THE EUROPEAN COMMISSION'S DECISION IN GE/HONEYWELL AND THE QUESTION OF THE GOALS OF ANTITRUST LAW

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1. INTRODUCTION

The decision of the European Commission on July 3, 20011 to stop the merger between General Electric Company ("GE") and Honeywell International, Inc. ("Honeywell") on the basis of European Community merger control2 was groundbreaking, and, not surprisingly, led to a very harsh exchange of remarks between parties on both sides of the Atlantic.3 Although it is certainly re-

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2 This Article will refer to the merger control of the European Community ("EC") rather than the European Union ("EU") because the merger control rules pertain only to the EC and not to the EU. With regard to the relationship between the two, it can be said that the EC (together with the Coal and Steel Community and the European Atomic Energy Community) forms one pillar of the EU, with the Common Foreign and Security Policy and the Cooperation in Criminal Matters forming the other two pillars.

markable that, for the first time, the Commission stopped a U.S. merger that had already received clearance from its "home" authority (in this case the U.S. Department of Justice ("DOJ")), the outcome of GE/Honeywell did not come as much of a surprise to many observers. The truth of the matter is that it was only a matter of time before the different merger control regimes in Europe and the United States would arrive at different results for the same merger. The problem of having different merger control regimes in two of the world's largest economies had simply been dormant for a long time.4

This Article is a revised version of an article that was the basis of a presentation at the April 2002 University of Pennsylvania Journal of International Economic Law Symposium, which was published in the Journal's Summer 2002 issue.5 During the Symposium and later that month at the ABA's antitrust section meeting in Washington D.C., I came across a number of new and very interesting comments and views on the GE/Honeywell decision and its impact on international merger control and decided to change the main thrust and focus of the article in order to address and accommodate these comments. From the Symposium itself and subsequent discussions I have had with competition lawyers in Europe and in the United States, I have concluded that the discussion about GE/Honeywell has very much become a discussion about whether the U.S. or the European merger control system is superior. Thus, despite all representations to the contrary, the discussion has turned into a contest between the merger control regimes, and, most importantly, their respective goals. It would be a most interesting task to focus the Article on the topic of goals alone and consequently on the battle between the Chicago and the Freiburg Schools of thought, which are respectively—at least to a large extent—the bases for the interpretation of the U.S. and the European merger control system. However, instead of concentrating on the philosophical and theoretical aspects of merger control in general,

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this Article endeavors to address the position of the GE/Honeywell decision under European law and its practical impact on international merger control. Where appropriate, however, the Article will make references to the theoretical side of merger control in Europe and the United States.

This Article will first provide a very brief overview of EC competition law and, to a limited extent, will address how this framework compares to U.S. antitrust law. In this context, references to the different schools of thought will be made, albeit in a limited scope. Next, the Commission’s decision in GE/Honeywell will be outlined and analyzed in detail. Finally, this Article will address the question of international cooperation in merger control, if and how this cooperation was affected by the Commission’s decision in GE/Honeywell, and where international cooperation is headed in the future.

2. DOGMATIC BACKGROUND OF ANTITRUST LAW IN THE UNITED STATES AND EUROPE

"Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals?" This easy-sounding but very accurate statement made by Robert Bork in his Antitrust Paradox of 1978, although aimed at the discussion in the United States at the time, can also be used to pinpoint the debate that is going on right now between the United States and Europe. Interestingly, and as Bork continued, in over eighty years, the U.S. courts have never settled for long upon a definitive statement of antitrust law’s goal and, at the time of writing his book in the 1970s, the courts seemed as far from doing so as ever. GE/Honeywell and its subsequent discussion show that the question is still far from being answered in the international community. Therefore, in order to understand the discussion that became ever more visible after GE/Honeywell, one

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6 It is not intended to, nor can it, encompass in depth all the aspects of European merger control. For a comprehensive overview of the European merger control regime, see C.J. Cook & C.S. Kerse, E.C. Merger Control (3d ed. 2000); Christopher Jones & Enrique González-Díaz, The EEC Merger Regulation (1992); José Rivas, The EU Merger Regulation and the Anatomy of the Merger Task Force (1999).


8 Id.
has to examine what the current goals of antitrust law are in Europe and in the United States.

European merger control is, to a large extent, based on the German concept of competition law. German law, in turn, has been largely influenced by the so-called ordoliberal school of thought, developed to a large extent in the South German University of Freiburg. Under this approach, it is believed that every individual should enjoy economic freedom as part of his political freedom and, therefore, that competition should be completely free from any form of government interference. However, this belief was based on the assumption that individuals competed with one another—as was indeed the case in the early to mid-eighteenth century economy. The Industrial Revolution in the late nineteenth century brought this situation to an end and the market became more and more the playing field of large entities. These entities sometimes became so strong that competitors were driven out of the market and effective competition was eliminated. German ordoliberals therefore propagated a system where the market players would freely compete with each other, while the State would guarantee and provide for an order or constitution according to


10 Hence the label “Freiburg School.”


12 PROMETHEUS, supra note 9, at 23.

13 It must not be forgotten that the original law against restraints of trade, i.e., agreements not to practice a trade, was aimed at preventing a man from signing away his livelihood in a society where extensive governmental and guild restrictions might prevent him from finding comparative employment. See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 YALE L.J. 775, 784 (1965) (explaining that the original law against restraints of trade was aimed at protecting individuals). Thus the alleged first noted antitrust case, the often quoted and rarely read Dyer’s Case of 1415, a nine line report where a John Dier undertook not to use his dyer’s craft in a certain town for half a year, and the judge held that such a bond was void on account of the condition being against common law. Y.B. 2 Hen. 5., fol. 5, Pasch. pl. 26 (1415).

14 Another danger to competition was the increasing formation of cartels as a response to the economic crises in the late eighteenth century.
which such competition was, and remained, possible. Part of this order was the control and restriction of overly powerful single entities. This approach was adopted in Germany after World War II in its first competition law. This competition law and thinking later also found their way into the Treaty of Rome and the European merger control regime.

At least one of the goals of antitrust law in Germany and Europe is the protection of small and medium enterprises from dominant competitors. The underlying reason for this goal is that it was believed that the participation of smaller businesses would ensure a competitive market—and such competitive market would benefit consumers. German and European antitrust laws thus aim at benefiting almost everyone involved—small and medium competitors as well as consumers—maybe with the exception of entities who are, or are poised to become, dominant. There is no clear (dogmatic) indication as to which party should benefit most from the antitrust legislation. To reduce this approach to a “big is bad” label is therefore most certainly an oversimplification. Big is not always and not necessarily bad; it could be bad if it leads to the

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15 Donna E. Patterson & Carl Shapiro, Transatlantic Divergence in GE/Honeywell: Causes and Lessons, 16 ANTITRUST 18, 20 (2001) (arguing that the European caution towards large entities “appears dangerously close to the . . . ‘Big is Bad’ doctrine from the 1960s” and has no sound economic basis).

16 For an overview of the development of German competition law and its relation to the ordoliberal school of thought, see PROMETHEUS, supra note 9, at 266-94.

17 To a large extent, today’s European antitrust policy is thus based on the German model. See Gerber, AM. J. COMP. L., supra note 9, at 71-74 (noting that most leading German representatives in the founding of the EC were closely associated with ordoliberalism); Rodger, supra note 11, at 306 (discussing the role of ordoliberalism in the EC competition model). One consequence of this influence has been the prominent role of German competition lawyers in the administration of European competition law. Since the establishment of the EC, a German national has primarily held the Directorate General position responsible for Competition: of the six Directors General since 1958, five have been German. The last German to hold this post, Alexander Schaub, was removed from his post as part of a general rotation of high-level officials who have held the post for more than seven years. In a departure from German dominance, Briton Philip Lowe replaced him.

18 In the early twentieth century, Socialist politicians especially favored this approach because they equated “consumers” with “workers,” their clientele, who deserved protection.

demise of competitors—and in the eyes of the Europeans thus ultimately also damages consumer interests. Based on these ideas, both the German and the European system ask whether or not a merger will lead to the creation of a dominant position. The substantive test under European law is therefore, as will be shown in more detail below, one of market dominance (the "MD test").

Interestingly, and in contrast to its later development, the original development of antitrust law in the United States was not very different from the one just described in Europe. In the late 1800s, concerns grew in the United States about the rising power of giant combinations called trusts—Standard Oil being one of the most prominent among them. The Sherman Act was enacted in response to these concerns. In 1914, the Sherman Act was followed by the Clayton Act, which was specifically aimed to "prohibit certain trade practices which... are not covered by the [Sherman Act]... and thus to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." However, the relevant provision in the Clayton Act did not have much practical relevance until the changes effected by the Cellar-Kefauver Act of 1950. Hence, until 1950, merger control in

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20 Section 36(1) of the Act Against Restraints of Competition ("GWB") states that a merger has to be prohibited if it can be expected to create or strengthen a dominant position. Uniquely, the GWB gives clear levels of market share above which one or several competitors are deemed to be dominant, i.e., one-third for one competitor, one-half for three or fewer competitors, and two-thirds for five or fewer competitors. Gesetz gegen Wettbewerbsbeschrankungen (GWB), v. 26.8.1998 (BUNDESGESETZBLATT, TEIL I [BGBI.I] S.2521), as amended v. 2.9.2002 (BGBI. I S.3448, 3670).

21 See generally Standard Oil Co. v. United States, 221 U.S. 1, 30-46 (1910) (discussing the problems with centralization of power and control in the oil industry).

22 See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 463 (2d ed. 1985) (stating that the Sherman Act was in passed only in response to trusts); David McGowan, Innovation, Uncertainty, and Stability in Antitrust Law, 16 BERKELEY TECH. L.J. 729, 742 (2001) ("Congress passed the [Sherman] Act because Congress was concerned that large firms or groups of firms were doing bad things.").

23 BORK, supra note 7, at 47 (citing preamble to original Clayton Act bill).

24 This Act was actually passed because of fears of large corporations. See McGowan, supra note 22, at 750-51 (quoting Representative Cellar saying: "Small, independent, decentralized business of the kind that built up our country... first, is fast disappearing, and second, is being made dependent upon monster concentration. It is very difficult now for the small business to compete against the financial, purchasing, and advertising power of mammoth corporations." and Senator O'Conor saying: "the passage of this bill will go far to curb further growth of monopoly. In achieving this desirable objective, the interests of small business as an important competitive factor in the American economy will be advanced") (emphasis added).
the United States was administered mostly under the Sherman Act.\textsuperscript{25}

Section 7 of the Clayton Act prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."\textsuperscript{26} Based on the wording of Section 7 of the Clayton Act, U.S. law thus focuses on the structure of the market by asking if the merger, independent of whether or not it creates a dominant position of a single entity, will lead to a decrease in competition in a market—i.e., whether the merger will \textit{substantially lessen competition} (the "SLC test"). In U.S. antitrust law the position of the individual entity is only considered as evidence of the concentration of the market. In other words, in the United States, market concentration is the starting point in a merger control investigation\textsuperscript{27}—just like the market dominance of one competitor is the starting consideration in Europe. Both systems, as will be shown below, will subsequently assess the anticompetitive effect of a merger under their respective but similar tests—and it is in the application of these tests that the question of the goals of antitrust law arises.

The law in the United States (just like in Europe) does not give a clear guideline as to what the main goal of antitrust law should be, under what auspices the question of the lessening of competition should be decided, and what role the interests of both consumers and small and large companies should play.\textsuperscript{28} A number of

\textsuperscript{25} Between 1914 and 1950 only fifteen mergers were overturned in the United States, of which ten were based on the Sherman Act.


\textsuperscript{27} The 1992 Horizontal Merger Guidelines assess concentration in accordance with the Hirschman-Herfindahl Index ("HHI"). The HHI examines the relationship between the number of competitors and their respective market share in order to determine how concentrated a market is and what change in the index will occur through a merger. The HHI is calculated by summing the squares of the market shares of each firm in the market. A market dominated by few competitors with high market shares leads to a high HHI, indicating a highly concentrated market, whereas many competitors with relatively small market shares will lead to a low HHI, indicating a low level of concentration. The Horizontal Merger Guidelines create a presumption of illegality in cases where the HHI is increased by more than 100 points in markets of 1800 and above, and a presumption of legality if the HHI is either below 1000, or between 1000 and 1800 and the increase is less than 100. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines 1992 (Apr. 2, 1992) (revised Apr. 8, 1997) [hereinafter Horizontal Merger Guidelines 1992], para. 1.51, \textit{available at} http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

\textsuperscript{28} McGowan, \textit{supra} note 22, at 750.
different opinions have been offered in the United States as to how the antitrust law should be interpreted and what the Congressional intent was in enacting it. 29 In this respect, the discussion in the United States in some ways preceded the one taking place today between Europe and the United States, especially in the aftermath of the GE/Honeywell decision. 30

After the enactment of the Sherman Act, there was considerable opinion in the United States that the interests of small businesses should play an important role and that it was Congress' intention to protect those interests from too-mighty market players. The protagonists and the course of this discussion are well known and shall only briefly be mentioned here. Justice Rufus Wheeler Peckham, for example, talked about concern for "small dealers and worthy men." 31 His ideas were famously developed further by Justice Louis Dembritz Brandeis who was willing to balance the interest of small producers against those of consumers. 32 Justice Learned Hand in his decisions in Alcoa 33 and Associated Press 34 emphasized the situation of the small business vis-à-vis large firms. The position of the small business against all-mighty competitors was also advanced famously and in many cases by the Warren Court in the 1960s. 35 Brown Shoe, 36 Proctor & Gamble, 37 and Von's

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29 For a superb discussion of the different historical approaches to antitrust enforcement, see Eleanor M. Fox & Lawrence A. Sullivan, Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC AND POLITICAL POLICY 2 (Harry First et al. eds., 1991).


