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The European Commission's Extraterritorial Jurisdiction Over Corporate Mergers

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THE EUROPEAN COMMISSION'S EXTRATERRITORIAL JURISDICTION OVER CORPORATE MERGERS

David J. Feeney*

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ABSTRACT

This article examines the concept and application of the European Merger Regulation as it applies to mergers, acquisitions, and joint ventures external to the European Union (the Union) and the European Economic Area (EEA). More specifically, the article traces the development of the Merger Regulation and how its application developed into the legal vehicle for the European Commission (the Commission) to administer its authority over the clearance or prohibition of mergers beyond its territorial frontier. Part I addresses the historical concept of extraterritorial jurisdiction under the Merger Regulation. It considers the European Court of Justice's approach to extraterritorial jurisdiction under Articles 81 and 82 of the Treaty Establishing the European Community, formerly Articles 85 and 86, and its application to the Merger Regulation. Part II reviews the Commission's assessment of mergers between non-Community enterprises. It concentrates on the Commission's analysis of whether a proposed merger is compatible with the European Common Market. Part III considers the measures available to the European Commission to enforce its authority under the Merger Regulation, while Parts IV and V review the sensitive *Boeing/McDonnell Douglas* and *General Electric/Honeywell* merger cases, respectively. This article covers the law in effect as of December 31, 2001.

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INTRODUCTION

As corporations become more globally integrated, mergers, acquisitions, and joint ventures—not fathomable a generation ago—have become a frequent occurrence. Such commercial transactions may easily alter the balance of competition in markets far removed from where the entities are domiciled. Competition authorities must be keenly aware of the potential impact such mergers have on their authority to prevent serious disruption of competition. Within the European Union, the European Commission maintains the effective competitive balance in the European Common Market (the Common Market).

The vehicle for dealing with mergers, acquisitions, and joint ventures in the European Union is Council Regulation 4064/89, known as the Merger Regulation.[1] The Merger Regulation authorizes the European Commission to review the compatibility of mergers with the competition rules of the Common Market.[2] Although the Merger Regulation lacks express language granting jurisdiction over mergers outside the European Union, it is the basis for Commission jurisdiction, and provides a means of analysis and possible application of sanctions for or blockage of such mergers.[3]

Although some members of the business community outside the European frontier may question the Commission's authority to review mergers external to its immediate area of influence, the Commission has faced little confrontation in its application of the Merger Regulation. For example, the highly contentious *Boeing/McDonnell Douglas* merger eventually reached resolution when the transacting parties conceded to the Commission's demands to receive its approval of the transaction.[4] The proposed merger of General Electric and Honeywell is now before the European courts.[5]

1. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257), *amended by* Council Regulation 1310/97, 1997 O.J. (L 180) [hereinafter Merger Regulation].

2. *See id.* art. 8(3).

3. *See* PIERRE BOS ET AL., CONCENTRATION CONTROL IN THE EUROPEAN ECONOMIC COMMUNITY 379-81 (London, Graham & Trotman 1992).

4. *See* Case IV/M.877, *Boeing/McDonnell Douglas*, 1997 O.J. (L 336) 16, 39.

5. *See* Case T-210/01, Gen. Elec. v. Commission, 2001 O.J. (C 331) 24.

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The Merger Regulation is a highly effective instrument that the Commission uses to maintain the competitive structure within the European Union. It authorises the Commission to intervene in transactions that impede efficient competition in the Common Market regardless of where the transacting parties are located.

I. DEVELOPMENT AND APPLICATION OF EXTRATERRITORIAL JURISDICTION OVER NON-COMMUNITY MERGERS

A. Introduction

The world of economics and commerce is becoming increasingly global. Businesses are continually transforming their organization and structure through mergers, acquisitions, and joint ventures to compete effectively in the international market. To maintain pace with this constant evolutionary process, communal competition authorities must adapt as well.[6] As a result, various countries and trading blocks have reached agreements dealing with the impact on competition created by the moving tide of commercial change.[7] These agreements provide a cooperative method to avoid the burdensome legal aggravations and political turmoil that can arise if one country attempts to enforce its competition laws on entities of another jurisdiction.[8] An example of such cooperation is the agreement between the European Communities and the United States on the enforcement of competition laws by comity.[9] Although this agreement facilitates a cooperative relationship between the European Union (the Union) and the United States to avoid clashes between the two trading partners, it excludes cooperation in the area

6. *See generally* Minister for Foreign Aff. Mogens Lykketoft, Speech in Copenhagen (Aug. 23, 2001), *at* http://europa.eu.int/futurum/documents/speech/sp230801_en.pdf.

7. *See id.*

8. *See id.*

9. Agreement on the Application of Positive Comity Principles in the Enforcement of Competition Laws, U.S.-E.C., 1998 O.J. (L 173), at 28 [hereinafter Agreement] (referencing the Sept. 23, 1991 agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws and the exchange of interpretative letters dated May 31 and July 31, 1995).

of mergers.[10] Therefore, the Merger Regulation[11] and U.S. merger control rules such as the Sherman Act,[12] the Clayton Act,[13] and other related U.S. anti-trust acts do not form part of the cooperative relationship under the agreement.

From the European Union's perspective, such competition agreements exclude the Merger Regulation because it does not provide discretionary power to the European Commission (the Commission) to investigate mergers.[14] The power granted to the Commission under the Merger Regulation only applies to the examination of mergers with a "Community dimension."[15] It is evident from the Commission's ability to exercise its authority under Articles 81 and 82 of the Treaty Establishing the European Community (the Treaty) that the power to investigate must be automatic.[16]

The Commission has relied on the Merger Regulation to find jurisdiction for reviewing mergers between parties external to the European Union even where an agreement between the trading partners implicated in the transaction does not expressly provide for extraterritorial application of the Regulation.[17] The Merger Regulation applies to all merger, acquisition, and joint venture concentrations that have a Community dimension.[18] It does not specify where the concentration must occur to fall under the Commission's jurisdiction, leaving open for debate the extent to which the Commission may review mergers external to the Union. In

10. *Id.*, art. II § 4, at 29.

11. Merger Regulation, *supra* note 1. Compare the Merger Regulation with a European Economic Area (EEA) Agreement that authorizes the European Commission to review mergers affecting the EEA. THERESE BLANCHET ET AL., THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA (EEA): A GUIDE TO THE FREE MOVEMENT OF GOODS AND COMPETITION RULES 269 (Oxford University Press 1994).

12. 15 U.S.C. §§ 1-7 (2000).

13. 15 U.S.C. §§ 12-27 (2000).

14. Joseph P. Griffin, *Antitrust Aspects of Cross-Border Mergers and Acquisitions*, 19 EUR. COMPETITION L. REV. 12, 17 (1998).

15. *See id.* ("[I]f the United States requested the Commission to review a merger that was not of a 'community dimension,' the Commission would have no power to do so.").

16. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997), arts. 81-82 [hereinafter EC TREATY].

17. *See* Merger Regulation, *supra* note 1, art. 1(2)(a).

18. *See id.* arts. 1, 3.

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the view of the Commission, if a proposed merger meets the definition of a concentration and has an impact on the European Union, the location of the parties to the merger is inconsequential.

Without an agreement in place for extraterritorial jurisdiction over non-Community undertakings and without any relevant provisions in the Merger Regulation, the Commission and the European Court of Justice (ECJ) have developed the right to affirm such jurisdiction on the basis of ECJ decisions involving other European Union competition rules.[19] Extraterritorial jurisdiction derives from application of Articles 81 and 82 of the Treaty[20] under the single economic entity theory and the effects doctrine.[21]

B. Single Economic Entity Theory

The single economic entity theory states that, where a parent company exerts influence on the actions of its subsidiary, the two entities are considered as one. The most exemplary decision adopting this theory is *Imperial Chemical Industries v. Commission of the European Communities* (*ICI*)[22]. The Commission found that a number of entities registered outside the Community violated Article 85 of the Treaty by implementing uniform price increases within the Common Market.[23] In its ruling, the ECJ determined that the location of the primary entities involved in the violation of competition rules was immaterial.[24] That they were not registered within the Community did not have an impact on whether the Commission or the ECJ had authority to proscribe their activities.[25] The determinative factor was that the non-Community parent companies exerted power over their Community subsidiaries, directing them to orchestrate the concerted practice of price fixing

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19. *See* J.D. Banks, *The Development of the Concept of Extraterritoriality Under European Merger Law and Its Effectiveness under the Merger Regulation Following the Boeing/McDonnell Douglas Decision 1997,* 19 EUR. COMPETITION L. REV. 306, 306, 309 (1998).

20. EC TREATY, *supra* note 16, 85-86 (as in effect 1985) (presently articles 81-82).

21. *See* Banks, *supra* note 19, at 306-08.

22. Case 48/69, Imperial Chem. Indus. v. Commission, 1972 E.C.R. 619.

23. *See id.* at 621, 648, 661.

24. *See id.* at 692.

25. *See id.*

within the Common Market.[26] This factor put the issue within the purview of the Commission.[27] The Court stated that "[b]y making use of its power to control its subsidiaries established in the Community, the [non-Community parent company] was able to ensure that [its] decision was implemented on [the European] market."[28] Although the subsidiaries had separate legal personalities,[29] the principle enterprises and their Community subordinates formed a single economic entity because the subsidiaries did not act independently and lacked autonomy.[30]

Therefore, under the single economic entity theory, the ECJ ruling means that an organization attempting to manipulate competition within the Community may not shield itself behind its non-European domicile. If the organization creates a Common Market operation that acts as a puppet for the parent company, the tentacles of the Commission may reach it.

The ECJ reaffirmed its *ICI* decision in *Europemballage Corp. and Continental Can Co. v. Commission of the European Communities (Continental Can)*[31] and *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. E.C. Commission (Commercial Solvents).*[32] In *Continental Can*, the court stated that the Commission had administrative competence, and the ECJ had jurisdiction over an entity registered outside the Community "in those cases particularly where the subsidiary company does not determine its market behavior autonomously, but in essentials follows directives of the parent company."[33] Likewise, in *Commercial Solvents*, the ECJ rejected the argument that the Commission lacked competence over a non-Community-registered entity.[34] The court held that, in a

26. *See id.* at 662; *see also* Banks, *supra* note 19, at 306.

27. *See Imperial Chem. Indus.*, 1972 E.C.R. at 663.

28. *Id.* at 662, ¶ 130.

29. *See* id. at 662, ¶ 132

30. *See id.*; *see also* RICHARD WHISH, COMPETITION LAW 380 (3d ed. 1993).

31. Case 6/72, Europemballage Corp. & Cont'l Can Co. v. Commission of the European Cmtys., 1973 E.C.R. 215.

32. Joined cases 6 & 7/73, Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. E.C. Commission, 1974 E.C.R. 223, 1 C.M.L.R. 309 (1974).

33. *Cont'l Can*, 1973 E.C.R, at 242, ¶ 15.

34. *See Commercial Solvent*, 1 C.M.L.R. at 661-63, ¶¶ 125-42.

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proposed merger between a subsidiary of a non-registered entity and another enterprise, the parent "holds the power of control of [the subsidiary's] relations with [the third entity] and it is therefore proper 'to treat the companies . . . as constituting in their relations with [the third entity] and for the purposes of the application of Article 86 a single undertaking or economic unit.'"[35]

The ECJ analysis favors the effect of the agreement in the Community.[36] However, in the above cases, the court carefully avoided adopting such a broad principle by using the link between a "foreign" corporation and its Community subsidiary to justify jurisdiction.[37]

C. Effects Doctrine

The effects doctrine is more applicable to mergers external to the Community. The effects doctrine finds its origin in U.S. law.[38] In *United States v. Aluminum Co. of America (Alcoa)*,[39] the U.S. Supreme Court adopted a two-part test establishing the effects doctrine: (1) the performance of the foreign agreement must be "shown actually to have had some effect" in the United States, (2) which the agreement must have intended.[40] *Timberlane Lumber Co. v. Bank of America*[41] added a balancing test as the third element defining the application of the effects doctrine.[42] This test determines whether the interest of the United States is strong enough to justify extraterritorial jurisdiction.[43] These two cases provide a guideline for United States agencies responsible for the enforcement of competition rules on foreign entities. The ECJ has not adopted the effects doctrine.[44] However, it made a general reference to the

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35. *Id.* at 343, ¶ 37.
36. *See id.* at 342, ¶ 33; *Cont'l Can*, 1973 E.C.R. at 217, ¶ 12.
37. *See Commercial Solvent*, 1 C.M.L.R. at 343, ¶ 37; *Cont'l Can*, 1973 E.C.R. at 242, ¶ 15.
38. *See* Banks, *supra* note 19, at 307.
39. 148 F.2d 416 (2d Cir. 1945).
40. *Id.* at 444; *see also* Banks, *supra* note 19, at 307.
41. 549 F.2d 597 (9th Cir. 1976).
42. *See id.* at 613; Banks, *supra* note 19, at 307.
43. *See Timberlane*, 549 F.2d at 613; Banks, *supra* note 19, at 307.
44. *See* Banks, *supra* note 19, at 307-08.

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principles of the doctrine in *Beguelin Import Co. v. G.L. Import Export S.A.*[45] There, the ECJ disregarded the entity's domicile and instead focused on the effects the agreement produced within the Common Market.[46]

Despite the ECJ's unwillingness to adopt the effects doctrine, the Commission has referred to it for the purpose of review. In its Eleventh Report on Competition Policy, the Commission stated "[t]he Commission was one of the first antitrust authorities to have applied the internal effect theory .... To assert the contrary would be tantamount to preventing public or judicial authorities from effectively dealing with competition cases falling within their jurisdiction."[47] Furthermore, in *ICI*, Advocate General Mayras supported the effects doctrine by stating that, before applying the effects principle, an agreement or concerted practice must have a "direct and immediate" impact on competition and be "reasonably foreseeable" and "substantial."[48]

Although the Commission has not based any rulings solely on the doctrine,[49] it relied indirectly on the general principles of the theory in *A. Ahlstrom Osakeyhtio v. Commission (Woodpulp)*.[50] There, the Commission ruled against non-Community-registered pulp producers, who participated in various anti-competitive practices.[51] The Commission stated that all implicated producers were "exporting directly to or doing business within the Community . . . [and] [t]he *effect* of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the [Community] was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices."[52]

45. Case 22/71, Beguelin Import Co. v. G.L. Import Export S.A., 1971 E.C.R. 949, 11 C.M.L.R. 81 (1972).

46. *See id.* at 95; *see also* Banks, *supra* note 19, at 308.

47. Eleventh Report on Competition Policy, *Application of the Competition Rules to Non-Community Undertakings*, at 36 (1981); *see also* Sixth Report of Competition Policy, *The Rules of Competition in the International Context*, at 31 (1977).

