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Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers

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Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers

Pinar Karacan*

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I. INTRODUCTION

Due to the extraterritorial application of the antitrust laws of the United States and the European Union ("EU"), some mergers might be reviewed by both jurisdictions. The European Merger Regulation is applied extraterritorially when the merger is above a certain threshold.¹ Similar to Europe, the United States applies its competition laws to foreign companies based on the "effects test" as established in *U.S. v. Aluminum Co. of America*.² Not only is it possible, but it is becoming more common that the same merger is reviewed under both systems. The dual system of review is demonstrated in *Boeing/McDonnell Douglas*,³ *General Electric ("GE")/Honeywell*,⁴ *Sandoz/Ciba-Geigy*,⁵ *Guinness/Grand Met*,⁶ *Exxon/Mobil*⁷ and many more.⁸

The two jurisdictions usually reach similar conclusions because there is increasing substantive convergence in the application of merger rules. But it is not unheard of for the two jurisdictions to reach different conclusions, as in the latest merger case *GE/Honeywell*.⁹ The question is whether the different outcomes are due to different effects of the merger on different markets, or whether they are due to differences in the approach and analysis. While overall the merger analysis is similar and there has been convergence in the area, there has also been a significant level of divergence between the two jurisdictions.

The purpose of this paper is to point out some of the areas of divergence. For example, the EU focuses on the merger's effect on competitors, while the United States focuses on consumers or prices; the EU focuses more on single firm dominance and monopolies, but the United States focuses on collective dominance, collusion, and differences in conglomerate effects; and lastly there are differences in efficiency considerations. This analysis will compare two important merger cases, *Boeing/McDonnell Douglas* and *GE/Honeywell*, which were reviewed in both jurisdictions and resulted in different outcomes. This article and the comparative case analysis will show that the EU uses a broader

1. See *Wood Pulp* case 1988 ECR 5193, 4 CMLR 901 ¶ 3 (1988) (holding that where two-thirds of the product in question is affected by concentration, the effect is deemed substantial enough to establish jurisdiction).

2. 148 F. 2d 416 (2d Cir. 1945)

3. M 877 (1997), *Boeing/McDonnell Douglas*.

4. M 2220 (2001), *GE (General Electric) /Honeywell*.

5. M 737 (1996), *Ciba-Geigy/Sandoz*.

6. M 938 (1997), *Guinness/Grand Metropolitan*.

7. M 1383 (1999), *Exxon/Mobil*.

8. See Janet L. McDavid, *Globalization of Premerger Notification and Review: Practical Problems and Solutions* in INTERNATIONAL ANTITRUST LAW & POLICY 35 (Corporate Law Institute 1999) (explaining that multiple investigations of transactions involving U.S. and foreign firms, or just foreign firms are common, see e.g.: *BP/Amoco/Arco*, *BT/AT&T*, *BP/Amoco*, *Daimler/Chrysler*, *American Airlines/British Airways*, *BT/MCI*, *Sprint/France Telecom/Deutsche Telekom*, *Shell/Montedison*, *Metal Leve/Mahle*, *Grand Met/Guinness*, *Federal Mogul/T&N*, *Exxon/Mobil*, *WorldCom/MCI*, *Sandoz/Ciba Geigy* and many others).

9. See *GE/Honeywell*, *supra* note 4.

analysis than the United States. In addition, the EU is more concerned with competitors and the conglomerate effects of the merger.

II. BOEING/MCDONNELL DOUGLAS

The first case, Boeing/McDonnell Douglas, involved a merger between Boeing and McDonnell Douglas, two U.S. corporations. The merger was reviewed in both jurisdictions. The United States approved the merger without any conditions, while the EU approved the deal only after the parties accepted some important concessions.

Boeing is a U.S. corporation whose shares are publicly traded. Boeing operates in the commercial aircraft, defense and space market. "Commercial aircraft operations involve the development, production and marketing of commercial jet aircraft, and providing related support services to the commercial airline industry worldwide. Defense and space operations include research, development, production, modification and support of military aircraft and helicopter and related systems, space and missile systems, rocket engines, and information services."¹⁰ Boeing acquired Rockwell International's defense and space unit prior to its merger with McDonnell Douglas.

McDonnell Douglas is also a U.S. corporation whose shares are publicly traded. According to the EU Commission, McDonnell Douglas was the world's leading manufacturer of military aircraft. McDonnell Douglas operated in the military aircraft, missiles, space and electronic systems, commercial aircraft, and financial systems markets. Its operations in military aircraft and missiles involved the design, development, production and support of the following products: military transport aircraft; combat aircraft and training systems; commercial and military helicopters and ordinance; missiles; satellites; launching vehicles and space station components and systems; lasers and sensors; and command, control, communications, and intelligence systems. In the commercial jet aircraft area,¹¹ McDonnell Douglas designed, developed, produced, modified and sold commercial jet aircraft and related spare parts. McDonnell Douglas also engaged in aircraft financing, commercial equipment leasing and the commercial real estate market for itself and other commercial customers.¹² In sum, both of the corporations were involved in commercial and military aircrafts. However, McDonnell Douglas was no longer a meaningful competitor in the commercial aircraft market.

McDonnell Douglas' decline in the commercial aircraft industry was a main point of divergence between the United States and EU's analysis of the proposed merger. The United States focused on McDonnell Douglas' inability to compete

10. Case IV/M 877, Boeing/McDonnell Douglas, Commission Decision 97/816, 1997 OJ (L 336) 16, [hereinafter Boeing/McDonnell Douglas (EU)] ¶ 3.

11. Douglas Aircraft Company ("DAC") is the commercial aircraft business of McDonnell Douglas.

12. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 4.

in commercial large aircraft and its affect on prices. The EU Commission also accepted that McDonnell Douglas was no longer a real force in the commercial aircraft market.¹³ However, the EU differed from the Federal Trade Commission's ("FTC") approach because it analyzed the possible effects of McDonnell Douglas' commercial aircraft business after integrating with Boeing's commercial aircraft business.¹⁴ The EU Commission analyzed the effects of the increase in overall resources, customer base,¹⁵ market shares,¹⁶ capacity in commercial aircraft and skilled work force, and the ability to induce airlines to enter into more exclusive dealing agreements. Also, Boeing's acquisition of McDonnell Douglas' spare parts and maintenance business would give Boeing additional leverage over the existing McDonnell Douglas aircraft users, who operate twenty-four percent of the total aircraft fleet worldwide.¹⁷

Although both of the companies dealt in commercial and military aircraft, both the EU and the United States considered the world market to be the market for large commercial aircraft. However the FTC did not clearly identify the proper geographic market in its decision. At the request of the U.S. government, the EU Commission declined to investigate potential anticompetitive effects in the military-defense side. However, it did analyze the spillover effects. The EU Commission limited the scope of its review to the civil side of the operation, but its analysis focused on the link between McDonnell's civil and defense divisions, the effect of military capacity on Boeing's civil aircraft division, and the overall effects resulting from the defense and space business of Douglas.

In the large commercial aircraft market there were three competitors on the worldwide market: Boeing, Airbus and McDonnell Douglas. After the merger, only two would remain. Although this was an important fact in the EU analysis, the United States analysis did not look at the competitors. Instead, its analysis focused on the ineffectiveness of McDonnell Douglas as a competitor.

In the large commercial aircraft market, there is one important factor to consider: Boeing had recently entered into exclusive arrangements for the supply of large commercial aircraft to American Airlines, Delta and Continental Airlines. For example, American and Boeing agreed to a long-term partnership that would make Boeing the exclusive supplier of jet aircraft to American until the year 2018; Delta for 20 years; and Continental also agreed in principle to thirty five firm orders and further purchase options from Boeing with an exclusivity requirement for twenty years.¹⁸ According to the EU Commission's decision, it is estimated that 14,400 new aircraft will be delivered worldwide

13. *Id.* ¶ 57-59.

14. *Id.* ¶ 60 (finding it is not doing well, but can be a significant factor in the market when integrated with Boeing. Further, Boeing might change its reputation or phase out DAC and have its customer base).

15. From 60% to 84% of the current fleet in service. *Id.* at ¶ 62.

16. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 54 (ranging from 64% to 70%).

17. *Id.* ¶ 64.

18. *Id.* ¶ 43.

between 1997 and 2016, of which 2400 are on firm order with Boeing, McDonnell Douglas or Airbus. Of the remaining 12,000 aircraft, Boeing's exclusive deals, including options and purchase rights, account for thirteen percent of this open market. This number constitutes over thirty percent of the U.S. market. The exclusive dealing agreements might have anticompetitive, unilateral effects, which made them problematic in the EU. In the United States, while the FTC did find the exclusive dealings troubling, it was because of issues unrelated to the merger. Thus, the FTC decided merely to monitor these agreements. However, in the EU, one of the concessions that the parties agreed to was abandoning these exclusive dealing agreements. The reasons underlying each jurisdiction's decision will be examined in turn.

A. The United States

In the United States, Boeing and McDonnell Douglas announced their proposed merger on December 15, 1996. In the media, the merger was seen as creating a better balance between defense and commercial aircrafts, which are complementary product lines. It was also viewed as a means of increasing Boeing's ability to use McDonnell Douglas' capacity to help meet its current order backlog and new demand for commercial aircraft.¹⁹ According to Harry Stonecipher, president of McDonnell Douglas, the transaction combines a focused, broad-based aerospace company with extraordinary capabilities in commercial and military aircraft, defense and space systems.²⁰ And, according to Phil Condit, president of the Boeing Company, the merger would be great for the airline industry, for the nation's defense program and for the space program worldwide.²¹ According to Boeing's lawyers, the rationale from the beginning was that this was a defense merger and not a transaction for commercial purposes. Thus, Boeing was not interested in the merger for McDonnell Douglas' commercial aircraft, but rather it made sense from a defense standpoint.²² Since McDonnell Douglas contained both defense and commercial aircraft programs, the merger included both. As discussed below, these reasons provided the basis for the EU Commission's concerns.

19. Eric J Stock, *Explaining the differing U.S. and EU positions on the Boeing/McDonnellDouglas Merger: Avoiding Another Near-Miss*, 20 U PA J. INT'L ECON L. 825, 839 (1999).

20. Press Release, *Boeing and McDonnell Douglas to Merge with Boeing, combination to be the World's Largest Aerospace Company* (Dec. 15, 1996), available at <http://www.boeing.com/news/releases/1996/news.release.961215.html> (01/01/2002) (copy on file with *the Transnational Lawyer*) (last visited Apr. 6, 2004).

21. *Id.*

22. Interview with Thomas L Boeder & Benjamin S Sharp Attorneys for Boeing, 12 Antitrust 5, 8 (Fall 1997) [hereinafter Boeder & Sharp Interview].

According to its report, the FTC accepted that on its face, the merger created concerns based on high market shares and extremely high barriers to entry.²³ The market share for Boeing was roughly sixty percent in large commercial aircraft. McDonnell Douglas' share was less than five percent, although the FTC did not provide a market share in the public statements. The HHI increase would be a total of 480 from 4912 to 5392.

The United States looked at commercial large aircrafts and the FTC decided not to challenge the deal.²⁴ Although on its face there were concerns, the United States found that the merger would not reduce competition or tend to create a monopoly either in the defense or commercial aircraft markets. The merger was not challenged because McDonnell Douglas was no longer a meaningful competitor in the commercial aircraft market. McDonnell Douglas' product line was limited and the products did not have common features with the other products and were not interchangeable. The United States focus was on McDonnell Douglas' inability to compete in commercial large aircraft and its effect on prices. According to the FTC Report, the decision not to challenge the proposed merger was not based on a failing company defense.²⁵

The United States applied the *General Dynamics* criteria in the Boeing case.²⁶ Under the *General Dynamics* doctrine, McDonnell Douglas should be seen as having overstated the importance of its market share to competition, since, McDonnell Douglas no longer constituted a meaningful competitive force in the commercial aircraft market.²⁷

23. Chairman Robert Pitofsky and Commissioner Janet D. Steiger, Roscoe B. Srarck III and Christine A. Varney (July 1, 1997) 5 Trade Regulation Reporter (CCH) 24,295.

24. *See id.* (approving the Boeing/McDonnell Douglas merger) [hereinafter Boeing/McDonnell Douglas (US)].

25. *See id.* (saying that "... failing company defense comes into play only when Commission first finds that the transaction is likely to be anticompetitive, but McDonnell Douglas is no longer an effective competitor").

26. Thomas E. Kauper, *Merger Control in the U.S. and the EU: Some Observations*, 74 ST JOHN'S L. REV. 305, 325 (2000); Eric J Stock, *supra* note 19, at 855; *General Dynamics* 415 U.S. 486 (discussing the merger between General Dynamics and United Electric Coal Company). The high market shares were enough to establish a prima-facie case of illegality under the Philadelphia Bank rule in the absence of other considerations. The District Court considered other factors and found the merger not likely to lessen competition thus rebutting the presumption of illegality. The Supreme Court affirmed the decision focusing on the likely effect of the merger. *Id.* There were fundamental changes in the market structure for coal. First according to the District Court, coal producers were declining, but not because of small producers being acquired, but as the inevitable result of change in the nature of demand for coal. Coal was also becoming less able to compete with other sources of energy. Also coal was sold under long-term contracts thus committing reserves. Hence, such coal was not available for spot purchase on the open market. Although other factors were considered the concluding factor was that United Electric had no available coal to sell because everything was committed in long-term contracts. United Electric was a less significant factor in the coal market, its potential to compete with other coal producers in the future was weak, and thus the merger would not lessen competition and would have any adverse effects. In this case the Court looked beyond the share and concentration numbers in assessing a merger's likely competitive effects, market shares might be misleading of the effects of the merger. *Id.*

27. Stock, *supra* note 19, at 856.

Thus, the United States analysis is narrower than to the EU approach. The United States focused on the likely price effects in the future and did not look at competitors such as Airbus or exclusive dealing agreements. In the United States, these agreements did not raise many concerns. Although they were found to be potentially troubling, the United States regarded them as independent of the merger and focused narrowly on the effect that the merger would have on competition and future prices.²⁸ The FTC decided that it intended to monitor the potential anticompetitive effects of these or any future, long-term exclusive contracts.²⁹ Commissioner Mary Azcuenaga stated that it was unnecessary to consider whether the contracts were anticompetitive or not.³⁰ According to Commissioner Azcuenaga, the exclusive dealing agreements accounted for eleven percent of the market, and this was well below any level of concern to the Commission.³¹ Additionally, the FTC did not look at McDonnell Douglas' commercial side in the hands of Boeing, which Commissioner Azcuenaga even criticized. According to her, the merger would combine two of the three remaining manufacturers of commercial aircraft in the world, and would eliminate one-third of the firms in a highly concentrated market where entry is unlikely and difficult. Although McDonnell Douglas had a small share, it did not mean that it exercised no competitive constraint. For example, in 1996, four percent of total narrow body-wide body orders in the commercial aircraft industry were McDonnell Douglas'. This is why she argued that the Commission had to look at this more closely. Also, the FTC did not analyze the unilateral effects of Boeing acquiring McDonnell Douglas' maintenance and repair business for the existing McDonnell Douglas aircrafts. Lastly, the FTC did not find any concerns with the combination of Boeing with McDonnell Douglas' military side, which is contrary to the concern expressed by the EU. The FTC did not analyze the spillover effects of McDonnell Douglas' military side's combining with Boeing.

In the United States, the Department of Defense ("DOD") also evaluated the merger. According to the Defense Department's letter of July 1, 1997, the DOD accepted the deal. Competition would remain in the defense industry post merger, and the merger did not threaten competition in military programs. The DOD looked at the programs in which the companies competed or expected to

28. According to the lawyers of Boeing the reason why the FTC looked at exclusive deal agreement was because the issue was raised in the EU and in their consultations with EU, otherwise nothing to do with the merger. Sharp, *Interview with Thomas L Boeder and Benjamin S. Sharp Attorneys for Boeing, supra* note 22, at 7. The EU looked at them although they were not in the scope and they had other ways to challenge them because they felt like they had a hammer because of the merger review and they exercised it. [Boeder, p. 8].

29. Statement of Chairman Robert Pitofsky and Commissioner Janet D. Steiger, Roscoe B. Srarck III & Christine A. Varney, (July 1, 1997) *Trade Regulation Reporter (CCH)*, 24, 295.

