

All Bundled Up: Bringing the Failed GE/ Honeywell Merger in from the Cold

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All Bundled Up: Bringing the Failed GE/Honeywell Merger in from the Cold

Douglas K. Schnell†

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Introduction

When Jack Welch, who is regarded as one of the world's most admired CEOs,¹ stepped to the podium on October 30, 2000 to confirm the

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1. Michael Skapinker, *Survey—World's Most Respected Companies*, FIN. TIMES (London), Dec. 17, 2001, at 2.

planned merger between General Electric and Honeywell, the deal was generally seen as the capstone to his brilliant career.² Delaying a planned April 2001 retirement until the end of 2001 in order to personally oversee the acquisition,³ Welch seemed poised to enhance his already sterling reputation. Facing no significant opposition from the United States Department of Justice's Antitrust Division⁴ or the Federal Trade Commission, the U.S. regulators approved the merger with only minor concessions. On July 3, 2001, however, the European Commission dropped a bombshell on Welch and the rest of the global business community. Unsatisfied with GE's response to its antitrust concerns, the Commission decided to block the merger.⁵ Welch's "last hurrah" became a footnote in history, dashed by bureaucrats in Brussels. Without question, the most profound impact of the blocked merger was that it left other executives around the world asking the same question: "What next?"⁶

Until recently, antitrust and competition policy had not been at the forefront of international law, largely because it has traditionally been viewed as a local matter.⁷ In the United States, a comprehensive antitrust policy first emerged in 1890 when the Sherman Act⁸ "almost completely federalized American competition law,"⁹ and offered, for the first time, a unified national competition policy. Just as U.S. states followed their own paths on competition policy during the nineteenth century prior to the Sherman Act, other major industrial nations engaged in independent competition law development, primarily after World War II.¹⁰ Thus, businesses attempting to operate on a transnational scale quickly found themselves pushed, pulled, and prodded in myriad directions by local com-

2. See generally *GE Plans to Acquire Honeywell for \$45 Billion*, L.A. TIMES, Oct. 23, 2000, at C1.

3. See *id.*

4. *GE-Honeywell Merger Given Green Light*, TORONTO STAR, May 4, 2001. The Justice Department, concerned over higher prices for the U.S. military, conditioned merger approval on the divestiture of Honeywell's helicopter engine business and new authorization for third-party maintenance and repair service for some GE-manufactured aircraft engines. *Infra* III.B. See also 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, 274 (2002).

5. David S. Evans, *The New Trustbusters*, 81 FOREIGN AFF. 14, 14-15 (2002).

6. *Id.* at 14. Evans argues that "European antitrust regulation could become an unexpected stumbling block on the road toward a more integrated global economy" and that "[t]he EU's opposition to the merger has highlighted the risks that multinational corporations face as antitrust laws proliferate around the globe." *Id.* See also Bruce Barnard, *Competition Questions Linger*, EUR., Sept. 2001 (Magazine), at 22 (stating that the blocked merger "prompted ordinary Americans, and not a few business leaders [], to ask what right a foreign regulator had to interfere in a deal between two US firms.").

7. Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 197 (1998).

8. Sherman Act, 15 U.S.C. § 1 (2000).

9. Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 353 (1997).

10. See Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEGAL STUD. 433, 435 (2002).

petition authorities.¹¹ In response to these inconsistent laws, “five great attempts [were] . . . made to achieve a true international harmonization of competition law in the twentieth century.”¹² Two former U.S. Assistant Attorneys General for Antitrust recently proposed a sixth¹³ and seventh¹⁴ option. The first five attempts have already failed,¹⁵ the sixth is likely to meet the same fate,¹⁶ and the seventh remains promising but is yet to be realized.¹⁷ If anything is clear from these negotiations, it is that regulators remain conscious of the need for a rational, uniform approach to antitrust¹⁸ issues on a global scale. To date, competition authorities have simply been unable to balance effectively the needs of their own nations against the greater good of a global policy. This failure comes despite increased pressure from political and business leaders who want something more than vague promises of cooperation and a growing legacy of botched deals.¹⁹

What, though, if a framework was in place to handle mergers that generated different approval outcomes in different jurisdictions? Imagine a situation in which the regulatory onus fell primarily on local officials responding to local concerns, but a standards body operated in the background to ensure uniformity. This body would work to develop competi-

11. *Id.* at 438-39.

12. Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 558 (1994). The first proposal by the League of Nations to develop a system of international controls on cartels was never adopted by the League, largely because of European objection. See Waller, *supra* note 9, at 349-50. The International Trade Organization (“ITO”), or “Havana Charter,” contained detailed competition law rules and was intended to be the third leg of “a liberal post-war economic order built on the ITO, the World Bank, and the International Monetary Fund,” but was never ratified by the United States. *Id.* at 350. The third try, a new version of the ITO, was defeated in the United Nations Economic and Social Council through a combination of cold war politics and U.S. wavering on the form and substance of international antitrust. *Id.* at 350-51. The Organization for Economic Cooperation and Development (“OECD”) and the United Nations Conference on Trade Development (“UNCTAD”) both adopted competition codes, but their non-binding nature made them the fourth and fifth failures, respectively. *Id.* at 351.

13. See William Sugden, Note, *Global Antitrust and the Evolution of an International Standard*, 35 VAND. J. TRANSNAT’L L. 989, 990 (2002).

14. See Charles A. James, *International Antitrust in the 21st Century: Cooperation and Convergence*, Speech Before the OECD Global Forum on Competition 9 (Oct. 17, 2001), at <http://www.usdoj.gov/atr/public/speeches/9330.pdf> (last visited Oct. 8, 2003).

15. Waller, *supra* note 12, at 558.

16. Sugden, *supra* note 13, at 992, 996.

17. See James, *supra* note 14, at 8-11.

18. “Antitrust is an ambiguous term, especially in an international setting. It refers to a competition policy dealing with business structure and conduct and, more broadly, with the appropriate role of business in modern life.” Sullivan, *supra* note 7, at 197. As should already be clear, the term “antitrust” has almost as many meanings as does the concept. Competition policy, competition law, antitrust policy, and antitrust all seem to be bandied about as interchangeable with each other, though each can take on a more specific, nuanced meaning in certain contexts. Unless otherwise noted, I am adopting this convention and using the terms as perfect substitutes.

19. See, e.g., William J. Kolasky, *Conglomerate Mergers and Range Effects: It’s a Long Way from Chicago to Brussels*, 10 GEO. MASON L. REV. 533 (2002).

tion laws that encompassed both the best economic thinking and the real experiences from regulatory agencies all over the world. The United States, with one of the oldest national antitrust policies, would be at the same table as European regulators, who began active regulation only about a decade ago, as well as nations that are only now beginning to think about competition policy. As a new global antitrust “common law” developed, each nation would harmonize its enforcement, if not its substantive law, to that developed by the standards body. Businesses would finally know what regulatory burdens to expect in a cross-border transaction and—perhaps most importantly—increased transparency would encourage regulators to use competition policy as a sword for economic development rather than as a shield for dying industries.²⁰ Yet, such a framework does nothing for mergers contemplated in the long run-up to greater law harmonization. As such, this standards body must be prepared to fill in the gap and act, at least temporarily, as a court of last resort.

Such developments, though promising in theory, are still some way off. If the GE/Honeywell merger represents a period of divergence between U.S. and European regulators, businesses operating under both regulatory schemes need something more than promises of future convergence when contemplating a merger with cross-border implications. Arbitration may provide an option to bridge the current gap between a contentious reality and a cooperative future. In the U.S., the use of arbitration for antitrust disputes in the international commercial context has increased in the past decade, usually as the result of a contractual arbitration clause.²¹ What if, when U.S. and European regulators reached differing substantive outcomes when examining a merger—that is, when one jurisdiction approves a merger but the other does not—they, in consultation with the affected companies, could submit the merger to arbitration for a final decision? Such an outcome is not as impossible as it might first appear.

This Note explores some of the major dimensions of international antitrust policies, specifically as they relate to the failed GE/Honeywell merger, and offers a framework for harmonizing global antitrust policies. Part I examines the differing philosophies on the role of antitrust in regulating market behavior that has developed on both sides of the Atlantic. Part II lays the foundation for the discussion of the GE/Honeywell merger by looking at two major antitrust cases predating GE/Honeywell: the 1997 merger of Boeing and McDonnell Douglas and the 2000 merger of AOL and Time Warner. Part III examines the GE/Honeywell merger itself, focusing on the

20. See, e.g., Sugden, *supra* note 13, at 1018. In his article, William Sugden suggests that many of the overall goals of a more unified antitrust scheme could be accomplished through greater extraterritorial application of domestic antitrust laws. While true, this seems like an unfortunate, and duplicative outcome, because it largely preserves the status quo and offers little more than louder shouts from various regulators.

21. See Eric James Fuglsang, Comment, *The Arbitrability of Domestic Antitrust Disputes: Where Does the Law Stand?*, 46 DEPAUL L. REV. 779, 804-06 (1997). This can be traced directly to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), where the Supreme Court upheld a contractual arbitration clause governing an international commercial dispute.

economic rationale provided by European regulators as the basis for their ultimate decision to block the merger. Part IV discusses some of the lessons regulators on both sides of the Atlantic can draw from the failed merger, while Part V challenges the conventional wisdom by asking whether the blocked merger has any long-term implications and whether we really need to do anything to harmonize competition law. Finally, Part VI develops a proposition that arbitration may represent an effective, though temporary, way to deal with the vexing problem of cross-border antitrust integration.

I. The History: Differing Goals, Differing Philosophies

A. Development of Antitrust Law in the United States

Before 1870, the American economy was rather simple: small manufacturers, often with only a few employees (who were likely family members), purchased raw materials to meet their production needs.²² Wholesalers bought the output and sold it to retailers who, in turn, sold the items to consumers.²³ As urban populations and technology grew, American industry expanded dramatically.²⁴ As a result of this growth, state competition laws could not meet the needs of a national economy and were confronted with “the worst excesses of national corporations.”²⁵ Public outcry over the economic power wielded by the industrial magnates²⁶ of the late nineteenth century through their massive trust companies²⁷ and the “popular dissatisfaction and anger at the capacity of these enterprises to force out rivals and to raise prices to consumers”²⁸ triggered legislative action.

In this environment, the early statutes, which remain the principal guides for antitrust enforcement in the United States, were drafted quickly, leaving a tremendous amount of room for judicial interpretation.²⁹ In essence, American antitrust laws are designed to guard against any concentration, either through merger, joint venture, or cartel, which will “facilitate

22. See Sullivan & Fikentscher, *supra* note 7, at 199.

23. *Id.*

24. *Id.* Demand led to competition between these rapidly expanding firms and businesspersons decried the intense downward pressure on prices. Price fixing “pools”—cartels, in essence—resulted, but “cheating” and new market entrants led industrialists toward horizontal integration as a means of smoothing out the supply curve and controlling prices during weak demand periods. *Id.*

25. Waller, *supra* note 9, at 352.

26. Names like Rockefeller, Gould, Vanderbilt, Carnegie, and Fisk are familiar to anyone with even a basic grounding in U.S. economic and cultural history.

27. David J. Gerber, *Competition Law*, 50 AM. J. COMP. L. 263, 268 (Supp. 2002). See also Sullivan & Fikentscher, *supra* note 7, at 199-200. The authors point out that trust companies typically resulted after a market had reached a significant level of horizontal integration. At that point, the trust would expand vertically, back through inputs and forward through consumer marketing in an effort to control the entire market from raw materials to consumer sales. Standard Oil became the prototypical example of this process which occurred throughout American industry.

28. Gerber, *supra* note 27, at 268.

29. *Id.* at 270.

collusion, actual or tacit, between the merged firm and the other firms in the market,"³⁰ with relatively little focus placed on a merger's harm to competitors.³¹ Section 7 of the Clayton Act³² sets out the principal test for any merger or joint venture, stating that it can be held illegal if the effect "may be substantially to lessen competition, or to tend to create a monopoly."³³ Similarly, Section 1 of the Sherman Act³⁴ provides that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal."³⁵ Thus, the primary concern for U.S. antitrust regulators under both the Clayton and Sherman Acts is whether the merger will result in a market with significantly reduced competition.³⁶

Regulators begin an antitrust investigation by looking at the merger's potential impact on both the market itself and on the combined firm's position in the market after the merger.³⁷ Regulators focus on five factors: (1) whether the merger would result in a concentrated market; (2) whether the merger generates concerns about a possible decrease in competition; (3) whether barriers to market entry are low enough to outweigh possible anticompetitive behavior; (4) whether the merger creates efficiency unobtainable by other means; and (5) whether, without the merger, either firm might fail and ultimately leave the market.³⁸ The resulting structure of the market after the merger—the number of competitors, the degree of competition, potential barriers to entry, and the like—is of primary concern to regulators.³⁹ Regulators also examine a merger's impact on competitors, but

30. Thomas E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 320 (2000). See also Sullivan & Finkentscher, *supra* note 7, at 200 (noting that "[t]he constitution the nation knew in 1890 was attuned [sic] to protect economic opportunity, property, contract, and political liberty from the excesses of governmental power. Accordingly, antitrust would protect these same values from the excesses of the new 'autocrat[s] of trade.'" See also 15 U.S.C. §§ 1-2 (2000).

31. See James, *supra* note 14, at 6-7 (stating that "the purpose of the anti-trust laws 'is not to protect business from the working of the market; it is to protect the public from failure of the market.' Indeed, the competitive process is largely about encouraging the more efficient to grow at the expense of the less efficient.").

32. Clayton Act, 15 U.S.C. § 18 (2000).

33. *Id.*

34. 15 U.S.C. § 1 (2000).

35. *Id.*

36. See Sullivan & Fikentscher, *supra* note 7, at 200.

37. See U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 0.2 (1992) [hereinafter MERGER GUIDELINES]. The FTC and DOJ issued MERGER GUIDELINES in order to provide guidance to practitioners on the current state of antitrust law. The guidelines, however, do not have the force of law and are designed to "describ[e] the analytical foundations of merger enforcement and provid[e] guidance [to] enabl[e] the business community to avoid antitrust problems when planning mergers." U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, STATEMENT ACCOMPANYING RELEASE OF REVISED MERGER GUIDELINES, *reprinted in* ABA SECTION OF ANTI-TRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTI-TRUST ISSUES 461 (Robert S. Schlossberg & Clifford H. Aronson eds., 2000) [hereinafter DOJ STATEMENT].

38. See MERGER GUIDELINES, *supra* note 37, § 0.2.

39. See *id.*

only in a peripheral sense.⁴⁰ Both geographic and product-based markets are established with each product or service of the merging entities placed in a different market.⁴¹ Geographic markets are established for each of the firms' products by looking for areas where the seller competes and where the buyer can reasonably turn for supplies.⁴² Product markets include the products and services that a significant number of consumers would accept as a substitute if the price of the original product were increased.⁴³ If any of the products overlap (that is, the firms are direct competitors), the merger is typically considered horizontal.⁴⁴

To understand whether a merger will prompt changes in a product market, regulators rely on the "small but significant and nontransitory" increase in price (SSNIP) test to gauge the market's response to a price increase.⁴⁵ "If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the [regulators] will add to the product group the product that is the next-best substitute for the merging firm's product."⁴⁶ Regulators assume that a hypothetical monopolist will pursue maximum profits in deciding whether to raise prices on products under its control and continue the analysis until a group of products is identified in which a hypothetical monopolist could "profitably impose at least a 'small but significant and nontransitory' increase, including the price of a product of one of the merging firms."⁴⁷

After establishing the relevant geographic and product markets, regulators calculate the percentage of the market controlled by the merging firms. This is an important number because higher levels of control are

40. See generally Sullivan & Fikentscher, *supra* note 7, at 200 (noting that antitrust seeks to ensure "that the industrial and business processes remain[] competitive.").

