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## NOTE

# Turning Competition on its Head: Economic Analysis of the EC's Decision to Bar the GE-Honeywell Merger

*Paul Jin*<sup>\*</sup>

## I. INTRODUCTION

On July 3, 2001, the Commission of the European Communities ("Commission") rejected the proposed \$45 billion merger between The General Electric Company ("GE") and Honeywell International, Inc. ("Honeywell"), which U.S. antitrust regulators had approved. Of the some 400 mergers involving U.S. companies reviewed by the Commission since 1990, only one had ever been barred. In that instance, however, U.S. authorities had also blocked the proposed transaction.<sup>1</sup> Thus, the failed GE-Honeywell merger marked the first time the Commission had blocked a merger involving U.S. companies that had been approved by U.S. authori-

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<sup>1</sup> The blocked merger involved WorldCom and Sprint. *Blocked Merger Opens E.U.-U.S. Split* (July 4, 2001), at <http://www.cnn.com/2001/WORLD/europe/07/03/eu.merger/index.html> [hereinafter *Blocked Merger*].

ties. The Commission's move to block the GE-Honeywell merger brought a firestorm of criticism.

This paper seeks to explain the different treatment given to the proposed GE-Honeywell merger by European and American regulators, and explores the reliance by the Commission on an economic theory that has been rejected by the majority of the U.S. antitrust community. Part II will give the background of the case and the events leading up to the Commission's decision. Part III will illuminate the differences in the foci of antitrust law between the United States and the European Union, and show that the European Union is behind the United States in the development of its antitrust laws. Part IV will analyze the economic rationale behind the Commission's decision, and posit that the Commission based its decision on two shaky grounds: a misplaced concern for bundling and foreclosure, and a dubious economic theory that placed too much weight on speculative long-term anticompetitive possibilities at the expense of definite short-term gains for consumers. Part V will explore the potential consequences of divergence in transatlantic antitrust policy, and the opportunity for convergence.

## II. BACKGROUND

### A. The Proposed Merger

GE is a behemoth manufacturing and services company based in Fairfield, Connecticut, with a reported \$130 billion in revenues for 2000.<sup>2</sup> It is one of the world's largest manufacturers of jet engines,<sup>3</sup> but offers a wide array of products and services, including household appliances, network television (NBC), industrial controls, lighting, power generation, medical imaging equipment, and engineering plastics.<sup>4</sup> Honeywell, based in Morristown, New Jersey, reported \$25 billion in sales for 2000. Honeywell is also a diversified manufacturing and technology company, involved in avionics products and services, building and industrial controls, automotive products, power generation systems, specialty chemicals, fibers, and home security systems, among other things.<sup>5</sup> In October 2000, Honeywell, itself formed by a merger between Honeywell, Inc. and Allied Signal, was in the process of fleshing out a proposed merger with United Technologies Corp.

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<sup>2</sup> Press Release, Department of Justice, 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.pdf](http://www.usdoj.gov/atr/public/press_releases/2001/8140.pdf) [hereinafter DOJ PR 1].

<sup>3</sup> Jim Vicevich, *GE-Honeywell Deal Near Collapse* (July 3, 2001), at <http://www.msnbc.com/local/wvit/nbcoob3ipoc.asp>.

<sup>4</sup> See DOJ PR 1, *supra* note 2.

<sup>5</sup> *Id.*

when GE presented a more lucrative offer.<sup>6</sup>

GE and Honeywell hailed this merger of complementary businesses as a match made in heaven. Jack Welch, the much revered chairman and CEO of GE, stated, “[n]ot only are the businesses a perfect fit, but so are the people and processes.”<sup>7</sup> The companies expected the deal to yield significant cost savings and considerable synergies in the aerospace industry. Welch delayed his planned April 2001 retirement until the close of the year in order to see the company through this deal.<sup>8</sup> While the parties understood that the deal, slated to be the largest industrial merger in history,<sup>9</sup> would not likely pass antitrust muster without a few minor changes, no one at the time predicted the scrutiny that the European Commission would give to the transaction. Welch predicted that it would be “the cleanest deal you’ll ever see.”<sup>10</sup> “Everything is complementary,” Welch declared. “That’s not a speech for the antitrust people, that’s fact.”<sup>11</sup>