48. Case 48/69, Imperial Chem. Indus. v. Commission, 1972 E.C.R. 619, 694.

49. Banks, *supra* note 19, at 307.

50. Case 114/85, A. Ahlstrom Osakeyhtio v. Commission, 1988 E.C.R. 5193.

51. *See id.* at 5195, 5243.

52. *Id.* at 5198 (emphasis added).

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Relying on the *ICI* judgment, wherein the ECJ had not adopted the effects doctrine, the applicants argued on appeal that the Commission had overstepped its authority under the competition rules.[53] In the alternative, the applicants argued that permitting such application would violate public international law, which forbids the Community from regulating restrictive competition action undertaken outside the Common Market simply because of economic repercussions within the Community.[54]

The Commission proffered the argument that it had jurisdiction under Article 85 in instances of anti-competitive practices that had an impact on trade within the Common Market, irrespective of the impact of such practices on markets outside the Community.[55] Adopting the words of Advocate General Mayras in *ICI*, the Commission attempted to strengthen its argument by claiming that the practices were substantial, intended, and direct.[56]

The ECJ rejected the Commission's assertion that its jurisdiction derived from the effects of the concerted practice occurring within the Community.[57] The Court avoided reference to the effects doctrine, holding instead that the Commission could maintain jurisdiction under the territoriality principle of public international law.[58] The ECJ referred to two types of conduct that violate Article 85 and have "the effect of restricting competition": formation and implementation.[59] Because entities can readily escape jurisdiction by forming an agreement outside the jurisdiction, the court focused on implementation and discounted formation as a basis for jurisdiction.[60] The ECJ defined implementation in vague terms, leaving the impression that the effects of the agreement were most significant when pulp producers sold directly to entities within the Common

53. *Id.* at 5241, ¶ 6.
54. *Id.*
55. *Id.* at 5197.
56. *See* Case 114/85, A. Ahlstrom Osakeyhtio v. Commission (Woodpulp), 1988 E.C.R. 5193, 5198; *cf.* Case 48/69, Imperial Chem. Indus. v. Commission, 1972 E.C.R. 619, 694.
57. *See Woodpulp*, 1988 E.C.R. at 5243.
58. *Id.*
59. *Id.*
60. *See id.*

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Market and engaged in price competition to entice Community customers.[61] According to the court, this action was sufficient to create competition within the Community, thus permitting Commission intervention.[62]

Avoiding the use of effects, the court relied on the territoriality principle, universally recognized in conventional public international law, to find Community jurisdiction.[63] Under this principle, the court reasoned that implementation of the agreement was the key element.[64] The entities involved initiated their agreement to fix prices within the Community, intending the Common Market as the primary location for the concerted practices.[65] An act perpetrated within the territory as a result of conduct outside the territory satisfied the objective territorial jurisdiction criterion.[66] Therefore, the use of subsidiaries, agents, subagents, and the like was immaterial because the implementation had consequences in the Community.[67]

In international law, the principle of territoriality provides a basis for jurisdiction.[68] This principle applies if the individual or entity that is engaged in anti-competitive activities has an effective and significant connection ("constituent effect") with the state in which such activities took place.[69] "If a claim is founded upon an effective connection which is held to be significant in the practice of states, international law recognizes its validity and opposability *vis-à-vis*

61. *See* Antonio F. Bavasso, *Boeing/McDonnell Douglas: Did the Commission Fly Too High?*, 19 EUR. COMPETITION L. REV. 243, 245.

62. Case 114/85, A. Ahlstrom Osakeyhtio v. Commission (Woodpulp), 1988 E.C.R. 5193, 5242 ¶ 12.

63. *Id.* at 5243.

64. *Id.*

65. BOS ET AL., *supra* note 3, at 381.

66. *Id.*

67. *Woodpulp*, 1988 E.C.R. at 5243, ¶ 17.

68. *See* Banks, *supra* note 19, at 308; Andre R. Fiebig, *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform*, 19 EUR. COMPETITION L.REV. 323, 325 (1998).

69. Andrea Bianchi, *Comment* to Harold G. Maier, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 74, 90 (Karl M. Meessen ed., 1996); *see also*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (4th ed. 1990).

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other states."[70] The term "constituent effect," as defined in international law under the territoriality principle, is consistent with the effects doctrine. Given that the Community binds itself to the standards of public international law, the application of the objective territorial jurisdiction principle by the Community is presumed.

Woodpulp dealt with the issue of concerted practices such as price fixing in violation of Article 85.[71] The ECJ determined that, because the enterprises implemented the agreement within the Common Market, the Commission had jurisdiction under the territorial principle of international law, regardless of the domicile of the entities.[72] Does the same principle also apply to merger concentrations? In other words, is the impact of a merger on the Common Market the significant factor in satisfying extraterritorial jurisdiction, making the location of the merging parties irrelevant? The ECJ, speaking broadly in terms of the Community's jurisdiction over enterprises registered outside its territory, stated that "[t]he Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law."[73] Therefore, the justification for extraterritorial jurisdiction applies to all Community competition rules, including the Merger Regulation. For the court, the key element is implementation. Thus, for the Merger Regulation, the issue focuses on where the impact of the merger takes place.[74]

D. Establishing Jurisdiction Under the Merger Regulation

The Merger Regulation does not mention jurisdiction in its text.[75] This omission is important because the draft of the Merger

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70. Andrea Bianchi, *Comment* to Harold G. Maier, *Jurisdictional Rules in Customary International Law, in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 74, 90 (Karl M. Meessen ed., 1996)

71. *See Woodpulp*, 1988 E.C.R. at 5195.

72. *Id.* at 5243.

73. Case 114/85, A. Ahlstrom Osakeyhtio v. Commission (Woodpulp), 1988 E.C.R. 5193, 5243 ¶ 18.

74. *See* Fiebig, *supra* note 68, at 327.

75. *See* Merger Regulation, *supra* note 1.

Regulation originally addressed extraterritorial jurisdiction.[76] The original draft exempted non-Community entities from Commission investigation despite their impact on the Common Market.[77] The lack of such wording in the codified Merger Regulation implies that all concentrations, regardless of location, potentially fall within the scope of the Commission's review.[78] Therefore, the Merger Regulation does not impose any jurisdictional limitations on the Commission.[79]

However, the Commission may not review all external mergers.[80] The Merger Regulation provides a standard for determining the Commission's competence to investigate a non-Community merger.[81] Essentially, the Merger Regulation employs a three-step process. The first two steps constitute an objective test to determine Commission jurisdiction, while the third step requires subjective analysis to determine the merger's compatibility with the Common Market. The first step requires the existence of a "concentration" as defined by Article 3(1) of the Merger Regulation.[82] This article correlates with Article 3(3) of the Merger Regulation, which defines "control".[83] "Control" envisions rights, contracts, or related means that "confer the possibility of exercising decisive influence on an undertaking" by giving either ownership to freely use or dispose of the assets, or providing absolute authority to vote or make decisions regarding the undertaking.[84]

After establishing that a concentration exists, step two evaluates evidence of a Community dimension.[85] In other words, the transaction of the non-Community undertaking must have a significantly recognizable impact on the Common Market.[86] Article

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76. *See* BOS ET AL., *supra* note 3, at 379.
77. *See id.*
78. *See id.*
79. *Id.*
80. *See* Merger Regulation, *supra* note 1, ¶¶ 27-29, at 16.
81. *See id.* ¶ 5, at 1.
82. *See id.* art. 3(1), at 17.
83. *See id.* art. 3(3), at 17.
84. *Id.*
85. *See id.* art. 1(2), at 16.
86. *See id.*

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1(2) of the Merger Regulation establishes the minimum financial thresholds, measured by the sale of products and the provision of services performed both within the Community and world-wide.[87] Once established, these elements satisfy the objective criteria necessary for the Commission's extraterritorial jurisdiction.[88]

According to Article 4 of the Merger Regulation, parties to a concentration with a Community dimension must notify the Commission, even if their domicile is outside the European Community.[89] The existence of a Community dimension justifies the Commission's requirement of notification even when the entity conducts most of its business outside the Common Market.[90] When undertaking an investigation under the Merger Regulation, the fundamental concern of the Commission is to maintain the competitive balance in the Common Market by preventing an entity or entities from creating or strengthening a dominant position.[91] Any evidence of such a dominant position renders the transaction incompatible with the Common Market.[92] The Merger Regulation seeks to eliminate from investigation those proposed mergers that have relatively little impact on the Common Market such as mergers with *a de minimis* effect on the Community.[93] The fifteenth recital of the Merger Regulation deems concentrations with a limited market share that do not have the ability to affect the Common Market compatible, particularly if their market share is less than twenty-five percent.[94]

Having established jurisdiction under the objective criteria, the Commission moves to the third step, which requires a subjective analysis. Under Article 2(3) of the Merger Regulation, the Commission may declare incompatible a merger that creates or

87. *See id.*
88. *See id.* arts. 1-3, at 16-17.
89. *See id.* art. 4(1), at 17.
90. *See* Banks, *supra* note 19, at 309.
91. *See* Merger Regulation, *supra* note 1, art. 2(3), at 17; *see also* Banks, *supra* note 19, at 309.
92. Merger Regulation, *supra* note 1, art. 2(3), at 16.
93. *See id.* art. 1, at 16.
94. *See id.* ¶ 15, at 15; *see also infra* Part II (reviewing compatible non-community mergers).

strengthens a dominant position.[95] This article applies to extraterritorial, as well as Community-domiciled, undertakings.

The Merger Regulation focuses not only on the monopolistic effect of the proposed merger, but also on concentrations that create an oligopolistic effect on the market.[96] For example, the Commission found incompatible a merger that would have removed one manufacturer from the product market wherein the two survivors in the industry would have created a duopoly with strong tendencies to weaken competition.[97]

The Commission thus establishes its extraterritorial jurisdiction using the first two steps in the process. The issue of extraterritoriality in the Merger Regulation conforms with the principle of constituent effect, or, in other words, with the effects doctrine.[98] The Commission objectively looks at the proposed transaction to determine if a concentration exists and whether the potential concentration meets a financial standard significant enough to have an impact on the Common Market.[99] This analysis, therefore, exempts from Commission scrutiny mergers between two entities that may have significant impact outside the Common Market.[100] The high thresholds in effect require that the non-Community transaction have a substantial and immediate effect.[101] If the entities can meet such high thresholds, the effect in the Community would be significant enough to warrant Community intervention.[102] To reiterate, the extraterritorial location of the entities is irrelevant. The Commission merely looks for a possible impediment to European competition. The Merger Regulation pertains to transactions that distort the competitive balance in the Common Market. The subjective analysis aims to determine whether the transaction of the non-Community undertaking creates or strengthens a dominant

95. Merger Regulation, *supra* note 1, art. 2(3), at 16.
96. *See id.*
97. *See infra* Part II.D.1 (discussing the incompatible *Gencor/Lonrho* merger).
98. *See* BOS ET AL., *supra* note 3, at 384.
99. *See id.*
100. *See id.*
101. *See id.*
102. *See id.*

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position. If, according to the Commission's analysis, the transaction creates or strengthens a dominant position within the Community, the Commission can declare the concentration between non-Community entities incompatible with the Common Market.

II. COMMISSION'S ASSESSMENT OF NON-COMMUNITY MERGER CASES

A. Introduction

Under the Merger Regulation, the European Commission has declared jurisdiction over various mergers involving non-Community enterprises. The Commission aims to maintain and develop the structure of the Common Market by ensuring efficient competition.[103] When evaluating a concentration, the Merger Regulation applies to any proposed merger, including those between parties based outside the Community.[104] Although most applications of the Merger Regulation involve parties within the Community, the Commission has received notification of a good sampling of extraterritorial concentrations that have a Community dimension.[105] The Commission's review of a few such proposed concentrations provides a glimpse into its authority to sanction or prohibit these mergers. These examples loosely fall into four categories: (1) mergers of two non-Community undertakings; (2) acquisitions of sole control of a non-Community undertaking by another non-Community undertaking; (3) mergers/acquisitions creating a joint venture in a market consisting of few competitors; and (4) mergers/acquisitions creating a joint venture by non-Community undertakings.[106]

B. Mergers of Two Non-Community Undertakings

1. Kimberly-Clark/Scott Paper[107]

103. *See* Merger Regulation, *supra* note 1, ¶ 1, at 14.
104. *See id.* ¶ 11, at 14.
105. *See id.* ¶ 10, at 14.
106. *See infra* Parts II.B-E.
107. Case IV/M.623, Kimberly-Clark/Scott Paper, 1996 O.J. (L 183) 1, 4 C.M.L.R. 443, 461-62 (1996).

The Commission undertook the investigation of two U.S. companies seeking to merge.[108] The proposed merger between Kimberly-Clark Corporation and Scott Paper Company concerned the Commission because it would have created a dominant position within the European Community.[109] In the Commission's analysis, the proposed merger among major tissue-paper and similar product manufacturers that have a substantial global reach in the consumer and industrial market would have evolved into the largest tissue-paper manufacturer in both the global and European markets.[110] The Commission felt the competitive balance of the Common Market was at stake given the potential world-wide market power that the proposed non-Community transaction would have created.[111]

To establish jurisdiction, the Commission found that the proposed transaction was a concentration.[112] In finding the existence of a Community dimension, the Commission concluded that the merger met the financial parameters necessary to assert extraterritorial jurisdiction.[113]

In its subjective analysis, the Commission realized that the new concentration would have less than twenty percent of the primary market of tissue paper in Western Europe. Although falling within the *de minimis* level for the entire Common Market, the European competition authorities focused on the Irish and United Kingdom markets for specific products involved in the merger.[114] According to the Commission, high transportation costs associated with the products involved, as well as consumer preference for particular brands, created a segregated market in those two countries.[115] Therefore, the proposed combined entity would establish a dominant position in both Ireland and the United Kingdom for specific brands

108. *See Kimberly-Clark/Scott Paper*, 4 C.M.L.R. at 461-62.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

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of tissue paper.[116] The Commission believed that the proposed merger would detrimentally weaken the inter-brand competition within the two Member States.[117] The Commission feared that higher prices for Irish and British tissue-paper consumers would be a disincentive for the U.S. concentration to improve the existing quality.[118]

After negotiations in which the two U.S. corporations offered special concessions to their original proposal, the Commission approved the merger.[119] Kimberly-Clark and Scott Paper assented to the modified transaction by extensively reconfiguring their approach in Ireland and the United Kingdom.[120]

Concerned about the impact of the merger between the two U.S. firms on the Common Market, the Commission focused on evaluating the relevant geographic market, which comprised Ireland and the United Kingdom.[121] Despite the non-Community entities' small market share in Europe, the Commission required modifications to the transaction because of the foreseeable impact of the merger on the Common Market.