41. See MERGER GUIDELINES, *supra* note 37, § 1.0.

42. *Id.* at 70 (analyzing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)).

43. *Id.* at 37-38, 50.

44. ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 87 (Robert S. Schlossberg & Clifford H. Aronson eds., 2000) [hereinafter UNDERSTANDING THE ANTITRUST ISSUES]. In a horizontal merger, regulators are looking for potential anticompetitive results in the form of "coordinated interaction and unilateral effects." *Id.* at 87. In contrast, a vertical merger is one that involves "firms at different but adjacent levels of production or distribution of a good or service." *Id.* at 287. In addition, in a vertical merger the firms are often involved in a supplier-customer relationship. *Id.* The primary concerns in a vertical merger are the facilitation of collusion and evasion of rate regulation. *Id.* at 295. Challenges to vertical mergers are rare under U.S. law. See *id.*

45. MERGER GUIDELINES, *supra* note 37, § 1.11. The test assumes a lasting five to ten percent price increase on a product and looks for changes in both consumer behavior (e.g., buying different products) and supplier response (e.g., increasing the production of substitute goods). If changes result, the product is included in the scope of the market. UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 49-50.

46. MERGER GUIDELINES, *supra* note 37, § 1.11.

47. *Id.* Regulators "generally will consider the relevant product market to be the smallest group of products that satisfies this test." *Id.*

generally associated with greater market power.⁴⁸ Market shares, calculated by adding and comparing the current annual sales of participants in a certain market,⁴⁹ are then used to determine the market's Herfindahl-Hirschman Index (HHI) of market concentration, from which regulators can get a rough idea of the merger's competitive impact on the market.⁵⁰ This is not to say, however, that authorities rely exclusively on market shares in deciding whether to challenge mergers.⁵¹ In fact, antitrust authorities have disavowed exclusive reliance on market shares in favor of a more "reasoned analysis of the likely competitive effect of the particular transaction."⁵² The Department of Justice (DOJ) and Federal Trade Commission (FTC) recognize that the competitive effects of a merger cannot be determined solely based on market concentration,⁵³ a position consistent with the decision in *United States v. General Dynamics Corp.*⁵⁴ Authorities also consider several other factors, including ease of entry into the market,

48. See UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 79. Market power is generally viewed as a firm's ability to set prices unilaterally or to cooperate with other firms to set prices in oligopolistic competition. *Id.* at 79, 95-96.

49. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974) (stating that "[e]vidence of the amount of annual sales is relevant as a prediction of future competitive strength"). Annual sales from previous years may be used if, for some reason, current sales do not accurately reflect the market. UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 80-81.

50. See UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 84-85. "The HHI is calculated by summing the squares of the individual market shares" of all firms in the market. MERGER GUIDELINES, *supra* note 37, § 1.5. This number ranges from near zero (no firm has more than a negligible share of the market) to 10,000 (one firm controls the entire market). UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 85. A market with an HHI below 1000 is seen as unconcentrated and a merger is unlikely to have a significant impact. MERGER GUIDELINES, *supra* note 37, § 1.51(a). If the HHI is between 1,000 and 1,800, the market is considered moderately concentrated. *Id.* § 1.51(b). Mergers that produce an HHI increase of less than 100 points in this segment are seen as unlikely to have competitive impacts, but mergers that result in an HHI increase of over 100 points raise significant competitive concerns. *Id.* Markets with an HHI of 1,800 or more are considered highly concentrated and an HHI increase of 50 points or more raises competitive concerns. *Id.* § 1.51(c). For example, if one imagines a market with four participants, each with a market share of twenty five percent, the HHI is 2,500 ($25^2 + 25^2 + 25^2 + 25^2 = 2,500$). This market is considered highly concentrated and a merger that results in an HHI increase of over fifty points (which involves a very small change in market share by one competitor in this example and is certain if two of these firms merge) is of strong concern to regulators. Larger firms have a greater proportionate weight than smaller firms in the calculation, allowing regulators to get a better feel for the potential collusive effect of larger firms. Thus, a market of four firms with 50, 20, 20, and 10 market shares generates an HHI of 3,400 ($50^2 + 20^2 + 20^2 + 10^2 = 3,400$). This 900 point difference from the equally balanced market shows the greater potential of the firm with the largest market share to engage in anticompetitive behavior. UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 85. The DOJ or FTC have typically challenged mergers in highly concentrated markets where the HHI change is more than 100 points. *Id.* at 94-95.

51. See UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 93.

52. 60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 61 ANTITRUST L.J. 229, 235 (1992) (emphasis omitted).

53. See MERGER GUIDELINES, *supra* note 37, § 1.52.

54. *General Dynamics Corp.*, 415 U.S. at 503-04; see *infra* notes 63, 67 and accompanying text.

the possibility of a failure by one of the firms, merger-related efficiencies, and market or product characteristics that make collusion especially likely.⁵⁵

Key to any merger analysis under U.S. law is the concept of merger-related (or merger-generated) efficiencies.⁵⁶ According to the DOJ and FTC, "the primary benefit of mergers to the economy is their *efficiency-enhancing potential*."⁵⁷ Economic analysis has played an increasingly large role in merger analysis over the past thirty years and considerably changed judicial and administrative attitudes about the role of efficiencies in merger review.⁵⁸ Broadly defined, an efficiency is something that increases the value of society's economically measurable assets.⁵⁹ Mergers can result in efficiencies "by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction."⁶⁰ Efficiencies can actually enhance competition and result in lower prices.⁶¹ Merging parties routinely offer evidence of the merger-specific reasons for having an incentive to lower prices, using these efficiencies (and their associated cost savings) to counterbalance incentives they might have to raise prices.⁶²

In sum, U.S. merger law focuses almost exclusively on the market, asking whether the merger will dampen competition in any segment, regardless of whether the merger creates a single dominant entity.⁶³

55. Lisa M. Renzi, Comment, *The GE/Honeywell Merger: Catalyst in the Transnational Conglomerate Merger Debate*, 37 NEW ENG. L. REV. 109, 122 (2002).

56. See UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 143.

57. MERGER GUIDELINES, *supra* note 37, § 4 (emphasis added).

58. See Charles A. James, Antitrust in the Early 21st Century: Core Values and Convergence, Address at the Program on Antitrust Policy in the 21st Century 13, 15 (May 15, 2002), at <http://www.usdoj.gov/atr/public/speeches/11148.pdf> (last visited Oct. 11, 2003).

59. See UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 143.

60. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 4 (revised 1997) [hereinafter revised MERGER GUIDELINES].

61. *Id.* The *Merger Guidelines* give an example of two high cost competitors combining to form one low cost competitor.

62. See Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST, Fall 2001, at 18, 21. This is known as the "efficiencies defense."

63. 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, 339 (2002). It is entirely possible, then, for a merger to garner approval even if the resulting company holds a dominant position in the market, so long as sufficient competition remains at the end of the day. This is primarily accomplished by showing that a significant number of non-market factors, such as ease of entry, efficiencies, and changing market conditions, survive the merger, and these are generally viewed as sufficient to rebut a prima facie showing of concentration in the post-merger market. See Donald I. Baker, *United States of America*, in INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 447, 455 (J. William Rowley & Donald I. Baker eds., 1991). In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court held that a showing of high concentration in the coal market, based on past coal production and sales figures, was insufficient, standing alone, to conclude that a merger between two leading producers of coal would, by contributing to concentration, substantially lessened competition.

What this means is that while any conduct that eliminates or disadvantages rivals may in some sense reduce competition, "reduction of competition does not invoke the [antitrust laws] until it harms consumer welfare"—that is, "when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."⁶⁴

Perhaps the most quoted line in American antitrust jurisprudence is that antitrust laws are concerned with the "protection of *competition*, not *competitors*."⁶⁵ As such, regulators focus on the impact a merger will have on consumers, not on competitors,⁶⁶ making a firm's potential to dominate a market the primary concern.⁶⁷ Antitrust laws, however, are not seen as a

Instead, the Court found that the competition for new coal contracts and the amount of available coal reserves in the post-merger market was the proper metric for gauging future market effect. See *id.* at 501-03; see also *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (providing that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness; the Supreme Court has never indicated that a defendant seeking to rebut a prima facie case is restricted to producing evidence of ease of entry. Indeed, in numerous cases, defendants have relied entirely on non-entry factors in successfully rebutting a prima facie case.").

64. William J. Kolasky & Janet Ridge, *United States: Summary of US Antitrust Laws*, INT'L FIN. L. REV., Apr. 2001, at 159, 159 (Supp. 2001) (quoting *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995)).

65. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis added). This corresponds with the classical economic idea that competitive and open markets would assure the common welfare. Sullivan, *supra* note 7, at 197.

66. See generally Kauper, *supra* note 30, at 320 (noting that "the base concern has consistently been with price setting by groups of firms"); see also Krzysztof Kuik, *Recent Developments in EU/US Trade Relations*, 79 U. DET. MERCY L. REV. 433, 442 (2002) ("Viewed in a nutshell, the United States antitrust policy has focused . . . on a single goal of increased economic efficiency leading to an increase in consumer welfare."); ROBERT H. BORK, *THE ANTITRUST PARADOX* 89 (1978) ("Whether one looks at the texts of the antitrust statutes, the legislative intent behind them, or the requirements of proper judicial behavior, . . . the case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws.").

67. See Schmitz, *supra* note 63, at 339. In *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963), the Supreme Court held that when a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," a presumption of illegality exists. In *Philadelphia Nat'l Bank*, a combined market share of thirty percent was sufficient to generate that presumption. *Id.* at 364. The Court then embarked on over ten years of analysis under this framework, resulting in the following decisions: *United States v. Von's Grocery Co.*, 384 U.S. 270, 302 (1966) (upholding the blocking of a merger where the combination would have resulted in a combined market share of 7.5%); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551 (1966) (upholding a blocked merger where the combined shares totaled 4.49% nationwide, 11.32% in a three-state area, and 23.95% in Wisconsin); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964) (upholding a blocked merger between a firm with 27.8% of the market and a firm with 1.3% of the market). In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Court pulled back from this presumption of illegality when it found that static market shares could not generate an accurate picture of future market power and allowed a merger that resulted in a combined market share of fifteen percent. See *id.* at 486. Today, because of *General Dynamics*, the analysis of market domination has returned to the fundamental concern over the avoidance of collusion. See Kauper, *supra* note 30, at 325. As a result, the courts have upheld mergers like that at issue in *United States v. Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984), in which a merger that resulted in a combined market share of over fifty percent was approved because ease of entry into the

way to “protect competitors from mergers that will make the merged firm more efficient,”⁶⁸ because competition is seen as the best way to promote efficiency. Former Treasury Secretary Lawrence Summers put it this way: “the goal is efficiency, not competition. The ultimate goal is that there be efficiency.”⁶⁹ A recent Supreme Court decision is illustrative:

The purpose of the [Sherman] Act is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.⁷⁰

This language goes a long way in explaining the underlying rationale of American antitrust law.

B. Development of Antitrust Law in the European Union

Competition policy in Europe is more policy-oriented, with “market integration, consumer welfare, and [the] creati[on of] a level[]playing field” considered more important than under U.S. law.⁷¹ Current law is based largely on the German concept of competition policy adopted after World War II.⁷² The German system rested on the principle that individual market participants would compete with each other while the state stood in the background to ensure that competition remained viable.⁷³ Seeking primarily to protect competitors from dominant firms, both the German and now the European Union systems focus on whether or not a merger will result in a dominant position.⁷⁴ Competition law also devel-

market generated substantially less fear about the impact of collusion on prices. *Id.* at 978-79.

68. Kolasky, *supra* note 19, at 5.

69. Lawrence H. Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 358 (2001).

70. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

71. Kuik, *supra* note 66, at 442.

72. Schmitz, *supra* note 63, at 338 n.64.

73. *See id.* Interestingly, the German model originally called for competition completely free of government influence (and interference). *See id.* at 337.

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

Id. at 337-38.

74. *See id.* at 338.

oped around a unique set of political incentives: European Community regulators initially needed a way to break down national borders in order to promote the European common market, and cross-border mergers were an effective means of promoting this goal.⁷⁵ The EU tends to focus more on continuous and balanced expansion rather than simply looking for anticompetitive behavior.⁷⁶ As such, the EU is much more willing to relax competition policy in areas that are foreign to U.S. regulators.⁷⁷ In general, the EU system is based primarily on examining mergers to ensure that they do not significantly restrict competition and serve the needs and interests of the Community.⁷⁸ It can be said that competition law is a tool of economic integration in Europe, while it is a product of such integration in the United States.⁷⁹

The predecessor to the European Union, the European Economic Community, instituted broad antitrust regulations in 1962, but the EU did not enter a period of "activist" enforcement until 1990⁸⁰ when it adopted the European Merger Control Regulation (hereinafter EMCR)⁸¹ requiring companies to prenotify the European Commission of major acquisitions.⁸² Before the EMCR, mergers were governed by EC Articles 81 and 82,⁸³ which established only general competition rules.⁸⁴ The EMCR central-

75. Waller, *supra* note 9, at 353.

76. *Id.* Professor Waller draws the interesting parallel that antitrust laws in the European Union played a role similar to that of the Commerce Clause in American law.

77. *Id.* at 353-54. For example, the EU will overlook merger barriers where a merger will strengthen or promote further integration of the Community and yet prohibit otherwise acceptable vertical agreements if they maintain national boundaries.

78. *Id.* at 354.

79. *Id.* at 355.

80. Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 FLETCHER F. WORLD AFF. 59, 60 (2002).

81. Council Regulation 4064/89, 1990 O.J. (L395/1), amended by Council Regulation 1310/97, 1997 O.J. (L180) 1 [hereinafter Council Regulation].

82. Lipsky, *supra* note 80, at 60.

83. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The main problems with Articles 81 and 82 were that they lacked "express language applicable to corporate mergers." Jeffrey M. Peterson, Comment, *Unrest in the European Commission: The Changing Landscape and Politics of International Mergers for United States Companies*, 24 HOUS. J. INT'L L. 377, 384-85 (2002). The EC and the European Court of Justice attempted to compensate for this shortcoming by broadly interpreting the articles in order to give life to the goal of preserving competitive market structures. Alessandro Bertolini & Francesco Parisi, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13, 17 (1996). The provisions, however, were viewed as corrective, rather than preventative. Because European firms were often suboptimal in size, mergers were viewed as a viable way of achieving efficient operating levels and there was a strong presumption of legitimacy in favor of corporate mergers. As such, absent abuse of a dominant position, no intervention before 1990 was the result of a solely structural analysis of the market or from the calculation of a so-called concentration index. *Id.* at 17.