30. Statement of Commissioner Mary Azcuenaga's statement in the Boeing Co., File No. 971-0051, available at <http://www.ftc.gov/opa/1997/07/ma.htm>.

31. Stock, *supra* note 19, at 853-855 (indicating that this is below 20%-30% SC precedent and agency practice).

compete (fighter aircraft and expandable launch vehicles), or markets in which it was likely to be defense suppliers, and determined that the transaction would not create excessive market concentration. According to the DOD, there were no current or future fighter aircraft procurement by the DOD in which the two firms were likely to compete. Also, there were no other domestic military markets in which products offered by the companies are substitutes for each other. The DOD saw significant cost savings from consolidation as well as the reduction of overhead costs. According to the lawyers for Boeing there was also an expectation that Boeing would apply commercial manufacturing technology and cost saving efficiencies to DOD defense business.³² However, the FTC decision does not reflect this argument. Additionally, the FTC, unlike the EU Commission, failed to consider the effect to McDonnell Douglas' defense side after integrating with Boeing's commercial aircraft side.

In sum, according to the FTC, the merger would not reduce competition either in defense or commercial aircraft. It is interesting that the FTC did not consider the military-side effects although this merger was seen as a defense merger in the media and also by Boeing's lawyers.

1. The European Union

The analysis completed in the EU was substantially different from that in the United States, although the market was defined the same in both instances: the market for large commercial jet aircraft is the world market. Pursuant to the agreement between the United States and the EU, the U.S. DOD and the Department of Justice ("DOJ"), on behalf of the U.S. Government, informed the EU Commission of its concerns regarding the merger. Specifically, the United States indicated that prohibiting the merger would harm U.S. defense interests. Moreover, a divestiture to a third party would likely be unsuccessful in preserving Douglas as a stand-alone manufacturer of new aircraft, and this failure would be anticompetitive because it would create a firm with the incentive and means to raise prices and diminish services with respect to the provisions of spare parts and Douglas' fleet. According to the Commission, it took the concerns into consideration to the extent consistent with EU law.³³ The Commission limited the scope of review to the civil side of the operation. According to the Commission, the merger affected the new large commercial aircraft market.³⁴ Segmentation of the large commercial jet aircraft market to narrow-body and wide-body aircraft was accepted. Since the competition problems resulting from the proposed merger were the same for both markets, the Commission assessed the effects on both markets together.³⁵ Given that large

31. Boeder and Sharp Interview, *supra* note 22, at 5.

33. *Boeing/McDonnell Douglas* (EU), *supra* note 10, ¶ 12.

34. *Id.* ¶ 13-19.

35. *Id.* ¶ 16.

commercial jet aircraft were sold and operated throughout the world under similar conditions of competition and the transportation costs of delivery were negligible, the geographic market was the world market.³⁶

After defining the market, the Commission analyzed the effects of the merger on the large commercial jet aircraft industry. There were three competitors on the worldwide market: Boeing, Airbus and McDonnell Douglas.³⁷ The Commission analyzed the current structure of the markets for large commercial jet aircraft. In particular, the Commission looked at the existing market shares of Boeing, the size of its fleet in service, the long-term exclusive supply agreements with major customers, the lack of potential new entrants, and that Boeing already enjoyed a dominant position on the overall market for large commercial aircraft.³⁸ The Commission then analyzed whether the merger would strengthen Boeing's dominant position in large commercial aircraft either by the impact of McDonnell's commercial aircraft business or by the overall effects resulting from the defense and space business of McDonnell.³⁹

The Commission considered the expansion of Boeing's market share and other factors strengthening its dominance. For instance, McDonnell's "six percent of market was enough to force Boeing to improve its price and purchasing conditions to induce customers to purchase Boeing planes."⁴⁰ There is inconsistency between the market shares estimated in the United States and the EU. The EU reported two percent more than the FTC, because it considered backlogged orders, and because it focused on older and more certain market shares.⁴¹

The EU Commission also accepted that Douglas was no longer a real force in the commercial aircraft market.⁴² However, the Commission still considered the effect of Douglas' commercial aircraft business in the hands of Boeing. The European Commission analyzed the effects of the increase in overall resources; customer base,⁴³ market shares,⁴⁴ capacity in commercial aircraft and skilled work force; the ability to induce airlines to enter into more exclusive dealing agreements; and bargaining power with suppliers due to its involvement with defense and civil aircraft production.⁴⁵ Also it considered that Boeing's acquisition of McDonnell Douglas' spare parts and maintenance business would

36. *Id.* ¶ 20.

37. *Id.* ¶ 21-24.

38. *Id.* ¶ 52.

39. *Id.* ¶ 54-112.

40. Amy Ann Karpel, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater US-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029, 1054 (1998). See also Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 25.

41. Stock, *supra* note 19, at 857.

42. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 57-9.

43. *Id.* ¶ 61-3 (showing an increase from 60% to 84% of the current fleet in service).

44. *Id.* ¶ 54 (indicating that the market share increased from 64% to 70%).

45. *Id.* ¶¶ 18, 24; see also Karpel, *supra* note 39, at 1043.

give Boeing additional leverage over the existing McDonnell Douglas aircraft users, which comprised of twenty-four percent of the total aircraft fleet worldwide.⁴⁶ The EU focused on the unilateral effects likely to result from those factors.

The EU also analyzed Boeing's exclusive arrangements and looked at their likely effects on competition. As discussed earlier, Boeing had recently entered into exclusive arrangements for the supply of large commercial aircraft to American Airlines, Delta and Continental Airlines. According to the EU Commission's decision, it was estimated that 14,400 new aircraft would be delivered worldwide between 1997 and 2016, of which 2400 are on firm order with Boeing, McDonnell Douglas or Airbus. Boeing's exclusive deals include options and purchase rights that account for thirteen percent of this open market, or over thirty percent of the U.S. market.⁴⁷ This was problematic because it would foreclose thirteen percent of the market and also because the three airlines accounted for thirty percent of the U.S. market for large commercial jet aircrafts. This factor was relevant to the merger analysis due to its effect on creating or strengthening the dominant position of Boeing and its unilateral effects. In the EU, it was argued these agreements should be covered in the analysis because Merger Regulation, Article 8(2) applies to restrictions that are necessary and directly relate to the implementation of the concentration. Hence, these agreements were not ancillary.⁴⁸

One other major difference in the analysis between the U.S. and EU's analysis was the focus given to the link between McDonnell's civil and defense divisions. The Commission analyzed the effect of military capacity on Boeing's civil aircraft division and access to publicly funded research and development (R&D) in its defense division.⁴⁹ The EU focused on the overall effects resulting from the defense and space business of Douglas. The agreements would strengthen Boeing's dominant position,⁵⁰ would increase Boeing's overall financial resources, and increase Boeing's access to publicly funded ("R&D")⁵¹ and intellectual property portfolios.⁵² Further, Boeing would increase benefits obtained from the transfer of military technology to commercial aircraft.⁵³ For instance, it would be possible to transfer technology developed under public funding on the military side to the commercial sector, especially considering the U.S. policy that defense, space and commercial technology are highly linked.⁵⁴

46. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶¶ 64, 68.

47. *Id.* ¶ 46.

48. William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 836 (2001) (discussing exclusive licensing agreements); *see also* Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 48.

49. *See generally* Boeing/McDonnell Douglas (EU), *supra* note 10; *see also* Karpel, *supra* note 40, at 1054.

50. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 72.

51. *Id.* ¶¶ 83, 84-8 (noting that the R&D in the aerospace industry to a large extent funded government).

52. *Id.* ¶¶ 102-03.

53. *Id.* ¶ 94.

54. *Id.* ¶¶ 92, 99.

According to the EU Commission decision using 1995 figures, Boeing's commercial aircraft operations accounted for seventy percent of its total sales. For McDonnell Douglas, seventy percent of its total business was related to defense and space operations. Not taking into account Boeing's latest acquisition of Rockwell Defense and Space activities, the merger would triple Boeing's defense and space operation activities. This would significantly increase Boeing's ability to cope with economic cycles in commercial aircraft, since the revenues achieved in the defense sector appear to be more stable than the commercial sector.⁵⁵ Other concerns include the increase in Boeing's overall financial resources, Boeing's access to publicly funded R&D⁵⁶ and intellectual property portfolios.⁵⁷ The EU focused on the integration of the commercial and military sides and the resulting advantages and anticompetitive effects since the merger would make Boeing the largest integrated aerospace company in the world.⁵⁸ This merger might increase Boeing's bargaining power vis-à-vis suppliers.⁵⁹

Furthermore, in this market intellectual property is extremely important for the competitive potential of players. The combination of the world's leading manufacturer of commercial aircraft with the world's leading manufacturer of military aircraft would result in the combination of two extremely large portfolios of intellectual property.⁶⁰ Boeing has more than five hundred published patents that are related to commercial aircraft and McDonnell Douglas holds around one hundred fifty patents.⁶¹ Eighty-six Boeing patents and twenty-six McDonnell Douglas patents could potentially restrict access to important future technology.⁶² In the end, this would increase Boeing's buying and bargaining power vis-à-vis suppliers.

In the EU, Boeing's access to publicly funded R&D and intellectual property portfolio in its defense division was a major issue. Would this increase Boeing's overall power and financial resources and its ability to use this technology from the military side on commercial aircraft?⁶³

55. *Id.* ¶ 73.

56. *Id.* ¶¶ 83, 84-8.

57. *Id.* ¶¶ 102-03.

58. *Id.* ¶ 73.

59. *Id.* ¶ 106 (explaining that with this integration there will be increase in Boeing's buying power and this would weaken competitive position of Airbus. Since, McDonnell Douglas is strong in military and Boeing in commercial aircraft, this would increase suppliers overall reliance on Boeing. Boeing would exert pressure on suppliers to discourage them to work with Airbus); *see also* United States Department of Defense, News Release, July 1, 1997, *DOD Finds Boeing's Acquisition of McDonnell Douglas Acceptable* (Including a copy of Deputy Secretary White's letter), available at http://www.defenselink.mil/news/Jul1997/b07011997_bt351-97.htm (copy on file with *The Transnational Lawyer*) (last visited Apr. 4, 2004).

60. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶¶ 102-03 (noting that the Commission considers the combination of Boeing and Douglas' know-how and patent portfolios to be further element for the strengthening of Boeing's dominant position in large commercial aircraft).

61. *Id.* ¶ 102.

62. *Id.*

63. *Id.* ¶ 72 (indicating that Boeing's position will be strengthened). Boeing will have at its disposal,

For these reasons, it was determined the merger would strengthen a dominant position through which effective competition would be significantly impeded in the common market.⁶⁴ The merger would make Boeing the largest integrated aerospace company in the world.⁶⁵

After Boeing made important concessions, the EU approved the merger.⁶⁶ In the next section, Boeing's concessions are outlined according to the area of concern.⁶⁷

a. Concerns Regarding Acquisition of McDonnell Douglas' Commercial Side

First, Boeing agreed to preserve McDonnell Douglas' commercial aircraft as a separate legal entity for ten years and supply a report to the EU. Boeing agreed to provide customer support for McDonnell Douglas aircraft at the same high quality level it provided for its Boeing aircraft. Boeing also agreed to apply the same Boeing guidelines and procedures for spare parts availability and pricing, and ensure appropriate levels of engineering support. Boeing agreed not to try to persuade DAC operators to purchase Boeing parts and products by offering more favorable terms to some operators over others. Moreover, Boeing will not use its privileged access to the existing fleet in service of DAC aircraft to leverage its opportunities for persuading current DAC operators to purchase Boeing aircraft.

b. Concerns from the Spillover Benefits from McDonnell Douglas' Defense Business to Boeing's Commercial Airplane Business

Boeing agreed to license patents obtained under U.S. government-funded contracts to commercial aircraft manufacturers on a non-exclusive, reasonable royalty basis to be used in the manufacture or sale of commercial jet aircraft, and to supply know-how related to such patents. Also, Boeing agreed to similar terms for cross licensing of its blocking patents to commercial aircraft manufacturers on non-exclusive and reasonable royalty. To provide increased transparency of the R&D process regarding U.S. government aeronautics R&D projects, Boeing agreed to supply an annual report to the European Commission on its current unexpired patents arising from government funding contracts and on its non-classified government funded aeronautics R&D for ten years. To prevent to

publicly funded research. *Id.* ¶¶ 83-8. Boeing will also have benefits obtained from military technology to commercial aircraft. *Id.* ¶ 94.

64. *Id.* ¶ 113.

65. *Id.* ¶ 73.

66. The Boeing case is similar to Aerospatiale-Alenia/de Havilland Case IV/M 053, but in Boeing, instead of blocking the merger, it was accepted by concessions.

67. News Release, Boeing-McDonnell Douglas Merger Gains a Positive Opinion from the European Commission (July 23, 1997), at <http://www.boeing.com/news/releases/1997/news.release.970723.html>. (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*).

leveraging its supply relationship to discriminate against other manufacturers of large commercial aircraft, Boeing agreed not to exert or attempt to exert undue or improper influence on its suppliers, directly or indirectly, by promising an increase in supplies or subcontracted R&D activities, threatening to decrease supplies or subcontracted R&D activities, or leveraging in any other way its own supply relationship.

c. Concerns About Exclusive Dealing Agreements

Boeing agreed not to enter into new exclusive deal agreements until August 1, 2007 and not to enforce the existing agreements with American, Delta and Continental Airlines.

In sum, the conclusion in two jurisdictions was different for the same merger. In Europe, the concern was that the merger would increase the leverage that can be exercised by a dominant firm and the EU looked at the possible impact of the merger on competitors.⁶⁸ In the United States, the focus was on the effect of the merger on future prices and consumers, and McDonnell was no longer seen as a competitor.

III. GE/HONEYWELL

There are also major differences in the approach used in the United States and in the EU regarding the merger between GE and Honeywell. General Electric is active in aircraft engines, appliances, information services, power systems, lighting, industrial systems, medical systems, plastic, broadcasting, financial services, and transportation systems.⁶⁹ GE is the leading producer of jet engines for large commercial aircraft and large jets, and also has an aircraft-leasing subsidiary called GE Capital Aviation Services ("GECAS"). GE's principal rivals are Pratt and Whitney ("P&W") and Rolls Royce. On the other hand, Honeywell is a leading producer of engines for small regional and corporate jets, and avionics and nonavionics, and Auxiliary Power Units ("APUs").⁷⁰ Honeywell manufactures small gas turbine engines (jet engines), turbofan and turboprop engines for business and regional aircraft, turboprop engines for agricultural aircraft, and turboprop engines for the helicopter industry.⁷¹ Honeywell does not field any high-bypass turbofan engines above 7,000 pounds of thrust and its experience is in 3,500-7,000 pound-thrust ranges.⁷² Honeywell has different rivals

68. Briefs; *FTC Investigation of Intel Tracks Earlier Microsoft Case*, FTC: WATCH, Sept. 29, 1997, no 485.

69. Case COMP/M 2220, 3 General Electric/Honeywell, Commission decision of July 3, 2001, [hereinafter General Electric/Honeywell (EU)].

70. *Id.* ¶ 4.

71. Honeywell is also involved in automotive products, electronic materials, specialty chemicals, performance polymers, transportation and power systems, home, building and industrial controls, in marine ground power and air management.

72. Press Release, FORECAST INTERNATIONAL/DMS, *GE and Honeywell: Their Positions in the*

in each market. In small jet engines, its competitors are P&W and Rolls Royce. In avionics, the competitors are Rockwell Collins and Thales. For nonavionics, United Technologies, BF Goodrich and Snecma are the competitors.⁷³

The United States approved the merger between GE and Honeywell after requiring divestiture of a helicopter engine business and authorization of a new third-party maintenance, repair and overhaul (“MRO”) service provider for certain models of Honeywell aircraft engine business and APUs.⁷⁴ However, the EU found the merger anticompetitive and did not approve it.⁷⁵

A. *The United States*

In the United States, the DOJ analyzed the merger and found that the only horizontal overlap was in U.S. military helicopter engines. GE and Honeywell are two premier manufacturers of U.S. military helicopter engines.⁷⁶ They comprise two of the three firms authorized to service TFE731 turbofan engines and related auxiliary power units manufactured by Honeywell.⁷⁷ The market was defined narrowly compared to the EU definition. The United States defined the market according to U.S. military helicopter engines and maintenance, MRO service for certain Honeywell aircraft engines, and auxiliary power units. In contrast, the EU Commission looked at markets more broadly by including markets for aerospace and power systems, large commercial aircraft engines, large regional jet aircraft engines and corporate jet engines, and avionics and non-avionics products.