31 United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897).


33 United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).


Grocery are the most prominent among those cases in which the Supreme Court, while stressing that antitrust law is concerned with the protection of competition not competitors, identified the desire of Congress "to promote competition through the protection of viable, small, locally owned businesses." It is therefore probable, though admittedly somewhat moot and speculative, that the Warren Court would also have prohibited GE/Honeywell on similar grounds as the Commission, and would have received the same type of reaction as it did when it decided its own cases in the 1960s.

The Supreme Court's approach was met with fierce criticism by judges and academics, starting with, but not limited to, the University of Chicago, in what became the Chicago School. There are two primary characteristics of the Chicago School. First is the insistence that the exclusive goal of antitrust adjudication is the maximization of consumer welfare, which must not be weighed against any other goal, such as the supposed social benefits of preserving small businesses against superior efficiency. Second, the Chicagoans wanted to apply economic analysis more rigorously.

The Chicago School gradually made an impact on the Supreme Court. In 1977, the Court decided the Sylvania case with an opinion that borrowed liberally from the Chicago School. Sylvania was not a merger case, but the opinion cast a long shadow over merger jurisprudence in lower courts because of the implicit endorsement of economic views that also had an application to

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39 According to Robert Bork, these cases are among the worst antitrust essays ever written, with Brown Shoe having a considerable claim to the title of being worst of all. BORK, supra note 7, at 210.
40 Timothy J. Muris, in contrast, states that these were the days when the opinions of the Supreme Court "sought to protect competitors, not competition." Timothy J. Muris, GTE Sylvania and the Empirical Foundations of Antitrust, 68 ANTITRUST L.J. 899 (2001). This statement is a remarkable parallel to the criticism of the European practice.
41 Brown Shoe, 370 U.S. at 344 (emphasis added).
42 Given the Court's history, this outcome would not be very surprising since "no merger ever survived the Warren Court's scrutiny." BORK, supra note 7, at 216.
43 Id. at xi. See also Stephen F. Ross, Network Economic Effects and the Limits of GTE Sylvania's Efficiency Analysis, 68 ANTITRUST L.J. 945 (2001) ("The significant contribution of the 'Chicago school' of antitrust has been to demonstrate persuasively, through the use of economic theory, how some business activities historically viewed with suspicion actually benefited consumers and promoted economic efficiency.").
merger law. Most notable was the Court’s implicit assumption that the economic welfare of consumers, rather than other concerns, was the appropriate objective of antitrust. In addition, the Court was willing to entertain arguments on the efficiency justifications for business strategies.

The discussion in the United States has in the meantime basically subsided and, thus, has paved the way for a more or less unified position in the United States against the European position. With the Reagan Revolution in the 1980s, the Chicago School’s triumph was completed and U.S. law finally moved away from the protection of small competitors and toward a focus on consumer welfare. As recently stated by Federal Trade Commission (“FTC”) Chairman Timothy J. Muris, “the focus is clearly on con-

45 FTC Commissioner Thomas B. Leary talks about the discussion in the United States as being similar to pendulum swings:

The pendulum is supposed to have swung dramatically from an aggressive enforcement policy in the 1960s and 1970s to a permissive policy in the Reagan and Bush years (1981-92), followed by a swing back to an aggressive policy in the Clinton years. Other commentators believe that the pendulum began to swing back during the Bush years, but the persistent image is one of reaction in the 1980s followed by a strong counter-reaction in the 1990s.


46 See id. sec. II. B. (“In the last 20 years of close involvement with merger law—including, most recently, two as a member of the Federal Trade Commission—I am not aware of a single instance where non-economic factors have played any part in the ultimate decision of either federal agency.”). But also see the prediction by Thomas Horton and Stefan Schmitz that the discussion will re-surface by a resurgence of ordoliberalism in Europe. ABA Newsletter, supra note 30, at 23.

sumers, and that debate is over." Consumer welfare is often mentioned in connection with efficiencies. "Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." According to a statement from the 1997 update to the Horizontal Merger Guidelines, the FTC and DOJ will assess any efficiency gains that cannot reasonably be achieved by the parties through other means.

The exact relationship between efficiency and consumer welfare is not clear. Both are often quoted alongside each other as being the exclusive goal of antitrust law. It seems that to the advocates of the Chicago School, "consumer welfare means nothing more than economic efficiency." In other words, only efficiencies that enhance consumer welfare as the ultimate goal of antitrust law become part of this ultimate goal, which is why it appears that

48 Interview with Timothy J. Muris, Chairman of the Federal Trade Commission, 16 Antitrust 52 (Fall 2001).

49 See Lawrence Summers, Competition Policy in the New Economy, 69 Antitrust L.J. 353, 358 (2001) ("[T]he goal is efficiency, not competition. The ultimate goal is that there be efficiency.").


51 Id. DOJ/FTC Merger Guidelines expressly recognize that efficiencies are worthy of strong consideration in approving substantial increases of concentration, and several lower courts have concurred. The Supreme Court most recently said that the possibility that efficiencies will result from a proposed merger cannot be used as a defense to illegality in Clayton Act Section 7 merger cases. See FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."). Furthermore, the Court has stated that where the effect of a merger "may be substantially to lessen competition, [it] is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." United States v. Nat'l Bank, 374 U.S. 321, 371 (1963). Attempts to pronounce the Supreme Court's reasoning as disproved or outdated minimize the inexorable waxing and waning of the diametrically opposed socio-economic belief systems through the decades.

52 See, e.g., Edwin J. Hughes, The Left Side of Antitrust: What Fairness Means and Why It Matters, 77 Marq. L. Rev. 265, 269 ("Consumer Welfare as the Exclusive Goal of Antitrust"). See also id. at 273 ("[E]fficiency is the single goal of the antitrust laws.") (1994).

53 Kovacic, supra note 47, at 1448. See also Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice on the Commission's Green Paper on the Review of Council Regulation 4064/89 (2001), at 3 [hereinafter ABA Comments] ("[M]erger-generated efficiencies should not be held against merging parties. Rather they should typically be seen as a pro-competitive result of a merger which may benefit consumers and encourage competitors to become more competitive themselves."), available at http://www.abanet.org/antitrust/commentsecgreen.doc.
both terms can be used alongside each other but basically mean the same thing.

As will be shown, European law acknowledges the importance of consumer protection, but by far does not award it the position it has in the United States today.\(^\text{54}\) Currently, it could be said that European law is close to where U.S. law was twenty-five years ago, although this statement should not be interpreted to mean that European law lags behind. Also, in Europe, efficiencies are not part of the assessment process itself\(^\text{55}\)—a fact that is under intense scrutiny with regard to possible changes of the European regime.\(^\text{56}\) At this time, however, the Commission is at pains to even counter the impression that there is an efficiencies offense. It could be argued that through the merger, the newly-formed company would have an advantage over its competitors, would thus strengthen its competitive position, and would in the long-term drive competitors who are unable to match the efficiency-driven lower prices out of business.\(^\text{57}\) Therefore, it could be argued that efficiencies are bad

\(^{54}\) It is therefore wrong to state that in Europe, the law protects competitors, not competition. This frequently-heard statement is called a "caricature of EU law" by Eleanor Fox. Fox, supra note 47, manuscript at 3.

\(^{55}\) Compare Thomas L. Greaney, Not for Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures, 44 St. Louis L.J. 871, 891 (2000), citing Case IV/M.53, Aerospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42, 4 C.M.L.R. M2 (1992) [hereinafter de Havilland]; Case IV/M.469, MSG Media Services, 1994 O.J. (L 364) 1, and citing "other Commission decisions" that take efficiency improvements into account "between the lines." Greaney argues "efficiencies have played a negligible role in European analyses." However, in both de Havilland and MSG, the Commission did not allow efficiency considerations to change the outcome of the decision if a dominant position is created or strengthened. Cf. Thomas E. Kauper, Merger Control in the United States and the European Union: Some Observations, 74 St. John's L. Rev. 305, 350 (2000) (mentioning an argument that merger controls in the EC recognized an expanded efficiencies defense). But see Dimitri Giotakos, GE/Honeywell: A Theoretic Bundle Assessing Conglomerate Mergers Across The Atlantic, 23 U. Pa. Int'l Econ. L. 469 (claiming that the criticism that the Commission does not recognize an efficiency defense must be categorically rejected). Giotakos claims that the efficiencies claimed by the parties in GE/Honeywell were not the type that antitrust authorities have to rely upon.


\(^{57}\) Cf. ABA Comments, supra note 53, at 14 ("The Sections are aware of concerns . . . that the creation of efficiencies may reinforce a Commission belief that a transaction may create or strengthen a dominant position.").
for competition and should be stopped. Such an allegation of an efficiency offense has no actual basis in EC law and Commissioner Monti recently issued a strong statement against this view.\textsuperscript{58} Interestingly, a similar allegation was made in the United States in the 1960s following a number of FTC decisions that appeared to be hostile to efficiencies.\textsuperscript{59} Here again, the discussion between U.S. and European lawyers after GE/Honeywell resembles the one in the United States in the 1960s.\textsuperscript{60}

3. IMPLEMENTING FREIBURG? THE EUROPEAN MERGER CONTROL REGIME

Specific rules on merger control as part of EC law are relatively new,\textsuperscript{61} especially when compared to the U.S. merger control rules enshrined in the 1914 U.S. Clayton Act. It was only in 1990 that the European Community Merger Control Regulation ("ECMR")\textsuperscript{62} came into effect.\textsuperscript{63} Before the enactment of the ECMR, mergers were dealt with using the general rules of competition law\textsuperscript{64} as laid


\textsuperscript{60} Cf. Swaine, supra note 35, at 603-04 (suggesting that Europe may still be learning, as the United States was in the 1960s); Kolasky, supra note 30, at 3 ("Surprisingly, as we enter the 21st century, we find ourselves replaying these old debates on a more global stage.").

\textsuperscript{61} There was a merger provision in Article 4 of the Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, as amended Treaties Establishing the European Communities (EC Off'l Pub. Off. 1987), as it results from Title III of the Treaty Establishing the European Union: Provisions Amending the Treaty Establishing the European Coal and Steel Community, 1997 O.J. (C 340) 145, art. H(1)-H(21), although this provision was only applicable to specific industries. The ECSC Treaty expired on Jul. 23, 2002.


\textsuperscript{63} For a history of the European merger control regulation, see RICHARD WHISH, COMPETITION LAW 735 (4th ed. 2001).

\textsuperscript{64} See Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215, 68 C.M.L.R. 199 (1973) [12] [hereinafter Continental Can] (employing articles 23, 85, and 86 of the EEC Treaty to judge the legality of a merger); Case 142/84, 156/84, British Am. Tobacco Co. Ltd. & R. J. Reynolds In-
down in EC Articles 81 and 82. These articles address concerted practices and the abuse of a dominant position and parallel Section 1 and Section 2 of the U.S. Sherman Act on antitrust. Merger control law and competition law in general on the European continent cannot claim as long a history as that of similar law in the United States. To the contrary, only very few countries had a merger control system established before the ECMR came into effect, and even general competition law has only recently been enacted in many countries. This fact must not be underestimated because it shows that there is less, if any, tradition of administering antitrust and merger control rules outside of the United States, where these rules have been part of the law for a century.

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67 Germany took the lead in Europe by introducing a so-called cartel regulation in 1923, i.e., more than thirty years after the Sherman Act. Verordnung gegen den Missbrauch wirtschaftlicher Machtfstellung, v. 2.11.1923 (Reichsgesetzblatt, Teil I [RGBl. I] S. 1067) (Order Against the Abuse of Economic Power). The German example was, however, not followed by other European countries. The situation in the United Kingdom was somewhat different. Although it introduced the Monopolies and Restrictive Practices Act as late as 1948, the Common Law doctrine of restraints of trade is much older and has roots as far back as the Middle Ages. Tim Frazer, Monopoly Competition and the Law 112-24 (2d ed. 1992). This law also had, as the following note shows, considerable influence on U.S. law.

68 Competition law was actually applied prior to that date, through reliance on principles of Common Law. Senator Sherman himself, when introducing the new legislation, stated that the act bore nothing new but only "applies old and well recognized principles of the common law." 21 Cong. Rec. 2456 (1890). In Standard Oil Co. v. United States, 221 U.S. 1, 51-62 (1910), the Supreme Court con-
Under the ECMR, all (and only) concentrations with a "Community Dimension" fall under the exclusive jurisdiction of the European authorities as opposed to that of one or more national authorities. Having established a Community Dimension, the substantive test under the ECMR asks whether a merger is "compatible with the Common Market."

3.1. Concentration with a Community Dimension

A concentration has a Community Dimension if the participating undertakings pass the turnover threshold laid down in ECMR Article 1. There are two scenarios in which a Community Dimension can be established: first, a concentration has a Community Dimension if the combined annual worldwide turnover of all undertakings concerned exceeds €5 billion (currently $5 billion) and if the European Community-wide turnover of each of at least two undertakings concerned is more than €250 million. In the case of GE/Honeywell, for example, this threshold was easily passed. The second threshold was introduced in 1997 to control mergers where a much lower turnover is involved, but the turnover is generated by a larger number of companies who are active in a larger number of Member States. In order for a concentration to have a Community Dimension, more than two-thirds of the Community-wide turnover of the undertakings concerned may not

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69 According to Article 22(1), ECMR concentrations, whether they are of Community Dimension or not, are exclusively dealt with by the ECMR while the rules of general competition law do not apply. However, if a joint venture qualifies as a concentration within the meaning of ECMR Article 3, it can be assessed under general competition laws if it does not meet the revenue criteria for a Community Dimension. ECMR, supra note 62.