84. For support, Schmitz cites Case 6/72 Europemballage Corp. v. Commission, 1973 E.C.R. 215, 1973 C.M.L.R. 1999 and Joined Cases 142 & 156/84, British American Tobacco Co. v. Commission, 1987 E.C.R. 4487, 2 C.M.L.R. 551 (1987). See Schmitz, *supra* note 63, at 329 n.23. In addition, for Article 82 to apply, the EC had to show that one of the merging parties already had a dominant position in a relevant market before it

ized antitrust enforcement, pulling it away from a complicated (and largely unworkable) mixture of general EC laws and national regulations that were often unenforced either because local regulators lacked substantive legal control to block a merger they viewed as harmful, or because politicians did not want to get involved in major acquisitions.⁸⁵ In a sense, competition policy in the EC until 1990 was very much like it was in the United States until 1890: ineffective and subject to a great variety of differing local laws.⁸⁶ Designed from the start to rectify this problem,⁸⁷ the EMCR replaced Articles 81 and 82 as the only Community-wide standard. Now, the EMCR preempts national laws, providing a uniform body of laws to govern the approval of a given transaction.⁸⁸

Under the EMCR, regulators focus on two factors: concentration and what the Europeans call turnover,⁸⁹ which is the amount derived from selling products and providing services.⁹⁰ A concentration results when "(a) two or more previously independent undertakings merge; or (b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire . . . direct or indirect control of the whole or parts of one or more other undertakings."⁹¹ Concentrations have a "community dimension" sufficient to come within the purview of the EMCR only if the combined aggregate turnover is more than five billion euros and the Community-wide aggregate of at least two of the companies is greater than two hundred and fifty million euros.⁹² Assuming the merger meets these statutory requisites, the Commission then examines the merger to ensure that it is compatible with the common market⁹³ and that the merged company

could challenge the merger. See Thomas L. Ruffner, Note, *The Failed GE/Honeywell Merger: The Return of Portfolio-Effects Theory?*, 52 DEPAUL L. REV. 1285, 1291 (2003); see also Bertolini & Parisi, *supra* note 83, at 20.

85. See Kauper, *supra* note 30, at 311. Regulators also were forced to accommodate the desire to form an integrated common market, resulting, at least initially, in discounting the fear that mergers would create anticompetitive effects in the market. See Bertolini & Parisi, *supra* note 83, at 16.

86. Waller, *supra* note 9, at 352-54.

87. See Peterson, *supra* note 83, at 385-86. Passage of the EMCR was, like many things in the EU, the result of a prolonged battle over various national interests. *Id.* at 386. Smaller states that lacked effective merger controls wanted tougher regulations, while those states with advanced domestic regulatory frameworks (specifically Germany and United Kingdom) were more reluctant to cede their merger control to Brussels. See William Elland, *The Mergers Control Regulation (EEC) No. 4064/89*, 11 EUR. COMPETITION L. REV. 111, 111 (1990).

88. Peterson, *supra* note 83, at 386.

89. See Council Regulation, *supra* note 81, art. 1.

90. See *id.* art. 5; see Commission Notice on Calculation of Turnover Under Council Regulation (EEC) No 4064/89 on the Control of Concentrations Between Undertakings, 1998 O.J. (C66/25). On a more general level, turnover can be thought of simply as total sales. See *id.* for a further discussion of exactly how turnover is calculated.

91. Council Regulation, *supra* note 81, art. 3(1).

92. See *id.* art. 1(2). Note that the five billion euro mark is a global aggregate and includes revenues earned outside of Europe. See Peterson, *supra* note 83, at 387.

93. Specifically, the Commission's mandate is to take into account "the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential com-

does not "create or strengthen a dominant position."⁹⁴ Dominance in EU case law is defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers[,] and ultimately of the consumers."⁹⁵ So long as a concentration "does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it," the merger is compatible with the common market.⁹⁶ By contrast, a concentration creating or strengthening a dominant position that *does* significantly impede effective competition is incompatible with the common market.⁹⁷

As in the United States, European regulators first establish the markets in which the merging firms will compete, both geographically and by product.⁹⁸ Geographic markets must include the "common market or . . . a substantial part of it."⁹⁹ Product markets typically include products in direct competition but can also include products that act as substitutes on either the supply or demand side.¹⁰⁰ In 1997, the Commission¹⁰¹ began to encourage the use of the SSNIP test,¹⁰² but it is unclear how much impact this is having on regulatory decisions.¹⁰³ After defining the market, the Commission looks at a variety of factors, including market shares, ease of entry into the market, efficiencies, and the ability to bundle products in packages¹⁰⁴ to evaluate the firm's dominance in a particular market.¹⁰⁵ Although market shares are important, they are not analyzed with the same primacy as in the U.S.;¹⁰⁶ that is, other factors can play a larger role in the

petition from undertakings located either within or without the Community." Council Regulation, *supra* note 81, art. 2(1)(a).

94. *Id.* art. 2(3).

95. Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, 1979 E.C.R. 461, 462.

96. Council Regulation, *supra* note 81, art. 2(2).

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

98. Renzi, *supra* note 55, at 115-16.

99. Council Regulation, *supra* note 81, art. 2(2).

100. Renzi, *supra* note 55, at 116. The importance of market definition should not be underestimated, for as Professor Korah states, a "wide definition will usually indicate a smaller market share which understates the firm's market power." VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 83 (7th ed. 2000). Thus, the more narrowly a market is defined, and the more the Commission includes substitutes in its analysis, the easier it is to find an abuse of a dominant position. *See id.* 84-85.

101. *See* Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5.

102. *See supra* note 46 and accompanying text.

103. Indeed, Professor Korah states unequivocally that the "test is flawed when it is applied to articles 81 or 82." KORAH, *supra* note 100, at 87, 91.

104. For a fuller discussion on bundling, see *infra* Parts III.C-D and IV.A.

105. *See* KORAH, *supra* note 100, at 309-15; Michael Reynolds & Elizabeth Weightman, *European Union of European Economic Area*, in 1 INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 449, 458 (J. William Rowley & Donald I. Baker eds., 2d ed. 1996).

106. *See supra* notes 48-50 and accompanying text.

decision to accept or reject a merger.¹⁰⁷ “One possibly perverse feature of the E.C. law is that efficiencies, which in the USA may justify a merger that reduces competition somewhat, are treated in the opposite way under the [EMCR].”¹⁰⁸

In sum, European merger law is primarily concerned with the impact of a merger on competitors (especially smaller firms) rather than on consumers.¹⁰⁹ If a merger is going to create or strengthen a dominant position in a market, such that the merger might result in other firms being driven from the market, it is unlikely to gain much favor with European regulators.¹¹⁰ Götz Drauz, Director of the Merger Task Force for the European Commission, nicely illustrates this point:

While there is nothing wrong in admitting that the competitive process is about encouraging the more efficient firms to grow at the expense of the less efficient, it might be prudent for antitrust authorities not to unconditionally adopt such a Darwinian theory, whereby competitors that are unable or unwilling to meet the new competitive environment created through a conglomerate merger would have to leave the market. . . . This argument, however, disregards the realities of certain markets, where market exit may not be followed by new entry. In such a case, protecting the competitive structure of an industry should not be confused with the protection of inefficient competitors. This was precisely the case with the GE/Honeywell merger, where high entry barriers and very long industrial cycles did not favor entry. Once rivals are marginalized or expelled from the market, they would remain in that position on a lasting basis.¹¹¹

C. Putting the Two Together

Merger regulations in the U.S. and Europe remain the product of different forces.¹¹² The rise of trusts like Standard Oil prompted Congress to step in and fundamentally regulate the structure of the market.¹¹³ From the beginning, American policy has been mostly consumed with the fear that mergers would create collusion between market players.¹¹⁴ Especially in areas where concentration is high, the concern is that one or two firms will be able to dominate the market to such an extent that they can, even without actual collusion, dictate prices regardless of market forces.¹¹⁵ The actual position of the individual market player relative to others in the mar-

107. See KORAH, *supra* note 100, at 310-11.

108. *Id.* at 312. This is especially true if one views competition law as primarily concerned with ultimately protecting consumers.

109. See *id.* at 80. (“The preamble to the treaty refers to many factors other than efficiency, such as social policy, fair competition, small and medium-sized undertakings, peace and liberty.”)

110. See Renzi, *supra* note 55, at 117.

111. Götz Drauz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law*, 25 *FORDHAM INT’L L.J.* 885, 904 (2002).

112. Schmitz, *supra* note 63, at 337-39.

113. *Id.* at 338.

114. Kauper, *supra* note 30, at 320.

115. *Id.*; see Kolasky, *supra* note 19, at 3-4 (stating that the DOJ challenges mergers when “they eliminate a competitor and may thereby enable the merged firm to restrict output and raise price.”).

ket only provides evidence of concentration and is not dispositive.¹¹⁶

In Europe, by contrast, the focus is on the "creation or strengthening of the dominant position of a single firm."¹¹⁷ This focus, almost by necessity, requires looking at the impact a merger will have on other market players.¹¹⁸ Interestingly, European regulators also use noneconomic factors, such as political and social considerations, when passing judgment on a merger—a marked contrast to the United States' approach.¹¹⁹ To summarize, European regulators are concerned with a single firm rising to a dominant position, while American regulators are more averse to a group of firms coming together to impede the market.¹²⁰ To put it another way, market dominance by one competitor is the starting point of any merger investigation in Europe, whereas market concentration is the starting point in the U.S.¹²¹

Setting aside varying definitions of "market dominance," the EMCR is primarily concerned with the ability of competitors to compete in the same market as the merged firms.¹²² The focus is on measuring harm to the competitors of a merged firm, rather than on harm to the market itself.¹²³ This focus makes it significantly more difficult to incorporate productive efficiencies into the merger calculus, since a merger that creates substantial efficiencies is likely to strengthen a dominant position.¹²⁴ Indeed, in at least one case, the Commission referred to efficiency gains (economics of scale) as evidence of the strengthening of a dominant position.¹²⁵ Some EC officials have gone as far as to say that "once a dominant position or strengthening of a dominant position is found, efficiencies are not considered."¹²⁶

The United States takes the opposite approach and focuses on the impact a merger will have on consumers (the market), rather than the impact it will have on competitors.¹²⁷ If a merger can generate efficiencies, this can weigh heavily toward approval,¹²⁸ because efficiencies invariably

116. Schmitz, *supra* note 63, at 339.

117. Kauper, *supra* note 30, at 320.

118. See Kolasky, *supra* note 19, at 4.

119. See Ruffner, *supra* note 84, at 1302.

120. See Kauper, *supra* note 30, at 320; see also Eric S. Hochstadt, Note, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 296 n.39 (2002).

121. Schmitz, *supra* note 63, at 339; see Hochstadt, *supra* note 120, at 316 n.104.

122. Kauper, *supra* note 30, at 321-22; Ruffner, *supra* note 84, at 1300.

123. Kauper, *supra* note 30, at 321-22; see Kolasky, *supra* note 19, at 5 ("[I]t is well established under U.S. law that the antitrust laws do not protect competitors from mergers that will make the merged firm more efficient, even if they fear they may as a result be forced from the market." (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986))).

124. Kauper, *supra* note 30, at 322; see also Patterson & Shapiro, *supra* note 63, at 21.

125. Case IV/M.382 Philips/Grundig, 1993 O.J. (C 336) 11. The merger was ultimately approved.

126. Kauper, *supra* note 30, at 356 n.240.

127. *Id.* at 322; see Ruffner, *supra* note 84, at 1300.

128. Revised MERGER GUIDELINES, *supra* note 60, § 4. However, the revised MERGER GUIDELINES make it clear that "[e]fficiencies almost never justify a merger to monopoly or near monopoly." *Id.* § 4. Typically, only those efficiencies that cannot be achieved

lead to lower prices, a fundamentally procompetitive outcome.¹²⁹ According to one member of the FTC, "it is fair to say that the EC focuses more on single firm dominance and the U.S. focuses more on oligopoly coordination."¹³⁰

II. Differences Illustrated: Recent Cases

Before the GE/Honeywell merger, the United States and the EU wrangled over two significant and illustrative mergers: the 1997 merger of Boeing and McDonnell Douglas¹³¹ and the 2000 merger of AOL and Time Warner.¹³²

A. Boeing/McDonnell Douglas

Boeing and McDonnell Douglas, both large aerospace and defense suppliers, agreed to merge in December 1996.¹³³ The firms were direct competitors (and two of only three remaining manufacturers worldwide) in the market for large, commercial jet aircraft.¹³⁴ At the time of the merger, Boeing and McDonnell Douglas controlled approximately seventy percent of the world market for such aircraft,¹³⁵ though Boeing itself accounted for sixty-four percent of the market.¹³⁶ Despite the resulting high level of concentration, the FTC did not challenge the combination, finding that McDonnell Douglas' future was dim and that "[i]ts current market share considerably overstated its future potential" in the aircraft sector.¹³⁷ Thus, the FTC did not believe that McDonnell Douglas could exercise any influence in the market, noting that "[i]t no longer had a chance to receive any orders for a large aircraft and no economically plausible strategy could change this situation."¹³⁸ The FTC did express some concern over long-

by anything short of a merger will be considered, and even then, the actual impact that the efficiency argument has with regulators is open to debate. See Kauper, *supra* note 30, at 353. For a list of cases in which courts have examined and either rejected or recognized efficiency claims, see *id.* at 353 n.232.

129. See Patterson & Shapiro, *supra* note 63, at 20–21; see also Hochstadt, *supra* note 120, at 327 (stating that "modern U.S. antitrust law has generally focused on one goal—the maximization of consumer welfare").

130. Debra A. Valentine, *Building a Cooperative Framework for Oversight in Mergers—The Answer to Extraterritorial Issues in Merger Review*, 6 GEO. MASON L. REV. 525, 528 (1998).

131. See generally Schmitz, *supra* note 63, at 359.

132. See generally *id.* at 362.

133. Thomas L. Boeder, *The Boeing-McDonnell Douglas Merger*, in ANTITRUST GOES GLOBAL 139, 140 (Simon J. Evenett et al. eds., 2000).

134. Schmitz, *supra* note 63, at 359. The third is Airbus, one of the larger success stories in European economic integration. See generally AIRBUS, AIRBUS TODAY, at <http://www.airbus.com/about/history.asp> (last visited Oct. 13, 2003).

135. Kauper, *supra* note 30, at 339.

136. Schmitz, *supra* note 63, at 359.

137. Kauper, *supra* note 30, at 339. See Boeing Co., Trade Reg. Rep. (CCH) ¶ 24,295, at 24,123 (FTC July 1, 1997). Kauper points out that FTC's analysis of the merger rested on the Supreme Court's decision in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

138. Schmitz, *supra* note 63, at 360.

term supply contracts that Boeing had with a number of airlines and the potential that these contracts could potentially deny Airbus equal access to the market.¹³⁹ Ultimately, though, the Commission felt that the potential for Boeing to foreclose Airbus from the market through these contracts could be better examined in a separate proceeding.¹⁴⁰ Throughout its investigation, the FTC primarily focused on the potential for adverse impacts on consumers (in this case, airlines purchasing airplanes from the merged companies).¹⁴¹ As is customary in U.S. merger review, the FTC conducted its investigation in private, with the only substantive commentary coming from the post-review decision to permit the merger.¹⁴²

European authorities, by contrast, conducted a highly political and very public review, with the EU's top competition official, Karel Van Miert, giving frequent interviews and speeches on the merits of the transaction.¹⁴³ The European Commission focused its investigation much more heavily on the possible adverse affects on Airbus and on advantages Boeing might have over Airbus as a result of the merger.¹⁴⁴ The Commission gave considerable weight to evidence submitted by Airbus.¹⁴⁵ This is in stark contrast to U.S. practice, which tends to disfavor submissions by a competitor seeking to block a merger.¹⁴⁶ The Commission did not consider McDonnell Douglas's future competitive potential as a factor in its analysis.¹⁴⁷ However, the Commission found the increase in Boeing's market power through the acquisition,¹⁴⁸ as well as Boeing's exclusive supplier contracts, relevant in gauging Airbus's ability to compete effectively.¹⁴⁹ Ultimately, the Commission did allow the merger to proceed on the condi-

139. Kauper, *supra* note 30, at 339; *see also* Boeing Co., Trade Reg. Rep. (CCH) at 24,124.

140. Kauper, *supra* note 30, at 339-40.

141. Boeder, *supra* note 133, at 141.

142. *Id.*

143. *See id.* at 142. At one point, Van Miert declared that the transaction would be rejected without major concessions and specifically detailed the concessions that would be demanded. *Id.*

144. *Id.*

145. Kauper, *supra* note 30, at 340. The Commission based most of its market share analysis on data submitted by Airbus. *See also* Commission Decision of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case No IV/M.877 Boeing/McDonnell Douglas), 1997 O.J. (L 336) 16, para. 29 [hereinafter Boeing/McDonnell Douglas].

