reliable and conclusive evidence ex ante argues strongly in favor of waiting until after the tie has occurred to consider challenging this type of conduct. In essence, two fundamental questions should be asked and answered affirmatively before blocking any merger on the basis of bundling/tying theories: (1) Would the firm engage in bundling after the merger? (2) Would the bundling strategy harm consumer welfare? Waiting, that is, ex post intervention, would yield important advantages in investigating both of these questions, as the first question is already resolved at that point, and more evidence on the second question is available even if it is not definitive. A decision about whether to prohibit a merger because of the potential range of effects must therefore weigh the costs and benefits of waiting until after the merger to prosecute any illegal behavior.

However, in the EU, a “wait-and-see” strategy may be costly in cases in which the competitive harm is one that is in essence irreparable. More generally, it should not be taken for granted that an enforcement agency will be effective and efficient in “regulating” company behavior ex post.

Leveraging practices may result in the foreclosure of rivals, their gradual marginalization or exit from the market or from some market segments. It is hardly conceivable that the punishment mechanism of ex post instruments can do anything to prevent such market foreclosure. The imposition of fines on the dominant merged firm, no matter how heavy, cannot do much, if anything, to reinstate the competitive thrust and constraint of weakened or exiting rivals. The damage to competition will have occurred and

97 Id. at 223.
98 Id.
the legal system of prevention of the creation of market dominance, notably through an effective merger control policy, will have failed.

2.2.6. Financial Strength as a Conglomerate Effect

As for the element of financial strength, the EU considers that financial strength may be a factor of importance for merger control. The United States doubts that financial markets can really be characterized as inefficient in providing funds to those firms that are inherently profitable.99 The U.S. opinion is that financial markets are generally efficient, so the case for exclusionary strategic pricing is empirically weak. In any event, it would be extremely difficult to discern when financial markets would not work efficiently. As a result, financial strength should not be considered a relevant element for assessing the impact of mergers in individual cases.

In the EU, the issue is not whether financial markets are efficient in some broad, vague sense, but rather whether access to finance is an issue in the specific industry under review. Because of the importance of finance to the conduct and market positioning of a business, financial strength should be considered and examined, particularly in those cases where: (1) finance is relevant to the industry under review; (2) there are significant asymmetries between competitors in terms of their internal financing capabilities; and (3) the nature of the industry is such that companies face difficulty in attracting external funds.100 In the vast majority of cases, financial strength is not an issue but in others it may be one of the factors that contributes to a merger giving rise to competition concerns.101

Financial strength may also have an impact on the ability to erect entry barriers, by locking up part of the market on the basis of exclusive contracts. However, the concept of entry deterrence is not so different from that of exclusionary strategic pricing.

3. PROCEDURAL DIFFERENCES IN THE EU AND U.S. MERGER CONTROL SYSTEMS

In the light of the Commission's assessment of the GE/Honeywell merger, one could reasonably think that the differ-

99 Kolasky, supra note 20.
100 Id.
ences between the merger control systems across the Atlantic were responsible for possibly different outcomes. For instance, one could think that the prosecutorial system in the United States and the fact that mergers can only be blocked by courts, not by government/regulatory action alone, grant the business community more certainty as to the fairness of the process. In contrast, in Europe, mergers are assessed by antitrust enforcers, such as the Commission's Merger Task Force, who are both investigating and decide on a notified case. As such, this system could be seen as unable to guarantee an equitable process.

This difference does exist, but it is impossible to judge whether one of the two systems is better. However, the administrative system that prevails throughout Europe—more as a result of legal tradition than anything else—contains a substantial number of embedded checks and balances that keep administrative actions within strict margins of legality while, at the same time, offering various possibilities to notifying parties that are not apparently available under the U.S. procedure.

First, before the opening of a Second Phase investigation, which is a full inquiry into a case—the equivalent of the Second Request—the Commission has to identify the competition concerns raised by the case. It has to articulate in a detailed and official manner, in the 6(1)(c) Decision addressed to the parties, the factual, theoretical, and legal bases for its "serious doubts," that is, the reasons why the transaction cannot be cleared within the one-month deadline of the First Phase investigation. The value of this document should not be underestimated as it allows the parties to the transaction to identify, very early in the proceedings, the nature of the concerns and to gather the information required to defend their case properly. It also forces the Commission to properly identify and focus on the issues that should be worth investigating in the Second Phase.