70 European law uses the word "turnover" which corresponds to "revenues" in American English.

71 ECMR, supra note 62, art. 1(2)(a)-(b).

72 GE/Honeywell, supra note 1, para. 7.

73 ECMR, supra note 62.

74 It provides that for a Community Dimension, the combined annual worldwide revenue of all subsidiaries is more than €25 billion; plus at least two subsidiaries have an EU Community-wide revenue of more than €100 million; plus the combined revenue in each of at least three Member States exceeds €100 million; plus in each of at least three of these Member States revenue exceeds €25 million for at least two subsidiaries. ECMR, supra note 62, art. 1(3)(a)-(d).
be generated in a single Member State ("2/3 rule"). The ECMR thus aims at ensuring that only (and, if possible, all) truly "multinational mergers" will be dealt with on an EC level, while those that concern the markets in the Member States will only be assessed by the competent national authorities. For multinational mergers, the ECMR awards its greatest benefit, the "one-stop-shop principle," by which it ensures that any other national jurisdiction within the EC need not be notified of the mergers, no matter how much effect they may have in these jurisdictions. Of course, authorities outside the EC may still have to be notified of the mergers, but, with just one investigation, the ECMR can grant legal certainty for the whole of Western Europe.

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75 See the last sentences of Article 1(2) and Article 1(3) of the ECMR. ECMR, supra note 62, art. 1(2)-(3).

76 Many international mergers, whether they are among European companies or not, are still not reported to the Commission because they do not reach the necessary threshold for Community jurisdiction despite their international character. Therefore, these mergers do not enjoy the "one-stop-shop" principle and need to be reported to a number of national authorities instead. As mentioned, of all the mergers in Europe that required clearance, the Commission was only notified of about 11%; the rest were reported to one or more national authorities. Merger control in Europe is therefore far from homogeneous and all-encompassing. The Commission, in its 2000 Report on the application of the Merger Regulation Thresholds, concluded that too many transactions with significant cross-border effects, and therefore a Community interest, remain outside of the Community's merger control rules. ECMR Review Green Paper, supra note 56, 2-3. In order to overcome this shortcoming, the Commission suggests a review of the existing revenue thresholds as well as other substantive and procedural rules relating to the control of concentrations, such as the 2/3 rule. It is therefore likely that either the existing thresholds will be lowered or a completely new threshold covering certain cross-border concentrations will be introduced. Such a new threshold would be lower than the existing ones and would either be combined with a modified 2/3 rule or would completely abandon such a rule. The Commission initiated a comprehensive discussion on the thresholds in its Green Paper on the Review of Council Regulation (EEC) No. 4064/89. ECMR Review Green Paper supra note 56.

77 It must not be overlooked that the Commission also has jurisdiction in cases where the European Economic Area ("EEA") is concerned. On May 2, 1992, the EEC, the ECSC, and the then-twelve Member States of the European Union reached an agreement with the European Free Trade Association ("EFTA") States for the establishment of an EEA that came into force on January 1, 1994 ("EEA-Treaty"). Treaty on the European Economic Area, 1991 E.C.R. I-6079, [1992] 1 C.M.L.R. 245 (1992). The aim of this agreement was to create a homogeneous economic area in Europe, including the states that had not yet joined the European Union. The agreement also attempted to unify competition law rules. By modeling its own rules on those of the EC Treaty, the EEA-Treaty effectively extended the EU competition rules to the participating EFTA States. Of the remaining EFTA Members, only Liechtenstein, Iceland, and Norway participate in the EEA.
By contrast, under the size-of-the-parties test of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, a merger has to be reported if one party has annual net sales or assets of at least $10 million worldwide and the other has annual net sales or total assets of at least $100 million. Not surprisingly, the U.S. authorities receive a much greater number of notifications every year than the Commission.29

3.2. The Material Test: Compatibility with the Common Market

The theoretical background for the material test that is applied in Europe has already been outlined above. As mentioned, European law focuses on the dominance of a newly merged entity. This principle is enshrined in ECMR Article 2(2), which states that a concentration that does not create or strengthen market dominance, whereby effective competition would be significantly impeded in the common market or in a substantial part of it, shall be declared compatible with the common market.

with Switzerland abstaining. EEA-Treaty Article 53 was modeled on EC Article 81; EEA-Treaty Article 54 parallels EC Article 82. Most importantly, according to EEA-Treaty Article 57, the rules of the ECMR effectively apply to the EEA. The EEA-Treaty also established its own authority, the EFTA Surveillance Authority ("ESA"), and an EFTA Court. However, whenever trade with the EC is affected to an appreciable extent, the Commission has jurisdiction under the EEA-Treaty (Article 56(1)(c) and 56(3)).


79 In 2000, the Commission reviewed 345 mergers, while its Washington counterparts reviewed 4926. Jean Eaglesham & Francesco Guerrera, Brussels (Tougher than U.S. on Merger Control), FIN. TIMES, Jan. 9, 2002, at 9. During this time, the national authorities within the EU received 3021 notifications. ECMR Review Green Paper, supra note 56, at n. 1.

80 The ways in which the European and U.S. authorities define the relevant markets do not vary much from each other. Cf. Kauper, supra note 55, at 329 (noting that there is little difference between market definition under the European Merger Regulation and the Clayton Act); David Snyder, Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body?, 29 LAW & POL’Y INT’L BUS. 115, 125-26 (1997) (noting that in both the United States and the Commission of the European Community, the determination of the relevant market depends on “demand-side substitutability”). The Commission describes the relevant product market as comprising “all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.” Commission Regulation 447/98 of 1 March 1998 on the Notifications, Time Limits, and Hearings Provided for in Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, Section 6, 1998 O.J. (L 61) 1, 18 [hereinafter Form CO]. See also Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 226; [1978] 2 C.M.L.R. 429, 483-84 [hereinafter United Brands] (de-
3.2.1. Creation or Strengthening of Dominance

fining the relevant product market as the fresh fruit market because these fruits were reasonably interchangeable by consumer. Interestingly, this did not apply to bananas, which the court considered, for a number of reasons, to be sufficiently distinct from the other fresh fruit markets.) *Id.* para. 35; Continental Can, supra note 64, at 235 (noting that the relevant product market is determined by a product's interchangeability with other products). The relevant product market thus includes those products and services that a significant number of consumers would accept as a substitute if the price of the original product were increased ("demand-side substitution").

The degree of price increases the European Commission used in the so-called SSNIP Test (Small but Significant Non-transitory Increase in Price Test) is 5% to 10%. See Commission Notice 97/C 372/03 of 12 September 1997 on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5 para. 17 (setting forth a 5% to 10% range in price increase as indicative of interchangeability). *See also* Horizontal Merger Guidelines 1992, supra note 27, para. 1.11 ("[T]he Agency at times may use a price increase that is larger or smaller than five percent."). If this price increase prompts consumers to purchase a large enough amount of another product instead, then both products are considered to be part of the same product market. In some cases, the market may also be considered from the supply side. If, on short notice, a supplier is able to switch its production to supply another good or service to meet demand when prices rise significantly, the alternative product is to be considered part of the same product market ("supply-side substitution"). Continental Can, supra note 64, at 248. Similarly, in the United States, the relevant product market is defined by reference to demand-side substitution. See Eastman Kodak Co. v. Image Tech. Serv. Inc., 504 U.S. 451, 481-82 (1992) (stating that the relevant market for antitrust purposes is determined by the "commercial realities" faced by consumers); Horizontal Merger Guidelines 1992, supra note 27, para. 1.11 ("[T]he Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a small but significant and nontransitory increase in price.").

The Commission first defines the relevant geographic market as the areas where the parties to the merger are active. Case IV/31.851, Magill TV Guide/ITP, BBC and RTE v. Commission, 1989 O.J. (L 78) 48; Case IV/29877, British Telecomm. v. Commission, 1982 O.J. (L 360) 36. A secondary definition is provided by the area in which the above-mentioned substitution could take place: where the conditions of competition are sufficiently homogeneous and can be distinguished from neighboring areas because conditions there are considerably different. *See* Case IV/M.1069, WorldCom/MCI v. Commission, 1999 O.J. (L 116) 1, paras. 80-82 (discussing the relevant geographic market for internet service providers). In the United States, the geographic market is defined as the area in which the seller operates and to which buyers can practically turn for supplies. *See also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 359-61 (1963) (noting that the relevant geographic market is determined by the area where the seller operates and the buyer can turn for supplies); T. Harris Young & Assoc. v. Marquette Elecs., Inc., 931 F.2d 816, 823 (11th Cir. 1991) ("The geographic dimension is the area in which the product or its reasonably interchangeable substitutes are traded.").
The ECMR (or for that matter any other EC document) does not contain a clear-cut definition of what constitutes a dominant position. For its assessment, the Commission relies on the established case law of the Court of Justice of the European Communities ("ECJ") on EC Article 82, which prohibits the abuse of a dominant position, and thus parallels Section 2 of the Sherman Act. According to the ECJ, the test to determine a dominant position is whether the economic strength enjoyed by an undertaking enables it to "prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately its consumers." The adoption of EC Article 82 for the determination of dominance in EC law is not without problems because the case law of the ECJ regarding this provision deals with the existing position of an undertaking in the market and whether or not this position is dominant and being abused. In contrast, the merger investigation is concerned with the position that arises through a merger and the question of whether it will create or strengthen a dominant position. Since it is not known how a proposed merger will actually evolve, this assessment necessarily involves a large degree of speculation. In comparison, under U.S. law, a firm

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82 This parallel must not be overemphasized since Section 2 of the Sherman Act requires a monopoly, whereas EC Article 82 lets a dominant position suffice. Cf. Kauper, supra note 55, at 321 ("The thresholds for finding a dominant position under [current Article 82] may be significantly lower than the measures of monopoly power under section two of the Sherman Act.").

83 United Brands, supra note 80, at 286. The court used the same formula in Case 85/76, Hoffmann-La Roche & Co. AG v. Commission, 1979 E.C.R. 461 (1979) [hereinafter Hoffmann-La Roche].

84 Cf. Donald Baker, Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects, 18 Wis. INT'L L.J. 577, 579 (2000) ("Even merger review based on straight antitrust judgments still involves recurring questions on which it is often difficult to make anything like an uncontradicted judgment."). This is also true for the significant lessening of competition ("SLC") approach and reflects the general situation of merger control which is based on an ex-ante appraisal.
must have "the power to control prices or exclude competition" to be considered dominant.\textsuperscript{85}

The most important factor, but by no means the only one, in determining whether or not a dominant position exists, is market share. In order to determine whether a merger should proceed, the Commission must consider the market share that would be created by the merger. Again, neither under EC Article 82 nor in the ECMR are there hard and fast rules for the level of market share the Commission uses to identify market dominance.\textsuperscript{86} The ECMR itself states that a combined market share of 25\% should, in all likelihood, not impede effective competition\textsuperscript{87} and is thus to be regarded as compatible with the Common Market.\textsuperscript{88} In a number of cases the Commission held that market shares between 50\% and 60\% were incompatible with the Common Market.\textsuperscript{89} The Commission has also ruled that, under certain circumstances, a share of as low as 44\% is incompatible.\textsuperscript{90} On the other hand, the Commission has granted permission to proceed to a company that had a market share of more than 80\%.\textsuperscript{91} This emphasis on market share in the


\textsuperscript{86} In comparison, for example, German merger control rules provide for a rebuttable presumption of dominance if one competitor has a market share of more than 1/3, or if two or three competitors have a share of more than 1/2, or if four or five have a 2/3 market share. In the United Kingdom, an undertaking with a market share of more than one half is presumed to be dominant. Cf. Monti, supra note 4, at 3 (noting that the EU Commission does not use any particular concentration ratio to establish presumptions).

\textsuperscript{87} ECMR, supra note 62, pmbl. no. 15. Apart from the fact that the wording of this provision seems to suggest that the 25\% threshold should not be regarded as a firm threshold, it must also be remembered that the recitals are not legally binding, but rather are merely used for interpreting the regulation.

\textsuperscript{88} Interestingly, in United States v. Philadelphia National Bank, 374 U.S. 321, 364 (1963), the Supreme Court found that a 30\% market share was sufficient to give rise to the presumption of illegality. The 1992 Horizontal Merger Guidelines assume that adverse unilateral price effects are most likely to occur when the parties to a merger have a market share of at least 35\%. Horizontal Merger Guidelines 1992, supra note 27, para. 2.211.

\textsuperscript{89} See, e.g., Case IV/M.553, RTL/Veronica/Endemol, 1996 O.J. (L 134) 32 (holding that a proposed merger with at least a 60\% forecasted market share would result in an entity with a dominant position in the Dutch television advertising market).

\textsuperscript{90} Case IV/M.754, Anglo American Corp./Lonrho, 1998 O.J. (L 149) 21.

\textsuperscript{91} Case IV/MO.42, Alcatel/Teleutra, 1991 O.J. (L 122) 48. See also Barry E. Hawk et al., Recent Developments in EU Merger Control, 15 ANTITRUST 24, 24 (2001) ("One of the longest standing 'hornbook' principles of EC competition law has been that single-firm dominance is unlikely to exist unless a (combined) firm has a relevant market share exceeding 40 percent.").
assessment of a dominant position is problematic. To begin with, it is questionable whether the market share figures of one company can simply be added to those of another after or because of the merger.\textsuperscript{92} Difficulties in implementing the merger may result in some of this share being lost to competitors. The decision to block a merger could thus quickly be overtaken by events that, ex post, render the decision wrong. If the European system were based solely on market share, this would constitute a fatal weakness. However, in almost all cases, market share is only the starting point. The Commission looks at various other factors for establishing market dominance. Market share alone is sufficient to establish market dominance in only a few cases. The most obvious case is a market share of 100\%, which would put the incumbent in a position to act completely independently of customers and competitors.

The aforementioned problems have also played a role in the discussion in the United States, where they led to the demise of the importance of individual party market share in analyzing mergers.\textsuperscript{93} In 1974, the Supreme Court held in \textit{United States v. General Dynamics Corp.} that the statistical data about the market and market shares relied upon by the government were not conclusive indicators of anti-competitive effects\textsuperscript{94}—thus effectively killing the market share presumption for illegality.\textsuperscript{95} Only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger.