This case is notable because the activities of the merging companies initially seemed to have little effect on the Common Market as a whole. The potential global power and its potential effect on two Member States caused great concern for the Commission. Therefore, the Commission deemed the use of its authority appropriate in requiring modification of a merger between two non-European companies.

2. Exxon/Mobil[122]

On December 1, 1998, Exxon Corporation (Exxon) and Mobil Corporation (Mobil) penned an agreement proposing a full merger of

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116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.* at 461.
120. *See id.*
121. *See Kimberly-Clark/Scott Paper*, 4 C.M.L.R. at 461-62.
122. Case IV/M.1383, Exxon/Mobil, 5 C.M.L.R., 959 (1999).

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the two American oil and gas giants. Essentially, the plan envisioned Mobil merging with a wholly-owned Exxon subsidiary, wherein Mobil would become the surviving corporation. In turn, Exxon would possess all of Mobil's issued and outstanding shares. Upon completion of the merger plan, Exxon shareholders would own roughly seventy percent of the combined entity, with the residuum in the hands of Mobil shareholders.

The nature of the proposed merger brought the concentration under the penumbra of Article (3)(1)(a) of the Merger Regulation. Further, because the corporation easily met the financial thresholds of Article 1(2), the Commission declared that the proposed concentration had a Community dimension. This finding satisfied the objective analysis supporting the Commission's jurisdiction to determine the compatibility of the proposed merger with the Common Market.

The merger of these industry leaders caused grave concern as the Commission reviewed the merger under its subjective analysis. As a result, the Commission opened a full investigation to determine whether the concentration created or strengthened a dominant position in any concomitant markets.[123] More specifically, the issue was whether the transacting enterprises skewed the commercial landscape and whether the post-merger balance of competition would reside in the hands of too few entities in the associated oil and gas markets.[124]

The Commission approved the transaction with the cooperation of the parties involved in the merger and after reviewing the other participants in the market.[125] Concentrating on the markets where the merged entity could exercise the greatest influence, the Commission painstakingly considered eight oil- and gas-oriented markets.[126] The

123. *See id.* at 959.

124. *See id.* at 959-60.

125. *See id.* at 959-62. In addition to the analysis of the concentration's effect on the relevant markets and a review of the resulting competitive balance, the Commission investigated "gas to liquid" technology. *See id.* at 960. Notably, Exxon and Mobil's solidified patent holdings in the technology field did not concern the Commission because the patents had a minor effect on the relevant markets. *Id.*

126. *See id.* at 959. The eight markets were: 1) wholesale transmission of natural gas in the Netherlands; 2) long distance wholesale transmission of natural gas in Germany; 3) underground storage facilities for natural-gas servicing in Southern Germany; 4) Group I base oils in the EEA; 5) motor-fuel retailing in Austria, Germany, Luxembourg, the Netherlands, and the U.K.; 6) motor-fuel retailing on

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Exxon/Mobil entity would have dominated these markets. The corporations committed to a number of concessions to purge the agitation the transaction wrought on the mind of the Commission.[127]

The investigation would be incomplete, however, without analysis of the competitors remaining in the aftermath of the merger. The Commission concluded that the modified merger of these two industry leaders would not leave too few competitors vying for the exploration, development, and production of crude oil and natural gas. Enough competition remained to prevent an oligopoly in these markets.[128] Pursuant to the amended proposal and the dismissal of oligopolistic concerns, the Commission assented to the transaction, finding it compatible with the Common Market.

3. Royal Bank of Canada/Bank of Montreal[129]

The merger of the Royal Bank of Canada (R.B.C.) and the Bank of Montreal (B.M.O.) provides a good example of the Commission's evaluating the limited impact of a non-European Community merger and its finding of compatibility with the Common Market. R.B.C. and B.M.O. pursued the creation of a unified bank.[130] The Commission established jurisdiction by determining that: (1) the transaction was a concentration because both parties would create a new bank incorporating the assets and liabilities of both R.B.C. and B.M.O., and (2) the merger had a Community dimension because the parties surpassed the financial thresholds required under the Merger Regulation.[131]

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toll motorways in France; (7) aviation lubricants world-wide; and 8) aviation fuels at Gatwick Airport (U.K.). *Id.*

127. *See id.* The corporations agreed to: 1) divestiture of Mobil's gas trading entity in the Netherlands; 2) divestiture of Exxon's twenty-five percent interest in a German gas wholesaler and reduction of certain voting rights in a separate German gas wholesaler; 3) sale of specified Mobil interests in depleted reservoirs in Germany; 4) divestiture of specified base oil entities; 5) divestiture of Mobil's interest in Aral; 6) divestiture of Mobil's interest in fuels that formed part of the BP/Mobil joint venture; 7) divestiture of Exxon's aviation lubricants and retailing in Europe; and 8) divestiture of specified pipeline capacity servicing at Gatwick Airport. *Id.*

128. *See id.*

129. Case IV/M.1138, Royal Bank of Canada/Bank of Montreal, 1998 O.J. (C 144) 4 (1998).

130. *See id.* ¶ 1.

131. *See id.* ¶¶ 4-5.

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Because the transaction lacked the potential to create or strengthen a dominant position in the Community, the Commission found that the merger between the two Canadian banks was compatible with the Common Market.[132] Prior to the merger, both banks were active in the United States and Canada but had little activity in Europe.[133] Their combined impact had a market share of less than two percent in Europe or any Member State.

The Kimberly-Clark/Scott Paper, Exxon/Mobil, and the Royal Bank of Canada/Bank of Montreal mergers provide examples of the Commission's readiness to review mergers of non-Community enterprises. When the objective criteria of a concentration and a Community dimension exist, the Commission will evaluate non-Community mergers as they relate to the level of competition within the Common Market. If the merger impedes competition, the Commission may judge the transaction to be incompatible with the Common Market or may require appropriate modification to attain Commission approval.

C. Acquisition of Sole Control of a Non-Community Undertaking by Another Non-Community Undertaking

1. Boeing/Hughes[134]

The Boeing Company (Boeing) notified the Commission of its intent to purchase Hughes Space and Communications (H.S.C.), a satellite industry of Hughes Electronics Corporation (Hughes) engaged in prime contracting and equipment manufacture. Of relevance in this all-American transaction was the vertical integration of H.S.C.'s satellite activities with Boeing's satellite launch capabilities. The Commission found that the planned acquisition was a concentration under Article 3(1) of the Merger Regulation. Having surpassed the economic thresholds, the proposed transaction qualified as having a Community dimension.

132. *See id.* ¶¶ 7-8.
133. *See id.* ¶ 6.
134. Case COMP/M.1879, Boeing/Hughes (Oct. 29, 2000).

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After a thorough investigation, the Commission authorized Boeing's acquisition of Hughes's satellite division. The subjective study of the proposed merger led to two inquiries related to the potential creation or strengthening of a dominant position.[135] The Commission found no skewing of the competitive balance thus alleviating the concern that the merger would detrimentally impact the European market.

The first concern was the strengthening of H.S.C.'s position in the commercial satellite market. Prior to the acquisition, H.S.C. held a lofty market share of thirty-five to forty percent in commercial satellites. The Commission found that coming within the Boeing fold would not strengthen this position. Strong competitors in the satellite contracting market would endure, preventing H.S.C. from acting independently. In addition, the nature of H.S.C.'s relationship with Hughes further minimized the domination impact. Although Boeing's activities may have procured additional customers, the Commission found that, without Hughes, H.S.C. would lose its support base that created nearly half of its recent contracts, which the merger with Boeing could not likely replenish. This loss, therefore, mitigated an otherwise foreseeable strengthening in the commercial satellite market.

Further, the Commission addressed the fear that the merger may have influenced the purchasers of H.S.C. commercial satellites to use Boeing's launch operations. For example, H.S.C. could have chosen to increase the purchase price of the commodity to comport with non-Boeing launchers. The Commission determined that such an increase would be highly unlikely because customers would have been inclined to choose an H.S.C. competitor if confronted with such marketing tactics. Therefore, the Commission deemed the merger between the two non-European corporations to be compatible with

135. A third inquiry involving the *Boeing/Hughes* merger involved the structure of the launch-service industry. Over-capacity and substantial fixed costs in this industry could lead to Boeing's ability to gain ground on competitors. A potential repercussion, based on the success of a few successful or failed launches, could be the loss of competition in the launch-service market. The Commission disregarded this conclusion citing reduction measures undertaken within the industry and availability of government launch-service expansion if a competitor lost commercial customers. *Id.*

the Common Market. The Commission found that the merger neither created nor strengthened a dominant position in the Common Market for commercial satellites.

2. Compaq/Digital[136]

The Commission reviewed the proposed acquisition of Digital Equipment Corporation (Digital) by Compaq Computer Corporation (Compaq).[137] The two U.S. corporations sought to create a Compaq subsidiary that would merge with Digital to create a new entity completely controlled by Compaq.[138] The Commission concluded that the proposed transaction was compatible with the Common Market.[139] To assert jurisdiction, the Commission established that the subsidiary was a concentration and met the financial thresholds for having a Community dimension.[140]

The Commission noted a list of items that would have prevented the subsidiary from creating or strengthening a dominant position in the Common Market,[141] including the relatively small market share of twenty percent possessed by the new entity and the presence of other strong competitors in the relevant product market.[142] Also, rapid technological growth in the industry limited the ability to fortify a dominant position.[143] The Commission will approve both extraterritorial transactions and Community-based mergers that do not pose a threat to the European competitive balance.[144]

3. Ingersoll-Rand/Thermo King[145]

The Commission reached the same result in the proposed transaction between U.S. companies Ingersoll-Rand and Thermo

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136. Case IV/M.1120, Compaq/Digital, 1998 O.J. (C 128) 21.
137. *See id.* ¶ 1.
138. *See id.* ¶ 4.
139. *See id.* ¶ 2.
140. *See id.* ¶¶ 5-6.
141. *See id.* ¶ 13.
142. *See id.* ¶ 13.
143. *See id.* ¶ 15.
144. *See id.* ¶ 17.
145. Case IV/M.1011, Ingersoll-Rand/Thermo King, 1997 O.J. (C 378) 3.

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King, wherein Ingersoll-Rand sought to obtain the shares of Thermo King from Westinghouse Electric.[146] The Commission asserted jurisdiction because the acquisition constituted a concentration within the meaning of the Merger Regulation and met the requirements of a Community dimension.[147]

In its subjective assessment, the Commission chose not to consider the geographic or product markets.[148] Thermo King faced stiff competition in Western Europe where it was not the market leader.[149] Additionally, Ingersoll-Rand did not have a vertical association with Thermo King and there was no threat that Ingersoll-Rand would exploit the new arrangement by using its financial strength.[150] Furthermore, as an ancillary forbearance, Westinghouse agreed not to compete in the market for three years.[151] On this basis, the Commission deemed the acquisition compatible with the Common Market.[152]

The *Boeing/Hughes*, *Compaq/Digital*, and *Ingersoll-Rand/Thermo King* cases provide straightforward examples of the Commission exercising its extraterritorial authority. Recognizing that each acquisition would have little impact on the Common Market, the Commission approved each merger. Any potential threat of dominance did not exist or disappeared after agreed modifications aimed at maintaining the competitive balance in the Common Market.

D. Mergers/Acquisitions to Create a Joint Venture in a Market Consisting of Few Competitors

1. Gencor/Lonrho[153]

146. *See id.* ¶¶ 1-2.
147. *See id.* ¶¶ 6-7.
148. *See id.* ¶¶ 10-12.
149. *See id.* ¶ 14.
150. *See id.* ¶¶ 15, 18.
151. *Id.* ¶ 20.
152. *See id.* ¶ 22.
153. Case IV/M.619, Gencor/Lonrho, 1997 O.J. (L 11) 30.

The proposed merger between Gencor and Lonrho provides a prime example of the power the Commission has in preventing a transaction that involves a party entirely outside the European Community.[154] Gencor, an international metal and mineral company wholly established in South Africa, sought to merge its platinum interests with the Lonrho U.K.-based platinum division that had similar platinum operations in South Africa.[155] The proposed transaction sought to combine control of Gencor and Lonrho's platinum activities.[156] The new entity would become the sole platinum producer and neither Gencor nor Lonrho would be involved in its coordination in addition to remaining completely outside the platinum market.[157]

The joint venture was a concentration under the Merger Regulation because Gencor and Lonrho had joint control over the transaction. Furthermore, the Commission stated that the proposed concentration reached a Community dimension by surpassing the thresholds established under the Merger Regulation, thus allowing for the assertion of extraterritorial jurisdiction over the proposed transaction.[158]

The new platinum entity had a substantial impact on the global market as well as the European Common Market.[159] The Commission pointed out that, although only twenty percent of direct global sales occurred in the Community, the nature of the platinum trade was free-flowing, meaning that the sale of platinum in one country led to the use of platinum as a component in another country.[160] For example, platinum ore sold by firms in South Africa to North America could be reformed and sold in Europe as jewelry or spark-resistant electric materials.[161] Therefore, the Commission

154. *See* Griffin, *supra* note 14, at 16.
155. *Gencor/Lonrho*, 1997 O.J. ¶¶ 1, 4-5, at 30-31.
156. *See id.* ¶¶ 1, 4-7, at 30-31.
157. *See id.* ¶ 10, at 31.
158. *See id.* ¶ 13, at 32.
159. *See id.* ¶ 18, at 32.
160. *See id.* ¶ 16, at 32.
161. *Id.* ¶¶ 16, 22, at 2-33.

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concluded that the effect of world trade inevitably impacts the European Common Market.[162]

The Commission focused on the possible formation of a duopoly in the particular market.[163] Given South Africa's possession of roughly ninety percent of the world's platinum reserves, the merger would have reduced the major producers of this significant supply to two South African firms, while the only other realistic competitor, a Russian platinum mine operation, did not have a meaningful impact on the market.[164] Based on studies showing that South Africa would remain the distinctively primary source for the commodity, the concentration of control of this precious metal could damage the competitive nature of the platinum market.[165] The Commission did not envision any new entrants in the market that could have swayed the competitive balance.[166] Further, any new entrants would have represented only a minor share of the platinum market.[167] In any event, market entry was difficult and doubtful because of the high cost of capital and the length of lead-time necessary to generate any viable results.[168]

Fearing abuse of a dominant position, the Commission found that the merger would have compromised the platinum market, which was susceptible to oligopolistic tendencies.[169] In the platinum industry, producers could determine their market share by quoted market prices, which measured the quantity produced.[170] A competitor would not necessarily compensate for a reduction in the product outflow of another entity, such as the newly created merger, which

162. *See id.* ¶ 206, at 62.
163. *See id.* ¶¶ 181, 206, at 58, 62.
164. *See id.* ¶¶ 75, 204-05, at 39, 61-62.
165. *See id.* ¶ 205, at 61.
166. *See id.* ¶ 89, at 42.
167. *See id.* ¶ 89, at 42.
168. *See id.* ¶ 154, at 54.
169. *See id.* ¶¶ 139, 159, at 52, 54.
170. *See id.* ¶ 144, at 52.