## B. The European Competition Committee Review Process

Firms that receive annual revenues of 250 million euros (about \$218 million) from operations in Europe, and combined global revenues of 5 billion euros (about \$4.35 billion) are automatically subject to a review from the European Commission.<sup>12</sup> GE and Honeywell easily met these limits. GE and Honeywell could have merged without the Commission’s approval, but the merged company would have been barred from conducting business in Europe.<sup>13</sup> Foregoing the right to conduct business in Europe would make no sense; Europe is one of the world’s largest aerospace markets, and GE, like other American companies, receives a large portion of its revenue outside of the United States.<sup>14</sup>

An investigation under European Merger Guidelines has a mandated timetable. After a notification of a proposed merger, the Commission has

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<sup>6</sup> *GE-Honeywell Deal Kaput?* (June 15, 2001), at [http://money.cnn.com/2001/06/15/deals/ge\\_honeywell](http://money.cnn.com/2001/06/15/deals/ge_honeywell) [hereinafter *Kaput*].

<sup>7</sup> Andrew Ross Sorkin & Claudia H. Deutsch, *G.E. Buying Honeywell in \$45 Billion Deal*, NEW YORK TIMES (Oct. 23, 2000), at <http://www.nytimes.com/learning/students/pop/001024wodtuesday.html>.

<sup>8</sup> *Id.*

<sup>9</sup> Mark Baker, *U.S./E.U.: Analysis—What Killed The GE-Honeywell Merger?*, RADIO FREE EUROPE (July 10, 2001), at <http://www.rferl.org/nca/features/2001/07/10072001124026.asp>.

<sup>10</sup> Deborah A. Garza, *Transatlantic Antitrust: Convergence or Divergence, The Background*, ANTITRUST, Fall 2001, at 6.

<sup>11</sup> *Id.*

<sup>12</sup> Michael D. Goldhaber, *Deal Breaker*, AM. LAWYER, Sept. 2001, at 116.

<sup>13</sup> See Baker, *supra* note 9.; Bill Mann, *GE/Honeywell Merger at La Mort’s Door?*, THE MOTLEY FOOL, at <http://www.fool.com/news/foth/2001/foth010615.htm> (last visited Feb. 1, 2003).

<sup>14</sup> *Id.*

one month to make an initial assessment. If the Commission has concerns about whether the proposed merger violates competition rules, a full investigation is initiated (Phase II). During these four months, the Commission will adopt a final decision either to allow the proposed merger to continue or to reject it.<sup>15</sup>

### C. The Investigation

GE and Honeywell notified the Commission on February 5, 2001 of their proposed deal. On March 2, the Commission announced that Phase II had been initiated.<sup>16</sup> The Commission stated that the initial assessment under the Merger Regulation had indicated that the proposed deal might cause horizontal overlaps,<sup>17</sup> most notably in the market for large regional jet engines, that were likely to significantly reduce competition.<sup>18</sup> The Commission also found that “vertical effects” (to the extent that Honeywell was a provider of components to competing jet engine producers) and “conglomerate effects” (resulting from the possible bundling of jet engines with avionics and other airplane parts) were likely to foreclose competition in those markets.<sup>19</sup> The focus of the investigation was whether or not the combination of GE’s strong market position on engines and Honeywell’s strong market positions on avionics and certain non-avionics products would result in, or strengthen a dominant position in any of those markets.<sup>20</sup> The Commission claims that the initiation of Phase II is a “procedural step without prejudice to the final outcome of the case.”<sup>21</sup> Nevertheless, the Commission’s review of the possible range of effects (or conglomerate effects) of the combined company, which was unexpected by GE, Honeywell, and antitrust observers in the United States,<sup>22</sup> hinted at trouble ahead.