When assessing whether a merger is compatible with the Common Market, ECMR Article 2(1) prescribes that the Commission shall take into account the following mandatory factors:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

\textsuperscript{92} Moreover, this type of addition can only be done in cases where the merging parties are active in horizontal markets. Market share necessarily plays a much less prominent role in cases of vertical mergers.

\textsuperscript{93} Kauper, \textit{supra} note 55, at 323.


\textsuperscript{95} Kauper, \textit{supra} note 55, at 323.
(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.  

While it seems that ECMR Article 2(1)(b) merely reiterates general concerns of merger control to consider as a matter of course, the factors in (b) are more specific and require careful attention. It is not completely clear how these criteria can be applied to the actual decision-making process and, in particular, how they relate to the criterion for establishing an impediment to competition. Since the factors must be considered when appraising compatibility with the Common Market and not merely when assessing the dominant position or the impediment to competition, it would appear that these factors must be applied after the aforementioned criteria are met. However, in practice, these factors are mostly used to establish dominance, as was the case in GE/Honeywell.

Previous case law suggests that the Commission has emphasized certain aspects such as superior technology, access to capital, vertical integration, a well-developed distribution system, product differentiation, overall size and strength, conduct and performance and has been less concerned with other aspects. There has also been emphasis on the general structure of the mar-

96 ECMR, supra note 62, art. 2(1).
98 Continental Can, supra note 64.
99 Hoffmann-La Roche, supra note 83, at 524; United Brands, supra note 80, at 276.
100 United Brands, supra note 80, at 276.
101 Michelin, supra note 97, at 3536.
102 United Brands, supra note 80, at 277.
103 Case IV/F-3/33.708, British Sugar v. Commission, 1999 O.J. (L 76) 1., para. 85.
kets involved. This can mean that a market share figure can be harmless in one case, but can result in market dominance in another, depending on the number of competitors and their market shares. In its decision to establish dominance in GE/Honeywell, the Commission went to great lengths in addressing the issues of access to capital, vertical integration, overall size and strength, and previous conduct. As already mentioned, it did not do so under a separate heading, but in its overall assessment, together with the questions of dominance and impediment to competition.

The interesting issue, and of importance in the case of GE/Honeywell, is the interests of intermediate and ultimate consumers as set forth in ECMR Article 2(1)(b). However, so far, this provision has had no relevance in practice. As mentioned earlier, this does not mean that consumer welfare plays no role in European merger control. It simply means that while the provision of ECMR Article 2(1)(b) has so far not been applied expressly as such, consumer welfare has nevertheless been part of the overall assessment.

3.2.2. Impediment to Competition

An interesting and often overlooked question in European merger control is whether the ECMR effectively calls for a two-tier test to determine whether a merger is compatible with the Common Market—and thus actually departs from the classic market dominance approach. If this were the case, the current discussion could be slightly off the mark and would be a more historical discussion about the traditional European model, rather than a discussion about the ECMR vis-à-vis the U.S. System. The wording of ECMR Article 2(2) and (3) ("create or strengthen a dominant position as a result of which effective competition would be significantly impeded") appears to suggest that there is in fact a two-tier test: dominant position plus significant impediment to competition, whereby the latter is a consequence of the first. It has been
argued—mostly by German writers\textsuperscript{108}—that the impediment to competition is a natural consequence of the first (and thus only) test of dominant market position,\textsuperscript{109} and therefore has no substance of its own.\textsuperscript{110} The Commission, however, seems to follow a two-tier approach. In \textit{Aerospatiale – Alenia/de Havilland},\textsuperscript{111} it explained that market dominance is not enough to establish incompatibility with the common market:

[A] concentration which leads to the creation of a dominant position may however be compatible with the common market within the meaning of Article 2(2) of the Merger Regulation if there exists strong evidence that this position

\textsuperscript{108} This is not surprising given their dogmatic background, which relies purely on market dominance.

\textsuperscript{109} Sir Leon Brittan, once the EC Competition Commissioner, stated “You may ask whether a dominant position without the effect of impeding competition is at all conceivable. I think that in most cases it is not.” Stock, \textit{supra} note 81, at 852.

\textsuperscript{110} Löffler, \textit{supra} note 107, paras. 9, 174; Ulrich Immenga, \textit{FKVO Artikel 2, in Kommentar Zum Europäischen Kartellrecht} para. 18 (Ulrich Immenga & Ernst-Joachim Mestmäcker eds., 2d ed. 1997). The Bundeskartellamt also appears to subscribe to this view. \textit{See Bundeskartellamt, Prohibition Criteria in Merger Control-Dominant Position Versus Substantial Lessening of Competition?} Antitrust Workshop, Discussion Paper, Oct. 8-9, 2001 (arguing that there are “no convincing reasons for changing the prohibition criterion in European or German Merger Control from the MD test to the SLC test”), available at http://www.bundeskartellamt.de/discussion_papers.html. In contrast, Anglo-Saxon lawyers in Europe favor the existence of a two-tier test that would bring European law closer to U.S. law. \textit{See C. W. Bellamy & Graham Child, Common Market Law of Competition} para. 6-062 (Vivien Rose ed., 4th ed. 1993) (noting that applying the second tier of the test would introduce “a degree of flexibility to the Commission’s appraisal which would be lacking if it were required solely to apply the dominance test”); C. J. Cook & C. S. Kerse, \textit{E.C. Merger Control} 128-29 (3d ed. 2000) (“The requirement that the dominant position must significantly impede competition in practice is a two-part composite test, and is a formulation broadly consistent with existing case law under Article 82.”); Alison Jones & Brenda Smith, \textit{EC Competition Law} 752 (2001) (arguing strongly for a two-tier test); Whish, \textit{supra} note 63, at 773 (considering whether articles 2(2) and 2(3) create one or two tests); Stock, \textit{supra} note 81, at 850 (“The Commission has used [the] ‘significant impediment’ test to add some flexibility in the merger analysis . . . .”). Interestingly, the German government also argued for the existence of a second criterion in the \textit{Kali und Salz} case. \textit{Joined Cases C-68/94 & C-30/95, French Republic v. Commission}, 1998 E.C.R. I-1375, para. 106, [1998] 4 C.M.L.R. 829 (1998), para. 106 [hereinafter \textit{Kali und Salz}].

\textsuperscript{111} de Havilland, \textit{supra} note 55.
is only temporary and would be quickly eroded because of high probability of strong market entry.\textsuperscript{112}

In \textit{MCI WorldCom/Sprint}, the first U.S. merger blocked by the Commission,\textsuperscript{113} the Commission first identified the dominant position and then continued by expressly asking what the impact of the merger would be on competition.\textsuperscript{114} A similar approach was taken in \textit{AlliedSignal/Honeywell} in which the Commission expressly stated that the merger would not create a significant impediment to competition.\textsuperscript{115} The ECJ also seems to have subscribed to this view. In \textit{Kali und Salz}, the court acknowledged the existence of a second test by saying that:

\begin{quote}
The introduction of that criterion is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed.\textsuperscript{116}
\end{quote}

The approach of the Commission and the Court, while obscurely phrased, deserves support. The wording of ECMR Article 2, which in itself is fairly clear in identifying a second test, would not make sense if this test had no meaning of its own.

\textsuperscript{112} \textit{Id.} para. 53. In other words, the fact that market dominance had been established was not sufficient to prohibit the merger. A similar decision was made in Case IV/M.222, Mannesmann/Hoesch v. Commission, 1993 O.J. (L 114) 34.

\textsuperscript{113} There are a number of factors that make the \textit{MCI WorldCom/Sprint} case different from \textit{GE/Honeywell}. For one, the deal did not receive the blessing of the U.S. authorities before the Commission reached a negative verdict.

\textsuperscript{114} Case COMP/M.1741, MCI WorldCom/Sprint v. Commission (2000), paras. 129-74, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741_en.pdf. The parties had actually argued before the FCC that the merger would have no impact on competition in which case, according to the two-tier approach, the Commission would have cleared the merger. However, the Commission did not accept this argument as it consequently denied clearance.


\textsuperscript{116} \textit{Kali und Salz}, supra note 110, para. 115.
A two-tier test, as described, effectively means a departure from the classical emphasis on market dominance and introduces a correction that brings the European test closer to the one in the United States. This would be even more the case if, within the evaluation of whether an impediment of competition occurs, Europe were to accept efficiencies and the role of consumer welfare. Market dominance is only the first test or starting point of an investigation, similar to the HHI test in the United States. Only once this test has been passed will the real substantive antitrust assessment begin, looking at the actual effects on competition, as in the United States. Suddenly, the two systems will no longer seem so different from each other. However, the substantive assessment in Europe ("impediment to competition") focuses substantially on a certain understanding of how the market should look (see the reference to the structure of the markets that need to be appraised under ECMR Article 2(1)(a)).

This is where the differences between the two systems surface again. In Europe, at least currently, the structural goal is a diversified market with as many players as possible and no dominant competitor. In the United States, on the other hand, the assessment focuses on consumer welfare.

If the two-tier test is applied, apart from the question of impediment, two further tests need to be passed, as prescribed by the language of ECMR Articles 2(2) and (3). First, a causal link must exist between the negative effect and the dominant position ("as a result of which"). Second, the impediment to competition must be significant. This introduces a de minimis rule that would allow for small infringements. The two-tier test would thus give the Commission more flexibility to deal with mergers, since market dominance alone does not automatically render a merger impossible.

In the case of GE/Honeywell, the question of whether the substantive test under the ECMR is one- or two-tiered played, or, more accurately, should have played, an important part in the decision. Adhering to the two-tier test, the Commission, after having estab-

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117 ECMR, supra note 62, art. 2(1)(a).

118 Market dominance would come into play at this point again and would thus play a dual role: entry criterion for the commencement of an investigation plus aspect for determination of impediment of competition. The important difference to a true MD interpretation therefore is that market dominance of one firm does not automatically lead to a prohibition of the market but is merely a factor, albeit an important one, in determining the legality of a merger.

119 See Stock, supra note 81, at 850 ("Market share data that results in a finding of a 'dominant position' does not end the legal inquiry.").
lished market dominance, should have continued by showing that
the proposed merger would bring about anti-competitive effects.
This would have necessitated a very thorough analysis of the eco-
nomic impact and consequences of the merger—the alleged failure
of which was one of the main points of criticism from the United
States. The steps the Commission took in GE/Honeywell were less
straightforward. Instead of first establishing dominance under one
heading and then assessing the question of impediment to compe-
tition under another, the Commission addressed both aspects to-
gether and included the mandatory factors in its assessment.120

4. THE DECISION IN GE/HONEYWELL

By mid-2000, U.S. giants GE and Honeywell entered into nego-
tiations for a possible merger or, to be more precise, a takeover of
the latter by the former. On October 22, 2000, the parties signed an
agreement pursuant to which GE agreed to acquire the entire share
capital of Honeywell for a purchase price of $42 billion. Thus
Honeywell would have become a wholly owned subsidiary of
GE.121 The parties notified the DOJ of the proposed merger in Oc-
tober 2000, and notified the Commission four months later.122

4.1. The Decision in the United States

Under U.S. law the decision to block a merger can only be
made by a court and not the investigating authority (i.e., the FTC
or DOJ). The DOJ or the FTC “only” decides whether to take the
merger to court to get it blocked. In the proposed merger of GE
and Honeywell, the DOJ decided not to take this step. Tradition-
ally, the DOJ does not publish the reasons why it has decided not
to litigate a matter. However, in the case of the merger between
GE and Honeywell, the DOJ adopted an extraordinary position
and explained its decision.123 This was partly due to criticism that

120 GE/Honeywell, supra note 1, paras. 341-458.
121 An interesting aspect of the merger is that it was hoped the merger would
achieve savings of up to $1.5 billion through efficiency initiatives and productivity
122 The Commission was notified of the merger on February 5, 2001. Com-
mision, Prior Notification of a Concentration (Case COMP/M.2220 – General
Electric/Honeywell), 2001 O.J. (C 46) 6.
123 This was done in a DOJ submission for the Organisation for Economic
Cooperation and Development Roundtable on Portfolio Effects in Conglomerate
Mergers. Dep't. of Justice, Range Effects: The United States Perspective (Oct. 12,
the Department’s investigation lacked necessary diligence—especially when compared to the Commission’s extensive investigation and subsequent lengthy written decision.\textsuperscript{124}

In its investigation, the DOJ identified two key markets that would have been affected by the merger: the market for military helicopter engines and the market for providing heavy maintenance, repair, and overhaul ("MRO") services for aircraft engines and auxiliary power units ("APU"). This finding is interesting because the Commission identified completely different markets, most prominently those of avionics and jet aircraft engines, as being at the heart of its decision.

With regard to the first market, GE and Honeywell are the two premier manufacturers of U.S. military helicopter engines, collectively accounting for a substantial majority of all engines powering military helicopters flying today.\textsuperscript{125} The DOJ found that the merger would have substantially lessened competition in the production of U.S. helicopter engines, which could consequently expose the U.S. military to higher prices, lower quality, and reduced innovation in the design, development, and production of the next generation of advanced U.S. military helicopter engines.\textsuperscript{126} In order to remedy this concern, the DOJ required the parties to divest Honeywell’s helicopter engine business, which had generated revenues of $200 million in 2000.\textsuperscript{127}

With regard to the second market, the DOJ feared that, as a likely result of the strong and combined position of the merged company, a range of commercial business aircraft users would likely have suffered increased prices and reduced quality in the repair and overhaul of Honeywell aircraft engines and APUs.\textsuperscript{128} The DOJ therefore required the parties to authorize a new third-party MRO service provider for certain models of Honeywell’s aircraft

\textsuperscript{124} Kolasky, \textit{supra} note 30, at 8-9.