146. Boeder, *supra* note 133, at 142.

147. Kauper, *supra* note 30, at 340. Professor Kauper questions whether the so-called *General Dynamics* factors play any significant role under the European Merger Regulation.

148. Schmitz, *supra* note 63, at 360. The acquisition of McDonnell Douglas would give Boeing access to eighty-five airlines that did not operate Boeing aircraft but did operate either McDonnell Douglas aircraft exclusively or a combination of McDonnell Douglas and Airbus aircraft. *Id.*

149. Kauper, *supra* note 30, at 340. *See also* Boeing/McDonnell Douglas, *supra* note 145, para. 43-46, 54(e). The Commission was especially concerned that a broader product range, greater financial resources, and higher capacity might influence airlines into entering such exclusive deals in the future. Schmitz, *supra* note 63, at 361.

tion that Boeing eliminate its exclusive contracts.¹⁵⁰

This case illustrates the strong substantive differences in antitrust analysis between the United States and Europe, primarily through the different focuses on harm to competitors in the analysis.¹⁵¹ It also shows how nebulous the “compatibility with the common market” standard really is, as neither Boeing nor McDonnell Douglas was a European company and neither had production assets inside the EU.¹⁵² Despite this reason for not getting involved, the EU felt justified in overseeing the merger.¹⁵³

B. AOL/Time Warner

AOL, an Internet access and content provider, and Time Warner, a media conglomerate with significant print and broadcast holdings, agreed to merge in early 2000.¹⁵⁴ Neither a horizontal nor vertical merger, the combination fell in the vast gray area known as “conglomerate mergers.”¹⁵⁵ The FTC expressed concerns that the merger could have a chilling impact on the high-speed broadband Internet and interactive television markets through the combination of AOL’s subscriber base and Time Warner’s cable network.¹⁵⁶ More specifically, the merger would give AOL/Time Warner control over a vast amount of the cable network infrastructure in the United States,¹⁵⁷ a primary delivery mechanism for high-speed Internet services, which is “widely expected to be the pipeline for all future home digital entertainment.”¹⁵⁸ According to the FTC, the concern was that “‘these two powerful companies would create barriers that would injure competitors of Time Warner and competitors of AOL.’”¹⁵⁹ U.S. approval came only after the two companies agreed to allow other Internet service providers (“ISPs”) access to Time Warner’s network, to continue

150. Boeing/McDonnell Douglas, *supra* note 145, para. 116. Boeing also had to maintain McDonnell Douglas as an independent company for ten years and provide customer support for McDonnell Douglas aircraft at the same level as for Boeing aircraft. Schmitz, *supra* note 63, at 361.

151. See generally Boeder, *supra* note 133, at 142-43. At least one commentator has pointed out, though, that the unique nature of the industry and the strong parties on either side (specifically, Boeing and Airbus) mean that this merger will ultimately have only limited application in gauging future outcomes. See *id.* at 139.

152. Stevens, *supra* note 4, at 266.

153. *Id.* at 266.

154. See James M. Turner, Note, *Mega Merger, Mega Problems: A Critique of the European Community’s Commission on Competition’s Review of the AOL/Time Warner Merger*, 17 AM. U. INT’L L. REV. 131, 133 (2001).

155. See *id.* at 135-36. Combinations of firms with relationships that are neither horizontal nor vertical characterize conglomerate mergers. See also UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 44, at 307. In *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967), the Supreme Court characterized a conglomerate merger as “one in which there are no economic relationships between the acquiring and the acquired firm.” *Id.* at 577 n.2.

156. See Michael Stroh, *FTC Clears Union of AOL, Time Warner*, BALTIMORE SUN, Dec. 15, 2000, at 1A.

157. At the time, Time Warner was the second largest cable provider in the U.S., serving over 12.6 million homes. *Id.*

158. *Id.*; see also Turner, *supra* note 154, at 164-65.

159. Stroh, *supra* note 156 (quoting Robert Pitofsky, then chairman of the FTC).

development of digital subscriber line ("DSL") technology (an alternative to cable-based Internet access) in Time Warner cable markets, and to not interfere with content offered by other providers on Time Warner's network.¹⁶⁰

In Europe, the Commission initially cited similar concerns over the potential for Internet access domination.¹⁶¹ Although finding that AOL was the only ISP present in most EU member states,¹⁶² further investigation revealed that both companies lacked a broadband infrastructure sufficient to dominate the European broadband Internet market.¹⁶³ After reaching this conclusion, the Commission identified a new area of concern: the possibility that AOL/Time Warner could dominate what it termed "the emerging market for Internet music delivery on-line."¹⁶⁴ The online music industry is a two-part market, comprising music players and music catalogues.¹⁶⁵ AOL's music player, Winamp, uses both proprietary and nonproprietary formats,¹⁶⁶ and the Commission was concerned that access to this proprietary format could "tempt" AOL/Time Warner into making its music only available for its Winamp player.¹⁶⁷ As for the music catalogues, AOL had an existing promotion and distribution relationship with Bertelsmann AG, Europe's leading music label,¹⁶⁸ and the combination of Time Warner's and Bertelsmann's music holdings would have given the merged entity just over a third of the music publishing market in Europe.¹⁶⁹ Though this represented only a minority share of the market, the Commission believed that the online music market was sufficiently fragmented so that even a minority position could establish market dominance.¹⁷⁰ The possibility that AOL/Time Warner could condition access to its music catalogue through its Winamp player, forcing competitors to either license the player or the music catalogue, was simply too much for the Commission, which required AOL to sever its ties with Bertelsmann before the merger could win European approval.¹⁷¹ Though a different

160. *Id.*; see Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, 18 WIS. INT'L L.J. 577, 582 (2000).

161. Turner, *supra* note 154, at 165.

162. Press Release, European Commission, Commission Opens Full Investigation into AOL/Time Warner Merger (June 19, 2000), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt&doc=IP/00/634-0-AGED&lg=EN&display= (last visited Oct. 13, 2003).

163. See Press Release, European Commission, Commission Gives Conditional Approval to AOL/Time Warner Merger (Oct. 11, 2000), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt&doc=IP/00/634-0-AGED&lg=EN&display= (last visited on Oct. 13, 2003).

164. *Id.*

165. Turner, *supra* note 154, at 166.

166. *See id.*

167. Press Release, European Commission Gives Conditional Approval to AOL/Time Warner Merger, *supra* note 163.

168. Turner, *supra* note 154, at 167.

169. *Id.*

170. *Id.*

171. *See id.* at 167-68; see also Press Release, Commission Gives Conditional Approval to AOL/Time Warner Merger, *supra* note 163.

type of merger from Boeing/McDonnell Douglas, AOL/Time Warner also illustrates that the Commission's primary concern is often with a merger's impact on competitors rather than on competition.¹⁷²

III. The GE/Honeywell Merger

A. The Dance Begins: GE and Honeywell

General Electric (GE) is a diversified multinational corporation with business units that include everything from light bulbs to television to financial services.¹⁷³ GE's total revenues for 2001 exceeded \$125 billion.¹⁷⁴ The Financial Times has repeatedly named it the world's most respected company.¹⁷⁵ GE is a leading producer of jet engines for large commercial aircraft¹⁷⁶ and it also produces aircraft engines as part of a 50/50 joint venture with the French firm SNECMA under the name CFM International.¹⁷⁷ In the jet engine market, GE's principal rivals are Pratt & Whitney (a United Technology subsidiary) and Rolls Royce.¹⁷⁸

Honeywell, originally a heating and environmental controls provider, gradually expanded through acquisitions into the aerospace industry. In 1999, Allied Signal (itself the product of a merger between Allied Corporation and Signal Companies) acquired Honeywell and adopted its name after the merger.¹⁷⁹ Almost half of Honeywell's \$23 billion of revenue in 2001 came from its aerospace division, which includes jet engines, avionics, and non-avionics products.¹⁸⁰ Honeywell faces different rivals in each

172. See David S. Evans & Michael Salinger, *Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger*, 10 GEO. MASON L. REV. 489, 491-92 (2002); Stevens, *supra* note 4, at 275 (indicating that "[t]here were further suspicions that EC opposition to the AOL/Time Warner merger stemmed from concerns about the impact upon the large telephone companies of Europe that remain fragmented and dominated by originally state-owned utility companies").

173. Barry J. Nalebuff, *Bundling and the GE-Honeywell Merger 2* (Sept. 1, 2002) (Working paper No. 22, available at <http://papers.ssrn.com/abstract=327380> (last visited Oct. 13, 2003)); see also Evans & Salinger, *supra* note 172, at 496-97.

174. Nalebuff, *supra* note 174, at 2.

175. Michael Skapinker, *Different Game, but the Same Winners*, FIN. TIMES, Jan. 20, 2003, at 2, available at 2003 WL 3434076.

176. Kolasky, *supra* note 19, at 9.

177. Nalebuff, *supra* note 174, at 2. The CFMI joint venture is especially important because it accounts for a large percentage of GE's share of the market for large jet engines. CFMI engines are the only models available on current production derivatives of the Boeing 737, the most successful aircraft family in history. Including CFMI, GE has an engine market share of around 65%. *Id.* If CFMI engines used on Boeing 737s are excluded, though, GE's market share falls to 44% (even including all other CFMI sales). The competitive analysis is obviously much different depending on which market share is used: the Europeans included all CFMI sales, while the Americans excluded those sales tied to the 737 program. Kolasky, *supra* note 19, at 10-11.

178. Kolasky, *supra* note 19, at 9.

179. *Id.* at 3.

180. *Id.*; see also Evans & Salinger, *supra* note 172, at 497 (noting that in 2000 aerospace products accounted for forty percent of revenues). Avionics products consist of aircraft guidance and control, navigation, and communication systems; non-avionics products are things like landing gear, in-flight entertainment systems, and supplemental power, electrical, and climate control systems. See *id.* at 499.

business line: Pratt & Whitney is the principal competitor in its jet engine business; Rockwell Collins and Thales are the main rivals in the avionics market; and United Technology, BF Goodrich, and SNECMA are the principal rivals in the non-avionics market.¹⁸¹

B. The American Response

After GE announced its plans to acquire Honeywell, the DOJ began an investigation into the proposed merger.¹⁸² The DOJ quickly identified two markets with possible anticompetitive concerns for the merged company: "the market for military helicopter engines, and the market for providing heavy maintenance, repair, and overhaul ("MRO") services for aircraft engines and auxiliary power units ("APUs")."¹⁸³ With respect to helicopter engines, GE and Honeywell largely dominated the market¹⁸⁴ and the DOJ determined that the merger risked substantially lessening competition, possibly leading to higher prices, lower quality, and reduced innovation.¹⁸⁵ Consequently, the DOJ required GE to sell Honeywell's helicopter engine business as a condition of merger approval.¹⁸⁶ In the MRO and APU market, the DOJ was concerned with the potential for higher prices and lower quality because of the combined company's dominant position.¹⁸⁷ To rectify this, the DOJ required GE to authorize a new third-party MRO service provider for certain Honeywell aircraft engines and APUs in order to inject competition into the market.¹⁸⁸ GE and Honeywell agreed to both conditions.¹⁸⁹ Other than these two concerns, the DOJ expressed no further opposition to the proposed merger.

C. The European Response

GE and Honeywell did not enjoy as favorable a reception in Europe as they did in the United States. In contrast to American regulators, the Commission was unconcerned with the market for helicopters and MRO services.¹⁹⁰ Instead, European authorities focused primarily on the markets

181. Kolasky, *supra* note 19, at 9.

182. Schmitz, *supra* note 63, at 364.

183. *Id.* at 364-65.

184. "GE and Honeywell are the two premier manufacturers of U.S. military helicopter engines, collectively accounting for a substantial majority of all engines powering U.S. military helicopters flying today. GE and Honeywell have also received virtually all of the applicable research and development funding provided by the U.S. Department of Defense (DOD) through its Joint Turbine Advanced Gas Generator (JTAGG) program." Press Release, DOJ, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm (last visited Oct. 13, 2003) [hereinafter Press Release].

185. *Id.*

186. *Id.* ("Honeywell's helicopter engine business accounted for revenues approximating \$200 million in 2000.")

187. Schmitz, *supra* note 63, at 365.

188. Press Release, *supra* note 184.

189. *Id.*

190. Schmitz, *supra* note 63, at 367. "This is not surprising because this market had very little effect on the Common Market and the issue had already been addressed and remedied by the DOJ investigation." *Id.*

for jet aircraft engines, avionics, non-avionics, and engine starters.¹⁹¹ In jet aircraft engines, a market untouched by U.S. regulators, the Commission determined that a combination of GE and Honeywell would result in a monopoly position (100% market domination) in the market for large regional aircraft jet engines¹⁹² and a dominant position in the corporate jet engine market, with the merged firm having a fifty to sixty percent market share.¹⁹³ In the market for large commercial aircraft engines, the Commission found GE's sixty percent market share¹⁹⁴ insufficient to establish market dominance per se, but when coupled with the power and influence of its GE Capital and GE Capital Aviation Services divisions, GE's high market share acted as "proxy for dominance."¹⁹⁵ As stated previously, a dominant position is not automatic grounds for denying a merger (especially when, as here, the dominant position already existed); rather, that position must result in an appreciable anticompetitive impact on the common market.¹⁹⁶ The Commission ultimately also determined that the vertical inte-

191. See Kolasky, *supra* note 19, at 9; Schmitz, *supra* note 63, at 368; Dimitri Giotakos et al., *General Electric/Honeywell—An Insight into the Commission's Investigation and Decision*, EC COMPETITION POL'Y NEWSL., Oct. 2001, at 5-9. The Commission was also concerned that the merged entity would have a dominant position in the market for small marine gas turbine engines, but that is beyond the scope of this Note. See *id.* at 9.

192. Schmitz, *supra* note 63, at 368-69. The Commission actually broke the jet engine market into three distinct segments depending on the market for the aircraft: "[a)] large commercial aircraft (i.e., aircraft with more than 100 seats, a range of greater than 2,000 nautical miles and a cost in excess of USD 35 million), [(b)] regional jet aircraft (i.e., aircraft with around 30 to 90 plus seats, a range of less than 2,000 nautical miles and a cost of up to USD 30 million) and [(c)] corporate jet aircraft (i.e., aircraft designed for corporate activities and with a cost generally in the region of USD 3 million to USD 35 million)." Commission Decision of 03/07/2001 Declaring a Concentration to Be Incompatible with the Common Market and the EEA Agreement (Case No. COMP/M.2220 General Electric/Honeywell) (2001) [hereinafter GE/Honeywell], para. 10, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf (last visited Oct. 13, 2003). The Commission further broke the regional jet market into small regional jets (30 to 50 passengers) and large regional jets (70 to 90 or more passengers). *Id.* para. 20. Of these two submarkets, Honeywell and GE were the only engine suppliers for large regional jets. *Id.* para. 22. Both GE and Honeywell felt these categories were overly rigid and did not take into account the possible overlapping uses of different types of jets at the margins as well as the presence, at the time, of only four manufacturers of large regional jets. See Renzi, *supra* note 55, at 129; see also GE/Honeywell, para. 21.