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could lead to price increases.[171] That type of situation permitted duopolists to exploit their positions.[172]

According to the Commission, the loss of a third competitor due to the merger restricted consumer's options.[173] After the merger, each of the two significant remaining competitors would have realized a market share of around thirty to thirty-five percent that could have increased to forty percent after the Russian competitor was expected to halt the sale of its resources.[174] As a result, a duopoly would form, where each of the two remaining competitors could mimic the other's tactics and thus limit their production yields. The Commission foresaw a reduction of output by the new entity, which would have been "enough to lead to a tightening of the supply-demand balance and thereby to price increases."[175] Such increases would harm competition and cause European consumers to suffer.[176]

The Commission described the platinum market prior to the proposed merger as resembling anti-competitive parallel behavior.[177] The only entity willing to increase output and fight its rivals was Lonrho. The proposed merger would have eliminated the only "maverick," thus motivating the survivors to stifle competition.[178] There would be no incentive for the two remaining South African entities to compete with each other in light of the high cost structure and the inherent lack of competition in the platinum industry.[179] As already mentioned, a likely restriction in output would result in

171. *See id.* ¶ 205, at 62. The Commission looked at the market from the demand side and found moderate growth, inelastic demand, and insignificant consumer buying power. *See id.* ¶ 141, at 52. On the supply side, it determined that supply was

> highly concentrated with high market transparency for a homogenous product, mature production technology, high entry barriers . . . and suppliers with financial links and multi-market contacts. These supply side characteristics make it easy for suppliers to engage in parallel behaviour and provide them with incentives to do so without any countervailing checks from the demand side.

Id.

172. *See id.* ¶¶ 142, 206, at 52, 62.
173. *See id.* ¶ 186, at 59.
174. *See id.* ¶ 181, at 58.
175. *See id.* ¶ 187, at 59.
176. *See id.* ¶ 186, at 59.
177. *See id.* ¶ 204, at 61.
178. *See id.* ¶ 205, at 61-62.
179. *Id.*

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higher prices and a market where the joint venture and its only significant rival would hold a dominant duopolistic position with little or no outside competition.

Despite efforts by the merging entities to concede some aspects of the transaction, the Commission concluded that the proposed merger would have created a dominant duopoly that would have eliminated any form of competition in the platinum market. The Commission thus decided that the proposed merger was incompatible with the Common Market.[180]

Despite the presence of a European entity in the joint venture, the Commission considered the merger extraterritorial. Its concern about a global duopoly led to its disapproval of the transaction. The Commission saw the joint venture of platinum corporations as a global business and recognized that the price instituted in the Community would reflect the world-wide price of platinum. Seeking to protect European consumer interests against the possibility of adverse action by the remaining competitors, the Commission found the concentration incompatible with the Common Market. Although the major players were South African, the reach of the Commission's authority transcended the European frontier to protect its constituents from the potential harm that the non-Community entities could have inflicted upon the Common Market.

2. Caemi/CVRD[181]

The Commission examined the iron ore market upon receiving notification that Companhia Vale do Rio Doce (CVRD), a Brazilian producer and seller of iron ore, and Mitsui and Co. (Mitsui), a trading company involved in the production and sale of iron ore, intended to procure joint control of Brazilian-headquartered Caemi Mineracao e Metalurgia SA (Caemi). Caemi was a holding company that invested in producers and distributors of iron ore. The post-transaction ownership structure would have given both CVRD and Mitsui equal

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180. *See id.* ¶ 219, at 63.

181. Caemi/CVRD, 5 C.M.L.R., at 1226 (2001).

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ownership of Caemi's voting shares. Due to the nature of the concentration and the sizeable turnover of the merging entities, which surpassed the Merger Regulation's financial thresholds thus creating a Community dimension, the Commission declared that it had the authority to review the proposed transaction between the non-Community participants.

Substantive review conducted by the Commission raised anxieties that the merger would create or strengthen a dominant position in the iron ore sector of the market. Of utmost concern to the Commission was that the proposed merger would yield the world's largest producer of seaborne iron ore. Considering the Western European steel producers' heavy reliance on seaborne iron ore material and that this form of supply equated to nearly half of all traded iron ore, the Commission believed the merger could negatively affect the Common Market. The Commission also feared the loss of a competitor in a small market. Removing one of four significant iron ore producers in the seaborne iron ore market would leave only the two Australian participants capable of competing with the proposed entity.[182]

Ultimately, the Commission approved the transaction. However, the transacting parties had to make concessions in an area of significant competitive concern to obtain the Commission's clearance.[183] The Commission was resolute in its finding that the transaction would have created and possibly strengthened a dominant position in the iron ore market. Notably, Caemi conceded to separate itself financially from a Canadian iron ore producer in which Caemi

182. Only Australian companies Rio Tonte and B.H.P. would have remained as significant competitors in the market. Prior to the merger of CVRD/Mitsui/Caemi, B.H.P. notified the Commission of its intent to acquire sixty percent of Caemi. As owner of the remaining forty percent, Mitsui exercised its right of first refusal, forcing B.H.P. to withdraw its plan of acquisition. B.H.P./Caemi, 5 C.M.L.R. at 1364.

183. One of the commitments offered by the parties provided that the joint venture would create a new corporate entity. However, this concession was not instrumental in the Commission's finding of compatibility. According to this amendment to the proposal, the new entity would consist of Caemi's existing assets in Mineracao Brasileiras Reunidas and CVRD's Fertico interests, both iron ore mining companies. CVRD and Mitsui would each retain fifty percent ownership in the operation and equal participation in appointing directors while Mitsui had the deciding vote except where CVRD could veto a fundamental change. *Id.* at 1227.

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had a fifty percent stake. Presumably, the remaining competitors in the market provided significant competition and customers retained sufficient buyer power after the merger to thwart any attempts of the new concentration to establish a dominant position. As a result, the Commission approved the purchase and assumption of joint control of Caemi by CVRD and Mitsui.

3. Aerospatiale-Alenia/de Havilland[184]

The Commission found a proposed transaction between two European companies and a Canadian firm incompatible with the Common Market.[185] The transaction involved a French entity and an Italian entity that jointly controlled an undertaking (ATR) that specialized in manufacturing regional turbo aircraft.[186] ATR sought to acquire de Havilland, a Canadian regional aircraft manufacturer.[187] Because this transaction would have merged the two largest manufacturers in the relevant market, the Commission found that the resulting merged entity would create an extremely strong position world-wide and within the European market.[188] According to the Commission, after the merger the combined undertaking would have a fifty-percent share in the global market and a sixty-five percent share in the Common Market.[189] Additionally, the competition was relatively weak; therefore, the new entity would have severely limited consumer bargaining power.[190] As a result, the Commission deemed the proposed concentration incompatible with the Common Market.[191]

The *Gencor/Lonrho*, *Caemi/CVRD*, and *Aerospatiale-Alenia/de Havilland* decisions demonstrate the Commission's willingness to use its authority to prevent the anti-competitive impact that non-Community firms may have on European and global markets. These

184. Case IV/M.053, Aerospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42.
185. *See id.* ¶ 72, at 60.
186. *See id.* ¶¶ 3-5, at 42-43.
187. *See id.* ¶ 7, at 43.
188. *See id.* ¶¶ 51-52, at 56.
189. *See id.*
190. *Id.* ¶ 51, at 51.
191. *See id.* ¶ 72, at 60.

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cases illustrate that, where few participants exist in a market, the Commission considers the effect of such mergers on the global supply of the commodities involved. In so doing, the European antitrust authority recognizes the impact of global supply problems on the Common Market.

E. Mergers/Acquisitions to Create a Joint Venture by Non-Community Undertakings

1. DuPont/Hitachi[192]

The Commission evaluated a transaction between two non-Community corporations in the proposed merger between DuPont de Nemours & Company (DuPont), a U.S. corporation, and Hitachi Chemical (HCC), a Japanese entity. The firms sought joint control of Hitachi Chemical DuPont Microsystems L.L.C. (JVCO), which was designed to be a unique entity embodying the attributes of a joint venture. The Commission determined that the transaction fell under the Merger Regulation because the proposed merger was a concentration with a Community dimension.[193] DuPont and HCC would jointly control JVCO as a concentration in the market of liquid polyimide and complementary products.[194] JVCO was designed to be a full-function joint venture because the corporations intended that it would last indefinitely.[195] The merger satisfied the Community dimension criterion by exceeding the financial thresholds of the Merger Regulation.[196]

After determining that the merger satisfied the objective requirements, the Commission began its subjective analysis and found that the non-Community joint venture did not create or strengthen a dominant position in the Common Market.[197] The Commission saw no serious obstacles to competition in the market in which JVCO would operate, due primarily to the relatively low

192. Case IV/M.994, DuPont/Hitachi, 1998 O.J. (C 6) 2.
193. *See id.* ¶ 15.
194. *See id.* ¶¶ 7, 16.
195. *See id.* ¶ 8.
196. *See id.* ¶ 15.
197. *Id.* ¶¶ 23-28.

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market shares of non-Community entities in the Common Market, accompanied by comparatively low expected sales by JVCO in Western Europe.[198] As a result, JVCO would not disturb the competitive balance in the Common Market.[199] The Commission determined that even in the limited polyimides product market, the new joint venture would be only second in Western Europe among other powerful competitors in the Common Market.[200] Further, the Commission found that the ease of market entry and the high level of consumer buying command was persuasive evidence in finding no dominant position.[201]

2. JCSAT/SAJAC[202]

In a proposed merger among several Japanese companies, the European Commission exerted its authority to investigate and ultimately approve the transaction under the Merger Regulation. The parties involved were four Japanese trading companies.[203] Two companies had formed the Japan Communications Satellite Company, Inc. (JCSAT), which dealt in domestic Japanese telecommunications service.[204] The other two companies held interests in a satellite operation called Satellite Japan Corporation (SAJAC).[205] Under the planned transaction, the four Japanese entities would own roughly equal shares and would assume joint control of the new entity (Newco).[206]

Newco met the definition of a concentration by virtue of its indefinite and autonomous nature, and had a Community dimension because it surpassed the financial thresholds.[207] Having establishing its jurisdiction over this non-Community merger, the Commission

198. *See id.* ¶ 23.
199. *See id.* ¶ 28.
200. *See id.* ¶ 24.
201. *See id.* ¶¶ 25-27.
202. Case IV/M.346, JCSAT/SAJAC, 1993 O.J. (C 219) 0.
203. *See id.* ¶ 1.
204. *See id.* ¶ 3.
205. *Id.*
206. *See id.* ¶¶ 1, 4.
207. *See id.* ¶¶ 7-10.

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sought to determine whether the transaction was compatible with the Common Market. Finding that neither JCSAT nor SAJAC would be able to distribute their telecommunications services outside of Japan, the Commission concluded that the merger had no impact on the Common Market.[208] Given the absence of any foreseeable expansion into Europe and the low probability of obtaining official Japanese authorization permitting both domestic and international transmissions, any future impact on the Common Market was unlikely.[209] Additionally, the requirement of European regulatory approval would prohibit the creation of dominance in the future, even if the entities could penetrate the European market. The Commission granted approval because the merger did not threaten to upset the balance of competition within the Common Market.[210]

3. Norske Skog/Abitibi/Papco[211]

In September 1998, and then again in July 2001, the European Commission reviewed the concentration of entities that operated in the newsprint and publication paper markets.[212] The Commission evaluated the proposed joint venture among Norske Skogindustrier ASA (Norske Skog) of Norway, Abitibi Consolidated, Inc. (Abitibi) of Canada, and Hansol Paper Co., Ltd (Hansol) of South Korea.[213] The three parties created a joint venture called Pan Asian Paper Company (Papco) whereby each of the aforementioned companies would acquire an equal interest in Papco, whose sole operation was in the magazine paper market.[214]

An independent economic business concern developed from the transaction, giving Papco the freedom and autonomy to function in the market indefinitely.[215] As a result, the Commission declared that

208. *Id.* ¶ 11.
209. *See id.* ¶ 12.
210. *See id.* ¶ 13.
211. Case COMP/M.2493, Norske Skog/Abitibi/Papco, 5 C.M.L.R. 220 (2001).
212. *Id.*; Case IV/M.1296, Norske Skog/Abitibi/Hansol, 1998 O.J. (C 306) 12.
213. Case IV/M.1296, Norske Skog/Abitibi/Hansol, 1998 O.J. (C 306) 12, ¶ 1.
214. *See id.* ¶¶ 5, 12; *see also* Case COMP/M.2493, Norske Skog/Abitibi/Papco, 5 C.M.L.R. 220 (2001).
215. Case IV/M.1296, Norske Skog/Abitibi/Hansol, 1998 O.J. (C 306) 12, ¶ 10.

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the newly created autonomous entity fell within the purview of the Merger Regulation.[216] The concentration reached a Community dimension by satisfying the financial threshold.[217]

In its subjective analysis, the Commission quickly determined that the proposed concentration posed no threat of creating or strengthening a dominant position.[218] Either in the relevant product market or in the geographic market, Papco would not prove to be an impediment to the European Common Market.[219] The objective of Papco was to operate solely in the Asian newsprint and magazine paper markets. Norske Skog, Abitibi, and Hansol proposed to use Papco as a vehicle for their respective Asian interests and affairs, thus maintaining their current presence and market share in the Community. As a result, the Commission found this concentration compatible with the Common Market.[220]

Nearly three years later, the Commission weighed in on a change of ownership structure of the Papco joint venture.[221] Norske and Abitibi notified the Commission of a proposed transaction wherein the two companies would acquire and equally divide Hansol's stake in the joint venture.[222] The Commission approved the transaction because the activities of Papco would remain in the Asian market, insulating the Common Market from the threat of the creation or strengthening of a dominant position in the European newsprint market.[223]

A review of the Commission's assessment of *Hitachi/DuPont*, *JCSAT/SAJAC*, and *Norske Skog/Abitibi/Papco* reveals that the Commission only concerns itself with the impact of a proposed merger on the European Community. Because the non-Community mergers either had little chance to dominate the Common Market (*DuPont/Hitachi* and *Norske Skog/Abitibi/Papco*) or lacked the

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216. *See id.*
217. *See id.* ¶ 11.
218. *See id.* ¶¶ 12-14.
219. *See id.* ¶¶ 12-13.
220. *See id.* ¶ 17.
221. *See* Case COMP/M.2493, Norske Skog/Abitibi/Papco, 5 C.M.L.R. 220 (2001).
222. *See id.* ¶¶ 4-5.
223. *See id.* ¶¶ 8-9.

proper infrastructure to fully integrate the Common Market (*JCSAT/SAJAC*), such mergers were judged to be compatible with the Common Market. However, given the Commission's ruling in *Gencor/Lonrho*, if the circumstances point to the creation or strengthening of a dominant position, it is likely the Commission would declare such a concentration among non-Community enterprises incompatible with the Common Market.