\textsuperscript{125} They also received virtually all of the applicable research and development funding provided by the U.S. Department of Defense through its Joint Turbine Advanced Gas Generator Program. Press Release, DOJ, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), \textit{available at} http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm.

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Press Release, DOJ, \textit{supra} note 125.
engines and APUs in order to introduce a new player in this mar-
ket and thus allow for more competition. With these conditions
implemented, the DOJ expressed the view that competition in both
markets "will continue to flourish" and, on May 2, 2001, reached
the appropriate agreement with the parties.\footnote{\textit{Id}.}

4.2. The Case Before the Commission

4.2.1. History

The Commission had knowledge of the proposed merger at the
time notice was given to the U.S. authorities, and it is very likely
that it was involved in talks with the parties from that point forward.\footnote{\textit{Id.}} However, the Commission was not formally notified of
the merger proposal until February 2001. This was not only four
months after the notification in the United States, but probably also
after the DOJ had indicated that it would allow the deal to go
through. GE could have hoped that the U.S. decision would put
pressure on the European authorities to approve the deal as well.\footnote{\textit{Id.}} However, the first setback occurred on March 1, 2001, when the
Commission decided to open a full investigation into the merger.\footnote{\textit{Id}.} This was an alarming sign, since about 95% of all cases do not

\footnote{U.S. Assistant Attorney General Charles James, in a speech before the
OECD Global Competition Forum in Paris, stated that the Commission had been
informed and involved in the discussions throughout the U.S. investigation. U.S.
Assistant Attorney General Charles A. James, Address Before the OECD Global
Forum on Competition (Oct. 17, 2001), \textit{available at} \url{http://www.usdoj.gov
/atr/public/speeches/9330.pdf}. Competition Commissioner Mario Monti denied
this fact, saying that "he had 'some useful telephone conversations' with Mr.
James in the days beforehand, but that it was 'unfortunately impossible to have
any discussions at all at the very highest policy level.'" John Deq. Briggs \& How-
ard Rosenblatt, \textit{A Bundle of Trouble: The Aftermath of GE/Honeywell}, 16 \textit{ANTITRUST}
26, 28 (2001).

\footnote{The parties approached both authorities at the same time, in early No-
ember 2000, to discuss the competition problems. However, it is said that it took
GE and Honeywell a very long time to prepare Form CO to the satisfaction of the
MTF. \textit{See Patterson \& Shapiro, supra} note 15, at 22 ("It was not until early Febru-
ary 2001, about the same time that the parties went into substantial compliance
with the Second Request in the United States, that the MTF staff agreed that the
Form CO was complete and could be filed.").

\footnote{See Press Release, European Commission, Commission Opens Full Inves-
tigation into the General Electric/Honeywell Merger (Feb. 3, 2001) ("[T]he Com-
mision will make a detailed assessment of the impact of the transaction on com-
petition . . . ."), \textit{at} \url{http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist}.}
reach this stage. In its decision, the Commission reasoned that the first phase of the investigation indicated that the merger might bring about horizontal overlaps in the market for large regional jet engines, which would significantly reduce the existing degree of competition in this market. In the Commission's view, there were also vertical effects "to the extent that Honeywell [was] a supplier of components to competing engine manufacturers." Furthermore, there were conglomerate effects "stemming from the possible bundling of jet engines, avionics and non-avionics [that were] likely to foreclose competition in these markets."133

On May 8, 2001, the Commission sent GE a 155-page statement of objection to the deal, which reflected continuing concerns about the markets likely to be affected by the potential merger of the two companies. The statement, a clear indication of the upcoming difficulties, invited the parties to strengthen their efforts to reach an agreement with the Commission and stated that the merger would not be allowed in its current form. On June 14, 2001, GE and Honeywell responded to the Commission's concerns with a package of measures. When the Commission signaled that it did not consider the offers of GE and Honeywell sufficient, the parties withdrew their offer and submitted a new and substantially modified set of measures on June 28, 2001.135 This again proved unsuccessful, and after intensive last minute negotiations, on July 3, 2001, the Commission formally decided to block the merger.

4.2.2. The Reasoning of the Commission

In contrast to the DOJ, the Commission was not concerned about the market for helicopters and MRO services. Their lack of concern about this issue is not surprising; this market had very little effect on the Common Market, and the DOJ investigation had already addressed and remedied the problem. Rather, the Commission identified a number of other affected markets. The most

133 Id.
134 Id.
135 This submission was actually inadmissible because Article 18(2) of Regulation 447/98 of March 1, 1998 on the Notifications, Time Limits and Hearings, states that commitments intended by the parties to form the basis of a decision of compatibility have to be submitted within three months of the decision to open proceedings, which in the case of GE/Honeywell would have been June 14, 2001. Commission Regulation 447/98, 1998 O.J. (L 61) 1, 8. The Commission did not see any reason that would justify an extension of the given timeframe.
important of these markets were those for jet aircraft engines, avionics, and engine starters, which I will address in detail below. 136

To the parties involved and their lawyers, the Commission's decision came as a total surprise.137 GE had relied on previous case law of the Commission,138 especially the decision in Allied-Signal/Honeywell,139 in assuming that the Commission would allow the merger.

4.2.2.1. The Market for Jet Aircraft Engines

According to the Commission, the market for jet aircraft engines had to be divided into three categories of aircraft:140 (a) large commercial aircraft, i.e., aircraft with more than 100 seats and a range greater than 2000 nautical miles, (b) regional jet aircraft, i.e., aircraft with around 30 to 90 seats and a range of less than 2000 nautical miles, and (c) corporate jet aircraft, i.e., aircraft designed for corporate activities.141

GE, not Honeywell, was active in the market for large commercial aircraft engines. Apart from GE, the players in this market were Pratt & Whitney and Rolls-Royce. It was undisputed that GE's position in this market was strong. In terms of installed engines, GE had an overall market share of 52.5%, compared to Pratt

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136 The Commission also commented at length on other markets that are of less importance to this Article.
137 See generally Helen Power, The Honeywell Monster, LAWYER, July 23, 2001, at 24-27 (describing the background to the Commission's decision to block the merger).
139 AlliedSignal, supra note 115, paras. 103, 112-24, 136. One can only guess which part of the decision led the parties to believe that the Commission would also allow GE and Honeywell to merge, but there is strong language in the decision with regards to possible bundling. The Commission stated that its "investigation ha[d] shown it to be unlikely that the potential of the new post-merger entity to technically bundle products will significantly impede competition." Id. para. 113; see infra Section 4.2.2.1.2 (discussing conglomerate effects and bundling).
140 The Commission stated that "an engine is a complementary product to the aircraft, the sale of one being of no value without the sale of the other. As a consequence, in defining the relevant jet engines product markets, one must therefore take into account the competition between the end-use applications—that is, between the types of aircraft that final buyers consider suitable." GE/Honeywell, supra note 1, para. 10.
141 Id.
& Whitney’s 26.5% and Rolls-Royce’s 21%.\textsuperscript{142} In terms of engine orders as of January 1, 2001, GE had a share of 65%, compared to Pratt & Whitney’s 16% and Rolls-Royce’s 19%.\textsuperscript{143}

In the market for regional aircraft engines, both GE and Honeywell were again competing with Pratt & Whitney and Rolls-Royce. However, the Commission concluded that there were distinct markets for large and small regional aircraft and found that only GE and Honeywell were supplying engines for the large ones.\textsuperscript{144} Of the two, GE had a market share of between 60% and 70% in the market for aircraft that were still in production, and Honeywell, which only supplied the engine to one type of aircraft, a market share of between 30% and 40%.\textsuperscript{145} The Commission considered GE already dominant in this market. With the acquisition of Honeywell, GE and Honeywell’s combined market share would have amounted to 100%, making the merged entity a monopoly.

Both GE and Honeywell were active in the market for corporate aircraft engines and were competing with Pratt & Whitney and Rolls-Royce. GE’s position in this market was weaker, with engines installed mostly in aircraft that were no longer in production. Based on data provided by the parties, GE’s market share of overall engines installed was 10-20%, Honeywell’s 40-50%, Pratt & Whitney’s 30-40%, and Rolls-Royce’s 10-20%.\textsuperscript{146} Honeywell’s position in this market could therefore be described as strong, and the combined market share of the new company after the merger would have been between 50% and 60%.

There are two questions to be addressed in connection with the issue of dominance. First, whether or not GE or Honeywell had already enjoyed a dominant position before the merger; and, second, whether the merger would either create or strengthen a previously non-existing market dominance.

The Commission did not find GE’s market share of about 65% for large aircraft engines sufficient to establish market dominance.

\textsuperscript{142} See generally id. para. 70 tbl.5 (quoting data provided by the parties and based on installed base of engines on large commercial aircraft in service on December 31, 2000). The picture is different when one looks at the market shares of orders for engines as of January 1, 2001: there, GE has a share of 65%, Pratt & Whitney 16%, and Rolls-Royce 19%. Id. para. 77 tbl.6.

\textsuperscript{143} Id. para. 70 tbl.6.

\textsuperscript{144} Id. paras. 19-29.

\textsuperscript{145} Id. para. 84 tbl.7.

\textsuperscript{146} Id. para. 88 tbls.9-10.
per se, but it did find it *indicative* of dominance.\textsuperscript{147} Regulators had a similar opinion regarding Honeywell's position in the market for corporate jet aircraft engines.\textsuperscript{148} Not surprisingly, the Commission already deemed GE, with a market share of 60% to 70%, already dominant—without having to consider other factors.

Having failed to establish GE's dominance in the market for large aircraft engines based on market share alone, the Commission had to invoke other factors that would enhance GE's position, focusing on GE's overall strength, particularly in the area of finance. First, the Commission commented on GE's financial arm, GE Capital.\textsuperscript{150} This subsidiary managed about $370 billion, more than 80% of GE's assets. The Commission maintained that through the financial strength of GE Capital, GE would gain a significant advantage over its competitors, who had nothing similar. GE Capital could, in the view of the Commission, be used to absorb potential product failures and strategic mistakes.\textsuperscript{151} GE could also use its financial strength to heavily discount prices for jet engines, as the company had done in the past.

Moreover, the Commission argued that the financial strength of GE Capital had and could be used to provide significant financial support to airframe manufacturers in the form of platform program development assistance, and thus obtain a monopoly over engines for those airframes.\textsuperscript{152} The Commission held that these exclusive agreements would significantly affect the engine market, since they guaranteed "significant penetration of an air-

\textsuperscript{147} Id. para. 83. In its OECD Submission, the DOJ appears to have understood that the Commission let the high market share suffice for the finding of dominance ("The EU's finding of dominance rested almost entirely on GE's large (65%) and growing share of outstanding orders.") and contrasted this alleged finding with its own results in which the DOJ found the market shares only weakly indicative of competitive conditions in the market. GE's large share was almost entirely dependent on a single source contract with Boeing for the 737. Excluding those sales would produce much more balanced market shares: GE 42%, Pratt & Whitney 32%, and Rolls-Royce 27%. OECD Submission, *supra* note 123, at 20-23.

\textsuperscript{148} GE/Honeywell, *supra* note 1, para. 89.

\textsuperscript{149} Id. para. 86.

\textsuperscript{150} Id. paras. 107-20.

\textsuperscript{151} As evidence for its argument, the Commission cites the example of Rolls-Royce who, after the failure of one of its research and development projects in the 1970s, had to exit from the relevant market. Id. para. 110.

\textsuperscript{152} In return for putting in a $2 billion advance order for the long-range version of Boeing's 777, GE was designated the exclusive engine supplier for the plane. Id. paras. 160, 167. GE has secured a total of ten exclusive positions out of the last twelve that were granted by airframe manufacturers. Id. para. 114.
line’s fleet and subsequent incumbency benefits.” Apart from influencing the manufacturers of airframes, the strength of GE Capital could also be used to influence airlines’ buying decisions. The Commission quoted from a book written by Jack Welch, then the CEO of GE, recounting a loan that GE Capital arranged for Continental Airlines in 1993 when the airline was in financial difficulty. A few months later, Continental ordered GE engines for its aircraft.

Next, the Commission addressed the position and powers of GE Capital Aviation Services (“GECAS”), GE’s airplane leasing division and the world’s largest buyer of airplanes, with a share of 10% of purchases of all new aircraft. GECAS has the largest single fleet of aircraft with 1040 units, making it twice as big as its direct competitor, International Lease Finance Corporation (“ILFC”). The Commission stated that GECAS could enhance GE’s position in the market through attractive financing packages for purchasing deals of large aircraft. Over the past decade, of more than 600 planes purchased by GECAS, only four did not have GE engines. While GECAS’ innovative financing techniques could result in attractive packages for customers, the Commission thought it would create an unfair advantage over competitors like Rolls-Royce and Pratt & Whitney because GECAS could demand the use of GE engines on all plane purchases, which could lead to a foreclosure of GE’s competitors from the market. By contrast, the DOJ interpreted these figures quite differently. Apart from the fact that a mere 10% share is substantially less than what U.S. antitrust courts usually require to support a finding of potential foreclosure, the

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153 Id. para. 115.
154 John Curran, GE Capital: Jack Welch’s Secret Weapon, FORTUNE, Nov. 10, 1997, at 116, 120 (quoting author and management consultant Noel Tichy as saying after the deal that “capital is part of the arsenal for GE’s industrial side to beat the competition”) (emphasis added), quoted in GE/Honeywell, supra note 1, para. 117.
155 In fact, Continental Airlines aircraft use predominantly GE engines. The Commission showed figures according to which the airline chose GE engines over those of its competitors every time it had a choice. See GE/Honeywell, supra note 1, para. 119 (“In other words, when Continental had a choice of engines, the airline chose GE engines every time.”).
156 Id. para. 122.
157 Id. paras. 127-45.
DOJ found no evidence that GECAS's policy of purchasing only aircraft equipped with GE engines had or could foreclose rivals from the market.