The DOD worked closely with the DOJ. The parties received all applicable R&D funding from the DOD through the Joint Turbine Advanced Gas Generator program, which began in 1998 to fund technological development of efficiencies

Gas Turbine Market, and GE's Standing After Purchasing of Honeywell (Wed. Nov. 8, 11:40 a.m. ET), available at http://www.forecast1.com/notable/yah_fin.htm (copy on file with *The Transnational Lawyer*), (noting GE's experience is in 8,500-9,200 pounds thrust range with CF 34 turbofan, growing up to 18,000 pounds). Honeywell produces one low-bypass turbofan, the 9,250 pound thrust F124. *Id.*

73. Deputy Assistant Attorney General Deborah Majoras, Remarks Before the Antitrust Law Section State Bar of Georgia, *GE Honeywell: The U.S. Decision*, 128 (Nov. 29, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9893.pdf> (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*) [hereinafter Deborah Majoras Remarks].

74. Press Release, DOJ, *Justice Department Requires Divestiture in Merger between GE and Honeywell*, May 2, 2001, [hereinafter General Electric/Honeywell (U.S.)], available at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm. See *Auxiliary Power Units*, available at <http://science.ksc.nasa.gov/shuttle/technology/sts-newsref/sts-apu.html> (explaining that the auxiliary power unit is a hydrazine-fueled, turbine-driven power unit that generates mechanical shaft power to drive a hydraulic pump that produces pressure for the orbiter's hydraulic system).

75. General Electric/Honeywell (EU) *supra* note 69, ¶ 567.

76. General Electric/Honeywell (U.S.), *supra* note 74 (explaining that GE diversified in manufacturing and services in aircraft engines, household appearances, lighting, power generation, industrial controls, medical imaging equipment and engineering plastics). GE revenues were approximately \$130 billion in 2000. Honeywell technology and manufacturing company in producing avionics products and services, home, building, industrial controls, automotive products, power generation systems, specialty chemicals, fibers, plastics, electronic and advanced materials. Sales approximately \$25 billion in 2000. *Id.*

77. *Id.*

in helicopter engine fuel consumption.⁷⁸ Honeywell developed the modern hi-bypass turbofan engine used in today's business jets under the Army's Joint Turbine Advanced Gas Generator program. It also built turboshaft and turboprop propulsion engines for business aviation, regional airlines, military aircraft, and marine and industrial markets.

In the United States, the merger as originally proposed would have substantially lessened competition in the production of U.S. military helicopter engines and in the provision of heavy MRO service for certain Honeywell aircraft engines and auxiliary power units.⁷⁹ According to the press releases, Honeywell's engines would enhance GE's position, with Honeywell's turboshafts added to GE's repertoire. Also, GE would have engines on three of the four most important U.S. Army helicopters,⁸⁰ would become a powerful competitor in any turbine engine market, and would be in a better position to compete to future helicopter projects.⁸¹ In the United States, the parties agreed to changes, which is an example of "fix it first" in which the parties agree to changes in the deal to avoid being sued. The parties agreed to divest the Honeywell helicopter engine business and to authorize a new service provider for engines and auxiliary power units for certain models of Honeywell aircraft engines and APUs.⁸²

The Assistant Attorney General for the Antitrust Division of the DOJ, Charles James, defended the agency's enforcement position. He said the agency conducted an extensive investigation and the merger with the modified remedies will be beneficial to consumers. Moreover, the merged firm would offer better products and services at lower prices than the firms could have individually.⁸³

However, because the case was settled with "fix it first" procedures, there is no competitive impact statement and there has never been a case. Thus, there is nothing available to support the idea that the merger would have been beneficial to consumers other than James' assertions, press releases and unofficial comments. There is no discussion of efficiencies, if there were any, and whether claimed efficiencies were cognizable and specific enough under the Merger Regulation. It is not clear from the limited information available why the merger had efficiencies and why it was classified as merger rather than a joint venture or bilateral agreement. In the United States, it was very difficult to assess these

78. *Id.* (noting that the DOD plans to allocate \$5 billion over the next 20 years to develop next generation helicopter engine, beginning no later than 2004).

79. *Id.*

80. UH-60 (T700), AH-64 (T700) and CH-47 (T55). *GE and Honeywell: Their Positions in the Gas Turbine Market, and GE's Standing After Purchasing of Honeywell*, *supra* note 72.

81. *Id.*

82. *Id.*

83. Antitrust & Trade Regulation Daily (July 6, 2001). *See also* News Release, DOJ, *Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition* (July 3, 2001), available at <http://www.usdoj.gov/opa/pr/2001/july/303at.htm> (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*) [hereinafter DOJ news release July 3, 2001].

claims and policy because there is a gap in information, since most of the information is not open to the public and the United States refuses to explain its position. Some information is available through competitive impact statements. However, because the DOJ decided not to challenge this merger, there is no competitive impact statement.⁸⁴

In sum, the merger in the United States was seen as offering improved products and better prices than either firm would have offered independently. Also, the proposed merger provided great incentive for competitors to improve their own product offerings, which is the essence of competition.⁸⁵

B. The European Union

On the other hand, the Commission of the European Communities prohibited GE's acquisition of Honeywell.⁸⁶ The parties notified the Commission of the proposed merger on February 5, 2001⁸⁷. On March 1, 2001, the Commission started its in depth investigation and analyzed the markets for aerospace and power systems.⁸⁸ Aerospace markets consisted of aircraft engines and related markets, avionics and non-avionics, and engine controls.

1. Jet Engines

There are three categories of jet engines: large commercial aircraft, regional aircraft, and corporate aircraft. For jet engines for large commercial aircraft, there was no horizontal overlap among the parties. GE was the only manufacturer of jet engines for large commercial aircraft and there were also two other competitors.⁸⁹ Regarding engines for *large regional jets*, GE and Honeywell were the only two manufacturers, and there is a horizontal overlap between them.⁹⁰

84. See Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition, *supra* note 83. Also, DOJ reasoning was explained in the OECD meeting in Paris (Cooperation and convergence, speech before the OECD global forum on competition Oct 17, 2001). The Tunney Act requires a competitive impact statement to be filed with the proposed consent decree and CIS describe the nature of the proceeding and explains the proposed consent decree and remedies available to the parties.

85. John Deq Briggs and Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell*, 16 ANTITRUST 26, 28 (Fall 2001) (quoting Charles James in his speech before the OECD global forum in Paris on competition, Oct 17, 2000).

86. General Electric/Honeywell (EU), *supra* note 69, ¶ 567.

87. *Id.* ¶¶ 1-2 (citing an agreement dated 22 October 2000, wherein GE agreed to acquire share capital of Honeywell, and Honeywell would become a wholly owned subsidiary).

88. *Id.* ¶ 8.

89. *Id.* ¶ 10 (explaining that large commercial aircraft have more than 100 seats and cost in excess of \$35 million). This case looked at the joint ventures and alliances, the structural links of GE and GE's vertical integration. That is why the market share of the alliance-CFMI—was attributed to GE when assessing dominance. *Id.* ¶ 66.

90. *Id.* ¶ 10 (defining large regional jets as those with 30-90 seats and up to \$30 million in value). Horizontal market share amounts to 100 percent. *Id.* ¶ 21. GE was already dominant prior to the merger, the

With jet engines for corporate aircraft, there is also horizontal overlap among the parties in particular in the segment for engines for medium jets.⁹¹ Honeywell was considered the leading engine supplier in this market.⁹² On the other hand, GE enjoyed a strong position in the market for engines for large commercial aircrafts.

Additionally, the Commission considered factors contributing to GE's dominance in engines.⁹³ First, the Commission considered GE's capital, unique combination of complementary products and services to customers, its status as one of the largest financial companies in the world, and that GE used its financial strength to influence airlines in their purchasing behavior.⁹⁴

The Commission also considered GE's vertical integration into aircraft purchasing, financing and leasing activities through GECAS.⁹⁵ According to the decision, there would be foreclosure through vertical integration of Honeywell with GE, combination of Honeywell's activities with GE's financial strength and vertical integration into financial services, aircraft purchasing and leasing, and aftermarket services.⁹⁶ The firms might offer packaged deals of GE and Honeywell products and services together.⁹⁷ Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets. The EU Commission ruled that this would ultimately adversely affect product quality, service and consumers' prices.⁹⁸

In sum, the Commission considered that all these factors made GE's high market shares the right proxy for dominance and gave GE the ability to foreclose competition.⁹⁹

The Commission also looked at MRO. GE had a strong MRO market for engines.¹⁰⁰ GE's position on the MRO market, coupled with the acquisition of

merged entity will have a monopoly position in large regional jets in the immediate future, and GE can be considered as dominant. *Id.* ¶ 86-87.

91. *Id.* ¶¶ 34, 88.

92. *Id.* ¶¶ 83, 89 (noting that corporate aircraft engines are designed for corporate activities).

93. *Id.* ¶¶ 107-62.

94. *Id.* ¶ 83 (explaining that commonality across engine types also contributes to GE's dominance). "[A]irlines using an aircraft powered by a particular type of engine generally tend to purchase incremental engines from that same engine manufacturer. . . . prefer to purchase the same type of engine in the future owing to the benefits of fleet/engine commonality." *Id.* ¶ 146.

95. *Id.* ¶ 121-139.

96. *Id.* ¶ 342.

97. *Id.* ¶ 349.

98. *Id.* ¶ 355; See also Mario Monti, European Commissioner for Competition Policy, *Antitrust in the U.S. and Europe: A History of convergence*, General Counsel Roundtable American Bar Association Washington, D.C., 14 November 2001 (explaining that while conglomerate mergers usually not anticompetitive, sometimes they lead to exclusionary effects and stifled competition).

99. General Electric/Honeywell (EU), *supra* note 69, ¶ 163.

100. *Id.* ¶ 102.

Honeywell's product range, is likely to give the merged entity a significant financial and commercial advantage.¹⁰¹

In addition, the Commission looked at competitors to determine if they would provide an effective competitive constraint on GE. The Commission considered P&W and Rolls-Royce, and determined that these companies were both unable to provide an effective competitive constraint on GE.¹⁰² The Commission also considered the countervailing buyer power and found it to be limited.¹⁰³ In conclusion, the Commission found GE to be in position to behave independently of its competitors, customers and ultimately consumers. Thus, GE would be dominant on the markets for large commercial jet aircraft engines and for large regional jet aircraft engines.¹⁰⁴ GE was already dominant in markets for large commercial aircraft engines and large regional jet aircraft engines, and its dominance would only be strengthened by the merger.¹⁰⁵ No other engine manufacturer had the size, financial strength or vertical integration to compete.¹⁰⁶

2. Avionics¹⁰⁷ and Non-Avionics¹⁰⁸

Avionics is subdivided into large commercial aircraft and regional/corporate aircraft. Non-avionics is a subdivided among large commercial aircrafts, regional, corporate and any other aircraft segment.¹⁰⁹ Honeywell is the leading supplier of aerospace equipment and non-avionics products. GE is not active in this market. Rockwell Collins, Thales, and Hamilton Sunstrand are Honeywell's three major competitors and the merger will affect them.¹¹⁰ Unlike these competitors, however, Honeywell has a unique product range, and can offer a complete range of avionics equipment.¹¹¹ Honeywell is also strong in services and MRO.¹¹² Also, "Honeywell is in a strong position to integrate across the entire aircraft industry¹¹³ and is well positioned to pursue a strategy of packaging its

101. *Id.* ¶ 106.

102. *Id.* ¶¶ 174-223.

103. *Id.* ¶¶ 224-28.

104. *Id.* ¶ 229.

105. *Id.* ¶ 341.

106. *Id.* ¶ 173.

107. General Electric/Honeywell (EU), *supra* note 69, ¶ 231 (explaining that avionics products "relate to range of equipment used for control of the aircraft for navigation and communication as well as assessment of the flying conditions").

108. *Id.* ¶ 234 (including auxiliary power units, environmental control systems, electric power, wheels and brakes, landing gear and aircraft lighting).

109. *Id.* ¶ 235.

110. *Id.* ¶¶ 298-329.

111. *Id.* ¶ 276.

112. *Id.* ¶ 283.

113. *Id.* ¶ 289 (referring to the fact that Honeywell has integration know-how, and a complete range of products, and airframe manufacturers that are increasingly relying on the integration capabilities of suppliers).

products and bundling.”¹¹⁴ In sum, “Honeywell is the leading supplier of a range of avionics and non-avionics products, and no competitor is independently capable of replicating its extensive range of products.”¹¹⁵

3. Engine Controls

“Honeywell has important market positions in a number of engine accessories and controls.”¹¹⁶ GE is not active in those markets.¹¹⁷ However, GE’s position in the downstream market for jet engines, combined with Honeywell’s upstream position for engine accessories and controls, creates a vertical relationship in the market.¹¹⁸ “The merger would lead to vertical foreclosure effects, stemming from the elimination of Honeywell as an independent supplier of engine controls to jet engine manufacturers competing with GE.”¹¹⁹ Honeywell and Hamilton account for ninety percent of the market.

4. Power Systems

Following the merger, GE/Honeywell’s market shares would increase, and it would become the strongest player in the market, making it four to five times larger than the nearest competitor.¹²⁰ Moreover, “Honeywell’s leading position in this market would be strengthened by combining it with GE’s financial strength, as well as vertical integration in the financial services and aftermarket services markets.”¹²¹

The proposed merger would lead to anticompetitive effects as a result of the horizontal, vertical and conglomerate integration of the merging parties’ activities. “The merger will result in the creation and strengthening of a dominant position in the markets for large commercial aircraft engines, large regional jet aircraft engines, and corporate jet engines, as well as on the markets for avionics and non-avionics products.”¹²²

114. *Id.* ¶ 293-97.

115. *Id.* ¶ 330.

116. *Id.* ¶ 331 (explaining that GE has a dominant position in the downstream market for jet engines and Honeywell is the leading supplier in the upstream market for various jet engine components).

117. *Id.*

118. *Id.*

119. *Id.* ¶ 340.

120. *Id.* ¶ 476.

121. *Id.* ¶ 478.

122. *Id.* ¶ 458.

The parties submitted undertakings both on June 14, 2001 and June 28, 2001, well beyond the deadline for submission of undertakings. GE proposed a new set of remedies, but they were not accepted because they would not remove competition concerns. The Commission found the proposed undertakings insufficient.¹²³ Commissioner Mario Monti, the Commissioner responsible for competition policy, mentioned that there were ways to eliminate the concerns, but the proposed undertakings were not enough. The proposed merger was declared incompatible with the common market pursuant to Article 8(3) of the Merger Regulation.¹²⁴ This was the second time the EU prohibited a merger involving only American firms. The first time the EU did this was when it prevented the *MCI/WorldCom-Sprint* merger.¹²⁵

The parties have appealed to the European Court of First Instance in Luxembourg. Since the case was not appealed under the new fast track procedure, it is not certain how long the appeal will take. The companies did not petition for the decision to block the merger be overturned. It seems they want to prove the arguments made by the Commission were simply wrong.¹²⁶

In sum, there were differences between the two systems. The above-mentioned points that were discussed in the EU were not analyzed in the United States. Once more, it is very hard to follow the United States' logic and analysis, and there is limited information about the United States' analysis.

However, after the EU decided not to approve the merger, the Deputy Assistant Attorney General Deborah Platt Majoras discussed some of the points in a speech that might provide some guidance to the U.S. approach.¹²⁷ According to her statement, the DOJ disagrees with many findings of the EU Commission. To begin with, the DOJ disagrees with the finding that GE has a dominant position in the large jet engines market. According to her, GE did not have a dominant position because GE's shares entirely depend on a sole-source contract with Boeing for the 737. If these sales are excluded, the market shares would be:

123. *Id.* ¶¶ 546-549 (finding no exceptions to the three month time limit on the submission of undertakings) The commission further stated that any changes could have been included in the 14 June submission. *Id.*

124. *Id.* ¶ 567.

125. *MCI/WorldCom-Sprint*, Case No COMP/M.1741. The opposite also happened when EU cleared it, U.S. blocked it. The United States blocked France's Air Liquide of Britain's BOC although EU cleared it. See Timothy J. Muris, FTC, *Merger Enforcement in a World of Multiple Arbiters*, Brookings Institution Roundtable on Trade and Investment Policy, Washington, D.C., December 21, 2001, at <http://www.ftc.gov/speeches/muris/brookings.pdf> (copy on file with *The Transnational Lawyer*).