F. Summary

The Commission evaluates mergers involving non-Community enterprises in a manner consistent with its analysis of mergers among European entities. If the merger meets the objective criteria for jurisdiction under the Merger Regulation, the Commission undertakes a subjective assessment of whether the proposed transaction between non-Community entities would create or strengthen a dominant position in the Common Market.

The Commission's sole interest is the impact these concentrations have on the European Common Market. However, as the Gencor/Lonrho merger indicates, the concentration's effect on the global market may make it incompatible with the Community. The Common Market does not exist in a vacuum and European consumers increasingly feel the pressures of commercial activities outside the Community. From the Commission's perspective, it must step forward and prevent external concentrations from harming European consumer interests.

III. ENFORCING THE MERGER REGULATION ON NON-COMMUNITY CONCENTRATIONS

A. Introduction

As the business world continues to grow, national borders are becoming much less of an obstacle to the interests of multi-national corporations. Mergers on the world stage affect economies beyond their own country of domicile. A merger between entities in North America, for example, can easily have an impact within the European

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Community. As a result, competition authorities must make special efforts to find the balance among the interests of consumers, merging parties, and political groups. Differences among various jurisdictions' competition rules, enforcement methods, and merger compliance requirements can lead to uncertainty among undertakings and governments. Corporations may withdraw from a particular market if they perceive that the competition authorities in that territory enforce competition rules in an arbitrary or capricious manner. Such enforcement could potentially harm competition in that market by eliminating the possible benefits of the merger. A government may overreact to the actions of another government, and attempt to block a merger it would otherwise find compatible with its market. A trade dispute could arise and ultimately harm the consumers whom the trade authorities seek to protect.

B. Cooperation Among Competition Authorities

In an attempt to avoid the harm created by competition authorities asserting extraterritorial jurisdiction, the Commission collaborates with other trading authorities to limit schisms among them.[224] Most noteworthy is the European Commission's cooperation with the U.S. anti-trust authorities. The Commission has used the Community's agreement with the United States as the basis for such cooperation.[225] According to Alexander Schaub, Director-General for Competition, in a majority of cases the Commission reaches an agreement with the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ), and the competition authorities "accept that there will exist infrequent situations where [their] approaches may diverge."[226]

The cases reviewed in Part II evidence such cooperation, not only with the FTC and DOJ, but also with other national trading

224. Alexander Schaub, *International Co-operation in Anti-Trust Matters: Making the Point in the Wake of the Boeing/MDD Proceedings*, COMPETITION POL'Y NEWSL., Feb. 1998, at 2 (article in a European Commission newsletter written by the Director-General for Competition). "In a merger case we shall notify at the outset of the case, then, when appropriate, when the Commission decides to initiate proceedings and, eventually, 'far enough in advance to enable the other Party's views to be taken into account', before a final decision is adopted." *Id.* at 3.

225. *See id.*; *see also supra* Part I.A.

226. Schaub, *supra* note 224, at 4.

authorities. The Commission's approval of a vast majority of mergers between non-Community entities eliminates serious difficulties with other trading authorities. However, the enforcement of the Merger Regulation in the event of a finding of incompatibility with a proposed non-Community transaction remains questionable. This issue becomes more complicated when the undertakings do not have a subsidiary located in the Common Market. If one of the entities has a subsidiary in the European Community, the Commission may take the necessary actions against those subsidiaries to protect competition. However, the finding of incompatibility of a non-Community merger when the undertakings do not have a subsidiary in the Common Market remains an important concern.

C. Sanctions Authorized by the Merger Regulation

According to Article 14 of the Merger Regulation, the Commission has authority, after establishing jurisdiction, to impose sanctions.[227] If the undertakings do not notify the Commission within a week of concluding their agreement, or if the parties file incorrect or misleading information, the Commission may impose a fine.[228] Further, the parties cannot complete their merger until the Commission determines that the proposed transaction is compatible with the Common Market.[229] These restrictions and sanctions also apply to undertakings established outside the Community.[230]

The concentration between Samsung Electronics Co. (Samsung) of Korea and AST Research (AST) of the United States illustrates this point.[231] Samsung sought to acquire its American counterpart. The Commission fined Samsung ECU 33,000 (approximately U.S. $32,000) for neglecting to notify the Commission in a timely manner of its proposed transaction—a violation of Article 4 of the Merger

227. Merger Regulation, *supra* note 1, art. 14, at 22.
228. *Id.* art. 14(1), at 22.
229. *See id.* art. 7(1), at 19.
230. *See id.* art. 2(1)(a), at 16.
231. Case IV/M.920, Samsung/AST, 1997 O.J. (C 203) 3.

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Regulation.[232] Further, Samsung's implementation of the acquisition without Commission approval constituted a breach of Article 7 of the Merger Regulation.[233]

The amount of the fine shows that the Commission sought to maintain a balance between the interests of the Community and the interests of the non-Community entities. The Commission chose to impose the substantial fine to preserve the integrity of the Merger Regulation in light of Samsung and AST's delayed notification and attempt to merge without the Commission's approval. The Commission weighed the fact that the merger caused no damage to European competition. It also noted that Samsung should have been cognizant of Community rules due to its significant presence within the Common Market.[234] The undertakings eventually notified the Commission, which determined that the delay was not designed to deceive.[235] Despite the fine, the Commission did approve the acquisition because the concentration between the non-Community enterprises had little effect on the Common Market.[236]

If the undertakings move forward with their merger despite a finding of the Commission that the transaction is incompatible with the Common Market, the Commission can impose financial penalties or require divestiture of the merger.[237] Article 8(4) of the Merger Regulation permits the Commission to consolidate and separate the assets of the parties or apply any other methods necessary to preserve and restore effective competition.

D. Member State Cooperation in Merger Enforcement

When a merger enacted by non-Community undertakings is found to be incompatible with the Common Market, the proposed

232. See Geraldine Emberger & John Kemp, *Decision to Impose Fines for Late Filing and Unlawful Implementation of a Concentration – Article 14 of the Regulation, Samsung/AST, in Recent Important Decisions*, COMPETITION POL'Y NEWSL., June 1998, at 71.

233. *See* Merger Regulation, *supra* note 1, art. 7(1)-(2); Emberger & Kemp, *supra* note 232.

234. Emberger & Kemp, *supra* note 232, at 72.

235. *Id.* at 74.

236. *See* Case IV/M.920, Samsung/AST, 1997 O.J. (C 203) 3, ¶¶ 5, 11-12.

237. *See* Merger Regulation, *supra* note 1, arts. 7, 8, & 14, at 19-20 & 22.

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transaction is deemed illegal in any Member State.[238] Article 5 of the Treaty states:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community, they shall facilitate the achievement of the Community's tasks. They shall abstain from any measure, which could jeopardize the attainment of the objectives of this Treaty.[239]

As signatories to the Treaty, the individual Member States must uphold the decisions of the Community's governing bodies. The authorities of the Member States must handle "foreign" mergers that are incompatible with the Common Market consistently with the Commission's decision to disregard the merger. Acting contrary to the Commission constitutes infringement of the Treaty. As a result, Member State law becomes a vehicle for prohibiting the implementation of impermissible merger transactions in that state's territory.

For example, the United Kingdom's Competition Act of 1998 states that "questions arising . . . in relation to competition within the United Kingdom are [to be] dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community."[240] When the U.K. courts deal with mergers, they must do so in a manner consistent with the provisions of the Treaty and the European Court's decisions under Community law.[241] U.K. courts must respect pertinent "decisions or statements" of the Commission[242].

Representative of other European Community Member States' competition rules, the U.K. Act shows the cooperational aspect that is of vital importance to fulfilling the Commission's goals. This Act

238. BOS ET AL., *supra* note 3, at 385.
239. EC TREATY, *supra* note 16.
240. Competition Act, 1998, c. 41, § 60(1) (Eng.).
241. *See id.* § 60(2).
242. *Id.* § 60(3).

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seeks to maintain harmony within the Community and to prevent non-Community undertakings from taking advantage of differences among various competition rules.

E. Summary

Cooperation with other trading authorities is the hallmark of extraterritorial jurisdiction over mergers. However, when enforcement is necessary, the Merger Regulation grants the Commission power to deal effectively with non-complying foreign undertakings and maintain efficient competition within the European Common Market.

IV. THE BOEING/MCDONNELL DOUGLAS MERGER

A. Introduction

The merger between U.S. aerospace giants, Boeing Company (Boeing) and McDonnell Douglas Corporation (MDC), carried the most interest and contention with regard to the European Commission's extraterritorial jurisdiction.[243] In addition to its commercial impact, this merger also had a political dimension.

The United States Federal Trade Commission (FTC) quickly approved the merger between Boeing and MDC.[244] From the American perspective, the merger represented an opportunity to enhance competition within the U.S. aerospace industry and to positively affect the country's economic and employment policies as well as U.S. interests in an effective and efficient defense industry.[245] Even the White House enthusiastically supported the merger between these aircraft manufacturers and U.S. President Bill Clinton became personally involved in bringing the transaction to fruition.[246]

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243. *See* Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16.

244. *See* Banks, *supra* note 19, at 309.

245. *See id.*

246. *See id.*

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B. Commission Assessment

The European Commission was very hesitant to approve the merger between the world's largest and third-largest aircraft manufacturers.[247] However, to influence the merger and its impact on the Common Market, the Commission had to establish jurisdiction over the transaction. The merger satisfied the criteria for a concentration under the Merger Regulation because the agreement turned MDC into a wholly-owned subsidiary of Boeing.[248] Moreover, the corporations met the required financial thresholds establishing a Community dimension according to the Merger Regulation, thus fulfilling the objective criteria that allowed the Commission to assert jurisdiction over the planned merger.[249] Despite objections from some members of the U.S. business community, the Commission established jurisdiction over these non-Community enterprises pursuant to Community law.[250]

In its subjective assessment, the Commission had serious doubts about the proposed transaction and its consequential impact on the aircraft market.[251] The Commission was extremely concerned that Boeing would strengthen its existing dominant position. However, the Commission recognized the U.S. interest in the defense aspect of the merger and the minimal likelihood that the proposed concentration would lead to a dominant position within the defense industry.[252] As a result, the Commission chose not to assess the defense side of the merger and instead focused solely on the large commercial jet aircraft industry as the relevant product market.[253] The Commission also determined that the geographic market for commercial aircraft was world-wide because jet airliner sales and operations took place across the globe.[254] At a minimum, the Commission's decision not to investigate the defense side of the

247. *See id.*
248. *See* Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 17, ¶ 6.
249. *See id.* ¶ 7, at 17.
250. *See* Griffin, *supra* note 14, at 16; *see also supra* Part I.
251. *See* Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 17, ¶¶ 8-10.
252. *See id.* ¶¶ 11-12, at 17-18.
253. *See id.* ¶ 12, at 18.
254. *See id.* ¶ 20, at 19.

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merger reflected the respect for cooperation and reasonableness shared by the European Community and the United States regarding competition policy.

Prior to the merger, there were three competitors in the relevant market: Boeing, MDC, and Airbus Industrie (Airbus).[255] At the time of the merger, Boeing held a sixty-four percent share of the world-wide market for commercial aircraft, whereas Airbus owned thirty percent and MDC had six percent.[256] Given these figures, it is evident that, prior to the proposed merger, Boeing occupied a strong position in the market, stemming largely from the complete "family" of aircraft that only Boeing could provide.[257] Boeing also had a large customer base that provided a competitive advantage against the competitors.[258] In addition, recently concluded twenty-year exclusive agreements with three of the four largest airlines in the world furthered Boeing's competitive strength.[259] Those exclusive deals indicated a dominant position because they shut out competitors for nearly a generation.[260]

The Commission concluded that new competitors were unlikely to enter the market due to extreme obstacles.[261] For instance, start-up costs are immense and effective procedures to benefit from economies of scope and scale take a long time to implement. Any new entrants would most likely compete in the regional aircraft market, leaving the large commercial jet aircraft market to the current market participants.[262]

After the merger, the Commission believed Boeing would strengthen its already dominant position by capitalizing on "MDC's competitive potential."[263] With only one competitive rival, Boeing's market share would increase in the short run.[264] Additionally,

255. *See id.* ¶ 21, at 19.
256. *See id.* ¶ 29, at 20.
257. *See* Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 23, ¶ 42.
258. *See id.* ¶ 62, at 26.
259. *See id.* ¶¶ 43-46, at 23.
260. *See id.* ¶¶ 45-46, at 23.
261. *See id.* ¶¶ 49-51, at 24.
262. *See id.* ¶ 50, at 24.
263. *Id.* ¶ 53, at 24.
264. *See id.* ¶¶ 54-55, at 25.

Boeing's customer base in civilian aircraft maintenance would increase, increasing the likelihood that Boeing would enter into more exclusive contracts.[265] Further, Boeing could strengthen its civil aircraft division through its acquisition of MDC's defense industry due to MDC's access to government-funded grants and intellectual property rights that Boeing could transfer to its commercial industry.[266]

Boeing would also strengthen its dominant position in relation to its suppliers.[267] The merger with MDC would put Boeing in a strong bargaining position by making it the largest customer of all commercial aircraft industry suppliers. Boeing's increased demand and bargaining power could harm Airbus' position in the market by taking a larger portion of all available supplies.[268] This development would further strengthen Boeing's dominant position in the commercial aerospace industry.

Therefore, the Commission determined that the originally proposed merger between these two American companies was incompatible with the interests of the European Common Market.[269] However, the Commission did permit Boeing the opportunity to alter the transaction to allay the Commission's concerns. As Boeing edged closer to meeting the Commission's demands via supplemental proposals, the U.S. government and the European Union disputed the consequences of the merger.[270]

C. Political Aspects of the Boeing/McDonnell Douglas Merger

Many competition experts from the European Union Member States firmly believed that the merger should not proceed.[271] French

265. Boeing's customer base would increase from sixty to eighty-four percent when combined with MDC. *Id.* at 24.

266. *See id.* ¶¶ 72, 83-103, at 28, 30-35.