The Commission concluded that the combination of the advantages GE enjoyed through GE Capital and GECAS made GE's high market shares "the right proxy for dominance,"159 aggravated by the fact that GE's competitors were not in a position to offer anything even close to the financial services of GE.160 The Commission concluded that given the nature of the jet engine market, GE's position with many airlines, its incentive to use GE Capital's powers with customers, and its ability to leverage its vertical integration through GECAS, GE appeared to be in a position to behave independently of its competitors, customers, and ultimately, consumers. It therefore concluded that GE could be characterized as a dominant undertaking in the markets for large commercial and regional jet aircraft engines.161

To overcome the reservations of the Commission, GE offered, inter alia, to maintain GECAS as a separate legal entity and to conduct its dealings with Honeywell on an arm's-length basis.162 An independent expert would monitor compliance. Not surprisingly, the Commission was dissatisfied with this offer. It argued that the

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160GE/Honeywell, supra note 1, para. 163.

161 GE/Honeywell, supra note 1, para. 163. Presumably, this would lead to ruinous competition, resulting in bankruptcy. Kolasky sees another interesting parallel to the discussion that went on in the United States almost one hundred years earlier, stating that "[e]ven Justice Peckham saw through" this type of argument when he held that "a ruinous competition defense would force the court to decide what a reasonable rate of profit in a particular industry should be" and that the courts were not up to that task. See Kolasky, supra note 30, at 16 (citing United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 372-73 (1897) (concluding "[h]ow ironic that we should be hearing the same arguments on the other side of the Atlantic a hundred years later").

162 Id. para. 498. GE also offered to divest 19.9% of its interest in GECAS. The Commission rejected GE's offer because it would have left GE with a substantial and decisive share in GECAS and would not have changed the influence of GE over GECAS' policy. There is an argument as to whether this share would have been sold to competitors or to the public. Götz Drauz, head of the Merger Task Force, stated: "We never said you have to sell it to competitors, we only said you have to find a way to guarantee independence, and that was translated by some as meaning you have to sell to competitors." Power, supra note 137, at 26.
mere legal separation of the entity would not affect its management, and control would remain in GE’s hands. Most importantly, the separation would not prevent GECAS from executing GE’s commercial strategy.\textsuperscript{163}

4.2.2.1.1. Creation or Strengthening of Dominance Through the Merger

Because GE had already enjoyed a dominant position in the market for large commercial jet aircraft engines and regional aircraft engines, the merger had to lead to a strengthening of this position to meet the requirements for denying merger approval under ECMR Article 2.\textsuperscript{164} Honeywell was only strong in the market for corporate aircraft engines, but ECMR Article 2 required the creation of such dominance.\textsuperscript{165} Traditionally, when assessing this question, the Commission can assess the vertical, horizontal, and conglomerate effects of a merger.\textsuperscript{166}

Since Honeywell was not active in the market for large commercial jet aircraft engines, the question of horizontal effects was limited to the market for large regional and corporate jet aircraft engines, where both companies competed with one another. Because of GE’s dominance in the market for large regional aircraft engines, the addition of its competitor Honeywell, despite its fairly small market share, would lead to a monopoly.\textsuperscript{167} In the corporate jet engine market, Honeywell was already the leading player. The addition of GE’s market share would lead to a combined market share of 50% to 60% of the overall installed base of corporate air-

\textsuperscript{163} GE/Honeywell, supra note 1, para. 531. It must also be noted that a divestiture of GECAS would, at this point, have only eliminated its financial powers vis-à-vis the pre-existing dominance of GE in the large jet aircraft engine market. Even if GE had sold GECAS completely and had thus convinced the Commission that there was no pre-existing dominance by GE in this market, it is very unlikely that the merger would have received the Commission’s blessing. It would still have been possible, indeed likely, as will be shown below, that the merger would have created a dominant position for GE. The investigation’s result would not have changed.

\textsuperscript{164} As in the United States, the mere existence of a dominant position is not illegal under European law, as long as this dominant position is not abused, in which case it can be subject to a review under EC Article 82. \textit{Treaty Establishing the European Community}, supra note 65, art. 82.

\textsuperscript{165} ECMR, supra note 62, art. 2 § 1(b)(3).

\textsuperscript{166} Whish, supra note 63, at 774-78; Monti, supra note 58, at 6.

\textsuperscript{167} The increase was not small enough to qualify as insignificant under a de minimis rule.
craft and 80% to 90% of the installed base of engines of medium corporate aircraft. In the Commission's view, this combination of market share would create a dominant position.168

The parties responded to the Commission's findings regarding the large regional jet aircraft engine market by offering to divest the part of their business that manufactured engines for certain new aircraft. While the Commission doubted that there was a purchaser for the business, it held that since the engine was still in development, the divestiture to a third party would "lead to significant uncertainty as to the timetable of the development as well as to the sales prospects of the aircraft." 169

The concern for the vertical effects of the proposed merger with regard to large commercial aircraft engines focused on Honeywell's strong position in the market for engine starters.170 The Commission was concerned about the vertical foreclosure of the competing engine manufacturers that would result from a vertical relationship between GE as an engine manufacturer and Honeywell as a supplier of engine starters to GE and its competitors.171 Following the proposed merger, the merged entity would have an incentive to delay or disrupt the supply of Honeywell engine starters to competing engine manufacturers, damaging the supply, distribution, profitability, and competitiveness of these companies. Also, the merged entity could increase the price of engine starters or their spares, thereby increasing rival engine manufacturers costs and further damaging their ability to compete. This would contribute to the further foreclosure of GE's competitors from the market for large commercial aircraft engines and would strengthen GE's dominant position. The Commission was concerned about how GE's financial strength and vertical integration into financial services, aircraft purchasing and leasing, and other market services would effect Honeywell as a corporate jet aircraft engine supplier and how they would effect the market for these engines.

The merger would also have vertical effects by bringing together the world's leading engine supplier, Honeywell, with GECAS. Honeywell's engine and related businesses would benefit from GE's aircraft leasing and purchasing businesses, since GE

168 GE/Honeywell, supra note 1, para. 437.
169 Id. para. 519.
170 Id. para. 420. See also infra Section 4.2.2.3. (discussing the market for engine starters).
171 GE/Honeywell, supra note 1, para. 419.
could promote Honeywell products and services and use its instrumental leverage ability to secure market placement for Honeywell products. In the Commission’s view, the integration of Honeywell and GE was likely to lead to the foreclosure and elimination of the ability of its competitors to invest in the development of the next generation of corporate jet aircraft engines. Since Honeywell’s corporate jet aircraft engine competitors would be unable to reproduce GE’s financial strength and vertical integration, they would eventually have to reconsider their presence in and ultimately withdraw from the market, since their chances of prevailing in a competition on the merits would be significantly reduced.  

4.2.2.1.2. Conglomerate Effects: Bundling

One of the Commission’s main concerns in the GE/Honeywell case was the new company’s ability to bundle its products. This was by no means an obvious concern; bundling had not played a prominent role in European merger control before. In a similar case, AlliedSignal, the Commission had even stated that the ability to bundle would not significantly impede competition. In GE/Honeywell, the Commission described bundling as “a simple business arrangement whereby a number of products are combined in a package and sold for a single price.”

Bundling is essentially a behavioral problem that addresses the question of how a market player uses its powers. However, European merger control focuses on the situation of the parties and the markets at the time of the merger, not on possible future behavior. The tool for this is general competition law, as laid down in EC Articles 81 and 82. The Commission cannot observe the sub-

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172 Id. para. 442.
173 Id. paras. 349-427.
174 See AlliedSignal, supra note 115, paras. 110-14 (holding that bundling does not have a consequential effect on competitors within the market).
175 GE/Honeywell, supra note 1, para. 293.
176 In the United States, merger control tends to be more forward-looking than in Europe. The DOJ has jurisdiction to attack mergers that have been completed. The Commission does not have this right and can only use the tools of EC Articles 81 and 82 to act against the newly merged company. Treaty Establishing the European Community, supra note 65, arts. 81-82.
177 But see Giotakos, supra note 55, at 506 (criticizing this position, he states that it would be dangerous to wait for the mechanisms of EC Article 82 to kick in because by then “damage to competition will have already occurred and the legal system of prevention of the creation of market power, notably through an effective merger control policy, will have failed”).
sequent behavior of the parties under merger control rules and intervene if the merger later turns out to be anti-competitive. European merger control thus differs from merger control in the United States, where the Supreme Court has held that the legality of a merger or acquisition under Section 7 of the Clayton Act is determined as of the time of the suit, rather than at the time of the stock or asset acquisition.

In the market for large commercial aircraft engines, the Commission needed to show a strengthening of a dominant position. However, it did not state that the newly merged entity would use bundling to improve its market position. Rather, the Commission thought it sufficient that the merged entity "[would] have the ability to engage in packaged offers of engines, avionics and non-avionic services." Since none of its competitors could match this ability, or could only do so at substantially higher costs, GE could be expected to attract new clients and retain existing ones. Ultimately, this would lead to the foreclosure of the market and the strengthening of GE's existing dominance. The Commission took a similar approach with regard to the strengthening of GE's already dominant position in the market for large regional aircraft.

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178 Mario Monti admitted that this was a notable difference between the European and the U.S. systems: "We have a one shot possibility to approve or block a merger." Philip Shishkin, EU Makes It Official: No Honeywell for GE, WALL ST. J. EUR., July 4, 2001, at 1.

179 In United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957) the Court stated that "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." The Court ordered divestiture over thirty years after the stock interest had been acquired. See also United States v. ITT Cont'l Baking Co., 420 U.S. 223, 242 (1975) ("'acquisition' under section 7 is not a discrete transaction but a status which continues until the transaction is undone"); United States v. Gen. Dynamics Corp., 415 U.S. 486, 505 (1974) (noting that the probability of lessening competition exists at the time of trial).

180 The Commission did state that bundling has repeatedly occurred in the industry. GE/Honeywell, supra note 1, para. 352. Dimitri Giotakos, Laurent Petit, Gaelle Garnier, and Peter de Luyk of the Directorate General of Competition ("DGIV") argue that "the incentives for the merged entity to sell bundles of products could have evolved over the short to medium term." Dimitri Giotakos et al., General Electric/Honeywell — An Insight into the Commission's Investigation and Decision, COMPETITION POL'Y NEWSL., Oct. 2001, at 10.

181 GE/Honeywell, supra note 1, para. 412 (emphasis added). See also id. paras. 434, 443 (addressing the market for large regional aircraft and corporate jet aircraft).

182 Id. para. 412.
engines,\textsuperscript{183} using the concept of potential bundling to determine the creation of a dominant position for the new company.\textsuperscript{184}

There are a number of points that make the Commission's reliance on bundling questionable. First, although it is probably true that the new company would indeed have the\textit{ potential} to bundle, and it could not be ruled out that at some point in time it might engage in this behavior, using this mere\textit{ potential} to conclude that the merger would strengthen a preexisting dominant position within the meaning of ECMR Article 2 is problematic. It is highly questionable that the ECMR allows a potential behavior in order to arrive at a dominant position when there is no clear indication (a) that this behavior will actually take place, or (b) what effects this behavior will have (the economic effects of bundling will be dealt with below). This is not to say that bundling goods and services, and the possible abuse this behavior could constitute, should not be subject to rigorous scrutiny by the Commission. On the contrary, the scenarios envisioned by the Commission require constant attention. However, as has been said, the tool for this investigation is and must be EC Article 82, not the ECMR.\textsuperscript{185}

Another point that commentators hotly contested in connection with bundling was the question of whether or not bundling, if it did take place, impeded competition within the meaning of the second test of ECMR Article 2. U.S. commentators argued strongly that the Commission's reasoning lacked sufficient economic basis and that bundling would not have a negative impact on competition. In Europe, the influence and role of economists in antitrust decisions are weak when compared to their strong role in the United States, especially given the increased influence of the Chicago School. The \textit{GE/Honeywell} decision did not deal at any great length with the theoretical economic analysis of bundling. The Commission stated that the competitors would be driven out of the market because of their inability to match the bundling capacities of the newly created company.

In its analysis, the Commission relied heavily on a model that Jay Phil Choi developed for one of the complainants as an extension of Barry Nalebuff's research. It would be beyond the scope of this Article to delve deeper into the issue of economic theories and

\textsuperscript{183} \textit{Id.} paras. 432-34.

\textsuperscript{184} \textit{Id.} paras. 443-44.