On May 3, 2001 the U.S. Department of Justice (“DOJ”) approved the proposed merger. The DOJ ruled that because the two companies had

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<sup>15</sup> Press Release, Europa: The European Union Online, Commission Opens Full Investigation Into the General Electric/Honeywell Merger (March 2, 2001), at [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/298/0|AGED&lg=EN&display=\[hereinafter E.U. PR 1\]](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/298/0|AGED&lg=EN&display=[hereinafter E.U. PR 1]).

<sup>16</sup> Press Release, Europa: The European Union Online, The Commission Prohibits GE’s Acquisition of Honeywell (July 3, 2001), at [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/939/0|AGED&lg=EN&display=\[last visited Feb. 1, 2003\]](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939/0|AGED&lg=EN&display=[last visited Feb. 1, 2003]) [hereinafter E.U. PR 2].

<sup>17</sup> Welch had claimed that there was no product overlap. See Garza, *supra* note 10, at 6.

<sup>18</sup> See E.U. PR 1, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Only seventeen percent of proposed mergers that trigger Phase II are prohibited outright. See Goldhaber, *supra* note 12.

<sup>22</sup> John R. Wilke & Matt Murray, *U.S. Approves GE’s Purchase of Honeywell* (May 3, 2001), at <http://stacks.msnbc.com/news/568046.asp>.

product ranges that were mostly complementary, the companies were not competitors.<sup>23</sup> The DOJ called for a few relatively minor divestitures,<sup>24</sup> requiring the companies to divest Honeywell's helicopter engine business and to allow a new third-party provider of maintenance, repair, and overhaul services for certain Honeywell aircraft engines and auxiliary power units.<sup>25</sup> According to the DOJ, the merger would have substantially decreased competition in those markets because GE and Honeywell are the two main producers of U.S. military helicopter engines, and had received virtually all of the research and development funding from the Department of Defense for its Joint Turbine Advanced Gas Generator program. Without the divestitures, the primary consumer (the U.S. Military) would have faced "higher prices, lower quality and reduced innovation in the design, development, and production of the next generation of advanced U.S. military helicopter engines."<sup>26</sup> The Commission, as GE and Honeywell were about to find out, would demand much more than what the DOJ required.

#### D. The Commission's Decision

The Commission's Merger Task Force pressed GE to sell more than half of Honeywell's aerospace division, the division that had led GE to acquire the company in the first place.<sup>27</sup> The Commission focused on some of Honeywell's most prized products, such as ground-proximity warning systems, collision-avoidance devices, corporate jet engines, and other avionics.<sup>28</sup> These divestitures would equal \$6 billion of the \$10 billion of yearly revenue from the aerospace unit, which contributed 40 percent of Honeywell's \$25 billion revenue in 2000.<sup>29</sup> After negotiating with the Commission, GE proposed divestitures that totaled \$2.2 billion of Honeywell's aerospace division.<sup>30</sup> The Commission was also concerned that GE's aircraft leasing subsidiary, GE Capital Aviation Services ("GECAS"), would require aircraft manufacturers to purchase GE products before it would

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<sup>23</sup> Baker, *supra* note 9.

<sup>24</sup> *Id.*

<sup>25</sup> See DOJ PR 1, *supra* note 2.

<sup>26</sup> *Id.*

<sup>27</sup> *GE-Honeywell Woes Grow* (June 12, 2001), at <http://www.cnn.com/2001/BUSINESS/06/12/ge.honeywell/index.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Press Release, General Electric, GE and Honeywell Submit Final Undertakings to European Commission (June 14, 2001), at [http://www.ge.com/cgi-bin/cnn-storydisplay\\_nu.cgi?story=/www/bw/webbox/bw.061401/211652149.htm&strip=1&notimes&stamp=1&noeditor=1&nohref=1&header=%2Fwww%2Fbw%2Fge%2Ftesttop.htm&footer=%2Fwww%2Fbw%2Fge%2Ftestbot.htm&textcolor=%23000000&bgcolor=%23FFFFFF&linkcolor=%230000FF&vlinkcolor=%23551A8B](http://www.ge.com/cgi-bin/cnn-storydisplay_nu.cgi?story=/www/bw/webbox/bw.061401/211652149.htm&strip=1&notimes&stamp=1&noeditor=1&nohref=1&header=%2Fwww%2Fbw%2Fge%2Ftesttop.htm&footer=%2Fwww%2Fbw%2Fge%2Ftestbot.htm&textcolor=%23000000&bgcolor=%23FFFFFF&linkcolor=%230000FF&vlinkcolor=%23551A8B) (last visited Feb. 1, 2003) [hereinafter GE PR 1].