The EU decided over 1,700 merger cases, 400 involved at least one U.S. based firm. The EU required undertakings as a condition of clearing a deal in about nine percent. In four percent, the parties, withdrew from the proposed transaction in face of a likely antitrust challenge. EU prohibited mergers of U.S. based firms in only two cases: WorldCom MCI/Sprint and GE/Honeywell. WorldCom MCI/Sprint was also challenged by DOJ. The EU blocked 16 other mergers, none of which involved a U.S. firm. *Id.*

126. Antitrust & Trade Regulation Daily, September 14, 2001.

127. Majoras, *supra* note 73.

GE forty-four percent, P&W twenty-three percent and Rolls Royce twenty-seven percent. Consequently, GE does not have a dominant position.¹²⁸ As to the concerns posed by the EU regarding vertical integration of Honeywell with GE [integration of financial services, aircraft purchasing and leasing and aftermarket services],¹²⁹ Majoras argued it was not a concern because GECAS's share of aircraft purchase was less than ten percent, which is substantially less than thirty to forty percent requirement that the U.S. courts require as a minimum to support a finding of potential foreclosure. Also, Majoras mentioned that there was no evidence that GECAS was only purchasing GE engines to foreclose rivals from the market. She argued that even if they were to bundle, there were no evidence that other firms would be unable to match the merged firm's offerings (by counterstrategies like mergers, teaming arrangements, buying power or by offering their own multi-product packages)¹³⁰, and thus would be unable to compete.¹³¹ Competitors have growing revenues and profits and they are increasingly investing in the new generation of engines.¹³² Buyers are also powerful and provide strong incentives to maintain competition in the supply of avionics and nonavionics.¹³³ The ability of competitors to respond to a more efficient competitor might have been underestimated.

However, as mentioned above, due to limited information on the U.S. side, it is hard to follow the reasoning from the decision. As will be discussed in a subsequent section, the EU's theories are not alien to American law as a historical matter. Similar approaches were followed in the United States in the 1960s-70s.

128. *Id.* at 5.

129. General Electric/Honeywell (EU), *supra* note 69, ¶ 342.

130. Majoras, *supra* note 73, at 10. That was also the EU Commission's view in the Allied Signal/Honeywell (M 1601 (1999)) merger.

131. *Portfolio Effects in the Conglomerate Mergers. Range Effects: The U.S. Perspective*, Antitrust Division-Submission for OECD Roundtable, at page 21, dated Oct. 12, 2002 and discussed Oct. 19, 2001, [hereinafter Antitrust Division Submission OECD]; William J Kolasky, Deputy Assistant Attorney General, Antitrust Division, DOJ, *Conglomerate Mergers and Range Effects: It's a Long Way From Chicago to Brussels*, 10 GEO MASON L REV. 533, 539 (2002) (providing that there is no evidence that Pratt & Whitney or Rolls Royce were no longer in a position to constrain GE's behavior).

132. Antitrust Division Submission, *supra* note 131 (noting that the competitors had outperformed GE in engine awards on the three major airframe offering a choice of engines). GE won 42% of contract awards, Pratt 32% and Rolls Royce 27%. *Id.*

133. Majoras, *supra* note 73, at 11.

IV. DIFFERENCES¹³⁴

As stated, the outcomes in *Boeing/McDonnell Douglas* and *GE/Honeywell* were very different. I believe the discrepancies were not a result of the different effects of the merger on different markets, but due to how the two jurisdictions analyzed and approached the problems. The likely differences in approach can be placed into three groups. The first group focuses on the effect of the merger. For instance, the EU focuses on competitors and the United States focuses on consumers. Also in the EU, the focus is more on single dominance and monopoly, whereas in the United States the focus is on oligopoly and coordination. The second group of differences involves the approach to conglomerate effects of mergers. Finally, the third group is the approach to efficiencies.

A. Focus

1. Competitors/Consumers

When there is a merger, the EU Commission looks at effects on competitors and measures the competitive harm in terms of actual injury to competitors.¹³⁵ However, in the United States, the focus is on how the merger will impact consumers, increase prices and reduce output. Since the European Commission

134. See, e.g., Robert J. Reynolds & Janusz A. Ordovers, *Archimedean Leveraging and the GE/Honeywell Transaction*, 70 ANTITRUST L.J. 171 (2002); Edward T. Swaine, "Competition, Not Competitors," *Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT'L ECON L. 597 (2002); Ryan Marth, *The Canadian Middle Road: Balancing Efficiency and Sovereignty in the Age of Multijurisdiction Merger Review*, 12 MINN J. GLOBAL TRADE, 221 (2003), Lawson A.W. Hunter QC & Susan M. Hutton, *Where There Is a Way: Cooperation in Canada-U.S. Antitrust Relations*, 20 CAN-US L.J. 101 (1994); John Deq. Briggs & Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell*, 16 ANTITRUST 26 (2001); Stefan Schmitz, *The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust Law*, 23 U. PA. J. INT'L ECON L. 539 (2002); Stefan Schmitz, *How Dare They? European Mergers Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON L. 325 (2002); Jeff King, *Boeing-McDonnell Douglas Revisited: Recommendations for a Unitary Merger Defense*, 11-WTR KAN J. L. & PUB POL'Y 363 (2002); William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way From Chicago to Brussels*, 10 GEO MASON L. REV. 533 (2002); Castaneda, Collins, Crampton, Harty, Peterson, Matthews, Solomon, Stock, *International Legal Developments in Review 2001*, 36 INT'L LAW 287 (2001); Lisa M. Renzi, *The GE/Honeywell Merger: Catalyst in the Transnational Conglomerate Merger Debate*, 37 NEW ENG L. REV. 109 (2002); Yeo Jin Chun, *GE-Honeywell Merger Debacle: The Enforcement of Antitrust Competition Laws Across the Atlantic Pond*, 15 NY INT'L L. REV. 61 (2002); Gotz Drauz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law*, 25 FORDHAM INT'L L.J. 885 (2002); Dimitri Giotakos, *GE/Honeywell: A Theoretic Bundle Assessing Conglomerate Mergers Across the Atlantic*, 23 U. PA. J. INT'L ECON L. 469 (2002); William Kolasky, *GE/Honeywell: Continuing the Transatlantic Dialog*, 23 U. PA. J. INT'L ECON L. 513 (2002); Jay Pil Choi, *A Theory of Mixed Bundling Applied to the GE/Honeywell Merger*, 16 ANTITRUST 32 (2001); Eleanor Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON L. 457 (2002). William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 71 ANTITRUST L.J. 377 (2001).

135. Kauper, *supra* note 26, at 334.

focuses on competitors, the EU was alleged to be protectionist, especially with regard to foreign companies.¹³⁶ The other decisions of the Commission are consistent; the Merger Regulation suggests that the effect of a concentration on a competitor should be taken into account.¹³⁷ In the EU, competitors' views are sought, and considerable weight is given to those views.¹³⁸

In *Boeing/McDonnell Douglas*, the Commission looked at the ability of the other competitors in the market. Specifically, it looked at Airbus and considered its competitiveness in the commercial aircraft business since the merger would leave only two commercial aircraft manufacturers.¹³⁹ The constraints on Airbus' ability to compete with Boeing were analyzed.

According to the EU decision, the proposed merger would increase Boeing's buying power and increase its bargaining power with suppliers because of its involvement with defense and civil aircraft production and McDonnell Douglas' strength in military aircraft and Boeing in commercial aircraft.¹⁴⁰ According to the EU Commission, the merger would weaken the competitive position of Airbus, and allow Boeing to use its leveraging power to exert pressure on numerous suppliers to discourage them from working with Airbus.¹⁴¹ To remedy this, Boeing agreed not to abuse its relationship with its customer base.

The way the EU analyzed the exclusive arrangements shows its concern for protecting competition. For instance, the EU treated these agreements as relevant to the merger analysis, and as lessening Airbus' ability to compete for a large number of commercial aircraft contracts. This is because Airbus does not produce a full family of aircraft and therefore cannot enter into exclusive deals.¹⁴² Accordingly, the parties agreed to give up existing exclusive dealing agreements and not to enter into similar ones.¹⁴³

The EU Commission also analyzed the integration of commercial and military side and the anticompetitive effects on Airbus. In particular, the focus was on the R&D in the government funded military side and its spillover effects

136. *Id.* at 338. Commissioner Mario Monti commented on the different outcome of the GE/Honeywell case: "We might interpret facts differently and forecast the effects of an operation in different ways; this does not mean that one authority is doing a technical analysis and the other is pursuing a political goal," Antitrust & Trade Regulation Daily, July 13, 2001 (discussing EU merger control, competition policy after GE&Honeywell).

137. Merger Regulation Article 2, Karpel, *supra* note 26, at 1056-1057; see also Thomas P. O'Toole, *The Long Arm of the Law—European Merger Regulation and its Application to the Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW 203 (1998).

138. See Kauper, *supra* note 26, at 338, 340 (stating considerable weight was given to evidence submitted by Airbus).

139. O'Toole, *supra* note 137, at 231-35.

140. *Boeing/McDonnell Douglas* (EU), *supra* note 10, ¶¶ 24, 106; Karpel, *supra* note 49, at 1043.

141. *Boeing/McDonnell Douglas* (EU), *supra* note 10, ¶ 106. Jeffrey A Miller, *The Boeing/McDonnell Douglas merger: the European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 MD J INT'L L. & TRADE 359, 366 (1999).

142. *Boeing/McDonnell Douglas* (EU), *supra* note 10, ¶ 70.

143. Article p1043: cessation of exclusive agreements-postpone until 2007.

in the commercial side. According to the EU Commission decision, there are extremely large differences between the United States and the EU on publicly funded research. In the United States, the funding is very high as compared to the funding provided for similar purposes in Europe.¹⁴⁴ Prior to the proposed merger, the U.S. government funded R&D was split between two companies. According to the decision, if the merger went through as originally requested, total government funded R&D would be concentrated in one single entity, resulting in the largest commercial aircraft business in the world.¹⁴⁵ As a result, the parties agreed to share military technology and provide access to intellectual property patents as well as the underlying know-how generated from publicly-funded research with other jet aircraft manufacturers.¹⁴⁶

As discussed above, all the agreed concessions support the view that the EU system protects competitors: giving up exclusive dealing agreements; the commitment of Boeing not to abuse its relationship with its customer base; sharing with other jet aircraft manufacturers military technology and giving access to intellectual property patents and underlying know-how generated from publicly funded research.¹⁴⁷

However, in the United States, the analysis did not look at how the merger would harm competitors themselves. Instead, the United States focused on the ineffectiveness of McDonnell Douglas as a competitor and the overall impact the merger would have on the market for consumers. In the large commercial aircraft market there were three competitors on the worldwide market: Boeing, Airbus and McDonnell Douglas. After the merger, there would be only two left. Although this was an important fact in the EU analysis, the United States did not consider this to be a critical issue in its analysis.

Similar differences existed in the *GE/Honeywell* case. In the United States, it was approved with divestiture, but not approved by the EU. Charles James commented on the different outcomes of the same case with the European Union and asserted that:

Having conducted an extensive investigation of the *GE/Honeywell* acquisition, the Antitrust Division reached a firm conclusion that the merger, as modified by the remedies we insisted upon, would have been pro-competitive and beneficial to consumers. Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either firm could offer individually. That in our view is the essence of competition. The EU however, apparently concluded that a more diversified, and thus more competitive, GE could somehow disadvantage

144. Boeing/McDonnell Douglas (EU), *supra* note 10, ¶ 100.

145. *Id.* ¶ 101.

146. *Id.* ¶ 117.

147. *Id.*

other market participants. Consequently, we appear to have reached different results from similar assessments of competitive conditions in the affected markets. Clear and longstanding U.S. antitrust policy holds that antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of divergence.¹⁴⁸

Commissioner Mario Monti's responded to this criticism¹⁴⁹ in an interview stating that

[t]he goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer... In the GE/Honeywell case not only competitors, but also customers, did complain.¹⁵⁰

However, as discussed above, the EU Commission's concern for competitors is evident.

Although it is not a requirement, there should be consistency among the EU Commission decisions.¹⁵¹ *Havilland*, *GE/Honeywell*, *Boeing McDonnell Douglas* all are similar in approach, and the outcomes were consistent. For instance, in the *Havilland* case, the analysis focused on the merger's impact on competitors.¹⁵² The Commission looked at the effect of eliminating Havilland as a competitor, the effect on the customer base, evaluation of the remaining and potential competition, the position of customers and the strength of the customers. *ATR/Havilland* could undercut the market by reducing prices once it benefited from the overlap in spare parts stock.¹⁵³ The Commission assessed the current and expected future strength of the remaining competitors to determine whether the new combined entity would be able to act independently of its competitors. The Commission found a mere hypothetical possibility that a price war could drive the merged company's rivals out of the market, and found this to be sufficient evidence of market disturbance that would significantly impede competition.¹⁵⁴

148. DOJ Press Release, July 3, 2001 *a* http://www.usdoj.gov/atr/public/press_releases/2001/8510.htm (July 3, 2001); *Antitrust & Trade Regulation Daily*, July 6, 2001.

149. Mario Monti, *The Future for Competition Policy in the EU*, available at <http://europa.eu.int/rapid/setLanguage.do?language=en> (copy on file with *The Transnational Lawyer*); Merchant Taylor's Hall, *Merger control: issues highlighted in the context of the GR/Honeywell Merger* (London 9 July 2001) (asking the question: Is it true that Commission cares more about competitors than customers?).

150. *Id.*

151. Karpel, *supra* note 40, at 1048.

152. Kauper, *supra* note 26, at 341.

153. Miller, *supra* note 141, at 380.

154. Case No IV/M.053 *Aerospatiale-Alenia/de Havilland*, council regulation (EEC) No 4064/89; *see also* Stock, *supra* note 19, at 853.

Overall, the focus in the United States is on the impact on consumers and effect on prices. In the EU, the focus is the effect on competitors and consumers. An equitable balance is important because if the focus is only on competitors, it might harm consumers in the long run by preventing competitors from becoming more efficient and innovative. And if the focus is solely on consumers and not the competitors, competition might also be negatively affected in the long run. If there are few effective competitors in the market, the merger will make an already dominant company more dominant, and the other competitors might eventually leave the market.

2. Single Firm/Collective Dominance

There are differences between the EU and the United States as to whether the focus should be on single firm dominance or collective dominance. Although both systems use both the unilateral and coordinated effects analysis, the anticompetitive analysis developed differently. The EU started with single firm dominance and the ability to raise prices and act. It then moved toward oligopolistic markets and collective dominance-collusion, parallel pricing and behavior.¹⁵⁵ On the other hand, the United States started with collusion concerns,¹⁵⁶ and coordinated interaction, and then moved toward “unilateral effects” analysis.¹⁵⁷ Today, the analysis used in both jurisdictions is similar. However, the United States focuses more on oligopoly coordination and the EU focuses more on single firm dominance.¹⁵⁸

In analyzing mergers, the EU focuses on several factors. Specifically, it looks at single firm dominance, creating or strengthening of a dominant position, monopoly creation, whether the merger would increase a dominant firm’s ability to exercise its leverage power, and the possible impact of the merger on competitors. The EU, presumes that it is less likely that remaining firms will collude, and that they would actively compete and check the market power of the dominant firms if they have sufficient strength to do so.¹⁵⁹ When mergers create a market structure that increases the firm’s share or creates leveraging opportunities due to market share increase, the merger is seen as strengthening a dominant position.¹⁶⁰ Commitments would prohibit or approve merged entities

155. EU uses the term “likely to engage in anti-competitive parallel behavior,” and “conditions make it likely for a tacit coordination when analyzing oligopolistic dominance.”

156. U.S. Department of Justice, Federal Trade Commission, Horizontal Merger Guidelines, years 1982, 1984, at §§ 3.11-3.44, reprinted in 4 Trade Reg. Rpt. (CCH) 13, available at <http://www.usdoj.gov/atr/hmerger.htm#guidelines> (copy on file with *The Transnational Lawyer*) [hereinafter Merger Guidelines].

157. Merger Guidelines, *supra* note 156, year 1992 at § 2.2.

158. Debra A. Valentine, General Counsel FTC, *Building a Cooperative Framework for Oversight in Mergers: The Answer to Extraterritorial Issue in Merger Review*, 6 GEO MASON L. REV. 525 (1998).