\textsuperscript{185} \textit{But see} Giotakos, \textit{supra} note 55, at 479-481 (arguing for the application of the ECMR rather than Article 82).
their impact on the Commission's decision, particularly since the Commission made no express reference to Choi or Nalebuff and all information available is based on statements from people present at the Commission proceedings. In his earlier works, Nalebuff concluded that bundling was "one of the more powerful and prevalent tools, perhaps we should say weapons, in our information economy."186 Interestingly, the parties retained the services of Nalebuff for their negotiations with the Commission to evaluate Choi's model. Nalebuff concluded that the model did not fit the aerospace industry and that the Commission's decision had to be reversed. He based this divergence from the Commission's approach (and his earlier findings) on the fact that the model was built on the critical assumption that all customers pay the same price for a product. This was, he continued, an inappropriate assumption for the aerospace industry, where prices are negotiated on a customer-by-customer basis.187 Nalebuff argued that, in reality, purchasers in the aerospace industry cannot be compared to customers who go to computer stores and face the choice between a bundled and discounted package (e.g., Microsoft Office) and a range of different components where all of the prices have to be added up. Nalebuff admitted that it would be very hard for a competitor with only one product to compete in this scenario. In the aerospace industry, however, there are no outlets where customers may go and pick what they need, and there are no uniform prices. Instead, lengthy negotiations precede purchases; during these negotiations, the sellers offer discounts and other incentives to the purchasers. Nalebuff continued "the Commission was unable to point to a single case where a bundle was offered at a sig-

186 Nalebuff states:

As powerful as bundling is to a monopolist, the advantages are even larger in the face of actual competition or potential competition. Selling products as a bundle can raise profits absent entry, raise profits even against established but uncoordinated firms, all the while lowering profits of existing or potential entrants and putting these rivals in the no-win position of not wanting to form a competing bundle.


significant discount over the prices of the individual products." Nalebuff concluded that the Commission was not able to distinguish between a discount and a discount conditional on buying a package, and that the Commission should have realized that "to the extent that package discounts were offered, these same discounts were extended to the individual items when the customers chose to order on an a la carte basis." It seems that the position the Commission took was based on a picture which very much resembled the situation of Microsoft, where customers who all pay the same price would choose a bundled and discounted product over an assembly of more expensive components. We cannot compare this situation to the aerospace industry, or indeed any industry, where the prices of all individual components, not the least because of their significant cost, are individually negotiated. Discounts are negotiated for the individual products and not for a bundle of products. The bundling of products, if it happened, would thus not have the negative impact on competition attributed to it by the Commission.

The Commission itself must have been aware of the weakness of its arguments because it issued a statement stating that "various economic analyses have been subject to theoretical controversy." This statement can at best be described as an oversimplification and misses the importance of the issues at stake.

The parties tried to overcome the Commission's concerns by offering not to bundle. The Commission regarded this effort as insufficient. It argued that the undertaking was "purely behavioral and as such cannot constitute the basis for a clear elimination of the said concerns." Even more interestingly, the Commission continued by saying that by not engaging in bundling, "the parties would become dominant or strengthen their dominant position but promise not to abuse it." Remarkably, the Commission, in its own statement, admits that it must have erred in its earlier finding.

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188 Id. at 16.
189 Id. at 16.
190 Francesco Guerrera, How "Dominance" Became Europe's Dirty Word, FIN. TIMES, Oct. 4, 2001, at 27. See also Patterson & Shapiro, supra note 15, at 18 (arguing that the decision "[is] based on dubious economic grounds and very weak evidence.").
191 GE/Honeywell, supra note 1, para. 499.
192 Id. para. 530.
193 Id. para. 532.
that the potential to bundle may be a factor for the creation or strengthening of a dominant position. Now the Commission appears to separate bundling from the dominance issue (an approach that would have been correct in the first place), and emphasizes the question of whether or not bundling in and of itself amounts to an abuse of a dominant position under EC Article 82. This is the correct approach, and the Commission should have used it from the outset instead of using bundling as a factor in establishing the strengthening of dominance.

Many have argued that the concept of bundling had no valid foundation in European merger control and has not been applied before. While the first statement appears to be correct, the second one does not. For example, in Guinness/Grand Metropolitan, a decision made under the ECMR, two liquor producers and distributors proposed to merge. The Commission found that there were different markets for different liquor; there were many countries in which the parties were not active alongside each other. Therefore, the merger had only limited horizontal effect. However, the Commission was of the opinion that the merger would lead to a larger portfolio, which would benefit the new company vis-à-vis its competitors because the new company would be able to offer a range of products that would give it greater flexibility to structure its prices, promotions, and discounts. The merger would

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194 Francisco-Enrique Gonzales-Diaz refers to the Commission’s investigation in Tetra Pak as a precedent for its decision in GE/Honeywell. Roundtable Discussion on GE/Honeywell, 16 ANTITRUST 7, 11 (2001). However, this case was about the abuse of a dominant position (with elements of predatory pricing, tying, rebates, etc.) under EC Article 82 and not a merger decision. While it is true that the Commission in its assessment of dominance can and does rely on the proximity to EC Article 82 and on the case law of the ECJ pertaining to this provision, these principles may only be applied mutatis mutandis. Cf. Kauper, supra note 55, at 321 (“However ‘dominant position’ is defined, the language of the Merger Regulation suggests that the Commission is likely to measure competitive harm in terms of injury to competitors.”). The case law on EC Article 82 has thus only limited relevance for merger control reviews. Closer to the concept of bundling as applied by the Commission in GE/Honeywell was an investigation of Digital Equipment under Article 85(1) of the EC Treaty. See XXVIIth Report on Competition Policy, COM (98)208 final, para. 69 (explaining that the Commission objected to the fact that Digital offered prices that were more attractive when customers purchased software services in a package with hardware services than when purchasing software services alone), available at http://europa.eu.int/comm/competition/publications/broch97_en.pdf.


196 Id. para. 31.
bring about a higher potential for tying and would put the new company in a position to realize economies of scale and scope in its sales and marketing activities.\textsuperscript{197} Thus, Guinness/Grand Metropolitan was a "precedent" for GE/Honeywell and in its time received fierce criticism.\textsuperscript{198} Since the parties in Guinness/Grand Metropolitan made a number of substantial undertakings to satisfy the Commission's requirements,\textsuperscript{199} the merger finally received the Commission's blessing and therefore substantially less publicity than GE/Honeywell two years later.

The Commission also identified bundling's potential threat to competition in AlliedSignal.\textsuperscript{200} However, in that case, the Commission concluded that competition would not be impeded because, inter alia, the position of customers was strong enough that they would only allow bundling if it were to their own advantage.\textsuperscript{201} The situation in AlliedSignal was more comparable to GE/Honeywell than Guinness/Grand Metropolitan because of the similar characteristics of the market. Although the issue of bundling was not instrumental for the blocking of the merger, or more precisely, for the reservations of the Commission that led to the parties' attempt to comply with European merger regulations, it should be understood that the Commission made it very clear that bundling had the potential to impede competition and could thus, in a different environment, be responsible for the blocking of a merger. In that respect, GE/Honeywell cannot be described as unprecedented.

Having criticized the Commission's position as being without sufficient basis in the ECMR, and having thus joined the dominant chorus of commentators on the decision, it must also be observed that the issue of bundling, despite the publicity it has received, was not as decisive as it has been portrayed. In fact, it was not the ma-

\textsuperscript{197} Id. para. 40. The Commission took a similar position a few months earlier in Case IV/M.833, The Coca-Cola Company/Carlsberg A/S, 1998 O.J. (L 145) 41, where the Commission concluded that a larger portfolio of different beverages would give a company an advantage over its competitors: "Generally this means that companies with...the broadest portfolio of beverages in their distribution system will have the lowest costs and be able to reach the highest number of customers." Id. para. 68.


\textsuperscript{199} Guinness/Grand Metropolitan, supra note 195, para. 183.

\textsuperscript{200} AlliedSignal, supra note 115, para. 110.

\textsuperscript{201} Id. para. 113.
jor component of the actual Commission decision; most likely, the Commission would have prohibited the merger even if they had ignored the bundling issue, because of the merger’s horizontal and vertical effects on competition to which I have already referred in this Article. One is thus compelled to ask why the Commission bothered to take on the bundling issue in the first place, and stir up so much controversy. The Commission may well not have foreseen this reaction, or the Commission may have wanted to base its negative vote on as many arguments as possible in order to make their decision more legitimate and acceptable. One desired effect of this strategy could be to create a precedent for future decisions where the Commission may have to rely on the question of bundling.

4.2.2.2. Market for Avionics

Avionics was another key market that attracted the Commission’s attention. This market was also of particular interest because it offered GE and Honeywell the opportunity to bundle complementary products.

Avionics products include equipment used for the control of aircraft, for navigation and communication, and the assessment of flying conditions. At the time of the Commission’s decision, Honeywell had captured between 50% and 60% of the market for avionics. Its main competitors were Rockwell Collins, with a market share of 20% to 30% of the market; Thales, with a share of between 10% and 20% of the market; and Smiths Industries, with a share of up to 10% of the market. In terms of sheer market share, Honeywell’s position was thus very strong.

The Commission believed that the merged entity would be able to offer an unprecedented package of products that no single competitor could challenge. The sale of complementary products through package deals may take several forms. It may include, for

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203 See Götz Drauz, Essay, Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law, 25 FORDHAM INT’L L.J. 885, 897 (2002) (“The core factor of the Commission’s... assessment... is the combination of GE’s financial strength and vertical integration... with Honeywell’s leading positions in various product markets... ”).
204 GE/Honeywell, supra note 1, para. 231; AlliedSignal/Honeywell, supra note 115, para. 10.
205 GE/Honeywell, supra note 1, para. 242.
instance, mixed bundling, whereby complementary products are sold together at a price that is lower than the price charged when the products are sold separately due to discounts applied across the product range. It may also take the form of pure bundling, whereby an entity sells only a bundle and does not make individual components available on a stand-alone basis.

Pure bundling may also take the form of technical bundling, in which the individual components only function effectively as part of a bundled system and cannot be used with components from other suppliers. In other words, the individual components are made incompatible with the competitor’s components. The proposed merged entity would have been able to price its package deals in such a way as to induce customers to buy GE and Honeywell products rather than those of its competitors, thus increasing the combined share of GE/Honeywell in both markets.

The Commission objected to the vertical integration of Honeywell with GE for the same reasons they mentioned in its corporate jet aircraft engine market analysis. The Commission felt that Honeywell’s combination with GE’s financial strength, in addition to vertical integration in financial services, aircraft purchasing and leasing, and after-market services, would contribute to the foreclosure effect already described. Following the proposed merger, the Commission predicted that Honeywell’s product range would benefit from GE Capital’s ability to secure exclusive positions for its products with airlines and GECAS’ instrumental leverage ability to foster the placement of GE Products, thus extending its “GE only” policy to Honeywell products.

GE’s strategic use of GECAS and GE Capital’s financial strength would position Honeywell as a dominant supplier of avionics, a market in which Honeywell already enjoyed a leading position. In light of their inability to produce financial strength and integration to any significant degree, rival manufacturers would progressively be forced to reconsider their strategies and would eventually choose not to compete fiercely in those markets dominated by the merged entity.

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206 Id. para. 351.
207 Id. para. 405.
208 Id. para. 406.
4.2.2.3. **Market for Engine Starters**

In view of Honeywell’s horizontal position within the market for aircraft engines, the Commission also emphasized the market for engine starters. Honeywell’s share in this market was estimated to be between 50% and 60%. Honeywell’s only real competitor was Hamilton Sundstrand, with a market share of between 40% and 50%. However, since Hamilton Sundstrand’s engine starters were only installed in the engines of its sister company, Pratt & Whitney, they were not available in the general market. Hamilton, therefore, could not be considered a competitor. Honeywell would thus be the only large independent supplier of engine starters. The Commission concluded that through the merger with GE and its resultant horizontal effects previously discussed, the newly formed company, GE Honeywell, would dominate the market.

In order to overcome the Commission’s concerns in this field, the parties offered to divest Honeywell’s engine starter business. The Commission interpreted this offer to mean that the would-be divested business would not include certain parts that needed to be purchased together. Since the new company would try to command this part of the market, the divestiture would not have the necessary effect.

4.3. **Conclusion**

The Commission’s decision in *GE/Honeywell* is essentially in line with the tradition of European merger control and everything this tradition entails. As a matter of law, the decision begins by addressing the question of market dominance, and this is where the first challenge to the decision can be made. The Commission did not find that GE’s and Honeywell’s shares in all markets would lead to dominance; therefore, they had to look for other factors that would get the merged entity’s position over the market.

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209 See supra Section 4.2.2.1.
210 GE/Honeywell, supra note 1, paras. 331-40.
211 In this respect the figures given for the market share reflect production volume and not sales in the market. Hamilton, by supplying Pratt & Whitney, has a lower market share in the overall engine market. Id. para. 338.
212 Id. para. 341.
213 Id. para. 493.
214 Id. para. 516.
dominance threshold. Here, the Commission relied heavily on the financial strength of GE, a line of reasoning in sync with previous case law and one to which one cannot object. It must not be overlooked that at this point in the analysis, the Commission was only concerned with the question of pre-existing dominance. The question of strengthening or creating dominance turned out to be much more difficult and controversial. Here, the controversy, rightly or wrongly, centered on the issue of bundling.

It is questionable whether the idea of bundling has a sufficiently legitimate basis in the ECMR. This was a major issue in the discussion about the validity of the Commission’s decision. Many argue that there was no basis for considering bundling in the Commission’s analysis in the ECMR and that the Commission, by addressing the bundling issue, improperly changed the scope of the ECMR. Henceforth, merger parties must fear that the Commission, when assessing a proposed merger, will not only identify the relevant markets in the traditional sense and assess the horizontal and vertical effects of a merger, but will also speculate on how positions in markets that are not related might be combined, even if there is no clear evidence that such behavior will emerge. This approach not only takes away much of the legal certainty that was the major strength of the merger control process, but also blurs the distinction between merger control and post-merger EC Article 82 investigations. Historically, the Commission has been unwilling to base decisions to halt a combination on the basis of speculative assessment of what the parties might do as a merged entity. The type of behavior that the Commission had previously addressed requires a certain degree of evidence to act upon; and in the case of GE/Honeywell, there was not enough of that evidence available. Therefore, it is commendable that GE and Honeywell have launched separate appeals against the Commission’s decision to the CFI, despite the fact that the two companies will not merge in any event. In a few years’ time, we will know if the CFI, or ultimately the ECJ, will condone the position of the Commission.