193. GE/Honeywell, *supra* note 192, para. 435.

194. This number is subject to dispute. See *supra* note 128 and accompanying text.

195. Schmitz, *supra* note 63, at 370-72; see also GE/Honeywell, *supra* note 192, para. 163. GE Capital managed more than 80% of GE's assets (some \$370 billion) and, according to the Commission, could be used to absorb losses due to heavily discounted aircraft engines, as well as influence the choice of engines by both airframe manufacturers and airlines. Schmitz, *supra* note 63, at 370. GE Capital Aviations Services (GECAS), GE's airplane leasing division, is the world's largest airplane buyer and the Commission felt that GECAS could enhance GE's position in the market at the expense of its rivals through attractive financing packages. *Id.* at 371; see also Renzi, *supra* note 55, at 131. Indeed, "[o]ver the past decade, of more than 600 planes purchased by GECAS, only four did not have GE engines." Schmitz, *supra* note 63, at 371.

196. See Schmitz, *supra* note 63, at 378-79.

gration¹⁹⁷ between GE and Honeywell in the production of large commercial aircraft engines,¹⁹⁸ along with the potential for product bundling,¹⁹⁹ could result in price increases and in GE's ability to artificially manipulate entry into the market through its control of key components.²⁰⁰ The combination of GE's market share, the strength of its financing units, and the potential for vertical integration was enough to push the merged entity into a position of market dominance.²⁰¹ This dominance, along with the combined company's complete domination of the market for large regional aircraft engines and dominant position in the market for corporate jet engines, allowed the Commission to establish the necessary impediment to competition in significant portions of the commercial jet engine market sufficient to justify blocking the merger.²⁰²

In addition to jet engines, the markets for avionics, non-avionics, and engine controls, when coupled with GE's engine production capability and financing strength, concerned the Commission. Honeywell had a market share of between fifty to sixty percent in avionics, as high as an eighty to ninety percent share of certain portions of the non-avionics market, and a fifty to sixty percent share of the engine starter market.²⁰³ As with the

197. The DOJ would be unlikely to characterize this as vertical integration but rather simply the result of integration between the product lines of the two companies. See Renzi, *supra* note 55, at 130.

198. GE/Honeywell, *supra* note 192, para. 419-420. This is especially relevant in terms of Honeywell's dominance of the engine starter market, in that GE could establish an unbroken chain between itself as engine manufacturer and primary supplier of starters.

199. Bundling involves combining a number of products and selling them as a package. See Giotakos, *supra* 191, at 10. In acquiring Honeywell, GE could offer a package, or bundle, of products—such as engines, avionics, and continuing maintenance—to airframe manufacturers or airlines for a single price. See *id.* Bundling is fundamentally a behavioral problem, in that it deals with how market actor uses its powers. See GE/Honeywell, *supra* note 192, para. 530. “Merger control, on the other hand, is concerned with the situation of the parties and the markets at the time of the merger, not with possible future behavior.” Schmitz, *supra* note 63, at 375. The bundling argument is especially interesting because “[i]t has been argued that the concept of bundling had no valid foundation in European merger control.” *Id.* at 377. At least one author has argued, though, that the bundling element of the decision was not dispositive and that the merger would have been stopped even if the Commission had not discussed bundling at all. See *id.* at 378. Nevertheless, the Commission's concern with bundling raises questions in future mergers. Merging parties must now be aware that “the Commission, when assessing a proposed merger, will not only identify the relevant markets in the traditional sense and assess the horizontal and vertical effects created by the merger, but will also speculate how positions in markets that are not related might be combined, even if there is no clear evidence that such behavior will emerge.” *Id.* at 382. For more on bundling, see *infra* Parts III.C and IV(A).

200. GE/Honeywell, *supra* note 192, para. 427; see also *infra* note 207 and accompanying text.

201. GE/Honeywell, *supra* note 192, para. 412. EU authorities have referred to this combination as “GE's [t]oolkit for [m]arket [d]ominance.” Drauz, *supra* note 111, at 898.

202. GE/Honeywell, *supra* note 192, para. 458; see Stevens, *supra* note 4, at 274.

203. See Renzi, *supra* note 55, at 131 n.185. Honeywell's non-avionics market share varied widely, from 80-90% share of the market for APUs to as low as no appreciable market share for in flight entertainment systems. The Commission felt, though, that Honeywell's wide range of non-avionics products put it in a unique position in the market. See also GE/Honeywell, *supra* note 192, para. 242, 275-276, 337.

aircraft engine market, the Commission saw the potential for bundling to be as troublesome as a dominant market position by the merged entity. More specifically, the combined company, in the Commission's eyes, would be able to offer a unique package, or bundle, of products at such attractive price points that airframe manufacturers would choose the GE/Honeywell offering regardless of whether the cost and quality of these products matched those of competitors.²⁰⁴ The Commission also felt that the combined company could engineer its individual products in such a way that they only functioned effectively as part of a bundled system and did not function alongside competitor's products.²⁰⁵ The Commission feared that GE Capital and GECAS, because of their influence in the market for airplanes, would exert pressure for "GE only" purchases, further closing the market to competitors and enhancing Honeywell's already dominant position.²⁰⁶ The engine starter market was of special concern to the Commission:²⁰⁷

[T]he merged entity would have an incentive to delay or disrupt the supply of Honeywell engine starters to competing engine manufacturers, which would result in damaging supply, distribution, profitability and competitiveness of GE's engine competitors. Likewise, the merged entity could increase the prices of engine starters or their spares, thereby increasing rival engine manufacturers' costs and reducing even further their ability to compete against the merged entity.²⁰⁸

Predictions similar to this appear throughout the Commission's formal report on the merger.

In response to the Commission's findings, GE and Honeywell agreed to make a variety of concessions, including offering to maintain GECAS as a separate legal entity,²⁰⁹ to divest part of the combined company's

204. GE/Honeywell, *supra* note 192, para. 350-361, 372, 412; Schmitz, *supra* note 63, at 379; Renzi, *supra* note 55, at 132.

205. See Schmitz, *supra* note 63, at 380. This is known as "pure bundling" or "tying," and the products are typically not offered on a standalone basis but only as part of the larger bundle. An example of pure bundling would be changing the design of Honeywell engine starters so that they only worked with GE engines. Contrast this with "mixed bundling," where the products continue to be offered on a standalone basis, but are also offered as part of package on discounted terms. See Matthias Pflanz & Cristina Caffarra, *The Economics of G.E./Honeywell*, 23 EUR. COMPETITION L. REV. 115, 115 (2002).

206. See Schmitz, *supra* note 63, at 380; Renzi, *supra* note 55, at 131; see Kolasky, *supra* note 19, at 15-20 (criticizing the Commission's decision).

207. See GE/Honeywell, *supra* note 192, para. 331-340; see also Schmitz, *supra* note 63, at 380-81. It is arguable that Honeywell had a total domination of the market because its only significant competitor, Hamilton Sundstrand, installed its engine starters only in engines made by Pratt & Whitney, its sister company. *Id.* at 381.

208. GE/Honeywell, *supra* note 192, para. 420; see also Schmitz, *supra* note 63, at 374. The idea, of course, would be to sell GE's engine starters to competitors at such a price per unit that airframe manufacturers and airlines would be "driven" to GE's engines through significantly lower total costs. Whether the combined company would have actually damaged its dominant, and lucrative, position in aircraft starters—and then not have experienced competitor inflow—for the sake of its engine division is, in my opinion, debatable. See Kolasky, *supra* note 19, at 19.

209. GE/Honeywell, *supra* note 192, para. 498.

regional jet engine business,²¹⁰ to not engage in bundling,²¹¹ and to sell Honeywell's engine starter business.²¹² Despite these concessions, the Commission deemed the proposal submitted by GE and Honeywell unacceptable²¹³ and formally blocked the merger on July 3, 2001.²¹⁴ Each company separately appealed the decision of the Commission,²¹⁵ but the merger is officially dead.²¹⁶

D. Winners and Losers

Scholars disagree on the correctness of the Commission's decision. Some argue that even with the controversial stance on bundling the decision was in line with European precedent.²¹⁷ More specifically, the Commission could only establish partial dominance in aircraft engines—the market with the most significant Community dimension—and thus it turned to other factors, including GE's financial strength, to make a more conclusive determination of a dominant position.²¹⁸ Once the Commission established that a dominant position would result, the merger was rejected. Thus, the scholars argue that the decision “is essentially in line with the tradition of European merger control.”²¹⁹

Other scholars disagree with the Commission and point to two areas of primary concern. First, opponents claim that the Commission's approach lacked a sound economic basis, especially in the key area of effi-

210. *Id.* para. 495.

211. *Id.* para. 499.

212. *Id.* para. 493.

213. The Commission's rationale centered on the general inadequacy of the avionics, non-avionics, and engine starters divestitures. *See id.* para. 500–17. The Commission also thought that divestiture of Honeywell's large regional jet engine business was impractical if not impossible, a point that is likely more valid than GE or Honeywell would admit. *See id.* para. 519–22. The commitment not to engage in bundling was considered “purely behavioural [sic] and as such [could not] constitute the basis for a clear elimination of the said concerns.” *Id.* para. 530. Finally, the Commission felt that even if GECAS were to be a separate legal entity, control would remain in GE's hands. *Id.* para. 531.

214. GE/Honeywell, *supra* note 192, para. 567.

215. Schmitz, *supra* note 63, at 382.

216. Press Release, General Electric Co., GE and Honeywell Terminate Merger Agreement (Oct. 2, 2001), available at <http://www.ge.com/en/company/news/ar> (last visited Oct. 14, 2003).

217. *See* 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, 585–86 (2002). It can be said that although bundling does not have valid foundation in European merger control analysis, it has some support under the EMCR. Schmitz, *supra* note 217, at 581. In *Guinness/Grand Metropolitan*, the Commission was concerned that the merged entity's broader product range would give it the flexibility to structure prices, promotions, and discounts through bundling. The merger was approved only after substantial divestitures. *See* Commission Decision of Oct. 15, 1997 Declaring a Concentration to Be Compatible with the Common Market and the Functioning of the EEA Agreement (Case IV/M.938-Guinness/Grand Metropolitan) 1998 O.J. (L 288) 24, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/L_288/L_28819981027en00240054.pdf (last visited Feb. 15, 2003); *see also infra* note 262 and accompanying text.

218. Schmitz, *supra* note 217, at 585–86.

219. *Id.* at 585.

ciencies.²²⁰ U.S. regulators supported the merger because their analysis showed that the combination would create merger-specific efficiencies that would ultimately result in lower prices, and mergers that generate lower prices are fundamentally pro-competitive.²²¹ The Commission, on the other hand, viewed the merger-specific efficiencies more as the result of strategic behavior than cost savings and therefore regarded them as anticompetitive.²²² Second, the Commission only identified the *potential* for harm; that is, it was unable to show, in any market, that the combination *would* lead to dominance, as required by the EMCR.²²³ It does appear that the Commission's economic analysis suffered from some fundamental flaws that are traceable, at least in part, to the pro-competitor stance of the Commission.²²⁴ Thus, it is probably best to say that the Commission's decision may be correct as a matter of EU policy, but incorrect on other, more empirical, grounds.

IV. What Now? And Where Do We Go from Here?

A. Lessons for the Future

One of the most interesting aspects of the Commission's decision to block the merger was its reliance on the possibility that the combined company might be able to bundle products at such attractive prices that competitors would be unable to remain in the market.²²⁵ Such bundling, or portfolio effects, analysis is most common in conglomerate mergers, where the merging firms function primarily in different markets, although there may be some product overlap.²²⁶ The concern is that a corporation may be able to enhance its position in the market by offering a wide range of products that are often purchased together, effectively providing consum-

220. See Kolasky, *supra* note 19, at 21-22.

221. See Patterson & Shapiro, *supra* note 63, at 20-21.

222. See *id.* at 21.

223. Nalebuff, *supra* note 174, at 5.

224. Evans & Salinger, *supra* note 172, at 518-20. For example, the Commission's decision directly addressed the question of whether the merger would result in an increase in the price of either GE's aircraft engines or Honeywell's avionics and non-avionics products, or both. The Commission argued the following:

Prior to the merger, any increase in the price of the stand-alone product would shift demand to a competing product. After the merger, by raising its stand-alone prices, the merged entity will lose fewer sales because GE and Honeywell products are also available through the bundle. Responding to these price increases, some customers will prefer to buy the said products as part of the bundle, at a lower price, rather than buying [them] separately, at a higher price.

Evans & Salinger, *supra* note 172, at 518.

However, it is not true that, as a matter of general economics, the merger would have given GE an incentive to raise prices on unbundled products, as the Commission claimed. Evans & Salinger, *supra* note 172, at 518-19 (Evans & Salinger give an excellent discussion on this point in the appendix to their article).

225. See Schmitz, *supra* note 217, at 527.

226. See Renzi, *supra* note 55, at 123.

ers with a "one-stop shop."²²⁷ In the GE/Honeywell decision, the Commission described bundling as "a simple business arrangement whereby a number of products are combined in a package and sold for a single price"²²⁸ and expressed the most concern over the combined company's potential for "mixed bundling whereby complementary products are sold together at a price which, owing to the discounts that apply across the product range, is lower than the price charged when they are sold separately."²²⁹ Such bundling could lead to a greater market share for the combined company: "the merged entity will be able to price its packaged deals in such a way as to induce customers to buy GE engines and Honeywell . . . products over those of competitors, thus increasing the combined share of GE and Honeywell [in] both markets."²³⁰ However, as economists point out, it is possible that bundling can also result in Pareto optimality where a manufacturer makes more from sales while the consumer actually pays a lower price.²³¹ This is the fundamental insight of the Cournot model, on which all bundling analysis is based.²³² If one imagines a market in which there is a monopoly seller of good 1 (say, aircraft engines) and a monopoly seller of good 2 (say, avionics) and where the two goods are used together by the customer, each monopolist, acting independently, will set an inefficiently high price.²³³ When the two firms merge, they can coordinate their pricing and sell the two products together, thus stimulating the demand for both goods.²³⁴ This results in lower prices for consumers and

227. See Aurélien Condomines, *The Prohibition of the GE-Honeywell Merger by the European Commission* (Nov. 2001), at <http://www.jurismag.net/articles/artiGB-GEHoneywell.htm> (last visited Oct. 14, 2003).

228. GE/Honeywell, *supra* note 192, para. 293.

229. *Id.* para. 351. The U.S. uses a different definition of mixed bundling and notes that it occurs when some items in the bundle are priced lower than their competitive price in order to promote greater sales of the entire bundle. See Department of Justice, Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers, *Range Effects: The United States Perspective* 21 (Oct. 12, 2001), at <http://www.usdoj.gov/atr/public/international/9550.pdf> (last visited Oct. 14, 2003) [hereinafter *Range Effects*]. Known as the "Cournot effect," this strategy is legal in the U.S. unless the pricing is predatory. See *id.* Most importantly, in mixed bundling, the items remain available separate from the bundle, but the package is sold at a discount relative to the individual items. Nalebuff, *supra* note 174, at 6. This differs from pure bundling where one of the items is sold in a bundle and by itself while the other is only available as part of the bundle. *Id.* at 5; see *supra* note 205 and accompanying text.

230. GE/Honeywell, *supra* note 192, para. 353.

231. See ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF MICROECONOMICS* 168 (2d ed. 2004); Nalebuff, *supra* note 174, at 7.

232. Nalebuff, *supra* note 174, at 6-7.

233. *Id.* at 6. The price set by a monopolist is by definition inefficiently high. See Robert Schenk, *What Is Wrong with Monopoly?*, available at <http://ingrimayne.saintjoe.edu/econ/Monopoly/Monopoly.html> (last visited Oct. 14, 2003); FRANK & BERNANKE, *supra* note 233, at 231.