Once this decision has been adopted, the Commission conducts its investigation. If the investigation confirms the initial doubts, the Commission cannot proceed to the prohibition of the deal without first articulating its objections in yet another detailed document. The Statement of Objections contains a fully-developed factual, legal, and economic analysis of the transaction and a com-

102 EU Merger Regulation, supra note 2.
103 Id. art. 6(1)(c).
prehensive articulation of the grounds on which the Commission may base a possible negative decision. Based on this document, the parties know exactly what factual, economic, and legal arguments to bring forth in the defense of their case.

Immediately after the issuance of the Statement of Objections and prior to formulating their reply to it, the parties are given access to the Commission's file, in which they may verify the results of the investigation and examine the evidence upon which the Commission has based its objections.

Apart from their right to reply to the Statement of Objections in writing, the parties are also given the opportunity to make their views known at an Oral Hearing. This is an administrative, non-judicial hearing which may explain why some commentators have accused the Commission of acting both as judge and jury. The purpose of the Hearing is to give the parties the opportunity to present their case to a broader audience, including other Commission departments that form part of the decision-making process and to representatives of the competition authorities of Member States that will be called upon later in the process to give an opinion on the transaction.

Following the Reply to the Statement of Objections and the Oral Hearing, but before any decision can be proposed, the Commission has to consult the national competition authorities, whose vote may determine the final proposal.

Finally, after having gone through all of these steps, the Commissioner in charge of competition can make a proposal to the full Commission for approval or disapproval of the transaction.

Throughout this procedure, the Merger Task Force has to go through a series of internal checks. Several other departments, either within the Directorate General ("DG") for Competition or within the Commission have the power to control the investigation process, the reasoning and drafting of the decision, and so forth. The Legal Service of the Commission is in charge of controlling the legal and procedural aspects of the instruction of the case, and its prior approval is required before any act having legal effects can be

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104 Id. art. 18.
105 Id.
106 Id.
107 Id.
108 Id. art. 19.
109 Id. art. 8.
proposed and adopted. Directorate General Economic and Financial Affairs ("DG ECFIN"), the economics department of the Commission, in cooperation with DG Enterprise, in charge of industrial analysis, and the internal pool of economists of DG Competition take a thorough look at the economic and industrial analyses of merger cases. Finally, other sectorial Commission departments intervene and bring forth expertise in mergers, depending on the industrial sectors involved. All of these internal checks and balances are necessary insofar as the decisions of the Commission are collegial acts that require the approval of all twenty Commissioners.\footnote{110 Id.}

Furthermore, like any other Commission decision, merger decisions are always subject to judicial review before the European courts. Merging parties who are subject to negative decisions can request that the European courts adopt interim measures, in which case a ruling can be expected in a matter of weeks. Such interim measures can, in theory, lead to the suspension of the negative decision. In this sense, court decisions on appeals from merger decisions of the Commission in the EU are not less frequent or more time-consuming than court rulings on challenges to merger decisions in most other jurisdictions.\footnote{111 As indicated by two experienced U.S. and EU law practitioners, "[T]he time, expense, and uncertainty associated with litigating merger cases in U.S. courts means that few cases are actually litigated. The great majority of proposed mergers to which the agencies object either are abandoned or are modified through settlements between the parties and the agencies." James S. Venit & William J. Kolasky, Substantive Convergence and Procedural Dissonance in Merger Review, in Antitrust Goes Global 79, 96 (Simon J. Evenett et al. eds., 2000). As has been noted by Venit and Kolasky, "[T]he EU's merger review process is often more transparent than the U.S. process because of the formality of EU procedures and the need to protect the rights of the defense." Id. at 92.}

This appears to be in accordance with what several legal practitioners working on both sides of the Atlantic have said, noting that the U.S. system, in which antitrust agencies can only block a merger before a court, may have the same effects upon merging companies as the European system of administrative action.\footnote{112 Id. at 88.} In fact, the mere prospect that a notified merger will end up in a U.S. court often prompts the notifying parties to offer remedies in order to be able to close their merger as soon as possible.