267. *See id.* ¶¶ 104-108, at 35.

268. *See id.* ¶ 106, at 35.

269. *Id.* ¶ 113, at 36.

270. *See* Banks, *supra* note 19, at 310-11.

271. *See* Emma Tucker & Michael Skapinker, *Boeing Merger Faces New Brussels Attack*, FIN. TIMES, July 17, 1997, at 24.

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critics held this position most audaciously.[272] The U.S. government strongly objected to a ban on the merger and claimed that it would not strengthen a dominant position.[273]

The Clinton administration threatened a trade war if the Commission stopped the merger.[274] Washington had considered restricting flights between the United States and France, in addition to imposing sanctions and impounding aircraft.[275] United States Senator Slade Gorton authored a resolution, unanimously approved by the U.S. Senate, that condemned the Commission's stance and stated that the "U.S. should impose sanctions 'at least appropriate to the offence'" after the Commission rejected Boeing's initial offer.[276] Boeing's supporters believed the Commission was exercising its authority to dictate its rules to the U.S. market, thus strong-arming U.S. business practices through Community competition law.[277] The fact that neither Boeing nor MDC had assets or subsidiaries in the Community lent credence to this argument.[278] In response, the United States may attempt to impose its competition rules on European mergers that it *perceives* run counter to U.S. competition. Thus, the United States could deny an otherwise legitimate merger U.S. approval in retaliation.

The ramifications would have been immense had Boeing followed through with the merger without the Commission's approval.[279] According to Article 14 of the Merger Regulation, the Commission has the authority to fine the parties up to ten percent of their combined turnover.[280] Given the revenues of each entity, the

272. *See* Bruce Clark, *Clinton and Chirac Join Row Over Boeing Merger*, FIN. TIMES, July 18, 1997, at 16.

273. *See* Tucker & Skapinker, *supra* note 271, at 24.

274. *See* Clark, *supra* note 272, at 16.

275. Bruce Clark, *US Could Retaliate if Brussels Rejects Boeing Bid*, FIN. TIMES, July 21, 1997, at 1. France is in a peculiarly precarious position because it is the only major European country without an explicit arrangement controlling air transport to the United States. *Id.*

276. *See* Clark, *supra* note 272, at 16.

277. *See* Christopher Carey, *Europeans Ask Bloc for Boeing Rejection, Resistance Could Delay Deal by Several Months*, ST. LOUIS POST-DISPATCH, July 17, 1997, *available at* 1997 WL 3354510.

278. *See* Fiebig, *supra* note 68, at 328.

279. *See* Tucker & Skapinker, *supra* note 271, at 24.

280. Merger Regulation, *supra* note 1, art. 14(2), at 22; *see also supra* Part III.C.

financial penalty would have been substantial.[281] The Commission might also have used its leverage within the Community to encourage European companies not to deal with Boeing.[282] This "bargaining chip" of sorts against Boeing's interests could limit Boeing's substantial commercial activities within the European Community.

D. Community Objections to the Merger

The Commission had three main objections to the merger between the two U.S. aerospace leaders: (1) the twenty-year exclusive supply deals Boeing offered to some of the world's largest airlines; (2) the expansion of Boeing's control over the civilian aircraft market; and (3) Boeing's potential to reap the benefit of access to MDC's publicly funded defense research.[283]

1. Exclusive Supply Contracts

The twenty-year exclusive deal contracts provided the largest hurdle to gaining Commission approval. The contracts had a foreclosing effect on a healthy segment of the market.[284] The Commission feared that the proposed merger would increase the likelihood that Boeing would enter into more exclusive agreements thus shutting Airbus out of an even greater segment of the market. Since Boeing could offer a wider range of aircraft, augmented by its increased access to MDC's client base, many other airlines could choose to arrange similar deals.[285] The possibility of reaching exclusive contracts with the ten largest airlines in the world is not far fetched in light of all airlines' goal of achieving the same advantages

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281. Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 17, ¶ 7 (relating that Boeing's world-wide turnover exceeded ECU 17 billion and MDC's turnover exceeded ECU 11 billion).

282. *See* Clark, *supra* note 272, at 16; Tucker & Skapinker, *supra* note 271, at 24.

283. Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 24-36, ¶¶ 53-112.

284. Boeing had thirteen percent of the world-wide market, or more than thirty percent of the U.S. market under its agreements with American Airlines, Delta Airlines, and Continental Airlines. *See id.* ¶¶ 43, 46, at 23.

285. *See id.* ¶ 70, at 28.

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as their rivals.[286] Such agreements could eliminate more than forty percent of the world-wide market to competitors.[287]

2. Expansion of Market Share

Boeing would have extended its market share after the merger by establishing long-term relationships with MDC's clients.[288] Boeing's closer contact with MDC clientele could permit Boeing to increase sales by identifying its new customers' requirements or influencing them to acquire Boeing aircraft in the future.[289] This close contact could have a foreclosure effect, inhibiting Airbus's ability to present its products to these buyers.

3. Boeing Access to Public Funds Potentially Used in Civilian Aircraft

The Commission was concerned that Boeing would use the U.S. government funds originally granted for MDC's defense research to develop its civilian aircraft.[290] MDC was a large benefactor of public funds for research and development and intellectual property rights.[291] According to the Commission, there was a strong likelihood that Boeing would transfer this technology to its commercial endeavors, thus increasing production and saving costs.[292] Such a trend would further strengthen Boeing's dominant position.[293]

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286. *See id.* ¶ 71, at 28.
287. *Id.*
288. *See id.* ¶ 62, at 26.
289. *Id.* ¶ 63, at 26.
290. *See id.* ¶¶ 94-103, at 32-35.
291. *See id.*
292. *See id.* ¶¶ 94-101, at 32-34.
293. *See id.* ¶ 103, at 35.

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E. Commission's Demands Accepted

Certainly realizing that the Commission's final decision in all likelihood would have found the proposed merger incompatible with the Common Market, Boeing modified its proposal to comply with the Commission's requirements.[294] The alteration of Boeing's merger agreement made business sense. Although sacrificing exclusive deal contracts had negative consequences, these consequences paled in comparison to the benefits received. Boeing must have realized that it would still occupy a more powerful position in the civil and defense aircraft market after the merger, but without facing the damaging repercussions of defying the Commission. The concessions also removed the dire consequences of a trade war and the political upheaval of such an event.

If Boeing had decided not to amend its proposal and its shareholders had approved the merger as such, undoubtedly the Commission would have found the transaction to be an impediment to the European Common Market. The Commission could have imposed fines based on the combined revenue of Boeing and MDC. To collect these fines, the Commission could have taken possession of Boeing's aircraft in the Community. Boeing could have also found deals with European airlines increasingly more difficult to conclude due to political pressure from the Community. Since most major European airlines are national airlines, tied closely to the Member States' governments, political arm-twisting from these national governments could have dissuaded the airlines from contracting with Boeing. This event could logically occur considering that most Member States' competition authorities objected to the original merger proposal. Paradoxically, this situation could have created a monopoly for Airbus in Europe. Fortunately for all interests involved, Boeing made concessions, thus eliminating such concerns.

294. *See id.* ¶¶ 114-19, at 36-38. See *infra* app. I for Boeing's proposals.

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F. Effects Doctrine in Boeing/McDonnell Douglas

Despite claims that the Commission over-stepped its authority by claiming extraterritorial jurisdiction over the merger, its authority was legitimate based on principles of Community and international law.[295] The Commission, however, did not base its authority on the single economic entity theory. Since neither Boeing nor MDC had a subsidiary in the Common Market, asserting authority based on this theory would have been inappropriate. The foundation for jurisdiction instead fell under the effects doctrine. Since the Boeing merger had an effective and significant connection with Europe, the transaction implicated the principle of territoriality under international law for extraterritorial jurisdiction.[296] Boeing's global reach and substantial customer base in Europe provided a measure for the connection. In addition, the shape of the post-merger large commercial jet aircraft industry would have a strong effect on the Common Market in the foreseeable future. Boeing had the potential to act independently of consumers and competitors, posing a serious threat to effective competition in the European Community. Boeing and MDC's location in the United States had no bearing on the application of the Merger Regulation.[297]

G. *Summary*

The ability of the Commission to exert its authority over mergers external to the Community in the wake of the Boeing/McDonnell Douglas merger enhanced its standing as the gatekeeper of competition policy within the Common Market. The notion that Boeing was willing to concede to the Commission's demands is of highest significance, signaling to the world that to do business in Europe, non-Community enterprise activities on a global scale provide authority for the Commission to intervene. Boeing could have ignored a Commission decision not granting approval, but it

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295. *See* Fiebig, *supra* note 68, at 328.
296. *See* Banks, *supra* note 19, at 311.
297. *See* Fiebig, *supra* note 68, at 328.

recognized the dreadful consequences and overall benefits of staying in line.

V. THE GENERAL ELECTRIC/HONEYWELL MERGER

A. Introduction

The proposed purchase of Honeywell International, Inc. (Honeywell) by General Electric Company (General Electric), whereby Honeywell would become a wholly-owned subsidiary of General Electric, provided much interest and consternation.[298] The transaction represented the largest industrial merger in the history of global corporate affairs.[299] In addition to the economic effect on market competitiveness and the corporation's shareholder wealth, the merger also had an impact on personal prestige and political relationships.

The Commission's denial of the merger represented only the fifteenth time the Commission forbade a merger proposal, American, European, or otherwise, during its twelve-year tenure as the ultimate arbiter under the Merger Regulation. Previously, the European Commission had nearly rejected two other all-American amalgamations and had prevented American enterprises from merging on one occasion. However, the *General Electric/Honeywell* case was unique. The Commission eventually approved the Exxon/Mobil merger and the Boeing/McDonnell Douglas merger after the entities involved complied with the Commission's wishes.[300] However, the GE/Honeywell merger was blocked despite the parties' attempts to placate the European antitrust authorities.[301] When the Commission blocked the proposed merger of MCI WorldCom and Sprint, its American antitrust counterpart came to the same

298. *See* Case COMP/M.2220, General Electric/Honeywell, July 3, 2001.

299. Daniel Dombey & Andrew Hill, *EU Seeks to Heal Rift After Veto of GE/Honeywell Deal*, FIN. TIMES, July 3, 2001; Stephen Fidler et al., *US Steps in Over EU Opposition to GE Deal*, FIN. TIMES, June 15, 2001.

300. *See supra* Parts II.B.2, D.1.

301. *See* Case COMP/M.2220, General Electric/Honeywell, July 3, 2001, ¶¶ 485-566; Dimitri Giotakos, et al., *General Electric/Honeywell – An Insight Into the Commission's Investigation and Decision,* COMPETITION POL'Y NEWSL., Oct. 2001, at 12.

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conclusion.[302] In contrast, the United States Department of Justice approved, after relatively minor adjustments, General Electric and Honeywell's merger proposal two months prior to the Commission's veto of the transaction.[303] For the first time, the Commission denied a merger request of two American corporations that the U.S. antitrust authorities had approved.[304]

B. Background

When Jack Welch, Chairman and CEO of General Electric, announced in late October 2000 that his company intended to acquire Honeywell, creating the single largest industrial merger in history, some analysts believed the $44 billion acquisition attempt was the last act by a corporate theatrical icon.[305] Jack Welch had been the epitome of the corporate chief persona--able to skillfully and gracefully manage a massive conglomerate.[306] His retirement nearing, this deal would have left an indelible mark on General Electric and on the corporate world. Having acquired nearly 150 smaller firms in the previous year, General Electric's intent to bring Honeywell on board certainly would have enhanced General Electric's presence in some of its markets and would have been quite a significant feather in the cap of a significant CEO.[307]

The greatest gain for General Electric would have been in the aerospace market.[308] With the addition of Honeywell, the new business entity would have provided customers products in jet engines, avionics, nonavionics, and related goods and services. Therefore, General Electric could have supplied its aerospace buyers with nearly all of their aerospace needs "under one roof."[309] General

302. Case COMP/M.1741, MCI WorldCom/Sprint, June 28, 2000.

303. *See* Press Release, Dep't Justice, Antitrust Div., *Justice Department Requires Divestitures in Merger between General Electric and Honeywell* (May 2, 2001), *available at* 2001 WL 470333 [hereinafter DOJ Press Release].

304. *See* Dobmey & Hill, *supra* note 299.

305. *See* Amy Barrett et al., *Jack's Risky Last Act*, BUS. WEEK, Nov. 6, 2000, at 40, *available at* 2000 WL 24486249.

306. *See id.*

307. *See id.*

308. *See id.*

309. *See id.*

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Electric then could have bundled a variety of complementary products for its customers and, most likely, increased its market share.[310]

General Electric's other business divisions stood to gain as well.[311] Honeywell's microturbine operations would have bolstered General Electric's presence in the power sector market. Also, Honeywell's expertise in equipment and software in petrochemical management would have created strong synergies when combined with General Electric's industrial system capabilities.[312] Significantly, the merger would have protected General Electric as well. Prior to General Electric's bid, United Technologies Corporation (UTC) had bid for Honeywell.[313] A UTC/Honeywell merger would have posed a significant threat to General Electric in the all-important aerospace market. Therefore, outbidding UTC proved to be a defensive measure.[314]

The potential upside of the merger was an expanded product base, combined with greater economies of scale, allowing General Electric to increase its market share.[315] According to General Electric estimates, the merged operation would have realized $1.5 billion in cost savings, increasing earnings per share by at least seven percent in the first year and thereby pleasing its shareholders.[316]

Few corporate marriages are perfect, however. In this case, it would take some time to realize all the merger benefits, as General Electric and Honeywell worked to integrate their differing corporate philosophies. However, the only things standing in Jack Welch's way were the antitrust authorities—namely the United States Department of Justice and the European Commission.[317]

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310. *See id.*; Andrew Hill, *A Target Too Juicy to Be Ignored*, FIN. TIMES, June 18, 2001, at 2 [hereinafter *A Target Too Juicy*].

311. *See* Barrett et al., *supra* note 305.

312. *See id.*

313. *See A Target Too Juicy*, *supra* note 310.

314. *Id.*

315. *See* Barrett et al., *supra* note 305.