234. Nalebuff, *supra* note 174, at 6 ("The overall price of two complementary technologies will tend to be lower when the technologies are sold together than when they are sold separately. The explanation for this is that, when sold separately, neither party takes account of the positive effect that a further reduction in its own price would have on the sales of the other party. Thus, each party sets prices at a higher level than is jointly profit-maximizing. When sold together, this positive externality can be internalized and the overall price will be reduced.").

increased revenues for the merged firm.²³⁵ The Commission acknowledged that both GE and Honeywell already had the capability to bundle their products and that these bundles would be desirable from the consumer's standpoint but still rejected the merger as anticompetitive and thus harmful to consumers.²³⁶

1. Bundling and Conglomerate Mergers

The trouble with bundling, as a merger investigation tool, is twofold: there is virtually no support in EU merger law for such an analysis,²³⁷ and there are real doubts about the anticompetitive impacts of portfolio-related theories like bundling.²³⁸ On the lack of support for blocking a merger based on product bundling, Stefan Schmitz put it this way:

Although it is probably true that the new company would indeed have the *potential* to bundle and it cannot be ruled out that at one point in time it might engage in this behavior, using this potential to conclude that the merger would strengthen a pre-existing dominant position within the meaning of ECMR Article 2 is questionable.²³⁹

It is also interesting to note that, despite Honeywell's strong positions in the markets for avionics, large regional jet engines, and corporate jet engines, there was no evidence that Honeywell had previously engaged in bundling or that Honeywell's competitors (including GE) had found it

235. See *id.* at 6-7. "Each firm causes a negative externality on the competition by raising its price. When the two firms combine, they internalize this effect and lower prices." *Id.* at 7.

236. Rockwell "Collins will be very much depend[ent] on the willingness of airlines not to behave in an economically rational way (by purchasing the merged entity's bundled product offers) and to keep selecting Collins' equipment." GE/Honeywell, *supra* note 192, para. 312. Rockwell Collins, it should be remembered, is a major Honeywell competitor.

237. Indeed, in a previous case (involving the merger of the two companies that eventually formed Honeywell) the Commission stated that on the facts of that case the ability to bundle would not impede competition. See Commission Decision of Dec. 1, 1999 C (1999) 4057 Final Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case COMP/M.1601, AlliedSignal/Honeywell) (1999) para. 110-114, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m1601_en.pdf; see also Drauz, *supra* note 111, at 886 (noting that "there is no explicitly stated framework for the analysis of conglomerate mergers . . . under the [EMCR]").

238. It is interesting to note that there was a time when American courts, along with the DOJ and FTC, embraced the entrenchment theory of competitive harm from conglomerate mergers, which is remarkably similar to the concerns expressed by the Commission over bundling. See Range Effects, *supra* note 229, at 2. Embodied in *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), this allowed for the blocking of mergers "if they strengthened an already dominant firm through greater efficiencies or gave the acquired firm access to a broader line of products or greater financial resources" sufficient to harm smaller rivals. Range Effects, *supra* note 229, at 2. Such an approach was categorically rejected by both agencies in 1982 because it would be illogical "to prohibit mergers because they facilitate efficiency or innovation in production." *Id.* (emphasis in original). Today, this so-called "efficiencies defense," while not absolute, weighs strongly against finding a conglomerate merger as anticompetitive. See Renzi, *supra* note 55, at 124; see also Range Effects, *supra* note 229, at 11.

239. Schmitz, *supra* note 63, at 375.

impossible to compete with Honeywell's wide range of products.²⁴⁰ For example, "the EU never explained why SNECMA, one of Honeywell's two principal competitors in the market for landing gear, would cooperate with GE in letting Honeywell domina[te] that market."²⁴¹ Indeed, the Commission determined that bundling was not a significant competitive phenomenon in the industry just eighteen months earlier.²⁴²

With regard to economic theory, bundling analysis builds on the idea that when competitors combine they eliminate the negative externality associated with competition.²⁴³ This does not require, however, that goods be perfect complements, nor does it factor in the specific form of the demand or cost functions.²⁴⁴ That is, the basic bundling model does not consider a merger's impact on other firms in the market; the incentive to cut prices to expand the market or compete against rivals (or both) is not present in the model.²⁴⁵ Here, GE/Honeywell cannot significantly expand the market for aircraft engines because this is almost entirely a factor of the total demand for aircraft.²⁴⁶ As such, the reason behind a price cut is almost certainly a desire to take market share from rivals.²⁴⁷ Competitors, however, are unlikely to sit idle as GE makes a play for more of the market: they will respond with their own price cuts, offsetting the merging firms' potential gain.²⁴⁸ Thus, regulators must focus on this new equilibrium point for a true understanding of the post-merger market.²⁴⁹ The EU, rather than trying to locate this point, simply declared that the mixed bundling price cuts were not real efficiencies but rather the result of "strategic pricing" that would not ultimately result in sustainable price reductions.²⁵⁰ This analysis is nearly impossible to justify, since there is no sound economic reason for distinguishing between productive and alloca-

240. Pflanz & Caffarra, *supra* note 205, at 116.

241. Kolasky, *supra* note 19, 11 n.29.

242. *Id.* at 11 n.6; Commission Decision of December 1, 1999 C (1999) 4057 Final Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case COMP/M.1601, AlliedSignal/Honeywell) (1999) para. 121, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m1601_en.pdf; see also Nalebuff, *supra* note 174, at 27; *supra* note 237 and accompanying text.

243. Nalebuff, *supra* note 174, at 7. When a firm raises its price, it generates a negative externality on the competition. *Id.* The combination of two competitors internalizes this cost and lowers prices. *Id.*

244. *Id.*

245. *Id.*

246. See *id.* Put another way, the price of an engine is only a small part of the total price of a new aircraft. See GE/Honeywell, *supra* note 192, para. 374. A price cut by GE—or any engine manufacturer—is incredibly unlikely to so change the cost metric that it, independent of a price cut by an airframe maker, could spur demand for new aircraft and enlarge the market. An analogy: a price cut in tires is unlikely to cause greater demand for cars. See Nalebuff, *supra* note 174, at 7. The Commission disagrees with this analysis. GE/Honeywell, *supra* note 192, para. 375-76.

247. See Nalebuff, *supra* note 174, at 7.

248. See *id.* at 7-8. This squares with existing evidence that other leasing companies are actively trying to differentiate themselves from GECAS by purchasing non-GE engines. Ruffner, *supra* note 84, at 1316.

249. Nalebuff, *supra* note 174, at 7-8.

250. See Drauz, *supra* note 111, at 907; Kolasky, *supra* note 19, at 20.

tive efficiencies.²⁵¹ As long as consumers benefit from lower prices and increased output, there is no reason to believe that this is somehow less beneficial or sustainable because it comes from the internalization of negative externalities rather than strictly through cost savings.²⁵² Externalities, after all, are a type of cost. In addition, the specific nature of the market in question tends to weigh against bundling theory, in that the anticompetitive effects from bundling presuppose that all buyers are charged the same price, which is decidedly not the case in the ultracompetitive aviation market characterized by highly differentiated products, powerful and sophisticated buyers, and individually negotiated transactions.²⁵³

Given all of these theoretical questions on bundling in the aerospace market, it is useful to see whether the empirical evidence tracks the theory. Initially, it does seem that bundling is important: companies like Honeywell often make a bid to supply components from across their product lines.²⁵⁴ However, the bids are broken down into prices for each individual component, which then total the price of the bundle.²⁵⁵ Bundling, though, involves a discount; if there is no discount, there is no bundling.²⁵⁶ The Commission attempted to document several cases of bundling by Honeywell,²⁵⁷ but the bundles *failed* to induce the customer to buy the package.²⁵⁸ These cases also do not distinguish between a discount offered by the supplier (with the customer getting the discount even if only parts, instead of the entire bundle, are purchased) and a discount *conditioned* on buying the bundle (with the customer not getting the discount without purchasing the entire bundle).²⁵⁹ If bundling really is effective, one “should see contracts that are won, not lost. And these contracts should offer a substantial discount for buying the entire package over à la carte purchases.”²⁶⁰ The evidence shows, categorically, that neither of these things are happening; the model used by the Commission simply does not fit the nature of the market.²⁶¹ Perhaps that is why the Commission seemingly abandoned bundling at the last minute.²⁶²

251. Kolasky, *supra* note 19, at 20.

252. *Id.* This is true so long as the prices do not violate antitrust laws or cause harm to consumer welfare from predatory (below cost) pricing. *Id.* at 21 (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990)).

253. See Nalebuff, *supra* note 174, at 8. The Cournot model is based on the assumption that firms do not price discriminate in the market; that is, that they set a single price for all customers. *Id.* As soon as price discrimination enters the equation, much, if not all, of the bundling advantage disappears. *Id.* Nalebuff goes on to state that “[w]hen the customer type is known and prices are negotiated, bundling can never lead to higher profits.” *Id.* at 16. Both of these factors are characteristic of the market for aircraft. *Id.*

254. *Id.* at 23.

255. *Id.*

256. *Id.*

257. See, e.g., GE/Honeywell, *supra* note 192, para. 364-365.

258. Nalebuff, *supra* note 174, at 24.

259. *Id.* at 24.

260. *Id.* at 25.

261. See *id.* at 32; Kolasky, *supra* note 19, at 12.

262. The Commission explained as follows:

2. Bundling, the Commission, and the Future

Despite this shaky economic evidence, the Commission seems intent on stamping out mergers that have even a hint of bundling.²⁶³ There is no question that a firm with a dominant position in many markets may be able to wield an inappropriately large amount of power over prices and product development.²⁶⁴ Yet, conglomerate mergers do result in real and quantifiable efficiencies.²⁶⁵ It may be that, if the Commission intends to use bundling analysis in future mergers, it needs to step back from a formalistic focus on bundling and transition to a more functional, market-focused approach.²⁶⁶ The concerns expressed by Charles James, former Assistant Attorney General for Antitrust, about bundling analysis, as currently applied, echo many in the legal, academic, and business communities:

[It] will lead antitrust regulators to disapprove efficiency-enhancing mergers on the basis of highly speculative and unprovable theories of competitive harm. Without a high standard of proof, . . . [bundling analysis] runs the risk of becoming an ill-defined, catch-all theory that allows antitrust regulators to challenge virtually any merger on the basis of vague fears of “dominance” . . . [and] would represent a step backwards in the evolution of antitrust policy, which has generally been moving toward[s] more clearly-defined, economics-based enforcement criteria.²⁶⁷

Because of the speculative nature of bundling problems, there is some attraction to the idea of dealing with them *ex post*: as long as sufficient mechanisms exist to block anticompetitive behavior by a merged entity (as they do in both the United States and the EU), higher prices as a result of bundling can be addressed when they arise.²⁶⁸ Antitrust law, after all,

“The various economic analyses have been subject to theoretical controversy, in particular as far as the economic model of . . . bundling[] . . . is concerned. However, the Commission does not consider the reliance on one or the other model necessary for the conclusion that the packaged deals that the merged entity will be in a position to offer will foreclose competitors from the engines and avionics/non-avionics markets.”

GE/Honeywell, *supra* note 192, para. 352. In truth, the Commission never stated anything beyond mere speculation and was never able to offer evidence to justify its predictions on the economic impact of any product bundling. See Ruffner, *supra* note 84, at 1312-13.

263. GE/Honeywell is the third major case in five years to contain at least some “portfolio power” analysis. See Case IV/M.938, Guinness/Grand Metropolitan, 1998 O.J. (L 288); Case No. IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336).

264. See Renzi, *supra* note 55, at 125.

265. See Kolasky, *supra* note 19, at 1-2. Kolasky also states that the DOJ “simply could not identify any conditions under which a conglomerate merger, unlike a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise price and restrict output.” *Id.* at 1.

266. See generally Nalebuff, *supra* note 174, at 25 (discussing the impracticality of bundling in the market for jet engines).

267. Range Effects, *supra* note 229, at 4.

268. See Kolasky, *supra* note 19, at 24-25; see also Schmitz, *supra* note 217, at 622. The Europeans tend to disfavor this approach because, in the absence of the treble damages permitted under U.S. law, *ex post* remedies are seen as less effective in the EU. Kolasky, *supra* note 19, at 24-25.

does not vanish once a merger is complete.

B. Pulling Back and Moving Forward

In recent months, European regulators have attempted to clarify their stance on the role that bundling played in the decision to block the merger, calling it “an additional aggravating or mitigating factor to existing horizontal and/or vertical effects,”²⁶⁹ and stating “that the GE/Honeywell merger, in its effects, as analyzed by the Commission, is not a ‘portfolio effects’ case.”²⁷⁰ It is relatively clear that this is merely an attempt to shift the analysis²⁷¹ back to the more traditional examination of the horizontal and vertical effects of a proposed merger rather than allowing the decision to stand as a glimpse at a future where “speculative long-term harms” drive the analysis.²⁷² Despite this change by the Europeans, bundling remains highly illustrative of the fundamental differences in merger policy between the United States and the EU. In one sense, it could be said that American regulators view bundling as a positive merger externality because it enhances efficiency.²⁷³ Such efficiency arguments hold little weight with European regulators because of their concern with single-firm market domination and the impact it has on competitors.²⁷⁴ Even if a single firm can be more efficient and consequently pass on those efficiencies to consumers, it is unlikely to be sufficient to support the merger if the Commission feels the merged firm can ultimately harm competitors.²⁷⁵

[T]he imposition of fines on the dominant merged firm, no matter how heavy they may be, cannot do much, if anything, to reinstate the competitive thrust and constraint of weakened or exiting rivals. The damage to competition will have already occurred and the legal system for prevention of the creation of market power, notably through an effective merger control policy, will have failed.

Drauz, *supra* note 111, at 908.

269. Dimitri Giotakos, *GE/Honeywell: A Theoretical Bundle Assessing Conglomerate Mergers Across the Atlantic*, 23 U. PA. J. INT'L ECON. L. 469, 473 (2002).

270. Drauz, *supra* note 111, at 897.

271. Or, perhaps more appropriately, it is an attempt to tie the European analysis of the merger back with traditional analysis.

272. William J. Kolasky, *GE/Honeywell: Continuing the Transatlantic Dialog*, 23 U. PA. J. INT'L ECON. L. 513, 519–20 (2002) [hereinafter Kolasky, *Transatlantic Dialog*].

273. Kolasky, *supra* note 19, at 20; see Kolasky, *Transatlantic Dialog*, *supra* note 272, at 518. Put another way, to the extent product bundling leads to lower prices (through buyer-side efficiencies as a result of the bundles or economies of scope, for example), they are consistent with the American philosophy. See generally Edward T. Swaine, “Competition, Not Competitors,” *Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT'L ECON. L. 597, 620 (2002). It is entirely possible—indeed, probable—that American regulators would never dig so far into the merger as to decide on the price points for various hypothetical product bundles. See generally Kolasky, *supra* note 19, at 25 (stating that “we are simply more humble about our ability to predict the future”). As long as the merger preserved competition in the market, American regulators are comfortable with the idea that efficiencies flow from that competition. See Kolasky, *Transatlantic Dialog*, *supra* note 272, at 518–19.