agree to purchase their airplanes. The Commission wanted GE to either spin-off GECAS, or sell a substantial portion of the unit.<sup>31</sup> GE offered to place a fence around GECAS by creating a separate audit and management structure (GECAS would still remain wholly owned by GE).<sup>32</sup>

These proposals, which fell well short of the Commission's demands,<sup>33</sup> would modestly reduce Honeywell's \$25 billion in revenues by 9% and the combined GE-Honeywell revenues by about 1.5%. The projected \$3 billion of synergies resulting from the acquisition would remain largely intact, and the long-term expectations that the merger would increase GE's earning growth rate by one to two points would not change. Furthermore, the estimated increase in earnings per share in the first full year of combined operations would only be reduced from eleven cents to nine cents.<sup>34</sup> Even so, these conditions were "extremely painful for GE,"<sup>35</sup> and GE and Honeywell both viewed them as significant concessions.<sup>36</sup> Welch stated that GE:

[W]anted to complete the transaction but we have always said there is a point at which we wouldn't do the deal. The Commission's extraordinary demands are far beyond that point. This shows you are never too old to get surprised. In this case, the European regulators' demands exceeded anything I or our European advisors imagined, and differed sharply from antitrust counterparts in the United States and Canada.<sup>37</sup>

This blistering and "very public"<sup>38</sup> statement led many to believe that the merger was indeed doomed. Honeywell came up with a last minute proposal, offering to accept a lower price if GE would make the required divestitures,<sup>39</sup> but Welch rejected it, stating "[w]hat the Commission is seeking cuts the heart out of the strategic rationale of our deal. The new deal you propose, in response to the Commission, makes no sense for our shareown-

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<sup>31</sup> See Kaput, *supra* note 6.

<sup>32</sup> *Id.*

<sup>33</sup> See Mann, *supra* note 13.

<sup>34</sup> See GE PR 1, *supra* note 30.

<sup>35</sup> See Mann, *supra* note 13.

<sup>36</sup> Press Release, General Electric, Statement by General Electric Regarding European Commission Decision (July 3, 2001), at [http://www.ge.com/cgi-bin/cnn-storydisplay\\_nu.cgi?story=/www/bw/webbox/bw.070301/211842232.htm&strip=1&notimes&noeditor=1&nohrule=1&header=%2Fwww%2Fbw%2Fge%2Ftesttop.htm&footer=%2Fwww%2Fbw%2Fge%2Ftestbot.htm&textcolor=%23000000&bgcolor=%23FFFFFF&linkcolor=%230000FF&vlinkcolor=%23551A8B](http://www.ge.com/cgi-bin/cnn-storydisplay_nu.cgi?story=/www/bw/webbox/bw.070301/211842232.htm&strip=1&notimes&noeditor=1&nohrule=1&header=%2Fwww%2Fbw%2Fge%2Ftesttop.htm&footer=%2Fwww%2Fbw%2Fge%2Ftestbot.htm&textcolor=%23000000&bgcolor=%23FFFFFF&linkcolor=%230000FF&vlinkcolor=%23551A8B) (last visited Jan. 29, 2003) [hereinafter GE PR 2].

<sup>37</sup> See GE PR 1, *supra* note 30.

<sup>38</sup> See Kaput, *supra* note 6.