The above analysis shows that the Commission's Merger Task Force and the Competition Commissioner are not left without

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\footnote{111 As indicated by two experienced U.S. and EU law practitioners, "[T]he time, expense, and uncertainty associated with litigating merger cases in U.S. courts means that few cases are actually litigated. The great majority of proposed mergers to which the agencies object either are abandoned or are modified through settlements between the parties and the agencies." James S. Venit & William J. Kolasky, Substantive Convergence and Procedural Dissonance in Merger Review, in Antitrust Goes Global 79, 96 (Simon J. Evenett et al. eds., 2000). As has been noted by Venit and Kolasky, "[T]he EU's merger review process is often more transparent than the U.S. process because of the formality of EU procedures and the need to protect the rights of the defense." Id. at 92.
\footnote{112 Id. at 88.}
checks and balances throughout the instruction of a merger case. In addition to these checks and balances, I would like to stress the legal certainty that prevails in the European system to the benefit of merging companies. The Commission has developed a system of pre-merger contacts with notifying parties, and many companies from all over the world have taken advantage of this opportunity. A fruitful discussion on the substance and procedure of the case can take place in these pre-notification contacts. On some occasions, such contacts take place even before an agreement has been signed. These contacts allow the notifying parties to properly anticipate the nature of the antitrust analysis that is likely to be conducted in their case.

In addition to the general effort toward transparency, the Commission is bound to publish every decision it adopts, be it negative or positive, and has a duty to motivate its decisions properly, on pain of annulment if it does not do so. As a result, through its decisional practice, the Commission provides guidance to the industry as to the type of competition law analysis it is likely to carry out. This policy on transparency and publication reduces uncertainty and lowers the cost to companies of trying to anticipate potential antitrust concerns.

4. CONCLUSION

The EU and United States see eye-to-eye on virtually all of the most important aspects of antitrust policy. Much of this convergence has been the result of an "organic" process: both are grappling with the same evolving economic realities and are exposed to the same evolution in economic thinking. Indeed, the real key to this convergence has been the fact that, in spite of the different legal instruments at their disposal, the EU and U.S. agencies have been using the same microeconomic analytical tools, and increasingly so in recent years.

Perfect convergence will never be achieved. A degree of divergence is unavoidable in a multi-polar world composed of sovereign jurisdictions, each with its own laws, enforcement authorities, and courts. Even within the United States, there is occasional disagreement between federal and state antitrust agencies, and among federal courts, about the correct interpretation of federal antitrust statutes. That is why cooperation and dialogue are so important. Indeed, EU/U.S. cooperation in antitrust law enforcement has been a remarkable story in itself: over the past decade we have con-
cluded two competition cooperation agreements and staff-level contacts have become a daily reality. The important, practical role played by such cooperation should not be underestimated; it has substantially reduced the incidence of divergent or incoherent rulings on the two sides of the Atlantic. This has been particularly remarkable in merger cases, where staff-level contacts are most frequent and intensive.

Cooperation in merger cases has been increasingly intensive in recent years, with a growing number of operations requiring simultaneous scrutiny on both sides of the Atlantic. Inter-agency discussions tend to focus on issues such as the definition of markets, the likely competitive impact of a transaction on those markets, and the viability of any remedies suggested by the merging parties.

When divergences do occur, we must learn to manage them and keep them from escalating into high-profile, transatlantic political disputes. Looking back over the past decade, the obvious instance that comes to mind is the Boeing/McDonnell Douglas episode. For a time, there were predictions of trade wars and of a lasting breakdown in EU/U.S. regulatory dialogue. Neither of these pessimistic scenarios materialized. EU/U.S. cooperation is sufficiently robust to survive any such perceived threats to its continued effectiveness: both the EU and U.S. authorities realize that it is in their mutual interest—and, ultimately, in the interest of the world economy’s prosperity—that they do so.