274. See Kauper, *supra* note 30, at 320.

275. See *id.* at 321. Two comments illustrate this tension, one from Mario Monti, European Commissioner for Competition Policy, and one from Deborah Majoras, Deputy Assistant Attorney General for Antitrust. “Our view is that whilst conglomerate mergers are normally not anti-competitive, under some circumstances they can lead to

V. Moving Forward or Standing Still: Is a Solution Needed?

A. Moving Beyond the Status Quo

By now, it should be clear that U.S. and European regulators have fundamentally differing, and often directly conflicting, views on some aspects of merger control. Thomas Boeder noted that the “primary difference” between antitrust analysis in the United States and Europe is that “the focus in the United States is on the process of competition and consumer impact; the focus in Europe is on the interests of both competitors and consumers.”²⁷⁶ Put another way, American regulators tend to be more concerned with a merger’s impact on the market as a whole, whereas European regulators are much more interested in a merger’s concentration of power in the hands of a single firm.²⁷⁷ It is almost inevitable that these two conflicting approaches will lead to different outcomes, even on the same set of facts.²⁷⁸

And yet, is that necessarily true? After all, only since the EMCR became effective in 1990 has the European Union developed a strong, cohesive antitrust policy.²⁷⁹ Before that, merger control was largely in the hands of member states.²⁸⁰ Since the EMCR, European regulators have blocked only one merger—GE/Honeywell—that received approval from U.S. competition authorities.²⁸¹ While U.S. and EU regulators sometimes disagreed on the potential impacts of a merger, such as the different concerns expressed in the Boeing/McDonnell Douglas and AOL/Time Warner mergers, this has not resulted in strained relations between U.S. and EU regulators or a conviction by either side that they were using fundamentally incompatible types of analyses. Some commentators suggest that GE/Honeywell was a blip on the global antitrust radar: a rare but inevitable disagreement by regulatory bodies that generally arrive at the same conclusion despite the use of different means.²⁸² Charles James originally remarked that the EU’s decision reflected “a simple, but rather fundamental, doctrinal disagreement over the economic purposes and scope of anti-

exclusionary effects and a worsening of competition conditions.” Mario Monti, Antitrust in the U.S. and Europe: A History of Convergence, Speech at the General Counsel Roundtable—American Bar Association (Nov. 14, 2001), at http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html (last visited Oct. 15, 2003). “[A]ntitrust should rarely, if ever, interfere with any conglomerate merger.” Deborah Platt Majoras, GE-Honeywell: The U.S. Decision, Remarks Before the Antitrust Law Section, State Bar of Georgia 13-14 (Nov. 29, 2001), at <http://www.usdoj.gov/atr/public/speeches/9893.pdf> (last visited Oct. 15, 2003).

276. Boeder, *supra* note 133, at 142-43.

277. See Kauper, *supra* note 30, at 320-21.

278. See generally Schmitz, *supra* note 217, at 383.

279. Kauper, *supra* note 30, at 311.

280. *Id.*

281. Schmitz, *supra* note 217, at 325-26; Evans & Salinger, *supra* note 172, at 490.

282. See, e.g., Editorial Comment, *GE and Brussels*, FIN. TIMES (London), June 18, 2001, at 19, available at 2001 WL 25827282; Mario Monti, *supra* note 275 (stating that “the EU and US agencies have, in spite of the different legal instruments at [their] disposal, been using the same micro-economic analytical tools, and increasingly so in recent years.”).

trust enforcement. What led the U.S. to clear the transaction—the prospect that it would make the combined firm a more effective competitor—was the very reason the E.U. opposed it.”²⁸³ By the spring of 2002, James’s tone had softened, and he noted that “the Commission now has made it clear, even to us, that it shares our view that the ultimate goal of antitrust policy must be consumer welfare, and that it views merger-generated efficiencies positively and will not challenge a merger just because it creates a more efficient firm.”²⁸⁴ This attitude echoes pledges from competition officials on both sides of the Atlantic to redouble their efforts to harmonize competition laws in the belief that closer cooperation will thwart differing outcomes in the future.²⁸⁵ Despite these sentiments, some business leaders and antitrust officials are concerned that GE/Honeywell is a stark illustration of the significant differences that remain between the United States and the EU regarding abuse of dominance and monopolization and that these differences will only result in more blocked mergers as the EU becomes evermore committed to enforcing its competition policy.²⁸⁶ If this is true, then GE/Honeywell is not a one-time aberration, but a harbinger of problems to come.²⁸⁷

B. A Problem in Need of a Solution?

Not surprisingly, the GE/Honeywell decision prompted a flurry of articles and commentary on what the United States and the EU should do in order to harmonize antitrust policy. Many commentators have written about a global antitrust body that would standardize enforcement across borders and prompt a harmonization of antitrust law akin to the progress made in standardizing international finance law.²⁸⁸ Proposals for a global antitrust body generally take two forms. The first proposes an antitrust authority housed under the auspices of the World Trade Organization (WTO) or Organization for Economic Cooperation and Development

283. Charles A. James, *Reconciling Divergent Enforcement Policies: Where Do We Go from Here?*, Address at the Fordham Corporate Law Institute 28th Annual Conference on International Law and Policy 4-5 (Oct. 25, 2001), at <http://www.usdoj.gov/atr/public/speeches/9395.pdf> (last visited Oct. 15, 2003).

284. James, *supra* note 58, at 6.

285. See Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT’L ECON. L. 457, 464 (2002).

286. See Kolasky, *Transatlantic Dialog*, *supra* note 272, at 515. Kolasky attributes the differences to a greater faith in markets than in regulators in the U.S. and a greater confidence in the benefits of governmental intervention in the market in the EU. Kolasky, *supra* note 19, at 27. “Europeans may also simply be uncomfortable with [the U.S.] emphasis on efficiency and . . . unwillingness to cut competitors any slack.” *Id.*

287. Kolasky, *Transatlantic Dialog*, *supra* note 272, at 514-15; see Hochstadt, *supra* note 120, at 379-80.

288. See William P. Connolly, Note, *Lessons to Be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law*, 6 FORDHAM J. CORP. & FIN. L. 207, 220 (2001) (discussing developments like the International Organization of Securities Commissions and the Basle Committee on Banking Supervision as robust international responses to challenges facing the international financial community).

(OECD), and is advanced principally by the Europeans.²⁸⁹ Many commentators are critical of shoehorning antitrust into either the WTO or OECD, principally because neither organization is structurally capable of handling the unique body of antitrust law.²⁹⁰ A second proposal, akin to ideas advanced by Joel Klein²⁹¹ and Charles James,²⁹² calls for the creation of a new global body to promulgate international antitrust standards.²⁹³ James's plan, known as the Global Competition Network,²⁹⁴ would focus "exclusively on the procedural and substantive issues directly affecting multijurisdictional antitrust enforcement"²⁹⁵ and provide a forum for structured dialogue in the hope of developing uniform practices that would then be adopted by individual countries.²⁹⁶ This proposal has promise, but it is also nonbinding.

Regional agreements to harmonize competition policy, while initially very promising, still have a long way to go before they can be considered a success.²⁹⁷ Surprisingly, the United States and the European Union have an agreement that covers a wide range of competition subjects.²⁹⁸ Signed in 1991, one of the agreement's primary aims was to overcome conflicts between competition authorities.²⁹⁹ Unfortunately, the agreement focuses

289. Sugden, *supra* note 13, at 1001.

290. *Id.* Critics are quick to point out that the WTO, which was created to foster global trade policy, is almost fundamentally incompatible with fostering global competition policy because trade policy focuses on the interests of an individual competitor (i.e., government efforts to encourage exports by domestic industries), while competition policy focuses on the interests of competitive markets (i.e., industry practices that raise prices through reduced output). *Id.* at 1002. The WTO is also concerned with policing the activities of governments through trade-damaging behavior like high tariffs, and its quasi-diplomatic proceedings are built around the political realities of international relations. *Id.* at 1002-03. Competition laws, on the other hand, are designed to remedy conduct by private parties (usually corporations) and the norms of international politics simply do not apply. *Id.* The OECD, which is designed to foster cooperation and discussion on economic policy matters, appears, at first instance, a slightly better candidate to host a global antitrust body until one realizes that the OECD has no power to enforce the recommendations of its members. *Id.* at 1003-04.

291. Joel Klein & Robert Pitofsky, Press Conference at the International Bar Association 10th Anniversary Merger Control Conference (Sept. 14, 2000), at <http://www.useu.be/issues/klein0918.html> (last visited Oct. 15, 2003).

292. See James, *supra* note 14.

293. *Id.* at 9.

294. The body is now known as the International Competition Network. James, *supra* note 58, at 26.

295. James, *supra* note 14, at 9.

296. *Id.* at 10. According to Mario Monti, this "venue should provide a forum where government officials [. . .] and others can 'exchange ideas and work toward common solutions of competition law and policy problems.'" Mario Monti, Speech at UNCTAD 3rd IGE Session, International Co-Operation and Technical Assistance: A View from the EU (July 4, 2001), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=&doc=SPEECH/01/328-0-RAPID&lg=EN (last visited Oct. 15, 2003).

297. See Sugden, *supra* note 13, at 1004-05.

298. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-Eur. Comm., 30 I.L.M. 1491.

299. Sugden, *supra* note 13, at 1005.

more on greater cooperation than on law harmonization.³⁰⁰ For example, it is silent on how a jurisdiction should engage, if at all, in bundling analysis.³⁰¹ Without question, the agreement has led to an unusually high level of cooperation between American and European competition officials,³⁰² but this cooperation tends to be more procedural than substantive. For example, even though regulators on both sides of the Atlantic often conduct joint interviews with company officials,³⁰³ they still retire to separate jurisdictions with conflicting standards to promulgate a decision.³⁰⁴ Such incremental steps are, in the end, helpful only at the margins.

VI. A Possible Solution

At this point, it is reasonable to ask if anything really needs to be done about the divergence between the United States and European Union. My answer is a qualified yes, because I do not believe that GE/Honeywell is a “first and only” situation. Commentator Sarah Stevens puts it this way:

[A] lack of consensus as to the ultimate aims and goals of antitrust law means that there is a significant likelihood that a merger will be reviewed and perceived differently by different antitrust authorities

There remains no overall consensus that merger control should focus on the criteria of efficiency. American antitrust law tends to elevate the welfare of the consumer as the ultimate goal, which is probably the closest example to, but still not wholly consonant with, an efficiency-based analysis in its purest form. The EC, however, expressly acknowledges competition law as a mechanism for the pursuit of non-efficiency related goals. . . . European competition law has long been recognized as a tool for achieving integration of the economically disparate as well as socially and culturally diverse Member States of the EU.³⁰⁵

These different substantive standards, in addition to the lack of desire on either side of the Atlantic to cede competition policy to a global body, can make global antitrust seem like an intractable problem.

Yet, it is beyond dispute that the companies involved will benefit from a greater level of certainty about their chances for merger success.³⁰⁶ The chilling effect of a wide divergence in competition policy, or even a few more blocked mergers, is obvious.³⁰⁷ History makes it clear that a global

300. *See id.* at 1006.

301. *See id.* at 1005–06.

302. *Id.* at 1006.

303. *See* Kolasky, *supra* note 19, at 8; *see also* Patterson & Shapiro, *supra* note 63, at 22.

304. *See* Patterson & Shapiro, *supra* note 63, at 23.

305. Stevens, *supra* note 4, at 284–85.

306. *See* Kolasky, *supra* note 19, at 22 (“[T]here are serious externalities associated with one jurisdiction blocking a merger on the basis of theories that other jurisdictions believe risk sacrificing important efficiencies to prevent speculative future harm to competition.”).

307. *See id.* at 23 (“[D]ivergent substantive standards between the U.S. and Europe are almost certain to increase the transactions [sic] costs associated with the merger clearance process. The result may well be to deter mergers that would have been pro-competitive and efficiency-enhancing.”); *see also* Peter Spiegel, *US Calls for More Antitrust*

competition policy is unlikely to develop organically and that regional agreements, the most successful convergence mechanisms to date, are not always sufficient.³⁰⁸ Law harmonization could take decades, if it ever occurs.³⁰⁹ As such, global business needs access to a safety valve that will ensure that the policies of one jurisdiction will not arbitrarily foreclose a valid merger opportunity. The international efforts to find a solution are one testament to regulators true feelings on the need for a harmonization of policies across borders. Just where, or how, this will come about remains unclear.

A. Antitrust Arbitration in the United States and the European Union

Developments in U.S. antitrust enforcement may provide one glimpse of an intermediate step for competition policy pending further law harmonization. Private enforcement of the antitrust laws has long been seen as playing an important role in preserving competition.³¹⁰ Yet, antitrust actions are incredibly fact-intensive and unusually susceptible to the delay and expense of traditional litigation.³¹¹ Arbitration provides a streamlined, cost-effective, and binding procedure to resolve antitrust disputes,³¹² and many businesses have turned to arbitration clauses as a way to ensure more expedient resolution of commercial disagreements.³¹³ Though the federal government has explicitly endorsed arbitration since 1925,³¹⁴ it was initially unclear whether arbitration extended to the antitrust laws because of the profound public interest involved and questions about whether private arbitrators, rather than federal courts, could properly effectuate antitrust policy.³¹⁵ American courts initially concluded that the public policy tension between the goals of arbitration and broader goals of antitrust was too strong to allow antitrust disputes to be arbitrated.³¹⁶ In

Agreement with Europe, FIN. TIMES (London), Oct. 26, 2001, at 11 ("The potential economic consequences of antitrust law meaning one thing in one jurisdiction and something extremely different in another are enormous.").

308. See Sugden, *supra* note 13, at 1004-05.

309. See Stevens, *supra* note 4, at 302.

310. John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 231-32 (1986); see also 15 U.S.C. § 15(a) (2000) (noting that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue").

311. See Fuglsang, *supra* note 21, at 795.

312. *Id.* at 808-09.

313. See James J. Calder et al., *A New Alternative to Antitrust Litigation: Arbitration of Antitrust Disputes*, ANTITRUST, Spring 1989, at 18-19 (noting that "traditional antitrust litigants, such as dealers and distributors, franchisers and franchisees, and licensors and licensees, regularly insert broad arbitration clauses in their agreements").

314. See Federal Arbitration Act of 1925, 9 U.S.C. § 2 (2000) (providing that written provisions for arbitration in a contract involving interstate commerce is "valid, irrevocable, and enforceable").

315. See Allison, *supra* note 310, at 232. "Because of the paramount importance of antitrust law to national economic policy, even private antitrust disputes are not purely private but are semipublic in character." *Id.*

316. See *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). The primary tension for the court was the "federal statutory protection of a large seg-

1985, the Supreme Court largely (though not explicitly) reversed this doctrine, holding that antitrust disputes stemming from international commercial transactions could be arbitrated pursuant to a contractual arbitration clause³¹⁷ and emphasizing “the need of the international commercial system for predictability in the resolution of disputes.”³¹⁸ Later cases have implicitly extended the arbitrability of antitrust claims to the domestic context as well.³¹⁹

In the European Union, arbitration is a recognized form of dispute resolution, but the proper scope of arbitration within the EU’s competition policy framework is unclear.³²⁰ The Commission has the exclusive power under Article 85 to grant exemptions to European competition law and has used this power in the past to require the parties to disclose any arbitration awards for exempted arrangements.³²¹ In doing so, the Commission has tacitly acknowledged that there is a place for arbitration in European competition law.³²² The Commission has been hostile to arbitration clauses that threaten to result in trade-restraining practices,³²³ but this should not be confused with a belief that antitrust claims are nonarbitrable because the Commission has upheld arbitration clauses.³²⁴ The European Court of Justice has also indirectly recognized the arbitrability of disputes under European competition law.³²⁵ However, the absence of a private cause of action under EU competition law³²⁶ significantly affects the overall usefulness of arbitration provisions and has undoubtedly resulted in a slower doctrinal development than in the United States.

B. Arbitration as an Intermediate Step in Law Harmonization

By one estimate, ninety percent of all international contracts contain

ment of the public, frequently in an inferior bargaining position, and encouragement of arbitration.” *Id.* at 826.

317. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639-40 (1985).

318. *Id.* at 629.

319. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (finding that much of the reasoning of *Mitsubishi* was applicable to domestic antitrust disputes); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995) (holding an antitrust claim arbitrable if within the scope of the arbitration clause); *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437 (9th Cir. 1994) (enforcing an agreement to arbitrate a domestic antitrust dispute); *Fuglsang*, *supra* note 21 at 804 n.223 (collecting cases).