<sup>39</sup> *E. U. Kills GE-Honeywell* (July 3, 2001), at <http://europe.cnn.com/2001/BUSINESS/07/03/ge.eu/index.html> (last visited Feb. 1, 2003).

ers, for the same strategic reasons.”<sup>40</sup>

On July 3, the Commission officially blocked the proposed merger.<sup>41</sup> It concluded that the merger would create or strengthen dominant market positions in several markets and that the proposals made by GE were inadequate to resolve those competition concerns. European Competition Commissioner Mario Monti announced that the merger would have “severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines.”<sup>42</sup> He further pronounced his regret that a negotiated solution was not reached, and acknowledged the different decision reached by the U.S. antitrust authorities.<sup>43</sup> The focus was on the horizontal overlaps and vertical integration of the two companies that would allow GE-Honeywell to bundle<sup>44</sup> GE jet engines with Honeywell avionics and GECAS financing.<sup>45</sup> The main concern was not leveraging but that, with the bundling, GE could then sell to buyers such as Boeing or Airbus at cheaper prices than what competitors such as Great Britain’s Rolls Royce PLC and France’s Thales SA could offer.<sup>46</sup> The Commission stated that this would foreclose competitors, thereby eliminating competition, which would ultimately have adverse effects on product quality, services, and prices.<sup>47</sup>

GE quickly responded with a press release stating its deep disappointment. GE claimed that the Commission’s assertions of harmful effects on competition were not supported by the facts, and that the Commission took a “fundamentally different approach to competitive issues than its counterparts in the United States, Canada and nearly a dozen other jurisdictions,” further noting that these jurisdictions had approved the merger “with few, if

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<sup>40</sup> Press Release, General Electric, General Electric Releases Letter From Chairman and CEO Jack Welch (June 29, 2001), at [http://www.ge.com/cgi-bin/cnn-storydisplay\\_nu.cgi?story=/www/bw/webbox/bw.062901/211802274.htm&strip=1&notimesamp=1&noeditor=1&nohrule=1&header=%2Fwww%2Fbw%2Fge%2Ftesttop.htm&footer=%2Fwww%2Fbw%2Fge%2Ftestbot.htm&textcolor=%23000000&bgcolor=%23FFFFFF&linkcolor=%230000FF&vlinkcolor=%23551A8B](http://www.ge.com/cgi-bin/cnn-storydisplay_nu.cgi?story=/www/bw/webbox/bw.062901/211802274.htm&strip=1&notimesamp=1&noeditor=1&nohrule=1&header=%2Fwww%2Fbw%2Fge%2Ftesttop.htm&footer=%2Fwww%2Fbw%2Fge%2Ftestbot.htm&textcolor=%23000000&bgcolor=%23FFFFFF&linkcolor=%230000FF&vlinkcolor=%23551A8B) (last visited Feb. 1, 2003) [hereinafter GE PR 3].

<sup>41</sup> See E.U. PR 2, *supra* note 16.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Europe Business News, *E.U. Rejection of GE-Honeywell Merger Adds New Strain With U.S.* (July 5, 2001), at <http://www.europebusinessnews.com/Market/Market.cfm?ID=498&c=3>.

<sup>45</sup> 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, at ¶ 229, available at [http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf) [hereinafter CD GE].

<sup>46</sup> John Christoffersen & Paul Geitner, *GE’s Welch Risked Big in Merger Effort*, THE CINCINNATI ENQUIRER (Online Edition) (July 8, 2001), at [http://enquirer.com/editions/2001/07/08/fin\\_ges\\_welch\\_risked\\_big.html](http://enquirer.com/editions/2001/07/08/fin_ges_welch_risked_big.html).

<sup>47</sup> CD GE, *supra* note 45, at ¶ 355.; see also E.U. PR 2, *supra* note 16.

any conditions.”<sup>48</sup> The Assistant Attorney General Charles A. James of the DOJ agreed with GE that the merger “would have been procompetitive and beneficial to customers.”<sup>49</sup> The DOJ concluded that the combined firm could offer better products and services at better prices than what either company could offer on its own. “That, in our view, is the essence of competition.”<sup>50</sup> The Commission’s decision, James noted, “reflects a significant point of divergence.”<sup>51</sup>

### III. DIFFERENT ANTITRUST AIMS

Why was there such a difference in outcomes? The answer to that question requires a look into the broader goals of antitrust law (or competition law, as it is called in Europe). Antitrust analysis today is largely an economic endeavor—in the United States especially, what matters is prices and quantities.<sup>52</sup> As Assistant Attorney General James stated, “[c]lear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors.”<sup>53</sup>