159. Kauper, *supra* note 26, at 344.

160. Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 377, 397 (2002).

and would drive rivals out or foreclose the competition, as was the case in *Havilland*, *Boeing* and *GE/Honeywell*, where there was more emphasis on unilateral effects. Examples include the exclusive dealing in the *GE/Honeywell* case, McDonnell Douglas' repair and maintenance business for the existing fleet, and the commercial side and military side in the hands of Boeing. The Commission tried to solve these concerns with the agreed concessions.

Additionally, U.S. law focuses more on cartel facilitation rather than monopoly creation. The United States measures harm more directly in terms of output and price effects felt by consumers, as opposed to the competitors of the dominant firm.¹⁶¹ The United States is more concerned with oligopolist pricing in concentrated markets¹⁶² and presumes that when concentration is high, remaining firms will collude and they will benefit from that collusion. This explains why the United States places less emphasis on competitors, competitive leverage, competitors' strength as a counterweight to the power of the merged entity and more emphasis on the affect of the merger on future prices, output, and consumers.¹⁶³

a. Conglomerate Effects

One other difference between the United States and the EU is the analysis of the conglomerate effects of mergers. The theory refers to the traditional leveraging theory-tying¹⁶⁴ or bundling.¹⁶⁵ The concern is that the merged entity will have the ability and incentive to leverage its market power from one market into other markets, foreclose competitors and eliminate competition. This will eventually lead to higher prices and loss of welfare. Conglomerate effects are discussed in the following cases: *Guinness/Grandmet*,¹⁶⁶ *Allied Signal-Honeywell*,¹⁶⁷ *Vodafone*

161. See Stock, *supra* note 19, at 830-831 (citing Pitofsky found at Robert Pitofsky Chairman FTC, *EU and U.S. Approaches to International Mergers*, EC Merger Control 10th Anniversary Conference. The European Commission DG Competition, International Bar Association, 14-15 September 2000 Metropole Hotel, Brussels, Belgium and Robert Pitofsky, Address Before the Business Development Associates, *Staples and Boeing: What They Say About Merger Enforcement at the FTC*, September 23, 1997, available at <http://www.ftc.gov/speeches/pitofsky/STAPLESspc.htm>).

162. Stock, *supra* note 19, at 842.

163. See Kauper, *supra* note 26, at 335.

164. Roundtable Discussion, *Transatlantic Antitrust: Convergence or Divergence?*, Francisco-Enrique Gonzales-Diaz, 16 ANTITRUST 5 (2001).

165. Jay Pil Choi, *A Theory of Mixed Bundling Applied to the GE/Honeywell Merger*, 16 ANTITRUST 32, 32 (2001).

166. Case No IV/M.938 Guinness/Grand Metropolitan (1997). The merged firm would have a broad range of products that would give it a driving force in the market, as well as a flexibility in pricing and marketing opportunities. The merged firm would have the ability to tie products, bundle sales, and have joint promotions, advertising, and discount campaigns. Since the competitors were weak, there was not enough countervailing buyer power, and barriers to entry were difficult. The merger was found to create and strengthen a dominant position, but it was approved after the full compliance with commitments. The merger was approved subject to conditions. Divestiture of two brands at the European level was required. *Id.*

167. Case No IV/M.1601, *Allied Signal/Honeywell* (1999).

Airtouch-Mannesmann,¹⁶⁸ *Coca-Cola/Carlsberg*,¹⁶⁹ *TetraLaval/Sidel*,¹⁷⁰ and *Boeing/McDonnell Douglas*.¹⁷¹ *GE/Honeywell*¹⁷² is the latest case in which the EU focuses on conglomerate effects.¹⁷³

The EU's concern about conglomerate effects is sometimes referred to as portfolio effects or range effects.¹⁷⁴ According to Mario Monti:

Our view is that whilst conglomerate mergers are normally not anti-competitive, under some circumstances they can lead to exclusionary effects and a worsening of competition conditions. . . . Conglomerate mergers will raise concerns when they make possible that the merged entity leverages its market power with the effect or object to foreclose one or several markets from effective competition. These foreclosing practices, which are not based on normal business performance or "competition on the merits", may substantially reduce consumers' choice and ultimately lead to higher prices and a loss of welfare.¹⁷⁵

In the EU, the analysis was very broad in the *Boeing/McDonnell Douglas* case. The Commission looked at the conglomerate effects, focusing on McDonnell Douglas' commercial aircraft business, defense-military business, and repair and maintenance business for Boeings existing fleet. The Commission analyzed the effects on the increase in overall resources, customer base, market shares, capacity in commercial aircraft and skilled work force, and ability to induce airlines to enter into more exclusive dealing agreements. Moreover, it

168. Case No IV/M 1795, Vodafone Airtouch-Mannesmann (2000) ¶ 42 (discussing the integrated network and how it will be able to provide advanced telecommunication services to all customers on a seamless pan-European basis).

169. Case No IV/M 833, Coca-Cola/Carlsberg (1997) (discussing the concern about tying and enhanced efficiencies, economies of scale).

170. Case No Comp/M 2416, TetraLaval/Sidel (2001) [hereinafter Tetra Laval/Sidel] (describing Tetra as the world's uncontested leader for carton packaging with an overall market share in Europe of over 80 percent). Sidel, on the other hand, is the leading manufacturer plastic PET packaging equipment and in particular stretch blow-moulding (SBM) machines. The combination of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment would provide the merged entity with the ability and incentives to leverage its dominant position in carton to gain a dominant position in PET packaging equipment. In addition, by eliminating Sidel as a competitor in a closely neighboring market, Tetra's existing dominant position in carton would also be strengthened. Due to the serious competition concerns the Commission prohibit the merger. *Id.*

171. See Charles River Associates, CRA Insights, Fall 2001 at <http://www.crai.com/Showpubs.asp?Pubid=2518> (copy on file with *The Transnational Lawyer*) (discussing the broad product range, existing fleet in service, cost savings from commonality benefits, size, scope, and government funded R&D). The author contends that the *Boeing/McDonnell* case demonstrates the existence of a large number of opportunities to engage in pricing practices. *Id.*

172. Offering low price bundles, leverage existing dominance in aircraft engines into avionics and non-avionics. GE's leasing arm would only buy Honeywell.

173. CRA Insights, *supra* note 171.

174. Monti, *supra* note 98, at 5.

175. *Id.*

considered the additional leverage the McDonnell Douglas' spare parts and maintenance business would give Boeing over the existing McDonnell Douglas aircraft users. On the commercial and defense side of the relationship, the Commission analyzed how the integration would increase Boeing's overall financial resources, its access to publicly funded R&D, and its intellectual property portfolio. The EU Commission also analyzed the exclusive arrangements that Boeing recently entered into for the supply of large commercial aircraft to American Airlines, Delta, and Continental Airlines. The merger would make Boeing the largest integrated aerospace company in the world.¹⁷⁶

In the *GE/Honeywell* case, the Commission looked at mixed bundling and cross-subsidization issues. It considered leveraging through vertical integration and foreclosure using GE's financial strength, vertical integration of Honeywell with GE, and Honeywell's leading position in some of the markets. The EU looked at the mixed bundling issues, the merged entity offering packages of engines and avionics for lower prices.¹⁷⁷ It was argued that the competitors would not be able to offer similar deals and would be driven out of the market and this would in the long run affect the competition process.

Later, the Commission looked at vertical integration to purchasing and leasing by GECAS. The Commission argued that since GECAS was in the leasing business, it might influence airlines to select similar equipments in the future and tie its leasing services to GE engines.¹⁷⁸ Thus, GECAS would have the incentive and ability to enhance market position of GE's engines by its purchasing leverage.

Finally, the Commission considered the combination of GE's financial strength, vertical integration of Honeywell with GE, the combination of Honeywell's activities with GE's financial strength and vertical integration into financial services, aircraft purchasing and leasing and aftermarket services.¹⁷⁹ It also reviewed foreclosure through packaged offers of GE and Honeywell products and services.¹⁸⁰ Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. The EU argued that the competitors were not able to meet these and will exit the market eventually.

However, in the United States, the analysis is more narrow in comparison with the EU approach. The agency in the United States focused on the likely price effects in the future and did not look at the exclusive dealing agreements. The United States viewed the exclusive dealing agreements as independent of the

176. Boeing/McDonnell Douglas (EU), *supra* note 10, at 73.

177. General Electric/Honeywell (EU), *supra* note 69, at 349.

178. A criticism to this approach is absent monopoly power or dominant position, the competitors can replicate.

179. General Electric/Honeywell (EU), *supra* note 69, at 342.

180. *Id.* at 349.

merger. The FTC did not look at McDonnell Douglas' commercial side in the hands of Boeing. Lastly, the FTC did not find any concerns with the combination of Boeing with McDonnell Douglas' military side.

The antitrust division discussed the conglomerate effects issue. Specifically, the *GE/Honeywell* case was discussed by the antitrust division in a report submitted for an OECD Roundtable on portfolio effects in conglomerate mergers.¹⁸¹ In this report, it was argued that the EU approach in *GE/Honeywell* and other conglomerate mergers is similar to the U.S. approach during 1965-1975.¹⁸² Under this approach, mergers were condemned if they strengthened an already dominant firm through greater efficiencies or gave the acquired firm access to broader line of products or greater financial resources.¹⁸³

In the 1970s and 80s, the U.S. conglomerate merger wave faded.¹⁸⁴ As discussed in this report, the U.S. antitrust agencies concluded that antitrust should rarely interfere with any conglomerate mergers for three reasons. First, it is hard to identify any conditions under which a conglomerate merger would give the merged firm ability and incentive to raise prices and restrict output. Second, bundling services could benefit consumers. Third, they generate significant efficiencies, thus satisfying the U.S.'s goal of efficiency. The United States is worried that this would affect the efficiency considerations.¹⁸⁵ Some criticized the conglomerate effects approach and argued this approach placed interests of competitors ahead of consumers and led to blocking efficiency enhancing mergers on highly speculative and improvable theories of competitive harm.¹⁸⁶ The United States eliminated conglomerate effects as a basis for challenging non-horizontal mergers in the 1982 Merger Guidelines. U.S. antitrust agencies conclude that antitrust should rarely, if ever, interfere with any conglomerate merger since conglomerate mergers generate efficiencies. In the United States, there is greater confidence in the market, especially when strong rivals and buyers who will usually find a way to protect themselves. On the other hand, the EU is more reliant on government involvement.¹⁸⁷

In sum, these cases exhibit differences in assessing conglomerate effects and bundling.¹⁸⁸ The EU argued that bundling and offering package deals would have

181. Antitrust Division Submission OECD, *supra* note 131.

182. *Id.* at 2; see also Charles Stark, *US-EU Merger Review Roundtable-Convergence, Divergence or Both? Views From the Private Sector and Reaction from Officials*, SUMMARY OF THE MEETING BY AT-MEMBERS REPORT (1967, Procter & Gamble), available at <http://www.abanet.org/intlaw/divisions/regulation/useu.pdf> (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*).

183. Antitrust Division Submission OECD, *supra* note 131, at 2.

184. William J. Kolasky, *supra* note 131, at 535.

185. *Id.*

186. Antitrust Division Submission OECD, *supra* note 131, at 15; see also Donna E Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18, 26 (2001).

187. William J. Kolasky, *supra* note 131, at 538 (stating that the EU has greater confidence in government intervention).

188. John Deq Briggs and Howard Rosenblatt, *supra* note 85, at 29-30.

anticompetitive effects and lead to market foreclosure.¹⁸⁹ Whereas, the United States saw it as a driving force for competitors to lower prices that will eventually enhance competition.

Recent developments in the EU might affect the *GE/Honeywell* decision on appeal and eventually change the criteria for conglomerate effects. Recently, the Court of First Instance overturned a Commission decision, *Tetra Laval* and *Sidel*, which focused on similar arguments as *GE/Honeywell*.¹⁹⁰

The following short summary of the case shows that the court did not agree with the Commission's economic analysis or the way the Commission used the bundling theory. The court did not rule that the bundling theory could not be used, but instead the court raised the burden of proof for the Commission, requiring the Commission to prove that companies have a financial incentive and are able to bundle products.¹⁹¹ The court found that the Commission failed to prove its bundling theory. This case might weaken the Commission's position on the conglomerate effects argument in the *GE/Honeywell* case on appeal since the bundling theory was one of the main arguments. However, Commissioner Monti saw no links between the Court's rulings against the Commission in the other cases.¹⁹²

Tetra Laval intended to acquire Sidel and the deal fell within the scope of the Merger Regulation. After the second phase the Commission declared the notified transaction incompatible.¹⁹³ The Commission considered that the merger would have foreseeable anticompetitive effects in three ways. First, Tetra could use its dominant position in global carton packaging to leverage its position to the plastic packaging market by offering the two products to clients in need of both types of packaging. This would eventually eliminate competition in the market.¹⁹⁴ Second, Tetra could reinforce its current dominant position in aseptic carton packaging market to eliminate competitive constraints. Third, it could strengthen

189. Choi, *supra* note 165, at 32.

190. Judgment of the Court of First Instance, October 25, 2002, *Tetra Laval BV v. Commission of the European Communities*, T-5/02, and T-80/02, [hereinafter *Tetra Laval/Sidel CFI*].

191. Rebecca Pasler, *Double Whammy for the Competition Commission*, WORLD MARKET ANALYSIS, Oct. 28, 2002; see also Francesco Guerrera, *Court Scraps Monti Veto of Packaging Merger*, FINANCIAL TIMES, Oct. 25 2002.

192. Denis Staunton, *Monti Promises to Overhaul EU Merger Policy After Series of Defeats*, THE IRISH TIMES, Oct. 26 2002.

193. *Tetra Laval/Sidel*, *supra* note 170, ¶ 6 (explaining that Tetra is a privately held company active in design and manufacture of equipment, consumables and ancillary services for processing, packaging and distribution of liquid food). Tetra is the world leader in traditional carton packaging and more limited involved in plastic packaging. *Id.* Sidel involved in design and production of packaging equipment and systems, in particular, blow moulding machinery, barrier technology and filling machines for polyethylene terephthalate plastic bottles. Sidel is the worldwide leader for production and supply of blow-moulding machines. *Id.* at 7. The Commission concluded that the notified concentration would create a dominant position in the market for PET packaging equipment, and strengthen a dominant position in aseptic carton packaging equipment and aseptic cartons in the EEA as a result of which effective competition would be significantly impeded in the common market and in the EEA. The concentration was declared to be incompatible. *Id.*

194. Monti, *supra* note 98, at 5.

the overall position of the merged entity on the market for sensitive product packaging.

The court decided to prohibit leveraging if the Commission concluded that a dominant position would be created or strengthened in the relatively near future and would significantly impede effective competition on the market.¹⁹⁵ Therefore, when the Commission assessed the effects of a conglomerate merger and relies on foreseeable conduct, which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether the illegal nature of conduct and/or the risk of detection will make such a strategy unlikely.¹⁹⁶ If the Commission's assessment is based on the possibility, or even the probability that Tetra will engage in such conduct in the aseptic carton markets, its findings in this respect cannot be upheld.¹⁹⁷ Therefore, it is necessary to examine if there was sufficiently convincing evidence¹⁹⁸ and whether the merged entity will have an incentive to engage in leveraging practices.¹⁹⁹ The Court found that the Commission committed a manifest error of assessment.²⁰⁰ The conditions in Article 2(3) have not been fulfilled as foreseen by the Commission regarding leveraging.²⁰¹

As for the elimination of competition, the Court found that the Commission had not sufficiently established that the merged entity would have less incentive than Tetra currently has to innovate in the carton sector.²⁰² The Commission had not shown that the merged entity's position would be strengthened vis-à-vis its competitors in the carton market.²⁰³

Lastly, as for the general strengthening effect of the merger, the Court decided that since two pillars vitiated by manifest errors of assessment, the third pillar must also be dismissed.²⁰⁴ In sum, the court annulled the decision because the contested decision did not establish to the requisite legal standard that the modified merger would give rise to significant anticompetitive conglomerate effects.²⁰⁵

In essence, this case raised the burden of proof for the Commission. The Commission must prove that companies can bundle products and that they have a financial incentive to do so.²⁰⁶ Although the EU's standard of proof might change in the future, the differences between the United States and the EU might remain.