320. See Hamid G. Gharavi, *The Proper Scope of Arbitration in European Community Competition Law*, 11 TUL. EUR. & CIV. L.F. 185, 187 (1996).

321. *Id.* at 188-89.

322. *Id.* at 189.

323. Ludwig von Zumbusch, Comment, *Arbitrability of Antitrust Claims Under U.S., German, and EEC Law: The “International Transaction” Criterion and Public Policy*, 22 TEX. INT’L L.J. 291, 314-15 (1987). The author cites *Re Stoves & Heaters*, 16 Common Mkt. Rep. D1 (June 3, 1975), and *Re the Agreements of the Davidson Rubber Co.*, 11 Common Mkt. Rep. D52 (June 9, 1972).

324. *Id.* at 315.

325. Gharavi, *supra* note 320, at 191, citing *Case 102/81, Nordsee Deutsche Hochseefischerei v. Reederei Mond et al.*, 1982 E.C.R. 1095.

326. von Zumbusch, *supra* note 323, at 312.

arbitration clauses.³²⁷ Several international treaties, of which the New York Convention³²⁸ is the most prominent, create a framework for the enforcement of international arbitration awards. The International Chamber of Commerce, the most prominent arbitration institution, and various other entities provide arbitration services throughout the world.³²⁹ Given that arbitration is firmly established in international commerce, an intermediate step toward a truly global antitrust policy may be a type of binding arbitration for mergers, like GE/Honeywell, that are approved by one set of regulators but blocked by another.³³⁰ Under this system, once a conflicting competition decision is reached, all sides—the government agencies and the merging companies—would submit their findings for review, much like they would if a private contract with an arbitration clause were at issue. The arbitrator³³¹ would promulgate a final response by adopting the position of one side.³³² In a sense, this process would be similar to the WTO's dispute settlement process for countries accused of trade violations, which should serve as a model.³³³ Competition authorities on both sides of the Atlantic would have a significant incentive to develop as strong

327. See KLAUS PETER BERGER, 9 INTERNATIONAL ECONOMIC ARBITRATION 8 n.62 (Norbert Horn & Richard M. Buxbaum eds., 1993).

328. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.

329. See Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 100 (2000).

330. The U.S. Department of Justice has developed a handbook on the use of binding arbitration by federal agencies. See PHYLLIS HANFLING & MARTHA MCCLELLAN, U.S. DEP'T OF JUSTICE, DEVELOPING GUIDANCE FOR BINDING ARBITRATION: A HANDBOOK FOR FEDERAL AGENCIES, at <http://www.usdoj.gov/adr/arbitra.htm> (last visited Oct. 15, 2003).

331. The importance of the position would almost dictate the need for a group of individuals rather than a single arbitrator. One vision might be a three-member panel, with one member appointed by the U.S., one by the EU, and one by the WTO. The problem with this, of course, is that the votes of two members are obvious. Another idea would be a larger panel, of seven members, with three appointed by each side and a chair appointed by the WTO. Here, an economist from both the U.S. and Europe would be mandatory members, as would leading antitrust practitioners. Presumably, the third member of each delegation would be the head of the relevant competition agency. Members of the WTO's Appellate Body, which must be "comprise[d] [of] persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally [and who] shall be unaffiliated with any government" seem like especially promising candidates for the panel. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Makkaresh Agreement Establishing the World Trade Organization, Annex 2, art. 17(3), at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Oct. 15, 2003) [hereinafter *Dispute Settlement*].

332. Some might call for the arbitrator to be able to adopt one side or reach an independent decision (for example, approving the merger but requiring divestitures not mandated by regulators from the jurisdiction that has given its consent to the merger). This would be a mistake because of sovereignty concerns. Neither the U.S. or the EU is likely to be much in favor of, in essence, handing the keys to their antitrust mechanism to a third party. By allowing the arbitrator only to reach an "approved" or "denied" position, each jurisdiction is giving up relatively little. Using GE/Honeywell as an example, the U.S., should the arbitrator come down in favor of the EU's position, suffers no worse a fate than the status quo. It has gained the upside, though, of a second chance at getting approval of the merger.

333. See generally *Dispute Settlement*, *supra* note 331.

a case as possible, knowing that the arbitration might ultimately act as a substantive review of their decision.³³⁴ The arbitrator would not be a permanent entity but would meet only when conflicting merger decisions were reached and then disband.³³⁵ This avoids the necessity of finding a global body in which to house the arbitrator and prevents the arbitrator from having any impact on mergers other than when needed.³³⁶ That said, the International Competition Network (ICN) seems like the ideal body to take the lead role, if only because it already represents the collective wisdom of competition regulators throughout the world. Arbitrators could be drawn from active but neutral ICN members, and service would simply be another element of ICN membership.³³⁷

Using GE/Honeywell as an example, the two sides would turn to arbitration only after the United States and the EU reached their conflicting decisions. At that point, each side, including the relevant corporations, would have a chance to present their case. Costs would be split three ways³³⁸—between the United States, the EU, and merging companies—and the arbitrator would be required to issue a final decision within two

334. This would go a long way to answering American concerns that the Commission sometimes acts “as investigator, prosecutor, judge, and jury” because judicial review of decisions to block mergers in the EU is “slow and highly deferential to the Commission[.]” Kolasky, *supra* note 19, at 26. This might be changing as three Commission decisions to block mergers have recently been overturned by European courts. Lou Whiteman, *Could GE-Honeywell Rise from the Dead?*, THEDEAL.COM, (Nov. 28, 2002), at http://204.118.37.25/siteware/output/buildings/2002/11/28/eng-dailydeal_tshaf/eng-dailydeal_tshaf_012754_8226372019614908324.asp (last visited Feb. 15, 2003). In one decision, the court cited errors in the Commission’s economic analysis and in another it said that the Commission had failed to prove that the deal would harm competition. *Id.* It remains unclear whether these decisions will result in Commission’s policy change. By far the most important was the June 2002 decision by the Court of First Instance to overturn the decision to block the merger of Airtours (now known as My Travel) with rival First Choice. See *Judges Overturn Airtours Merger Veto*, at <http://news.bbc.co.uk/1/hi/business/2028882.stm> The CFI rejected the Commission’s application of the merger’s facts to the economic theory used to justify blocking the combination. See *European Court Makes it Difficult for Commission to Block Mergers*, at <http://www.ashursts.com/pubs/pdf/2228.pdf>.

335. *Cf.* Dispute Settlement, *supra* note 331, art. 2, 17 (The Dispute Settlement Body and Appellate Body are permanent organs of the WTO).

336. This is similar to the ICN’s policy of not having a permanent secretariat. See International Competition Network, Memorandum on the Establishment and Operation of the International Competition Network 3, at <http://www.internationalcompetitionnetwork.org/mou.pdf> (last visited Oct. 15, 2003) [hereinafter ICN Memorandum].

337. This would not violate the ICN’s mission as an aspirational body with nonbinding recommendations. See Konrad von Finckenstein, Q.C., Recent Developments in the International Competition Network, Address at the 2003 Forum on International Competition Law—Hands on in Antitrust Heaven: Current Global Issues and Dilemmas (Feb. 6, 2003), at <http://www.internationalcompetitionnetwork.org/news/feb62003.html> (last visited Oct. 15, 2003) [hereinafter von Finckenstein Speech]. The ICN would only act as an intermediary in providing the arbitrator. The decision is actually binding because of existing treaty obligations.

338. This roughly corresponds with the practice of the International Competition Network. See ICN Memorandum, *supra* note 336, at 4 (noting that each member bears own costs).

months.³³⁹ If the arbitrator believes the Commission's case that bundling is a serious threat to rivals, the merger would not be allowed to continue. On the other hand, if it believes the American position that competition in the aerospace sector is robust enough to support the merger of GE and Honeywell and rejects the EU's economic theories, the merger would be able to proceed.

Two significant barriers to the proposal are obvious: consent from the relevant sovereigns and the differing standards in various jurisdictions. Consent, and in turn the legality of allowing a private body to effectuate antitrust policy, may not be as impossible to obtain as it first seems. A continuing complaint about many regulators is that they lack sufficient economic training or competition policy experience to make optimal solutions;³⁴⁰ indeed, this is a complaint that touches existing antitrust arbitration.³⁴¹ By tying the arbitration process to the ICN, regulators are assured that they are getting a decision maker who is at the forefront of competition policy as well as one who actually faces the difficulties of balancing economic growth and consumer protection on a daily basis. In essence, regulators would have two bites at the apple to vindicate their decision: once in reaching it and again in defending it. Legality may also prove to be a smaller hurdle than initially envisioned. In essence, an antitrust decision is a decision to permit or deny a merger.³⁴² That fundamental calculus does not change if the decision is sent for arbitration. Most importantly, the availability of post-merger remedies would not be foreclosed and regulators would be free to demand future concessions should anticompetitive behavior ultimately result. In the same vein, regulators could initially provide guidance on the decision they would make, including the reasoning supporting it, with a final determination and decision coming only after the arbitration process. This way, the decision results in nothing more than a (possible) change to the regulator's initial decision and is akin to an initial focus on one area of competition but a decision that ultimately deals with another.³⁴³

339. The WTO indicates that the typical case referred to the Dispute Settlement Body takes approximately one year to resolve but that appeals to the Appellate Body must be resolved within sixty days. See Dispute Settlement, *supra* note 331. The arbitration I propose is much closer to the WTO's appeals process because there has already been a factual finding (the main work of the Dispute Settlement Body). *Id.* Two months would allow the arbitrator to fully evaluate all arguments and preserves some expediency in the merger process, which is likely already close to a year in length by the time it reaches the arbitration panel. The GE/Honeywell deal was announced in October 2000 and formally blocked by the EU in July 2001.

340. See Kolasky, *supra* note 19, at 26.

341. See Allison, *supra* note 310, at 244 (discussing the "perceived lack of arbitrator expertise in dealing with antitrust claims").

342. Obviously, this is a gross generalization. Much of competition policy is made "between the lines"; that is, through the artful regulatory process of deciding at just what point competitors should be allowed to combine, what assets they must divest, and what monitoring the merged entity should undergo.

343. See *supra* text accompanying notes 160-163.

Key to this entire process is the transitory and ultimately disfavored role of the arbitrator. Arbitration should be seen as a last resort and should not develop into a way for competition authorities to shirk the heavy lifting of day-to-day regulatory policy. Antitrust must remain ultimately guided by the regulators in each country if it is to retain its important role in national economic policy.³⁴⁴ Regulators must never develop the attitude that it is best to leave the hard decisions to politically unaccountable arbitration, and this will be a continuing tension. Limiting the number of arbitrations is too simplistic and unnecessarily punishes companies that happen to merge near the end of a regulatory cycle. Instead, the ICN and the various regulatory bodies must make firm, good faith commitments to effective negotiation outside the arbitration process. This may require the ICN to decline an arbitration request if it cannot determine that regulators made sufficient efforts to come to a decision. Thus, the other roles of the ICN—those of dialogue and best practices³⁴⁵—remain as important, if not more so, than its role as arbitrator.

In the end, the ICN's role in this process cannot be underestimated. If the ICN is truly able to bring competition officials, members of the private bar, businesspeople, academics, and representatives of international organizations together, as is envisioned, it may be able to develop fundamental guidelines for merger review out of the cacophony of voices that are its membership.³⁴⁶ As guiding principles for merger analysis emerge from these discussions, the arbitrator could rely on these policies in examining the evidence submitted by both sides. A merger would be approved or rejected based on the current "best thinking" of competition officials from around the globe.³⁴⁷

Yet, the ICN process moves slowly. In June 2003, the ICN held its annual meeting in Merida, Mexico, at which it adopted four new recommended practices dealing with review, notification, and transparency.³⁴⁸ Unfortunately, like much of the output of consensus-based nongovernmental bodies, these recommended practices are often more show than substance: the recommendation on transparency, for example, was that merger control laws be applied transparently.³⁴⁹ This is certainly a useful ideal and will help to develop competition policy, but the ICN must take bolder steps if it, unlike its competition policy forbearers, is to succeed. Agreeing to provide more than just suggestions to achieve its goals of law convergence is just such a step.

344. See von Finckenstein Speech, *supra* note 337 (noting that "competition law is national but commerce is increasingly global").

345. See *id.*

346. See James, *supra* note 58, at 26-27.

347. In this sense, the ICN would be similar to the National Conference of Commissioners on Uniform State Laws.

348. Press Release, Department of Justice, Assistant Attorney General R. Hewitt Pate Promotes Merger Process Reform at International Competition Network Conference in Merida, Mexico (June 26, 2003), at http://www.usdoj.gov/atr/public/press_releases/2003/201115.htm (last visited Oct. 15, 2003).

349. See *id.*

Arbitration allows a neutral third party to evaluate the economic evidence before a merger is abandoned and decide which side has the better argument. The hypothetical arbitrator would have been called upon only one time since 1990, for GE/Honeywell. Thus, this process would be a rarely used safety valve—as it should be. This may also have the added benefit of pushing both the United States and the EU toward law harmonization through the ICN, with the ultimate goal of a merger investigation reaching substantially the same outcome in both jurisdictions. If the ICN is successful, arbitration could be little more than a temporary bridge as the competition laws of various jurisdictions slowly come together. As it stands now, if the EU blocks a merger, it is some years before the Court of First Instance hears the appeal.³⁵⁰ The time frame is usually shorter in the United States but still depends on the speed of the federal court system.³⁵¹ Of course, if the arbitrator were to approve a merger, each nation would still be free to use its *ex post* remedies if the merger generated completion problems.

Conclusion

Antitrust policy is likely at a significant crossroads, and there is more than a grain of truth in saying that “the way the world regulates megamergers . . . is now decided largely in Europe.”³⁵² On one side are the national economic interests that have always guided antitrust, which remain as valid today as ever. On the other is the increasingly global nature of business and the need for companies to continue to expand to meet the new challenges this brings. Couple these with the varying substantive standards in different jurisdictions—or, at the very least, different substantive ways of looking at mergers—and the waters become even murkier. Arbitration is not the ideal solution for these conflicting interests, nor is it the ideal solution to differing outcomes in merger review. Instead, competition authorities must work together to develop uniform standards. Unfortunately, history has shown this to be anything but an easy task. The ICN’s road, while promising, is a long and difficult one. That said, its success or failure will likely have an enormous impact on competition policy for years to come.

Thus, arbitration may be able to step into the void created between the current reality of uncertainty and a future of smooth, uniform laws. By allowing the ICN and the ideas developed by its members to play a substantive role in the competition debate years or decades earlier than they otherwise might, regulators can see the real and tangible benefits to working closer together. As these outcomes are accepted, grudgingly or enthusiastically, the promise of harmonization can begin to become a reality.

350. See Patterson & Shapiro, *supra* note 63, at 22.

351. See Kauper, *supra* note 30, at 314-15; see also James (Antitrust in the Early 21st Century speech), *supra* note 14, at 13-14.

352. Rich Thomas, *The Amazing Euroman*, NEWSWEEK, July 9, 2001, at 20, available at LEXIS, News Library.

As the world's economy becomes evermore integrated, it seems only appropriate that there be something more than vague promises and the hope that antitrust analysis might one day converge. Europe and the United States remain some ways apart in their attitudes toward competition, despite claims to the contrary. This divergence is neither intellectually nor ideologically defensible. When one regulatory agency is able to block a merger on questionable reasoning and novel theories, there is the real potential for consumers to be the ultimate victims. There must be something to move us beyond the untenable status quo so that when a future Jack Welch announces a merger, he has a good idea of where the regulatory process will take him.