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215 The parties apparently fear that competitors could use some of the Commission’s findings, especially those pertaining to GE’s position in the jet engine market, in future disputes and could keep the company from making future acquisitions. Cf., Andrew Ross Sorkin & Paul Meller, G.E. Said to Be Planning Appeal of Honeywell Decision, N.Y. TIMES, Aug. 1, 2001, at C4 (“The few companies that have appealed a prohibition ruling did so, analysts said, largely to clear any obstacles to future acquisitions.”).
5. INTERNATIONAL HARMONIZATION

Bearing in mind the harsh exchange of words and the hostility that developed among observers from both sides of the Atlantic, one of the consequences of the GE/Honeywell decision on which almost universal agreement was reached was that similar debacles should be avoided if at all possible. This goal can only be achieved by abolishing or mitigating the underlying differences between the two systems. In the following Section, I will highlight the most important differences between the two systems, and then suggest possible starting points for international harmonization.

5.1. Differences

After GE/Honeywell, it appears that the United States has more astutely identified the true differences between the U.S. and European systems. The United States has repeatedly asserted that the importance of consumer welfare is a, if not the, dividing line between U.S. and European approaches to competition law and policy. The European response to this has been that, as a matter of course, consumer protection has also been a very important factor in Europe. In fact, European lawyers argued, it was consumer protection that would require the avoidance of dominant entities because those dominant entities could behave in a detrimental way for consumers, so this difference should not be overestimated. While this argument is certainly valid at face value, it misses the real issue—and the criticism put forward by U.S. lawyers. There can be no doubt that consumer welfare in Europe is important; however, consumer welfare is definitely not the starting point and even less so the overriding interest around which the law is built. This is contrasted to Chicago School-driven U.S. antitrust law where consumer welfare enjoys this very position.

The substantial tests used to assess mergers do not actually differ significantly from one another. They both require an assessment of the consequences of a merger for competition, and they both ask whether or not competition is affected. It is how this question is applied in practice and where emphasis is placed that shows the difference between the two systems. The United States clearly puts emphasis on efficiencies that increase consumer welfare. In Europe, the emphasis is different. It is somewhat moot to discuss how consumer welfare ranks vis-à-vis other considerations; it is sufficient to state that it is not paramount.
5.2. Solutions

From the previous paragraph, it follows that the harmonization of antitrust law requires some agreement over what the goals of merger regulation should be. The Commission has partially opened the discussion by inviting comments about the future of the MD test in its Green Paper. It even went so far as to hint that a change from the traditional MD test to an American-style SLC approach was not out of the question. However, suggesting that Europe should switch from an MD to an SLC test actually misses most of the underlying differences between the two systems, since European law, as has been shown, already recognizes some principles associated with the SLC test. U.S. law does not have an MD threshold, so the difference remains, but it seems marginal in comparison to the more fundamental difference in the goals of antitrust law—and easier to overcome. To harmonize the MD and SLC tests would not solve the problem; the underlying difference between the two systems would remain. Only if the two systems agreed on the goals of merger control could harmonization be achieved, and at the heart of the matter is the question of how important consumer welfare should be.

It follows that for and before true harmonization, both systems must agree on the goals of antitrust regulation. This again revives the discussion that raged in the United States a long time ago. Talks between the United States and Europe regarding harmonization should not focus on what their respective lawmakers intended when they adopted the statutory instruments, as current U.S. statements about the topic would suggest, but rather what the goal of antitrust law should be today. Once the two systems have reached an agreement in this respect, the necessary changes in the administration and application of this goal are comparatively easy.

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217 See id. at 11 (“[The European Parliament] []considers that the current use of the ‘dominance test’ produces very similar results to those obtained using the ‘significant lessening of competition test’ (SLC test); but believes it necessary above all to balance this type of analysis with an overall economic and social assessment evaluating verifiable efficiency gains deriving from concentrations . . . .”) (emphasis added).
to achieve. The ABA’s Sections of Antitrust Law and International Law and Practice, in their joint comments on the Commission’s Green Paper, do not put the question in quite as plain terms, but appear to have identified the questions that need to be answered by the Europeans. They start by highlighting the issue of efficiencies and ask whether the creation of efficiencies should be an outright defense. More importantly, the Sections address the role of consumer welfare in the decision to approve a merger, and show the link between efficiencies and consumer welfare. They ask: “[s]hould there be limits on the ‘quality’ or types of efficiencies that will be recognized in order to permit an otherwise anti-competitive merger to proceed[?]” For example, should it be necessary to dem-

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218 It appears that apart from the indisputable value of its comments, the ABA did the course of harmonization a considerable disservice by simply arguing that the Europeans should not only adopt the U.S. SLC test; while they were at it, they should have also followed precedents from those jurisdictions who have applied the SLC test before, notably the United States and Canada. ABA Comments, supra note 53, at 14. In the sea of issues, this is probably a minor point, but it must have escaped the drafters of this statement, that European law, as well as continental European countries, does not even have a rule of precedent, so they in fact told the Europeans to not only to change their merger control regime, but also to get rid of their entire legal system and become, at least with respect to antitrust matters, common law countries. They might as well have told the Europeans to stay home and let U.S. and other common law lawyers take over the administration of their merger control because they are neither familiar with the SLC test nor with the rule of precedent. Through these comments, the authors have not only outing themselves as either ignorant or oblivious as to the situation in Europe, they have also damaged the discussion itself. These comments not only suggest that Europe adopt a U.S.-style test, which by itself is probably a reasonable suggestion, but call for a complete overhaul of the legal system of the continent, if not all of Europe. Continental European systems do not have a rule of precedent. Judges on the continent, as much as the ECJ, try to follow previous decisions in order to make the system more predictable and reliable. Vivian Grosswald Curran, Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union, 7 Colum. J. Eur. L. 63, 73 (2001). However, this system is not yet comparable with common law stare decisis and the technicalities connected therewith. Continental legal systems have no experience with the strict rule of precedent as found in the United States and would not be able to argue a case to accommodate this. A change from the civil law tradition to a rule of precedent would mean a revolutionary change, much more serious than a switch from the MD to the SLC test or even to the primacy of consumer welfare. Since this test is unknown to most European lawyers and they are not familiar with the rule of precedent, one could conclude that the gist of the ABA submission, is, plainly speaking, to tell European antitrust lawyers to go home and let somebody else do their job. The contents of this paper are not well-known in Europe; if the Europeans took the paper seriously, their reaction would be fierce. This is even more regrettable because the U.S. position is actually a very strong one and, if well presented, could and should have a significant impact in Europe.
onstrate that any claimed efficiencies are likely to be passed on to consumers?"219

The Berenguer Fuster Report on the Green Paper to the European Parliament appears to agree with the ABA comments, suggesting that “when evaluating the benefits resulting from a concentration [i.e., the efficiencies], attention should focus especially on the benefits to the economy in general and the consumer in particular.”220 The Report later downgrades (and to some extent contradicts) itself when it says:

[A]s regards the benefits or increases in efficiency that might result from a concentration, it is beyond dispute that the companies involved stand to gain a great deal. The potential benefits for the markets and hence the consumers directly affected are another matter altogether. When assessing this subject it is important to bear in mind that the goals related to the competitiveness of European industry have to be brought into balance with the aim of maintaining the necessary effective competition on the markets, because the benefits that would initially be passed on to consumers would otherwise ineluctably disappear in the medium term, with no possibility of reversing the tide.221

In other words, consumer welfare should play a more prominent part in merger analysis but should not have primacy, and at the end of the day there are other factors, most notably market competitiveness, which need to be taken into consideration and balanced. Presumably, the Report refers here to the traditional maintenance of a large number of competitors, among them small- and medium-sized enterprises; the Report suggests no real change to this scheme. By contrast, the Committee on Legal Affairs and the Internal Market, which attached an opinion to the Report, simply dismisses any thoughts on efficiencies by stating that “the ‘efficiency’ of a merger for the participants usually results in reduced efficiency for the economic system to which they belong because of the lessening of competition and should therefore not be used to

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219 ABA Comments, supra note 53, at 15.
221 Id. at 12 (emphasis added).
authorise [sic] a merger which leads to a situation of dominance."\(^{222}\)

Apart from the question of how the United States and Europe can bring differing goals in line with each other, it would appear that the natural obstacles to harmonization are the reluctance of the protagonists to depart from the systems to which they are accustomed and also, and more importantly, from what they think is best. Naturally, the two sides are hesitant to switch to something they do not know very well and are convinced that the foreign system is worse than what their countries apply today. A starting point for harmonization, wherever it will lead, is the increase of discussion between U.S. and European lawyers to better understand not only the law, but also those who administer it.\(^{223}\)

\(^{222}\) Id. at 16. In addition, the Committee wants to retain the MD test because of the compelling reason that “the use of the dominance test to evaluate concentrations currently provides a large measures of legal certainty, and therefore should not be replaced by the criterion of 'substantial lessening of competition,' which provides no appreciable advantage in terms of clarity and accuracy.” Id. at 16-18.

\(^{223}\) See Kolasky, supra note 30, at 23 (arguing that discussion between the United States and the European Union is needed to promote “institutional changes that might promote greater convergence”).
POST SCRIPT

THE COURT OF FIRST INSTANCE’S DECISION IN TETRA LAVAL/SIDEL AS A PRECEDENT FOR THE GE/HONEYWELL APPEAL?

On October 25, 2002, the CFI overturned the Commission’s decision to block the merger between Tetra Laval and Sidel. This was the third defeat of the Commission in a merger control case this year—and the second in one week, the Court having already overturned the Commission in the cases of Airtours/First Choice in June and Schneider/Legrand earlier in October. Apart from its potential consequences for the GE/Honeywell appeal which will be addressed below, these recent decisions are interesting for two more general aspects: first they have done away with the perception that the Court would not overrule the Commission and, second, that decisions would take an endless amount of time.

In its judgment, the CFI agreed in principle that conglomerate effects such as leveraging could lead to the strengthening or creation of a dominant position and to an impediment of competition, and could thus be the basis for the prohibition of a merger. This is an important finding because it removes doubt about the use of this economic theory in European antitrust law. The Court did
not follow the hard line Chicago School approach that conglomerate effects have no place in merger control at all.\textsuperscript{231} However, quasi in a reverence for this school of thought, the Court acknowledged that "the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, . . . the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects."\textsuperscript{232} As a consequence, the Court imposed a very high threshold of evidence before conglomerate effects could lead to the prohibition of a merger,\textsuperscript{233} both in terms of the likelihood of their occurrence and of their economic effects.

In \textit{Tetra Laval}, the Court acknowledged that the question of leveraging is essentially a behavioral problem\textsuperscript{234} and drew a distinction between legal and illegal behavior.\textsuperscript{235} It asserted that the newly merged company had two means of leveraging: first, it could apply pressure leading to tied sales or sales which bundle equipment and consumables; second, measures could be adopted to offer incentives, such as predatory pricing, price wars and loyalty rebates. Since Tetra had a dominant position in certain markets, the first behavior would constitute an abuse of a dominant position and would thus be illegal under EC Article 82. The Commission, in its decision,\textsuperscript{236} had assumed that Tetra would indeed

\textsuperscript{231} See, e.g., \textit{Bork}, supra note 7, at 248.

\textsuperscript{232} \textit{Tetra Laval}, supra note 224, para. 155.

\textsuperscript{233} \textit{Id.} paras. 147, 155.

\textsuperscript{234} \textit{Id.} para. 154

\textsuperscript{235} \textit{Id.} paras. 217-18.

engage in this type of behavior, citing as evidence certain economic incentives to do so.\textsuperscript{237} For the CFI, this level of likelihood of illegal behavior identified by the Commission was not enough. The CFI stated that the Commission was wrong not to take into consideration "the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities . . . and the financial penalties which could ensue."\textsuperscript{238} The Court concluded that "since the Commission did not carry out such an assessment in the contested decision, it follows that, in so far as the Commission's assessment is based on the possibility, or even the probability, that Tetra will engage in such conduct in the aseptic carton markets, its findings in this respect cannot be upheld".\textsuperscript{239}

With regards to the second type of (legal) behavior, the Court stated that the evidence of likelihood that it will happen (barely) sufficed.\textsuperscript{240} In the next step, the Court required sufficient evidence that this leveraging would lead to the strengthening or creation of a dominant position and stated, in fairly blunt words, that the Commission has also failed to deliver this. This high threshold of evidence is the reverse side of the Court's decision. While the CFI acknowledges the potential for leveraging to lead to the blocking of a merger in principle, it requires strong economic evidence that the alleged consequences will in fact occur, and it is this hurdle that the Commission failed to meet in Tetra/Sidel.

The outcome in Tetra Laval thus reflects in many ways the criticism after GE/Honeywell, in which it was alleged that the Commission's decision was not sufficiently based on hard and fast economic theory and evidence; thus, there seems to be a good chance that the Court will, in 2003, overrule the Commission in GE/Honeywell on similar grounds. Whether this will lead to the overturn of the entire decision remains to be seen. There were a number of other aspects (vertical and horizontal effects of the merger) which the Commission could put forward to arrive at its

\textsuperscript{237} \textit{Id.} para. 359 ("As carton and PET are technical substitutes, when a customer switches to PET he/she is a lost customer on the carton side of the business either because he/she partially switched from carton or because he/she did not switch some of the production to carton form other packaging materials.").

\textsuperscript{238} Tetra Laval, \textit{supra} note 224, para. 159.

\textsuperscript{239} \textit{Id.} para. 160. See also para. 218.

\textsuperscript{240} \textit{Id.} paras. 216, 219 & 224.
decision and which could, in the eyes of the Court, still suffice to declare the merger incompatible with the Common Market. However, following its recent decisions, it can be expected that the Court will vigorously attack large portions of the GE/Honeywell decision.

One thing that has already become clear after the last decisions is that the Commission will have to retain and rely upon the advice of economists much more than in the past. It may have been the lack of such involvement which made the decisions defective—and it can be expected that the CFI will issue the same verdict with respect to GE/Honeywell. Mario Monti has already indicated that, among other changes within the organization, such expertise would be added to the Commission. The same had been demanded and suggested by U.S. critics of GE/Honeywell and it seems that the Commission now acknowledges the validity and benefit of this change.

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242 See supra Section 4.2.2.1.2.