#### A. The Structure-Conduct-Performance Theory vs. The Chicago School

The goal of U.S. antitrust policy was not always so clear. Until relatively recently,<sup>54</sup> antitrust economics was heavily influenced by the “structure-conduct-performance paradigm”<sup>55</sup> manifested by industrial organization economists of the “Harvard” school.<sup>56</sup> This theory posited that the structure of the market determined whether competition was feasible. Within industries that were highly concentrated (the top four firms having around fifty percent of sales was a good benchmark), competition would be feeble unless there was government intervention to break up the concentrated industries. Proponents of this paradigm supported this theory with data showing that the most concentrated industries were the most profit-

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<sup>48</sup> See GE PR 2, *supra* note 36.

<sup>49</sup> Press Release, Department of Justice, Statement by Assistant Attorney General Charles A. James on the E.U.’s Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8510.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8510.htm) (last visited Feb. 1, 2003) [hereinafter DOJ PR 2].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See *Cont’l T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); see also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978).

<sup>53</sup> See DOJ PR 2, *supra* note 49.

<sup>54</sup> Paul L. Joskow, *The Role of Transaction Cost Economics in Antitrust and Public Utility Regulatory Policies*, 7 J.L. ECON. & ORG. 53, 55 (1991).

<sup>55</sup> Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986).

<sup>56</sup> See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

able.<sup>57</sup>

Structure-conduct-performance had an affect on antitrust policy that was characterized by a suspicion of many industrial practices.<sup>58</sup> Monopolization seemed just around the corner for any firm, and any behavior that could lead to concentration and monopolization warranted hostility. Such behavior included tie-ins (or bundling), vertical integration, resale price maintenance, and predatory pricing.<sup>59</sup>

Skeptics arose who doubted the perfect competition model upon which the structure-conduct-performance theory was based.<sup>60</sup> The skeptics charged that industrial organization of the 1950's and early 1960's:

[T]ended to be untheoretical, descriptive, "institutional," and even metaphorical. Casual observation of business behavior, colorful characterizations (such as the term "barrier to entry"), eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of the careful definitions and parsimonious logical structure of economic theory. The result was that industrial organization regularly advanced propositions that contradicted economic theory.<sup>61</sup>

This school of criticism came to be known as the "Chicago School."<sup>62</sup> The Chicago School argued that resale price maintenance is a way of fighting the free-rider problem, and that predatory pricing in almost all cases is unprofitable.<sup>63</sup> A firm that prices below cost will lose money in the short term, and an attempt to raise profits later to recoup the losses will result in the entrance of new competitors.<sup>64</sup> The Chicago School also argued that vertical integration could be pro-competitive.<sup>65</sup> Vertical integration involves complementary products, and an upstream monopolist gains nothing from monopolizing downstream.<sup>66</sup> In addition, the theory that vertical integration creates barriers to entry for competitors (by making entry in the market more costly due to the fact that new competitors also need to be vertically integrated) is negated by the point that "the cost to the monopolist of

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<sup>57</sup> See Easterbrook, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> Posner, *supra* note 56, at 926-27. For an example of a decision that shows hostility towards a business practice, see *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953). The fact that the business practices of the defendant were "long-standing traditions" in the industry and followed by competitors was no bar to liability. *Id.* at 344.

<sup>60</sup> See Easterbrook, *supra* note 55, at 1696. For a good list and discussion of the fundamental points of skepticism, see *id.* at 1700-01.

<sup>61</sup> Posner, *supra* note 56, at 928-29.

<sup>62</sup> *Id.* at n.1-2, at 925; Joskow, *supra* note 54, at 56; see also Easterbrook, *supra* note 55.

<sup>63</sup> Posner, *supra* note 56, at 927.

<sup>64</sup> *Id.*

<sup>65</sup> CHARLES J. GOETZ & FRED S. MCCESNEY, *ANTITRUST LAW* 465 (1998) [citing Telser, *What Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960)].