195. Tetra Laval BV v. Commission of the European Communities (T5/02) CFI ¶ 153 (Oct. 25, 2002) (celex no. 602A0005) (Kali & Salz, Gencor v. Commission, Airtours v. Commission).

196. *Id.* ¶ 159.

197. *Id.* ¶ 160.

198. *Id.* ¶ 161.

199. *Id.* ¶ 200.

200. *Id.* ¶ 308.

201. *Id.* ¶ 309.

202. *Id.* ¶ 332.

203. *Id.* ¶ 333.

204. *Id.* ¶ 335.

205. *Id.* ¶ 336.

206. Pasler, *supra* note 191; *see also* Guerrero, *supra* note 191.

The outcome of the *GE/Honeywell* decision will be decided on appeal at the Court of First Instance.

3. *Efficiencies*

Another difference between the United States and the EU is the weight placed on efficiencies both as a goal of merger, and differences in the analysis of efficiency in merger. One has to discuss whether the different treatment of efficiencies has been a factor in the different outcomes in *Boeing* and *GE/Honeywell* cases. In the United States, it was not clear from the limited information available whether efficiencies were considered, and thus whether they played a role in the different outcomes in *Boeing* and *GE/Honeywell*. The U.S. agencies presume efficiencies for all mergers unless there are clear and demonstrable anticompetitive effects.

In the *Boeing* case, the main justification for the U.S.'s failure to challenge the merger was that McDonnell Douglas was no longer an effective competitor. Hence, efficiencies might not have been considered because the merger was not found to be anticompetitive. However, in the media and the statements of the parties' presidents', efficiencies and synergies between the commercial and defense airline industry were important factors. Merger was seen as creating a better balance between defense and commercial aircrafts. According to Stonecipher, the president of McDonnell Douglas, the transaction created "a focused, broad-based aerospace company with extraordinary capabilities in commercial and military aircraft, defense and space systems." According to Condit, the president of Boeing Company, the merger would be great for the airline industry, the nation's defense program, and for the space program worldwide.²⁰⁷

For the *GE/Honeywell* case, Charles James defended the agency's position on the merger. He argued that after the agreed remedies, consumers would benefit from the merger. He noted that the merged firm would offer better products and services at lower prices than the firms could offer individually.²⁰⁸ Also, GE's former CEO Jack Welch claimed that GE expected to realize \$1.5 billion in cost savings through the application of the best practices between GE's management techniques and Honeywell's activities.²⁰⁹

Efficiency was barely discussed by the EU Commission, but in the little discussion available the court approached efficiency differently. The EU saw

207. Boeing, *McDonnell Douglas to Merge with Boeing*, NEWS RELEASE (expressing optimism about the merger deal), available at <http://www.boeing.com/flash.html> (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*).

208. Antitrust & Trade Regulation Daily, July 6, 2001; see also DOJ news release July 3, 2001 *supra* note 83.

209. William J. Kolasky, *GE/Honeywell: Continuing The Transatlantic Dialog*, 23 U. PA J. INT'L ECON 513 (2002) (citing JACK WELCH & JOHN A. BYRNE, *JACK: STRAIGHT FROM THE GUT* (Warner Books 2001)). Combining complementary assets and good management systems are a very important complementary asset-well recognized source of merger specific efficiencies. *Id.* (citing Joseph Farrell & Carl Shapiro, *Scale Economies and Synergies in Horizontal Merger Analysis*, 68 ANTITRUST L.J. 685 (2001)).

potential efficiencies and synergies as factors creating and strengthening a dominant position. On the other hand, the *GE/Honeywell* case did not discuss efficiencies. Both Commissioner Monti and Francisco-Enrique Gonzales, Head of the Merger Task Force, DG Competition, stated that the parties did not claim any efficiencies.²¹⁰ Thus, there are differences in how both systems analyze efficiencies. The EU analyzes the role of efficiency as a goal of antitrust, and the United States looks at the differences in the efficiency defense.

a. *Efficiency and Differences in Goals*

The EU and the United States have different goals and policies with regard to mergers, possibly explaining the different outcomes in these cases.²¹¹ For example, they differ over whether non-efficiency goals should be considered. The ultimate goal in the modern U.S. antitrust law system is consumer welfare, which has been developed with case law, enforcement actions and guidelines.²¹² Promoting economic efficiency is paramount.²¹³ The United States finds it more probable than the EU that

210. Monti, *supra* note 98, at 5.

211. See, e.g., Stefan Schmitz, *The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust Law*, 23 U. PA. J. INT'L ECON L. 539, 540 (2002) (mentioning that this is a battle between the Chicago and the Freiburg School of thought). The EU is concerned about the protection of small and medium enterprises from dominant competitors, the EU system asks whether the merger will lead to creation or strengthening of a dominant position. *Id.* This approach is similar to the early years of the U.S. approach; he argues that the case would have similar outcome in the Warren Court in the 60s. *Id.* Now the Chicago School of thought is dominant, where the exclusive goal of antitrust is maximizing consumer welfare, and according to this thought consumer welfare is nothing more than efficiency. *Id.* The United States puts emphasis on efficiencies that increase consumer welfare. *Id.*; see also generally Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA J. INT'L ECON L. 325 (2002).

212. See Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L REV. 287, 319 (2002) (explaining that, by and large, consumer welfare has risen to the top of many competing goals in the history of U.S. antitrust caselaw).

213. *Antitrust Goes Global, What Future For Transatlantic Cooperation?* P.60 (Simon J Evenett et al. eds., 2000) (explaining there is broad consensus that the ultimate goal of competition is enhancement of efficiency or almost equivalently maximization of consumer welfare.); Richard Posner, *ANTITRUST LAW* Chp. 2 (2d ed. 1976) (saying that there is no justification for using antitrust laws to attain goals unrelated to efficiency, such as promoting a society of small tradesperson); Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* 17 (Basic Books Inc. 1978) (describing origins of major theory that drives evolution of antitrust in 1890 to 1914). In the early period the dominant goal was advancement of consumer welfare, but Justice Brandeis gave weight to the conflicting goal of small business welfare. This goal became dominant, but not exclusive goal in the era of Warren Court. *Id.*

... The only legitimate goal of American antitrust law is maximization of consumer welfare. ... The responsibility of federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions. *Id.* at 51. [T]he conventional indicia of legislative intent overwhelmingly support the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare. *Id.* at 71.

Herbert Hovenkamp, *Economics and Federal Antitrust Law 1985 and Federal Antitrust Policy, The Law of Competition and Its Practice*, Chp. 2 (West 2d. ed., 1999) (determining the goals of antitrust is a tough job since the statute language is vague, the legislative history is also not much help because it is ambiguous). See also, Bork (there is dispute over the congressional interest, several discussions for the goal of antitrust: exclusively with allocative efficiency; justice or fairness in business behavior; arrest welfare transfer away from consumers

mergers will create efficiency gains and increase overall consumer wealth.²¹⁴ However, in the EU, efficiency is not the only goal. The other objectives include market integration and facilitating the entry of small firms into the market.²¹⁵ Additionally, the EU Commission has broad responsibilities and considers other policy concerns such as employment, trade, promoting harmonious development, and economic expansion during both merger analysis and evaluation of dominance.²¹⁶

and toward price fixers and monopolists; protecting small firms. At some point Chicago School dominated, preserving economic efficiency as the concern of the drafters of Sherman Act. Sherman, best case for efficiency view, protects consumers from high prices and reduces output caused by monopoly and cartels. Clayton, protection of small business, Celler Kefauver Amendment, depart from consumer welfare. Federal courts have always interpreted antitrust statutes in common law fashion, substantial divergence between statutory language and judicial decision. 1960s antitrust policy openly hostile toward innovation, large-scale development and protector of right of small business to operate independently. Warren Court is effective at this term; mergers were condemned because they created efficiencies in order to protect competitors of post merger firm. Later Chicago School, role of economics in antitrust, economic efficiency the pursuit of which should be the exclusive goal of antitrust laws. During the Reagan era, economic efficiency was the exclusive goal of antitrust policy. Post-Chicago. Timothy J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust* 68 *Antitrust L.J.* 899 (2001); see also Joseph Farrell & Carl Shapiro, *supra* note 209, at 911, "... Chicago School of thought, later Sylvania Case-a milestone, firmly grounded antitrust on economic analysis." Although this was not a merger case, the Court's implicit assumption that the economic welfare of consumers, rather than other concerns was the appropriate objective of antitrust. The Reagan era, moved away from protecting small competitors towards focus on consumer welfare. Schmidt *supra* note 211, at 548. Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers, Not Just to Increase Efficiency*, 34 *HASTINGS L.J.* 65, 959 (1982) (in the 1980s the Chicago School was firmly in control of antitrust world). Bork a leading Chicago School theorist explained antitrust goal with efficiency, but the primary concern of the Congress was protecting consumers. Although the Congress had additional goals including economic efficiency, the overriding concern was that consumers should not have to pay prices above competitive level. *Id.* at 962. See also REVITALIZING ANTITRUST IN ITS SECOND CENTURY, ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY (Harry First, et al. ed.). SCHERER & ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 3rd ed. 1998.

214. Stock, *supra* note 19, at 842.

215. Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (7th ed. 2000) (stating that in the EU there are also non-efficiency goals that mergers play a pivotal role in the pursuit of such goals like market integration); Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 *SYRACUSE J. INT'L L. & COM.* 263, 266, 285 (2002); see also Eleanor M. Fox, *Antitrust Regulation Across National Borders: The United States Boeing Versus the European Union of Airbus*, 1/1/98 *BROOKINGS REV.* 30, 1998 WL 10684773 (1998) (explaining that U.S. merger law is consumer oriented, and the inquiry is whether the merger will make consumers worse off, as by raising the price of jets to the airlines). If McDonnell Douglas was not a competitive force to be reckoned with, there was no antitrust problem. *Id.* at 266 EC law is concerned not only with consumers, but also with unfair competitive advantages of dominant firms. *Id.* at 285 Thus, not everything turned on the prospects for Douglas. The cases are eclectic and contain hidden tensions. In some cases, where a merger threatens no competitor, the decision may focus on efficient market competition and consumer impact. In others, where competitors may be disadvantaged, the decision may postulate a predatory scenario with the prospect that the dominant firm will squeeze out its competitors, and ultimately charge monopoly prices to consumers. *Id.*

216. Kauper, *supra* note 26, at 319; Stock, *supra* note 19, at 831-841. Furthermore, there is also a procedural difference in the EU. For instance, in the EU the final decision in the second phase is given by the entire Commission; not only the Commissioner in charge of competition but also the others who have responsibilities in the European Community. It is likely that they would consider policies other than consumer welfare and efficiency when making a decision. Kauper, *supra* note 26, at 319. According to Article 2 of the Treaty of Rome, a treaty established the European Community. Treaty Establishing the European Community, March 25, 1957, 298 UNTS 11,2 at Art. 2 available at <http://eu.int/abc/obj/treaties/en/entoc05.htm>

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3

In sum, the U.S. policy toward mergers presumes efficiency and the EU goals are more general.

The EU focuses more on competitors, and the United States focuses on consumer welfare and efficiency. This might explain the differences in efficiency treatment. In the United States, the concern with mergers is that they will restrict output and increase price. Hence, the United States will prevent anticompetitive mergers that harm consumers by effecting price and quality.²¹⁷ The United States favors efficiencies that benefit consumers by reducing prices and achieving better quality. On the other hand, the European Law is more concerned with ensuring a level playing field by protecting competitors at the expense of efficiencies.²¹⁸ As seen in the Commission decisions, there are more discussions on the effect of mergers on competitors and those factors which create and strength dominant positions. Both the United States and the EU have significant substantive differences in approach, such as divergence from a “consumer welfare and efficiency” mold analysis with more emphasis on protecting competitors from unfair competition.²¹⁹

b. Efficiency as a Defense in Merger Analysis

There are also some differences in the “efficiency defense” merger analysis between the United States and the EU. The “efficiency defense” arises when efficiencies would save an otherwise anticompetitive merger. Efficiencies are considered either when assessing the likely effects of a merger or as an affirmative defense to save an anticompetitive merger. Historically, in the United States, efficiencies were disregarded or viewed negatively. This has changed in recent years and the United States now considers efficiencies as a positive aspect of mergers. However, U.S. courts usually find inadequate proof of efficiencies to rebut the government’s case of an anticompetitive merger.²²⁰ Consequently,

and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. *Id.*

217. Kolasky, *supra* note 131, at 546.

218. Douglas Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO MASON L. REV. 437, 444 (1998).

219. See also James Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review*, located in, ANTITRUST GOES GLOBAL, *supra* note 213, at 85-86.

220. See, e.g., *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 63 (DDC 1998); *U.S. v. Rockford Mem'l Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989); *aff'd* 898 F. 2d 1278 (7th Cir), *cert. denied* 498 U.S. 920 (1990); *FTC v. Heinz Co.*, 246 F. 3d 708; *U.S. v. Long Island Jewish Medical Ctr.*, 938 F. Supp. 121 (ED N.Y. 1997) (requiring strong evidence establishing the extent of the efficiencies and the need for the merger to achieve them and show benefits to consumers).

... [A]ssuming that it is a viable defense, however, the Court cannot find in this case that the defendants' efficiencies evidence rebuts the presumption that the merger may substantially lessen competition or shows that the Commission's evidence gives an inaccurate prediction of

efficiency defense has a very limited usage.²²¹ The Merger Guidelines also reflect these changes.

c. *Merger Guidelines*

The 1968 Merger Guidelines considered efficiencies only in exceptional circumstances. Efficiencies were treated as a defense to mergers that would otherwise be challenged.²²² According to the 1982 Merger Guidelines, efficiency claims were only considered in extraordinary circumstances and as a defense or mitigating factor if a merger would otherwise be challenged.²²³ The 1984 Merger Guidelines changed efficiencies, making them a factor to consider when determining whether to challenge a merger.²²⁴ The reason for this change was the

the proposed acquisition's probable effect. The Court agrees with the defendants that where, as here, the merger has not yet been consummated, it is impossible to quantify precisely the efficiencies that it will generate. In addition, the Court recognizes a difference between efficiencies, which are merely speculative, and those, which are based on, a prediction backed by sound business judgment. Nor does the Court believe that the defendants must prove their efficiencies by "clear and convincing evidence" in order for those efficiencies to be considered by the Court. That would saddle Section 7 defendants with the nearly impossible task of rebutting a possibility with a certainty, a burden, which was, rejected in *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). Instead, like all rebuttal evidence in Section 7 cases, the defendants must simply rebut the presumption that the merger will substantially lessen competition by showing that the Commission's evidence gives an inaccurate prediction of the proposed acquisition's probable effect. Defendants, however, must do this with credible evidence, and the Court with respect to this issue did not find the defendants' evidence to be credible. . . . In addition, the defendants argued that the merger would also generate dynamic efficiencies . . . the Court finds, based primarily on testimony, that the defendants' cost savings estimates are unreliable. The Court cannot find that the defendants have rebutted the presumption that the merger will substantially lessen competition by showing that, because of the efficiencies, which will result from the merger, the Commission's evidence gives an inaccurate prediction of the proposed acquisition's probable effect. Therefore, the only remaining issue for the Court is the balancing of the equities.

FTC v. Staples, 970 F. Supp 1066, 1088 (D.D.C. 1997).

221. Robert M. Vernail, *One Step Forward, One Step Back: How the Pass-On Requirement for Efficiencies Benefits in the FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section*, 7 GEO. MASON L. REV. 133 (1998). HERBERT HOVENKAMP, *supra* note 213, at 12.2.a. As also discussed in the efficiency as goal of antitrust part, many argued that the Supreme Court before 1980s were protectionist and relied on populist goal of Congress and efficiencies were not considered or less value, they cite to *Brown Shoe*, 370 U.S. 294 (1962) and *Philadelphia National Bank*, 374 U.S. 321 (1963). Later, efficiency became the concern of antitrust.

222. FTC Staff Report, *Anticipating the 21st Century: Competition Policy in the new High-tech, Global Marketplace*, Chapter 2, p 8-9 (May 1996) available at www.ftc.gov/opp/global/report/gc_v1.pdf (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*) [hereinafter 21st Century FTC Staff Report]. Merger Guidelines, *supra* note 156, year 1968. Efficiencies were then referred to as economies. *Id.*

223. 21st Century FTC Staff Report, *supra* note 222, Chp. 2 at 9; Merger Guidelines, *supra* note 156, year 1982.