316. *Id.*

317. The Merger Branch of the Competition Bureau, the Canadian antitrust authority, approved the merger. Fidler et al., *supra* note 299.

https://readingroom.law.gsu.edu/gsulr/vol19/iss2/1
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C. American Antitrust Authority Approval

The United States Department of Justice (DOJ) was the first of the two antitrust authorities to announce its decision.[318] On May 2, 2001, the DOJ gave preliminary approval of the merger between General Electric and Honeywell.[319] However, a stipulation accompanied the clearance. To gain DOJ approval, General Electric had to dispense with Honeywell's military helicopter engine business and disengage from a variety of aero-engine-related service contracts held by both General Electric and Honeywell.[320]

The concern of the DOJ was the effect of the merger on competition.[321] The merger created the possibility that the United States military would have encountered a cost increase for helicopter engines if the merged entity had retained Honeywell's military helicopter division.[322] Additionally, the DOJ suspected that production of engines would stagnate and that there would be little, if any, incentive to introduce newer models.[323] Therefore, a sale of this division would thwart the substantial weakening of competition in this market, according to the DOJ.[324]

Regarding contracts, the DOJ found that competition for the maintenance of certain Honeywell engines and related auxiliary power units would also diminish.[325] To offset this risk, the DOJ mandated the creation of a new independent third party to service select Honeywell engine models and auxiliary power units.[326] The DOJ sought to ensure increased quality of service and competitive pressure on prices in these markets.[327]

In all likelihood, the merging parties would have agreed to the DOJ's directive. In a statement after the DOJ's announcement, Jack

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318. Andrew Hill, *US Regulators Approve GE Purchase of Honeywell*, FIN. TIMES, May 2, 2001 [hereinafter *US Regulators Approve*].

319. *See* DOJ Press Release, *supra* note 303; *US Regulators Approve*, *supra* note 318.

320. *See* DOJ Press Release, *supra* note 303; *US Regulators Approve*, *supra* note 318.

321. *See* DOJ Press Release, *supra* note 303.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

Welch commented, "We are pleased with the DOJ's action. Now that the U.S. has completed its review of the transaction, we can focus on our continuing discussions with European officials."[328] Such discussions, and ensuing battles, did in fact lie ahead.

D. Commission Assessment

In early February 2001, General Electric notified the European Commission of its intent to acquire Honeywell and make it a wholly-owned subsidiary.[329] Unaware that the American antitrust authorities had approved the transaction, the Commission went to work determining the compatibility of the merger with the Common Market.

As with any merger reviewed by the European antitrust authorities, the Commission first had to establish jurisdiction over the proposed merger between the two American companies. General Electric's purchase of Honeywell stock with General Electric shares would eliminate Honeywell's stock, thereby creating a wholly-owned General Electric subsidiary and producing a concentration pursuant to Article 3(1)(b) of the Merger Regulation.[330] Further, the Commission determined that a Community dimension existed because the transaction satisfied the financial requirements under Article 1.[331] Thus, the European Commission established its jurisdiction to review the proposed American transaction. Few objected to the European authorities' assertion of jurisdiction over the merger transaction.[332] Even Jack Welch, among many others, believed that European ratification was a mere formality.

The Commission's subjective assessment raised serious concerns about the proposed merger and its impact on the Common Market. The Commission began a full investigation of the matter and

328. *US Regulators Approve*, *supra* note 318.

329. Case COMP/M.2220, General Electric/Honeywell, July 3, 2001.

330. *Id.* ¶ 6.

331. *Id.* ¶ 7.

332. However, Secretary of the U.S. Treasury Paul O'Neil did state, after the European Commission blocked the merger, that the European Union was "reaching into the affairs of other countries." *See* Dombey & Hill, *supra* note 299.

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accepted submissions from customers and competitors alike. The European authority sought to establish whether the General Electric and Honeywell integration would substantially lessen competition by creating or strengthening a dominant position in the Common Market.

Both General Electric and Honeywell were diversified corporations, active in a number of business sectors.[333] General Electric, for example, had operations in appliances, medical systems, broadcasting, and financial services.[334] Honeywell, as a technology and manufacturing entity, included in its corporate portfolio operations in automotive products, electronics, and home and office security.[335] Yet, the aerospace products and industrial systems markets proved to be the relevant product markets that doomed the proposed transaction.

The Commission, in its assessment of the aerospace market, determined that the markets for jet engines, avionics, nonavionics, and engine starters were the most susceptible to competitive restraints as a result of the proposed merger.[336] The proposed merger sought to couple the leading aircraft engine manufacturer (General Electric) with the leading avionic, nonavionic, and engine starter manufacturer (Honeywell).[337] According to the Commission, this combination would have created considerable and consequential effects both horizontally, through product overlap, and vertically, creating a conglomerate effect by bundling related products in the assessed market.[338]

1. Horizontal Effects

The proposed merger would have had damaging horizontal effects by creating or strengthening dominant positions in the identified markets. The Commission took a three-tiered approach in its

333. Case COMP/M.2220, General Electric/Honeywell, July 3, 2001, ¶¶ 3-4.
334. *Id.* ¶ 3.
335. *Id.* ¶ 4.
336. *Id.* ¶ 567.
337. *Id.* ¶¶ 5, 567.
338. *Id.* ¶ 567.

analysis of the jet engine market by dividing the sector according to engine characterization.[339] In the large commercial aircraft engine market, General Electric held a very strong, if not dominant, position against its competitors.[340] In this market segment, Honeywell had no presence. However, both General Electric and Honeywell were competitors in large regional and medium corporate jet markets.[341] Horizontal overlap of product offerings was very much a concern for the Commission.[342] In the large regional jet aircraft engine market, General Electric and Honeywell were the *only* competitors.[343] The proposed merger would have created a monopoly in this market. In the absence of competition, the Commission rightly assumed that prices would increase and technological innovation would dwindle, eventually stifling the benefits to large regional aircraft engine customers and suppliers. Honeywell was the leading engine manufacturer of medium corporate jet engines.[344] A merger with General Electric would have greatly strengthened a dominant position in this market, given that General Electric was one of only four other participants. The significant horizontal overlap in these markets led the Commission to believe that the merger would minimize competition among the remaining three players.[345]

339. *See* Case COMP/M.2220, General Electric/Honeywell, July 3, 2001, ¶ 10. The Commission used three distinct markets for jet aircraft based on the seating capacity, flying range, and economics: (1) large commercial aircraft of 100 or more seats, with a flying range greater than 2,000 nautical miles, and costs above $35 million; (2) regional jet aircraft of thirty to ninety seats, with a flying range less than 2,000 miles, and costs up to $30 million; and (3) corporate jet aircraft serving corporate activities, ranging in price from $3 million to $35 million. *Id.*

340. General Electric, Rolls Royce, and Pratt Whitney were the three prime contractors for large commercial aircraft engines. Market share percentages included market share for these as prime contractors and proportional representation of joint ventures as a total for installed and backlog markets for large commercial aircraft engines.

Installed engines of large aircraft in market share percentages:

GE: 52.5% Pratt & Whitney: 26.5% Rolls Royce: 21%

Engine backlog on aircraft in production:

GE: 65% Pratt & Whitney: 16% Rolls Royce: 19%

Id. ¶ 84.

341. *See id* ¶¶ 87-89.

342. *See id.* ¶¶ 495, 497.

343. *See id.* ¶ 84.

344. *See id.* ¶ 85.

345. The Commission assessed post-merger market shares for engines installed as follows:

Corporate jets:

GE/Honeywell: 50%-60% Pratt & Whitney: 30%-40%

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2. *Conglomerate Effect and Vertical Integration*

General Electric had established itself in the aerospace sector through vertical integration using General Electric Capital Aviation Services (GECAS), by its financial strength via GE Capital, and due to the breadth of its existing products and operations.[346] According to the Commission, General Electric had placed itself in a "position to behave independently of its competitors, customers and ultimately consumers and can thus be characterized as a dominant undertaking on the markets for commercial jet aircraft engines and for large regional jet aircraft engines."[347] Until that time, General Electric controlled competitively sensitive aircraft engine markets. Meanwhile, avionics and nonavionics were specialty industries of Honeywell, the global front-runner in a market dominated by few firms.[348] Compared to its competitors, Honeywell could offer a full range of avionic and nonavionic equipment to its customers. Such a range of products permitted Honeywell to integrate its offerings to the advantage of its customers in a manner that competitors could not match.

United with General Electric's financial strength, vertical vitality, and market share, the Commission envisaged the merged entities' dominance in avionics and nonavionics markets. Combining General Electric's dominance in engine markets with Honeywell's strength in aircraft components and other aircraft engines would have positioned the merged entity to be a one-stop aerospace shop. In other words,

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Rolls Royce: 10%-20%

Medium corporate jets:

GE/Honeywell: 80%-90% Pratt & Whitney: 10%-20%

Rolls Royce: 0%-10%

Id.

346. General Electric Capital Aviation Services (GECAS) is the purchasing, leasing, and finance arm of General Electric. According to the Commission's investigation, GECAS purchased more aircraft than any other airline and thus had the single largest fleet of aircraft. Additionally, GECAS was one of the largest aircraft leasing companies buying on a speculative basis. Further, GECAS offered financial solutions to enable airlines to purchase aircraft. *See* Case COMP/M.2220, General Electric/Honeywell, July 3, 2001.

347. *Id.*

348. In the avionic and nonavionic markets, Honeywell held a market share position in most products between forty and eighty percent. *Id.*

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the merger would have created or strengthened the corporate union's dominance in multiple and significant markets. The resulting conglomerate would have been in a position to act independently of competitors, potentially to the detriment of customers, suppliers, and ultimately, consumers.

The ability of the merged entity to benefit by vertical integration, via General Electric's financial strength and GECAS, would have put the combined entity beyond the reach of its competitors. GE Capital would have had the ability to land exclusive supply deals, enable Honeywell to cross-subsidize its products, and perform predatory pricing activities. Additionally, GECAS's natural preference for Honeywell's avionic and nonavionic products could have potentially benefited the purchasing, financing, and leasing of such aircraft products. Honeywell's corporate jet engines operations also would have benefitted from this vertical integration. As the Commission surmised, under GECAS, the financial capital for purchasing and leasing would have led to foreclosing the corporate jet engine market to competition.[349]

The Commission was seriously concerned about these factors that created dominant positions for the companies individually. The European antitrust authority visualized the foreclosure of markets through the bundling of General Electric and Honeywell products. The proposed entity could have offered packaged arrangements such as General Electric engines and related services combined with avionic and nonavionic Honeywell equipment.[350]

349. From a vertical integration perspective, General Electric and Honeywell would have affiliated engine starters with General Electric engines. Honeywell represented the major supplier of engine starters. General Electric and Honeywell, by virtue of their paramount positions in their respective markets, would have realized significant downstream and upstream benefits. In the Commission's assessment, the proposed post-merger entity could have raised prices or reduced the manufacturing of engine starters, thus increasing expenses for competitors and strengthening General Electric's hold of the aircraft engine market. *Id.*

350. The Commission divided the bundle packages into three categories: (1) "mixed bundling," or selling inter-related products together at a price lower than the price for which products would be sold individually; (2) "pure bundling," or offering products together for sale, but not offering the components individually; and (3) "technical bundling," or selling individual products that will not perform efficiently without their bundled related products. *Id.*

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> As a result of the proposed merger, the merged entity would have had the financial and technical ability as well as the economic incentive to price its packaged deals in such a way as to induce customers to buy GE engines and Honeywell [selected avionic and nonavionic] products over those of competitors, thus increasing it combined share on both markets. This would have occurred as a result of, *inter alia*, the ability of the merged entity to cross-subsidize discounts across the products composing the packaged deal.[351]

Eventually, such bundling would have foreclosed markets to Honeywell's competitors in avionics and nonavionics. At the same time, given General Electric's market dominance in the large commercial aircraft and larger regional aircraft engine segments, bundling would have foreclosed competition with General Electric in these markets. The cooperative qualities of the various product lines would have induced customers to purchase complementary products, promulgating the one-stop shop system.

Based on the combined company's potential dominance in several markets, the European Commission asserted its extraterritorial jurisdiction to prohibit the merger between General Electric and Honeywell. The Commission maintained this position despite attempts by the parties to overcome the Commission's substantial objections to the merger.[352]

E. The Aftermath

The European antitrust authorities blocked the merger of two American corporations while the regulatory body of the United States had authorized the integration of these two companies. Such a result led to frustration on both sides of the Atlantic Ocean, as U.S. political heavyweights saw an opportunity to admonish the Commission and its findings, and the Commission sought to defend its conclusion.

351. Giotakos, *supra* note 301, at 10.

352. *See infra* app. II.

1. The American Response

American politicians and regulators questioned the European Commission's approach to the merger, particularly because the DOJ had approved the merger with relative ease, requiring only minor concessions. They questioned why the Commission maintained its stance despite extensive amendments to the merger plan offered to address European concerns. President George W. Bush expressed his dismay, stating that the blockage could injure European-American relations.[353]

A few U.S. Senators extolled their aggravation over the European authority's decision on the merger with more pointed remarks. In a letter to the European Commission's Vice President, Senator John Rockefeller said that American administrative leaders would "explore what might be the most effective U.S. response if the fairness and openness we have historically extended to the European aerospace firms is not being reciprocated."[354] Senate Commerce Committee Chairman Ernest Hollings questioned the Commission's motives, claiming that the European Commission sought to protect European competitors through its enforcement of the Merger Regulation. "This apparent EC disapproval gives credence to those who suspect that the EC is using its merger review process as a tool to protect and promote European industry at the expense of its US competitors."[355] Such sentiments are understandable given the significance of the proposed merger and the polarity of the two regulatory bodies' decisions.

2. Differences in Approach

General Electric CEO Jack Welch commented on the vast differences between the review process and the expectations of the two antitrust authorities: "You are never too old to get surprised. The

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353. *See* Fidler et al., *supra* note 299.

354. *Senator Warns of GE Retaliation*, FIN. TIMES, June 21, 2001.

355. Andrew Hill & Peter Spiegel, *Senator Attacks EU over GE Deal*, FIN. TIMES, June 22, 2001, at 1. Additionally, U.S. Senator Phil Gramm stated that he was troubled by the European Commission's stance on the merger. Andrew Hill, *GE Fears Brussels Veto May Hinder Expansion*, FIN. TIMES, June 22, 2001.

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European regulators' demands (for divestitures) exceeded anything I or our European advisers imagined and differed sharply from antitrust counterparts in the US and Canada."[356] Don Evans, Secretary of U.S. Commerce, found the approach of the European Union regulators "very, very troubling" when he compared the minor concessions demanded by the DOJ versus the massive divestiture commitments ordered by the Commission.[357] The European intransigence amazed Evans, who claimed that the Commission did not appear to understand "how constructive a merger like this could be [and that this merger was] a very positive kind of a step for free trade."[358]

The two competition bodies differed in their respective results quite dramatically. Many American critics found the issue to be based on politics; they viewed it as protectionism for European rivals of the merging firms. From a European perspective, the conflicting results derived from a difference of methodology. Competition Commissioner Mario Monti pointed out that the Commission applied the same framework for reviewing this case as it had for all other merger proposals since its inception. Commissioner Monti stated that the European Commission looked at

> whether or not the market would remain sufficiently competitive so that consumers would continue to have products to choose from at competitive prices. The nationality of the companies and political considerations have played and will play no role in the examination of mergers, in this case as in all others.[359]

Commissioner Monti concluded that European review was therefore a matter of economics and law, not politics.