<sup>66</sup> See *Concord v. Boston Edison Co.*, 915 F.2d 17, app. A, B (1st Cir. 1990).

integrating is *prima facie* the same as the cost to the new entrant of having to integrate.”<sup>67</sup> There is no advantage for the integrator from a monopoly perspective. There had to be a different explanation as to why firms participated in these practices other than the old suspicion that they were after monopoly profits. The hypothesis under the Chicago School is that the motivation must be a desire for efficiency rather than for monopoly.<sup>68</sup>

The Chicago School addressed tying by arguing that a tie-in is not an economically rational way of obtaining monopoly profits in a second product, because a higher price for the tied product will reduce the price that a consumer is willing to pay for the tying product.<sup>69</sup> A related notion, the leverage theory, hypothesized that a monopolist of one product could and would monopolize the product’s complements as well in order to receive more monopoly profits.<sup>70</sup> For example, a monopolist of aircraft engines would require aircraft builders to buy its avionics in order for the builders to obtain the monopolist’s engines (what good would it be to buy avionics from other producers if plane makers could not obtain engines?). But this also makes no economic sense for the monopolist. The Chicago School conjectured that the pricing of individual components is but a detail to the buyer. The buyer is concerned with the total price of the products. Given that the first product is already priced at the optimal monopoly level, if the producer charges the higher monopoly price for the complementary product, the total price of the products will be raised above the optimal monopoly price, thereby reducing the monopolist’s profits.<sup>71</sup>

The Chicago School does not do away with the possibility of illegal tying. It would be easy to construct situations in which a monopolist in one product could leverage that power to increase sales in another product. But the Chicago School poses a valid question as to whether tying is always illegal. The forcing of consumers to buy a product they would not otherwise purchase must exist for there to be illegality. The character of the demand for both the tying and tied product is the correct lens through which tying should be analyzed. This approach is referenced in *Jefferson Parish Hosp. v. Hyde*.<sup>72</sup> In her concurring opinion, Justice O’Connor states that there could be possible economic benefits of tie-ins.<sup>73</sup>

Today in the United States, the structure-conduct-performance paradigm has gone by the wayside, and few, if any, economists adhere to it.<sup>74</sup>

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<sup>67</sup> Posner, *supra* note 56, at 936.

<sup>68</sup> *Id.* at 927.

<sup>69</sup> *Id.* at 926.

<sup>70</sup> *Id.* at 929.

<sup>71</sup> *Id.*

<sup>72</sup> 466 U.S. 2 (1984).

<sup>73</sup> *Id.* at 35.

<sup>74</sup> Easterbrook, *supra* note 55, at 1698.

Under the structure-conduct-performance paradigm, the answer to the question of whether competitive injury can be found was “almost always,” while the answer under the Chicago School is “almost never.”<sup>75</sup> A more moderate, eclectic post-Chicago way of thinking has emerged, where the answer to the question of whether competitive harm can be found is “maybe.” Therefore, the basic point of the Chicago School has prevailed; the proper lens for analyzing antitrust problems is price theory.<sup>76</sup> The notion that problems of competition and monopoly should be analyzed using the tools of general economic theory rather than those of traditional industrial organization has triumphed.<sup>77</sup> Current Supreme Court antitrust jurisprudence emphasizes efficiency and consumer welfare,<sup>78</sup> and U.S. merger policy is much more tolerant of concentration now.<sup>79</sup> This holds especially true in the vertical merger context, where the possibility of efficiencies is overtly declared.<sup>80</sup> The debate still ensues as to the absolute viability of the Chicago School, but it exposed the lack of a “meaningful relationship between sensible notions of competition in relevant horizontal markets”<sup>81</sup> and the theories that characterized the analysis of unilateral conduct under the structure-conduct-performance paradigm.<sup>82</sup>

## B. The Focus of Antitrust Laws

There are three general dangers of mergers. Mergers offer an opportune way to create a monopoly as firms buy out competitors and gain the ability to raise prices.<sup>83</sup> Mergers also facilitate coordination amongst competitors that can harm consumers.<sup>84</sup> Finally, mergers can be problematic by lessening competition, thereby reducing incentives to be efficient and innovative.<sup>85</sup> The effects of the Chicago School’s supposition that firms are ra-

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<sup>75</sup> Spencer Weber Waller & Robert Stoner, *Economists Abroad*, 15-SPG ANTITRUST 66 (2001) (book review).