224. 21st Century FTC Staff Report, *supra* note 222, Chp. 2 at 10. Merger Guidelines, *supra* note 156, at year 1984, fn 56, p.14. Large portion of testimony supported the idea that efficiencies should be evaluated as part of the analysis of merger's likely competitive effects rather than an absolute defense. Also some testimony supported viewing efficiencies an affirmative defense. Merger Guidelines, *supra* note 156, at year 1984, fn 66, p. 16.

notion that the primary benefit of mergers to the economy is their efficiency enhancing potential. Thus, in a majority of cases firms would be allowed to achieve available efficiencies without Department interference.²²⁵ The 1992 Merger Guidelines were substantially similar to the 1984 Merger Guidelines.²²⁶ Lastly, the Merger Guidelines were revised in 1997, to clarify the role of efficiency and broaden circumstances where it will be considered. According to the Merger Guidelines, mergers can generate significant efficiencies by permitting a better utilization of existing assets. This enables the combined firm to achieve lower costs in producing a given quality and quantity than either firm could have achieved without the proposed transaction.²²⁷ Efficiencies are part of a direct competitive effects analysis.²²⁸ But, according to the latest Merger Guidelines, efficiencies are relevant, only if they are merger specific, have been verified, and do not arise from anticompetitive reductions in output or service. Merger specific “efficiencies” are ones that are unlikely to be achieved in the absence of either the proposed merger or another means with comparable anticompetitive effects.²²⁹ The United States presumes that mergers create efficiencies, and this is reflected in its policy toward mergers. On the other hand, the efficiency defense is limited for mergers that have anticompetitive effects.

d. United States Cases

The U.S. approach is not clear from history. Three Supreme Court cases mention efficiencies: *Brown Shoe*, *Philadelphia National Bank* and *FTC v. Procter & Gamble*. Some commentators argue the Supreme Court decisions during the mid 1960s considered efficiencies as an adverse factor in assessing legality of mergers, and thus condemned some mergers.²³⁰ However, some argue that these cases did not reject the efficiency defense. First, in *Brown Shoe*, Brown

225. 21st Century FTC Staff Report 2, *supra* note 222, Chp. 2 at 10; Merger Guidelines, *supra* note 156, year 1984.

226. Merger Guidelines, *supra* note 156, year 1984 § 11, (omitting the express requirement that efficiencies be proven by clear and convincing evidence.

227. Merger Guidelines, *supra* note 157 § 4.

228. 21st Century FTC Staff Report, *supra* note 222.

229. See *FTC v. Tenet Health Care Corp.*, 186 F 3d 1045 (8th Cir. 1999).

230. Arguments that the court was protectionist and the decisions were “populist antitrust” and the court did not give value to efficiencies. Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 521 (1996); Kauper, *supra* note 26, at 352; Pierre Emmanuel Noel, *Efficiency Considerations in the Assessment of Horizontal Mergers Under European and U.S. Antitrust Law*, 18 EUR COMPETITION L. REV. 498-519 (1997); HOVENKAMP, *supra* note 213, at 499. Brown Shoe, Von’s Grocery-protecting small business. They mostly refer to *FTC v. Procter & Gamble*, arguing that the Supreme Court refused to recognize possible economies as a defense to an otherwise unlawful merger. But, some commentators argue the opposite that this was not rejection of efficiency defense. *The Efficiency Defence and the European System of Merger Control*, European Economy, Reports and Studies No. 5 at 77 (2001), available at http://europa.eu.int/comm/economy_finance/publications/european_economy/reportsandstudies0501_en.htm (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*) [hereinafter EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL].

Shoe Company did not raise efficiency considerations as justifications.²³¹ The Court acknowledged the benefits to consumers, but focused on Congress' desire to promote competition through protection of small, locally owned businesses and resolved the competing considerations in favor of decentralization.²³²

In *Philadelphia National Bank*, the second Supreme Court decision, the parties presented three affirmative justifications, one of which arguably involved efficiency.²³³ The banks argued that Philadelphia needed a larger bank than it had

231. Berry, *supra* note 230, at 522.

232. 370 U.S. 294 at 344.

... The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision. Other factors to be considered in evaluating the probable effects of a merger in the relevant market lend additional support to the District Court's conclusion that this merger may substantially lessen competition. One such factor is the history of tendency toward concentration in the industry. *Id.*

233. *United States v. Philadelphia National Bank*, 374 U.S. 321, 370, 83 S. Ct. 1715, 1745 (1963).

... We turn now to three affirmative justifications, which appellees offer for the proposed merger. The first is that only through mergers can banks follow their customers to the suburbs and retain their business. This justification does not seem particularly related to the instant merger, but in any event it has no merit. ... Second, it is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state bank, particularly the New York banks, for very large loans. We reject this application of the concept of 'countervailing power. If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that market. *Id.* Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. ... This brings us to appellees' final contention, that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for U.S. already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid. In holding as we do that the merger of appellees would violate § 7 and must therefore be enjoined, we reject appellees' pervasive suggestion that application of the procompetitive policy of § 7 to the banking industry will have dire, although unspecified, consequences for the national economy. Concededly, PNB and Girard are healthy and strong; they are not undercapitalized or over loaned; they have no management problems; the Philadelphia area is

to bring business to the area and stimulate economic development. The Court rejected this argument, stating that making itself larger to attract more customers was not an efficiency argument. However, the Court's rejection of the argument was not related to the notion that the merger would lower costs or create efficiencies. Also, the banks' argument about achievement of economies of scale was not mentioned by the District Court so it was considered abandoned on appeal. The Supreme Court was not asked to consider whether such a benefit to the community would justify an otherwise illegal merger.²³⁴

Finally, in *FTC v. Procter & Gamble*, the Supreme Court rejected an efficiency defense argument and held that a potential economic efficiency cannot be used as a defense to illegality.²³⁵

During the 1980s-1990s, the lower courts started considering potential efficiencies in evaluating the legality of a merger.²³⁶ However, although efficiency arguments were used in approving consent decrees, there has not been a U.S. court decision to date that relied on efficiency in rejecting a challenge to an otherwise illegal merger.²³⁷ A number of cases can be looked at to illustrate how courts in the United States consider efficiencies in mergers and the efficiency defense. For instance, as discussed in the *FTC v. Staples* case, there is uncertainty with the efficiency defense:

[w]hether an efficiencies defense showing that the intended merger would create significant efficiencies in the relevant market, thereby offsetting any anti-competitive effects, may be used by a defendant to rebut the government's prima facie case is not entirely clear. The newly revised efficiencies section of the Merger Guidelines recognizes that, "mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quality and quantity than either firm could have achieved without the proposed transaction." See Merger Guidelines § 4. This coincides with the view of some courts that "whether an acquisition

not over banked; ruinous competition is not in the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary. *Id.* at 371-372.

234. *Id.* at 334-35, n.10. "Appellees offered testimony that the merger would enable certain economies of scale, specifically; that it would enable the formation of a more elaborate foreign department than either bank is presently able to maintain. But this attempted justification, which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, we consider abandoned." *Id.*

235. *Id.* at 380. *Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers, which lessen competition, may also result in economies but it struck the balance in favor of protecting competition. See Brown Shoe.*

236. See, e.g., ANTITRUST DEVELOPMENTS, *supra* note 236, at 347, n.187; *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir 1999); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 63 (DDC 1998); *FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 21 (DDC 1992); *U.S. v. Rockford Mem'l Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989); *aff'd* 898 F. 2d 1278 (7th Cir), *cert. denied* 498 U.S. 920 (1990).

237. For a list of consent decrees permitting transactions on efficiency arguments see *id.* at 347, n.189.

would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition. . . . [T]herefore, . . . an efficiency defense to the government's prima facie case in section 7 challenges is appropriate in certain circumstances. *FTC v. University Health*, 938 F.2d 1206, 1222 (11th Cir. 1991). However, in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, the Supreme Court stated that "[p]ossible economics cannot be used as a defense to illegality in section 7 merger cases." There has been great disagreement regarding the meaning of this precedent and whether an efficiencies defense is permitted.²³⁸

In some cases, courts have rejected the efficiency defense but found it acceptable to consider efficiencies as a part of the analysis.²³⁹ For example, in *FTC v. University Health*, the court considered efficiencies as part of the analysis but rejected the notion that efficiencies constitute a defense to an anticompetitive merger.²⁴⁰ According to the court, ". . . in certain circumstances, a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market."²⁴¹

In a few cases, courts have accepted the efficiency defense, but found insufficient proof. In *FTC v. H J Heinz Co.*,²⁴² the U.S. Court of Appeals found that the parties failed to produce sufficient evidence to rebut the inference of an anticompetitive effect. The court stated that, when there is a potential for high concentration in the market, extraordinary efficiencies are required before a merger can be justified. The court also found the alleged efficiencies were not sufficient to meet this standard when measured against the combined entity's total output and cost structure.²⁴³ It is clear from this case that if a party is

238. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088 (D.D.C., 1997).

239. See *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 63 (D.D.C., 1998); *U.S. v. Rockford Mem'l Corp.*, 717 F. Supp. 1251 (N.D. Ill., 1989), *aff'd* 898 F. 2d 1278 (7th Cir), *cert. denied* 498 U.S. 920 (1990); *FTC v. Heinz Co.*, 246 F. 3d 708; *U.S. v. Long Island Jewish Medical Ctr.*, 938 F. Supp. 121 (E.D.N.Y. 1997) from ANTITRUST DEVELOPMENTS, *supra* note 220, at 347 n.187.

240. Pitofsky, *supra* note 29. Of course, once it is determined that a merger would substantially lessen competition, expected economies, however great, will not insulate the merger from a section 7 challenge." *Id.* See *Clorox*, 386 U.S. at 579, 87 S. Ct at 1231 ("Congress was aware [when it enacted section 7] that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); *Philadelphia Nat'l Bank*, 374 U.S. at 371 ("Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.")

241. *FTC v. University Health*, 938 F. 2d 1206, 1222 (11th Cir 1991); Craig W. Conrath & Nicholas A. Widnell, *Efficiency Claims in Merger Analysis: Hostility or Humility?* 7 GEO. MASON L. REV. 685 (1999).

242. *FTC v. H J Heinz Co*, 246 F. 3d 708 (D.C. Cir. 2001).

243. See *FTC v University Health Inc*, 938 F. 2d 1206, 1223 (11th Cir. 1991) (accepting efficiencies as being useful in evaluating the ultimate issue, the overall effect on competition, that the parties did not presented sufficient evidence to support efficiency claims. *Id.* The case recognizes the existence of an efficiency defense. ". . . [W]e conclude that in certain circumstances, a defendant may create significant efficiencies in the relevant market . . . but the appellees have failed to demonstrate that their transaction would yield any efficiencies." *Id.* at 1221.

claiming efficiencies, there is a heavy burden to show that there are merger specific efficiencies that will maintain prices and output at pre-merger levels or better.

In sum, there is no case to date where an affirmative efficiency defense saved an otherwise anticompetitive merger. Efficiencies are considered in evaluating a merger, but the efficiency defense is very limited and has not saved an anticompetitive merger.²⁴⁴

e. European Union Cases

Efficiency has not played an important role in clearing mergers in the EU or in the evaluation of mergers.²⁴⁵ Some commentators argue that due to the separate condition that technical and economic progress resulting from a merger should not form an obstacle to competition, it is almost impossible to accept an efficiency defense since any improvement of a merged entity's efficiency is likely to enhance market power.²⁴⁶ There is no efficiency defense provision in the Merger Regulation, but the efficiency argument fits under Article 2(1)(b) of the Merger Regulation. In Article 2(1)(b), the Commission considers whether the merger will result in the development of technical and economic progress that is to the consumers' advantage and does not form an obstacle to competition.²⁴⁷

The *Havilland* case was one of the first EU cases to analyze the "development of technical and economic progress." In *Havilland*, the Commission considered a variety of efficiencies and did not find the "development of technical and economic progress" criteria satisfied to counteract the creation or strengthening of a dominant position.²⁴⁸ The decision implied that most efficiency arguments would be unavailing

244. *But see* FTC v. Butterworth Health Corp and Blodgett Memorial Medical Center, 946 F. Supp. 1285, 1300-1301 (W.D. Mich. 1996), *aff'd* 121 F. 3d 708 (6th Cir. 1997), unpublished opinion (explaining that the merger would result in significant efficiencies, which are sufficient to offset the anticompetitive competitive effects). *See also* Peter D. Camesasca, *The Explicit Efficiency Defence In Merger Control: Does It Make the Difference*, EUR. COMPETITION L. REV. 20(1), 14-28 (1999); *see also* EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL, *supra* note 230, at § 2, 16.

245. Thomas L. Greaney, *Not for Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*, 44 ST. LOUIS U. L.J. 871, 889 (2000).

246. EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL, *supra* note 230, at § 2, 14-17 (comparing the legislation and current practice in the EU, the USA and Canada).

247. There are some changes in the EU. For instance, there is a Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. *See* Proposal for a Council Regulation on the Control of Concentrations Between undertakings (Brussels) 11.12.2002 COM (2002) 711 final, 2002/0296 (CNS), available at http://europa.eu.int/eurlex/en/com/pdf/2002/com2002_0711en.pdf (last visited Oct. 4, 2004) (copy on file with *The Transnational Lawyer*) [hereinafter Proposal for a Council Regulation]. There are changes in the efficiency considerations; this will be discussed in the convergence part. *Id.*

248. *Aerospatiale-Alenia/de Havilland Case IV/M 053*, ¶¶ 65-69, IV/M053 1991. (declaring that the merger would not contribute to the development of technical and economic progress within the meaning of Article 2(1), but added that even if there were such progress, this would not be to consumers' advantage, the consumers will be faced with a dominant position which combines the post popular aircraft families on the market, choice will be significantly reduced).

given a finding of dominance.²⁴⁹ The EU considers technical and economic progress primarily as evidence of a strengthening, dominant position.²⁵⁰ Synergies and efficiencies that the merger might produce are seen as negative and as a potential source of dominance in the EU.²⁵¹ For example, in the *AT&T/NCR* case, possible synergies between merging parties were considered as potentially creating or strengthening a dominant position.²⁵² The Commission interpreted the provision to take into account economic efficiency in borderline cases, but not if a clear dominant position would result.²⁵³

The Commission clearly expressed its position in *Danish Crown/Vestjyske Slagterier*²⁵⁴. Under Article 2(1)(b) of the Merger Regulation, the Commission may take into account the development of technical and economic progress only to the extent that it is to consumers' advantage and does not form an obstacle to competition. Therefore, the creation of a dominant position in the relevant

249. *Id.* ¶ 891 citing Christopher Jones & F. Enrique Gonzales-Diaz, *The EEL Merger Regulation*, 153-158 (1992); Frederic Jenny, *EEC Merger Control: Economies as an Antitrust Defense or an Antitrust Attack?*, 1992 FORDHAM CORP. L. INST. 591, 602 (Barr's ed 1993).

... [I]n short, beside ignoring the most important productive efficiency gains in examining the ATR/de Havilland merger (while at the same time putting heavy emphasis on the fact that those gains may lead to a strengthening of the dominant position of the firms by enabling them to strengthen their customer base), the Commission declares expeditiously and somewhat arbitrarily that the manufacturing cost savings for parties are insignificant. . . .

250. Thomas E. Kauper, *supra* note 26, at 356.

251. Peter D. Camesasca, *The Explicit Efficiency Defence in Merger Control: Does It Make the Difference*, 20 EUR. COMPETITION L. REV. 14 (1999) (explaining that the wording of the Merger Regulation does not leave scope for taking dynamic efficiencies into account once dominance is concluded upon).

252. *AT&T/NCR*, IV/M 050 (1991) at 30 (arguing, "it is not excluded that potential advantages flowing from synergies may create or strengthen a dominant position."). Frederic Jenny, *supra* note 249, at 591, 596-97.

The reasoning here if merger is likely to lead to innovations which competitors have not been able to achieve, then there is prima facie case that the merger should be blocked because, by giving advantage to the firms involved, the innovation is likely to lead to the creation of a dominant position as innovation is likely to lead to creation of a dominant position as a result of which competition will be impeded . . . there is no efficiency defense but an efficiency attack.

Id.

See also EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL, *supra* note 230, at § 2, 14-17. (comparing the legislation and current practice in the EU, the USA and Canada). Also looking at the efficiency defense in practice. *Id.* at 81.