Commissioner Monti, as head of the antitrust authority, believed that politics did not play a role in the review of the merger; however,

356. Deborah Hargreaves, *Oceans Apart on Competition Policy*, FIN. TIMES, June 15, 2001.

357. *GE-Honeywell Merger: US Commerce Secretary Finds EU View "Troubling,"* CHI. TRIB., June 22, 2001, § 3, at 2.

358. Fidler et al., *supra* note 299.

359. Press Release, Eur. Competition Comm'n, Commissioner Monti Dismisses Criticism of GE/Honeywell Merger Review and Rejects Politicisation of the Case (June 18, 2001).

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leading politicians in the Community did see the decision at least in part as political and expressed the view that the Commission should take this role in regard to extraterritorial concentrations.[360] For example, Danish foreign minister Mogens Lykketoft stated that

> the European Commission's veto against the merger of General Electric and Honeywell was a striking example of the EU opposing the creation of yet another globally dominating multinational giant. The most important political task during the first half of the Twenty-first Century is to strike this balance between social regulation and free market forces.[361]

Also, Germany's Minister for Economic Affairs and Technology, Dr. Werner Muller, stated in a speech to the European Aerospace Research Conference that

> the Amalgamation of equipment suppliers General Electric and Honeywell is a new challenge. However hard it may seem, closer cooperation will be unavoidable if the market share of the European equipment manufacturers is to be maintained. Each case of foot dragging by ourselves [sic] gives a competitive advantage to non-European companies.[362]

a. Competitor Versus Consumer

According to Jack Welch, the procedures used by the Commission were "outside US antitrust canons for 75 years."[363] "Off the wall" was the description that Secretary of the U.S. Treasury Paul O'Neil used to describe the Commission's approach.[364] Given these strong

360. *See generally* Minister for Foreign Aff. Mogens Lykketoft, Speech in Copenhagen (Aug. 23, 2001), *at* http://europa.en.int/futurum/documents/speech/sp230801_en.pdf.

361. *Id.*

362. Werner Muller, Welcoming Address by the Federal Minister for Economic Affairs and Technology, Outlook for German and European Aviation, (Jan. 29, 2001), at http://europa.eu.int/comm/research/growth/aeronautics-days/speech-muller.html.

363. Deborah Hargreaves & Peter Spiegel, Comment & Analysis, *Mr. Tough Guy: Mario Monti Has Wrung More Concessions From GE Over Its Bid for Honeywell but Many Are Unpersuaded by His Reasons for Doing So*, FIN. TIMES, June 29, 2001, at 18.

364. *Id.*

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reactions, the differences in the respective merger conclusions appear to derive from the relative weight each regulatory body gave to consumers versus competitors.

The DOJ looked at the benefits to consumers, observing that a larger General Electric could provide a broader range of products and services to the customer and saw "bundling" as a benefit that would result from the merger. The U.S. regulators also perceived the strong possibility of price reductions as positive for competition. According to Kevin Arquit, a competition expert, "if a company becomes very efficient after a merger, the Europeans are not going to allow it. In the US, that would be a reason to approve it."[365] In eschewing his rival's opinion, Timothy Muris, Chairman of the Federal Trade Commission, noted that "competitor complaints are inversely correlated with benefits to consumers. Buyers tend to be a much more reliable source and the US antitrust authorities [rely] heavily on buyers [in] evaluating the impact of proposed mergers."[366]

Conversely, the European Commission put more weight on the potential repercussions on competition as a result of the merger. It looked at how the effects of "bundling" could have a negative impact on competition by eventually foreclosing particular markets to rivals. Therefore, the Commission may have been looking at a longer-range prognosis of the merger's implications. It may have minimized the short-term gains to consumers and looked more at the long-term problems if the merger had marginalized or driven out competitors, permitting the merged entity to act independently of all other market participants.

b. Lack of Cooperation

Given the significance of the proposed merger, one would have anticipated greater cooperation among the parties. Glitches in the process may have led to the contrasting decisions. Mario Monti, European Competition Director, claimed that the Commission and the DOJ could not have evaluated the merger at the same time

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365. *Id.*
366. *Id.*

because General Electric and Honeywell had delayed bringing the proposed merger plan to the attention of the Commission.[367] This would not have necessarily changed the respective conclusions, but simultaneous reviews may have led to a better understanding of the respective methodologies of each regulatory body. Thus, a more synergistic approach could have neutralized the political acrimony.

The fact that the Bush administration was in the early stages of its term may explain another impediment to cooperation among the antitrust authorities. At the time of review, President Bush had yet to appoint leaders of his antitrust team. Additionally, the interim head of the DOJ had to step aside from administering the case because of possible conflicts of interest.[368] Furthermore, each U.S. executive applied his influence on U.S. antitrust enforcement policy.[369] The Bush team took a more laissez-faire approach toward competition matters than the Clinton administration had. Such a change in policy presented a new working relationship for the European antitrust authorities as well as a new scope of enforcement by its American counterpart.

c. Lack of European Unity

The Europeans did not necessarily demonstrate a unified front in this case. Once it decided to reject the proposed merger, the Commission officially acted in support of this singular opinion. Under certain circumstances, Article 9 of the Merger Regulation allows the Commission to refer a concentration to the antitrust authorities of the Member States.[370] The Member State competition authorities questioned to varying degrees the approach taken by the Commission in blocking the General Electric/Honeywell merger. Although Member States vote with one voice at the advisory committee level, in a vote for the record, three Member States

367. Guy de Jonquieres, World News, *Blocked Deal Leaves Monti with One Regret*, FIN. TIMES, July 23, 2001.

368. *Id.*

369. HENRY R. CHEESEMAN, THE LEGAL AND REGULATORY ENVIRONMENT 624 (3d ed. 2002).

370. Merger Regulation, *supra* note 1.

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lamented the Commission's not approving the merger.[371] The United Kingdom's Office of Fair Trading, in particular, questioned whether the Commission's concerns were sufficient to justify blocking the merger.[372]

F. Ongoing Saga

The proposed merger has not come to an end for either of the companies or the European authorities. As of this writing, the case is before the European judicial system. On September 12, 2001, General Electric and Honeywell each brought separate suits to the Court of First Instance against the European Commission.[373]

In their suits, Honeywell and General Electric seek annulment of the Commission's decision to prohibit the merger. In support of their cases, they raise a number of arguments to refute the Commission's finding that the proposed concentration is incompatible with the Common Market by creating or strengthening dominant positions in several markets.

The parties claim that the Commission made serious errors in its factual analysis and thus reached a faulty conclusion. In particular, the corporations argue that the Commission did not base its bundling theory on rational economic analysis and did not offer any quantifiable evidence of bundling. The applicants claim that they would not necessarily have an incentive to bundle their products, or that customers would even want such bundles. Additionally, the claimants contend that there is no evidence that predatory pricing or cross-subsidization would occur. Therefore, General Electric and Honeywell contend that there is no factual basis for the Commission's allegations that the merger would either marginalize or foreclose competitors from the market.

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371. Deborah Hargreaves & Andrew Hill, *Monti Defends EU Over GE/Honeywell Aerospace Competition Commissioner Describes US Senator's Concerns as "Wholly Unfounded,"* FIN. TIMES, June 27, 2001. Ireland abstained from the vote. *Id.*

372. Daniel Dombey & Andrew Hill, *Cracks Appear in EU's Unanimity Against GE Deal*, FIN. TIMES, June 25, 2001.

373. Case T-209/01, Honeywell Int'l, Inc. v. Commission, 2001 O.J. (C 331) 23; Case T-210/01, Gen. Elec. Co. v. Commission, 2001 O.J. (C 331) 24.

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Furthermore, the parties argue that the Commission lacked evidence to conclude that, by merging, the parties would be able to dominate various markets both horizontally, through overlap, and vertically, through GECAS. The parties also submit that the Commission dismissed their attempts to alleviate its concerns without proper analysis. Apparently, the parties feel that if the Commission had appropriately addressed their concessions, it would have approved the merger.

General Electric and Honeywell have offered additional claims in their suit; however, they have made no objection to the jurisdiction of the European Commission to review the proposed merger. In fact, the American companies filed these lawsuits before a European bench, in an attempt to override the Commission's decision and clear the way for their merger. Significantly, the grievances of the companies pertain to substantive matters rather than procedural issues, which supports the Commission's assertion of authority over this extraterritorial merger.

G. Summary

General Electric and Honeywell did not question the jurisdiction of the European Commission over their proposed merger. Although in complete disagreement with the Commission's decision, the parties submitted notification, voiced disapproval, presented potential remedies and even brought suit against the Commission. At no time did the American companies simply follow the Department of Justice's conclusion and go ahead and merge. General Electric and Honeywell have not merged, in large part, if not solely, because they have not received approval from the European authorities. In this case, corporations have recognized the extraterritorial jurisdiction of the Commission and its procedural requirements.

As with the Boeing/McDonnell Douglas merger, the principle of territoriality under international law created jurisdiction for the European Commission. Undoubtedly, General Electric and Honeywell's significant global presence, and their presence within the European Common Market in particular, established jurisdiction

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using the effects doctrine. In the Commission's view, the post-merger impact on the jet aircraft engine, avionic, and nonavionic markets would have had considerable effects on the competitors and consumers within the Common Market. It appears that the European Commission's authority over non-Community mergers has firmly been established.

CONCLUSION

The Merger Regulation establishes extraterritorial jurisdiction over mergers external to the European Community on the basis of Community law and the doctrine of territoriality under international law. Once the Commission determines that a non-Community merger meets the objective criteria as a concentration and satisfies the financial thresholds establishing a Community dimension, the Commission can sanction or prohibit the transaction. Because international entities realize the magnitude of the Commission's power and the benefits of operating in the Common Market, they make the appropriate adjustments to their proposed transactions to meet the compatibility standard of the Commission.

This article demonstrates that the Commission aims to maintain effective competition in the Common Market. Where concentrations occurring outside the European frontier offset the balance of competition within the Community, the Commission must take the appropriate measures to rectify the imbalance. The interests of the European consumer, customer, and competitor are of prime importance to the Commission. The Boeing/McDonnell Douglas and General Electric/Honeywell mergers solidified the Commission's authority to review mergers external to the Community that may have an impact on the European competitive balance. As a result, the Commission will rely on the Merger Regulation to prohibit mergers that create or strengthen a dominant position within the Common Market, irrespective of the extraterritorial location of the transacting parties.

APPENDIX I

Prior to receiving permission for its merger with McDonnell Douglas, Boeing submitted a proposal to the Commission amending aspects of the transaction that made it compatible with the Common Market.[374] This appendix summarizes the key elements of the amended proposal that led to the Commission's approval of the merger.

Limitation of MDC Commercial Aircraft Division

For a ten-year period of time, Boeing will maintain the MDC commercial aircraft division as a separate legal entity. Boeing will provide the Commission a report, certified by an independent auditor, stating that such separation remains intact and Boeing will make the report available to the public. During this period, Boeing will provide customer support for the MDC commercial aircraft division of the same quality that it currently provides to its own aircraft customers. Also, Boeing will not withhold or threaten to withhold support for MDC products as a penalty if a customer chooses to purchase aircraft from a competitor. Boeing will not exploit its access to MDC's existing fleet to influence airlines that utilise MDC aircraft to purchase Boeing aircraft in the future.

Exclusive Deal Contracts

Unless a competitor offers an exclusive agreement, Boeing will not enter into any additional exclusive-deal arrangements until August 1, 2007. Additionally, Boeing will not enforce the existing exclusive agreements with American Airlines, Delta Airlines, or Continental Airlines.

Publicly Funded Patents

Upon request by a commercial aircraft manufacturer, Boeing will license, on a non-exclusive basis, for a royalty, "government funded patents," which the manufacturer could use in the sale of commercial aircraft. This license arrangement also applies to any know-how related property rights.

374. Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 36.

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Transparency of Research and Development Projects

Boeing will provide the Commission a yearly report for ten years with information on non-classified U.S. Government aeronautics projects.

Relations with Suppliers

Boeing will not exert undue influence on its suppliers. It may not promise an increase in supplies, threaten to decrease supplies, or manipulate in any way its own supply relationships.

APPENDIX II

After the initial merger rejection by the European antitrust authority, the parties had the opportunity to amend the transaction and placate the Commission's concerns by removing the obstacles that had prevented approval.[375] Of considerable import for the Commission was the likelihood that, post-merger, General Electric would bundle its engines with Honeywell avionic and nonavionic products and dominate the large regional jet engine market. At a minimum, the Commission sought a restructuring of GECAS or the divestiture of Honeywell's entire aerospace component division.

At the amendment submission deadline, General Electric proffered a solution it believed would receive approval. Among the numerous remedies presented, General Electric's most significant concession was the disposal of interest in a portion of Honeywell's avionic and nonavionic components and the divestiture of some Honeywell contracts for the aircraft engine business. General Electric also offered to make behavioral modifications to GECAS to reduce the bundling problem.

After reviewing the revisions, the Commission held its ground because it did not believe the changes went far enough. According to the European authorities, the divestitures inadequately addressed the vertical and conglomerate effects. In addition, after conducting market research, the Commission concluded that the Honeywell components presented for disengagement could not act as

375. *See* Case COMP/M.2220, General Electric/Honeywell, July 3, 2001, 112.

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independent entities--dependence on its parent was too strong. In regard to GECAS, the behavioral modifications were insufficient. The Commission determined that the intended effects of the modifications would be too arduous to achieve.

The European Commission gave General Electric and Honeywell a second opportunity for revision. The companies had a tight deadline to meet, but this time the Commission would review the amendments without the benefit of market analysis. In other words, the remedies at this late stage had to be clear and evident in the absence of a thorough study of the impact on competitors, customers, and the market. Too little time was available for such an in-depth study of the revised plan. For example, structural changes to GECAS had to address clearly its buying power and the bundling issues.

General Electric and Honeywell made their final proposal. The Commission rejected it and declared the merger incompatible with the Common Market. Again, the Commission found the proposal lacking in its ability to stem General Electric's dominance in various markets. In the revised plan, General Electric sought to restructure GECAS by selling nearly twenty percent of the financing and leasing arm and simultaneously removing some of the Honeywell components offered for divestment in the earlier proposal. However, in the Commission's estimation, the merger still would create and strengthen a dominant market position.

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