253. Edurne Nvon, Andres Font Glrza, Jaime Folguera Crespo, Jun Briones Alonso, *MERGER CONTROL IN THE EU, LAW, ECONOMICS AND PRACTICE*, at 315 (Oxford University Press 2002); European Economy, European Commission Directorate-General for Economic and Financial Affairs, *The Efficiency Defense and the European System of Merger Control*, No 5, 2001, Part 5, *Efficiency Defense in Practice*, p.81 referring to European Commission (1996). No efficiency defense where there is clear market dominance: European Economy, European Commission Directorate-General for Economic and Financial Affairs, *The Efficiency defense and the European System of Merger Control*, No 5, 2001. Part 2, a comparison of legislation and current practice in the EU, the USA and Canada, p. 15 *MSG/Media Services*, IV/M 469 (1994), the transaction would involve significant efficiencies, however it would result in dominant position that would hinder competition. See also Thomas L. Greaney, *supra* note 245, at 891 (explaining that in a number of cases the Commission has used the findings of enhancement of efficiencies to bolster its conclusion that the merger will create or increase market dominance; for example *MSG/Media Services* or *Du Pont/ICI*, IV/M 214 (1992)).

254. *Danish Crown/Vestjyske Slagterier*, 2000/42/EC March 9th 1999 (OJ L 20, 25.1.2000).

markets identified above means that the efficiencies argument put forward by the parties cannot be considered in the assessment of the present merger.²⁵⁵

In conclusion, the EU will consider efficiencies as part of the overall assessment to determine whether a merger creates or strengthens a dominant position, but not to justify dominance.²⁵⁶ Once a dominant position is created or strengthened, there is no practical scope for an efficiency defense.²⁵⁷

f. Efficiency Consideration to Challenge or Not to Challenge a Merger

The United States assumes efficiency as the most likely explanation for a merger and rejects anticompetitive potential unless it is clear. In the United States, efficiency is the primary explanation for mergers. The United States has a more positive approach to efficiencies and it is part of the competitive effects analysis.²⁵⁸ The positive approach of the United States might be a result of the United States' focus on consumers. In addition, efficiencies can lower prices and increase quality, thus benefiting consumers. The United States attributes more weight to plausible short-term benefits, and there is also more confidence in competitors, customers, and suppliers in the United States.²⁵⁹

While the United States explicitly acknowledges efficiencies, the EU, in contrast, is more skeptical about efficiencies. This most likely results from its focus on competitors, or its focus on single firm dominance.²⁶⁰ Potential efficiencies and synergies are factors contributing to dominant position.²⁶¹ For

255. EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL, *supra* note 230, at § 2, 15 (comparing the legislation and current practice in the EU, the USA and Canada).

256. EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL, *supra* note 230, at 80 (referring to European Commission (1996)): "... there is no real legal possibility of justifying an efficiency defense under the Merger Regulation, any efficiency issues are considered in the overall assessment to determine whether dominance has been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration which otherwise be prohibited," *Id.*

257. *Id.* at § 2, 15 (comparing the legislation and current practice in the EU, the USA and Canada).

258. Sliding scale approach, greater efficiency as the anticompetitive effects increase. Could not be achieved in a less anticompetitive way.

259. Interview with Timothy Muris Chairman of the FTC, 16 ANTITRUST 55 (2001); Timothy Muris, *Merger Enforcement In a World of Multiple Arbiters*, before Brookings Institution Roundtable on Trade and Investment Policy, Washington, D.C., December 21, 2002: (explaining that the U.S. gives more weight to short term benefits, greater confidence in ability of competitors, customers and suppliers). The DOJ did not want to sacrifice likely benefits for longer-term. *Id.* The DOJ concluded that it made more sense to approve and later challenge unlawful conduct if they occur. *Id.* The EU is more inclined than U.S. to give credence to concern over potential long-term harm that could arise from range effects of a merger. *Id.*; see Proposal for a Council Regulation, *supra* note 247, ¶ 52 (explaining that on the substantive side, the Green paper sought to launch debate on policy questions). It proposed to review and if necessary, clarify the role in merger investigations of efficiency claims made by merging parties. *Id.* ¶¶ 59-60. The Commission is of the opinion that it is legally possible to deal explicitly with the issue of efficiencies under the present substantive test and the present wording of the Merger Regulation, Article 2(1) b "the development of technical and economic progress provided it is to consumers' advantage and does not form an obstacle to competition". *Id.*

260. Greny, *supra* note 245, at 892 (arguing that mergers enhancing oligopolistic market may arise different efficiencies).

261. The Commission's interpretation clearly expressed in its decision Danish Crown/Vestjyske Slagterier, where it said "... *The creation of a dominant position in the relevant markets identified above, therefore, means*

example, the EU blocked the *GE/Honeywell* merger because vertical integration would foreclose competition, and as a result, the merger would create and strengthen a dominant position on the markets for large commercial aircraft engines, large regional jet aircraft engines, corporate jet engines, and markets for avionics and non-avionics products. Honeywell's access to cheaper capital from GE enabled it to invest more than its rivals in developing better and discounted products. The Commission viewed this factor as one creating or strengthening a dominant position negatively affecting competitors, potentially driving rivals from the market, raising prices and ultimately harming consumers.²⁶² The EU did not find enough countervailing power, either from competitors or buying power, to approve the merger.

In the *Boeing/McDonnell Douglas* case, the EU's concern was that Boeing would have large sales by combining military and commercial sides, and this would increase resources, technology, and R&D. The practical result of this is that Boeing's dominance would eventually be strengthened, thus foreclosing competition.²⁶³ In addition, the EU viewed exclusive dealing agreements and the complementary products of McDonnell Douglas as leading to dominant market power and considered them as negative factors.

In the United States, efficiencies were not discussed in connection with either merger, probably because the United States presumes efficiency for all mergers, unless there is clear and demonstrable anticompetitive effect. Commentators discussing the *Boeing/McDonnell Douglas* merger viewed the synergies between the commercial and defense sector, the balance between commercial and military work, and the increase in capacity and flexibility as welfare enhancing effects.²⁶⁴ The merger was considered beneficial, increasing capacity and flexibility due to efficiencies between military and commercial sectors.²⁶⁵ The factors seen as having a conglomerate effect in the EU might have been seen as efficiencies in the United States, where the concept of efficiency is broader.²⁶⁶

that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger." Council Directive 2000/42/EC, 1999 O.J. (L20) 25.1.2000). So if they are creating a dominant position, then efficiencies cannot be taken into account. *Aerospatiale-Alenia/de Havilland* Case IV/M 053, at ¶ 65-69, IV/M053 1991, *AT&T/NCR* IV/M 050 (1991) at 30, *MSG/Media Services*, IV/M 469 (1994), *Du Pont/ICI*, IV/M 214 (1992). *see also* Greaney, *supra* note 245.

262. *See* William J. Kolasky, *supra* note 131; William Kolasky, Deputy Assistant Attorney General Speech, Antitrust Division, Department of Justice, *U.S. and European Competition Policy: Are There More Differences Than We Care to Admit?* Before the European Policy Center, Belgium, April 10, 2002; Hochstadt, *supra* note 212, at 319; EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL, *supra* note 230, at § 2, 14-17 (comparing the legislation and current practice in the EU, the USA and Canada).

263. However, the merger was eventually approved. *See* Stock, *supra* note 19 (explaining that efficiencies were not mentioned in the FTC Report the differing U.S. and EU positions on the Boeing/ McDonnell Merger). This might be because the merger raised no concerns so no need to mention them, or even if concerns according to the sliding scale analysis—the efficiencies outweighed the anticompetitive concerns. But the merger was approved because McDonnell Douglas was no longer a meaningful competitive force. *Id.*

264. William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 *ANTITRUST L.J.* 805, 856-57 (2001); Kolasky, *supra* note 131.

265. Greaney, *supra* note 245, at 891.

266. The United States presumes mergers create efficiencies. According to the Merger Guidelines primary

g. *Efficiency as an Affirmative Defense*

For *GE/Honeywell* and *Boeing/McDonnell Douglas*, there might be differences in the efficiency defense analysis. However, the shortcoming for this comparison is that, in the United States, there is hardly any public information available unless the merger is litigated. It is harder to evaluate the U.S. analysis because the information is confidential. For example, in the United States, *GE/Honeywell* proponents were unable to prove efficiencies in the merger that would lead to better and cheaper products. The efficiencies were only assertions. Since the information is confidential, the public does not know the details regarding the asserted efficiencies. Therefore, the efficiencies remain unknown; there could be merger specific, cognizable efficiencies under the Merger Guidelines. However, there is no information available to determine why the merger was necessary, or why coordination, joint venture or bilateral agreements would not have been sufficient. It is impossible to know whether the efficiency arguments, if any, would have been accepted in court. According to the case law in the United States, one might conclude that, if these cases were litigated, the efficiencies would not have saved an otherwise anticompetitive merger, given the skepticism in the United States about the efficiency defense. As recently discussed in *FTC v. H J Heinz Co.*, if a party is claiming efficiencies, there is a heavy burden to show that they are merger specific efficiencies that will maintain prices and output at pre-merger levels or better.

Nevertheless, although not clear about its efficiency arguments, the United States criticized the EU Commission for condemning mergers leading to lower prices, more attractive products and services, merger specific cost savings, and for turning the efficiency defense into an efficiency offense, especially in the *GE/Honeywell* case.²⁶⁷

However, Commissioner Mario Monti rejected the assertion that the European Commission applies an efficiency offense when dealing with conglomerate mergers.²⁶⁸ There is a distinction between mergers that lead to price reductions as a result of strategic behavior of dominant firms to eliminate competitors and exploit consumers, and mergers that objectively lead to significant and durable efficiency gains that are likely to be passed to the consumers.²⁶⁹ According to Commissioner Monti, desirable efficiencies are aimed at long-term and structural reduction in the

benefit of mergers to the economy is their potential to generate efficiencies. Things considered as entrenchment in EU might have been called efficiencies under the U.S. antitrust policy and might have weighed in favor of transaction, exclusive dealing, military and commercial synergies. Robert Pitofsky, *Vertical Restraints and Vertical Aspects of Merger—A U.S. Perspective*, FORDHAM CORP L INST (1998) (Barry Hawk ed. 1998); Kovacic, *supra* note 264, at 805, 847, 853 available at <http://www.ftc.gov/speeches/pit1.htm>

267. CRA Insights, *supra* note 171, at 5 (concluding, that the EC policy condemns mergers leading to lower prices, more attractive products and services, or merger specific, cognizable cost savings). See also Jenny, *supra* note 249, at 591; Roundtable Discussion, *Transatlantic Antitrust: Convergence or Divergence?*, 16 ANTITRUST 9 (2001).

268. Monti, *supra* note 98 (admitting “conglomerate mergers might have the potential to generate efficiency gains”).

269. *Id.*

marginal cost of production and distribution. They are the direct and immediate result of the merger and cannot be achieved by less restrictive means. Moreover, it must be reasonably likely that the efficiencies will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality.²⁷⁰

Commissioner Monti argued that in the *GE/Honeywell* case the merging parties did not prove efficiencies, and it is harder for the antitrust authority to clear a transaction that is likely to lead to foreclosure effects. Commissioner Monti asserts that there is no difference between the way the United States and EU Commission apply the “Efficiency Defense.” Moreover, there is convergence between the two systems on efficiencies and efficiency defense criteria.

h. Convergence

In the EU, there is a positive attitude toward efficiency claims since the *Havilland* case. The EU is again reviewing its efficiency approach and intends to view efficiencies more favorably and integrate efficiency analysis into competitive effects analysis under its revision of the Merger Regulation.²⁷¹ According to the revisions, efficiencies will only be accepted when there is sufficient confidence that the efficiencies will encourage the merged entity to act competitively for the benefit of consumers and when efficiencies outweigh the adverse effects on consumers or make adverse effects unlikely. There is also a Draft Commission Notice (“Notice”) on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.²⁷² The efficiency part is similar to the U.S. Merger Guidelines. According to this Notice.

The Commission considers any substantial efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the

270. Monti, *supra* note 98; see also Mario Monti, *The future for Competition Policy in the EU*, Merchant Taylor’s Hall, London (July 9, 2001) Merger Control: Issues highlighted in the context of the GR/Honeywell Merger. available at http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html (commenting, “We are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition). We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead eventually to reduced consumer welfare.” *Id.*

271. Green Paper on the review of Council Regulation EEC No 4064/89 11.12.2001 Com (2001) 745/6 Final, at 170-72 (opening with discussion on to what extent efficiencies might be taken into consideration) [hereinafter Green Paper]; see also *The Competitive Effects of Efficiencies in European Merger Control*, Enterprise Papers No 11 (2002), at <http://europa.eu.int/comm/competition/mergers/others/>. The Commission acknowledged that it is legally possible to deal explicitly with the issue of efficiencies under the present substantive test and with the present and proposed wording of the Merger Regulation. Also covered under the proposed horizontal merger guidelines. *Id.*

272. Commission Notice, the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Commission of the European Communities, Brussels 11.12.2002, COM (2002) ¶ 2 (stating that “[t]he purpose of this notice to provide guidance as to how the Commission makes the appraisal of concentrations where the undertakings concerned are active sellers on the same relevant market or potential competitors on that market”) [hereinafter EU Notice on mergers].

efficiencies that the merger brings about, this merger does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the incentive of the merged entity to act pro-competitively for the benefit of consumers, by counteracting the effects on competition which the merger might otherwise have. In the interest of the consumer, it is necessary to ensure that the merged firm will have sufficient incentives not only to realise efficiencies arising directly from the merger but also to make continuing efforts to enhance efficiency. This presupposes sufficient competitive pressure from the remaining firms and from potential entry.²⁷³

The Notice also requires the efficiencies to be substantial, to the direct benefit of consumers, merger specific and verifiable.²⁷⁴

V. CONCLUSION

Although it is more common to have similar results in the same mergers and there is convergence in the area.²⁷⁵ There are still cases in which the EU and the United States reach different conclusions when analyzing the same merger. For example, in the *Boeing/McDonnell Douglas* case, the EU found the proposed merger anticompetitive and only approved it after several concessions were made. In contrast, the United States approved the same merger without concern. Similarly, in the *GE/Honeywell* merger, the EU found the merger incompatible and did not approve it, while the United States did. Some of the differences between the two systems can be grouped as follows. First, there is a difference in focus between the two. The EU looks at the effect of the merger on competitors

273. EU Notice on Mergers, *supra* note 272, ¶ 88.

274. *Id.* ¶ 89.

Efficiencies are most likely to make a difference when they are substantial and the possible anti-competitive effects that might otherwise occur are small . . . greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to the direct benefit of the consumer. . . . efficiencies have to be of direct benefit to consumers and to be merger-specific, substantial, timely, and verifiable. *Id.* at 90. . . efficiencies should directly benefit consumers in the relevant markets where it is otherwise likely that a dominant position will be created or strengthened as a result of which conditions of effective competition would be significantly impeded. . . . *Id.* at 91. Also, efficiencies that lead to a new or improved products or services may directly benefit consumers. *Id.* at 92. Merger specific. *Id.* at 93 verifiable. *Id.* at 94.

See also Mario Monti, *Radical Reform European Commission*, IBA Conference on EU Merger Control Brussels, 7 November 2002; *see also* EU Notice on Mergers, *supra* note 272.

275. Monti, *supra* note 98 (stating that substantive convergence is seen in the following recent cases with similar outcomes and remedies: MCI/Sprint (M 1741 (2000)), Alcoa/Reynolds (M 1693 (2000)), Exxon/Mobil (M 1383 (1999)).

and the United States focuses on consumers. Next, the EU focuses more on single firm dominance versus the U.S.' approach that concentrates on oligopoly and collusion.²⁷⁶ Another category encompasses differences in conglomerate effects and efficiencies. Other differences might arise as a result of differences in process and procedure. Finally, the two consider the innovation market analysis differently.

276. *Id.* However, EU's analysis is similar to the U.S.'s in collective or oligopolistic dominance—fear of coordinated interaction. Similar examination is coordination likely, post merger market conditions, market specific factors-homogeneity, market transparency etc. But not that common, potential issues of collective dominance, few instances of specific cases of this kind which both consider in parallel. But latest TimeWarner/EMI merger, but the deal collapsed before a decision. [would have reduced 5 to 4].

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