<sup>76</sup> Posner, *supra* note 56, at 932.

<sup>77</sup> *Id.* at 933-34.

<sup>78</sup> For an extensive list of cases, see Easterbrook, *supra* note 55, at n.7.

<sup>79</sup> *Id.* at 1698.

<sup>80</sup> See U.S. Department of Justice and the Federal Trade Commission, *1992 Horizontal Merger Guidelines* § 4, (Revised 1997), available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/toc.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html) (last visited March 1, 2002) [hereinafter *Merger Guidelines*]; see also Deputy Assistant Attorney General, Steven C. Sunshine, Address at The American Bar Association Section of Antitrust Law Spring Meeting (May 11, 1995), at <http://www.usdoj.gov/atr/public/speeches/2215.htm>.

<sup>81</sup> Joskow, *supra* note 54, at 56.

<sup>82</sup> *Id.*

<sup>83</sup> Eric J. Stock, *Explaining the Differing U.S. and E.U. Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT’L ECON. L. 825, 830 (1999).

<sup>84</sup> *Id.*

<sup>85</sup> See Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a*

tionally unable to obtain or improve monopoly power through unilateral action<sup>86</sup> is apparent in current U.S. merger policy. Although the potential dangers of unilateral conduct are recognized,<sup>87</sup> the first potential danger of mergers, namely monopoly creation, is not as heavily scrutinized as cartel facilitation and market-wide lassitude. U.S. merger review focuses more on collusion and coordination between competitors.<sup>88</sup>

This is not the case in Europe. The Commission there is concerned more with monopoly creation and the complacency of a market-dominating firm.<sup>89</sup> For European regulators, the most crucial test in assessing mergers is whether the merger creates or strengthens a dominant position.<sup>90</sup> This is expressly stated in the E.C. Merger Regulation, under which mergers are examined.<sup>91</sup> In the United States, the principal standard of whether a practice is anticompetitive is whether the practice benefits or harms consumers.<sup>92</sup> In Europe, however, the stated goal is to protect consumers by maintaining a high degree of competition in the common market.<sup>93</sup> The most important factor for the Commission in analyzing inter-firm cooperation is market structure and the position of the cooperating firms within that market.<sup>94</sup> This notion of maintaining competition by avoiding concentration was "fashionable in the United States in antitrust circles 50 years ago or so."<sup>95</sup> It seems that Europe has yet to advance from the structure-conduct-performance paradigm. Critics accuse the Commission of focusing on the number of competitors in the market instead of the effect of competition upon consumers. This one-or-the-other approach is perhaps too harsh; the idea of protecting consumers versus protecting competitors is more a continuum than a dichotomy.<sup>96</sup> This is evidenced in the European Union by the tension between the competition laws and member states' rules on un-

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*Global Economy*, 81 GEO. L.J. 195 (1992).

<sup>86</sup> See Posner, *supra* note 56, at 928.

<sup>87</sup> Merger Guidelines, *supra* note 80, at § 0.1.

<sup>88</sup> Stock, *supra* note 83, at 831-32.

<sup>89</sup> *Id.* at 831.

<sup>90</sup> E.U. PR 2, *supra* note 16.

<sup>91</sup> Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1.

<sup>92</sup> Baker, *supra* note 9.

<sup>93</sup> Mario Monti, *The Future for Competition Policy in the European Union*, Address at Merchant Taylor's Hall (July 9, 2001), at [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN) [hereinafter Monti Speech].

<sup>94</sup> Andre Fiebig, *European Law on Competition is Modernizing, Results are Important for U.S. Practitioners*, 8/6/2001 N.Y.L.J. 7, (col. 1).

<sup>95</sup> Baker, *supra* note 9 (quoting George Priest, Professor of Law and Economics at Yale University Law School).

<sup>96</sup> This is similar to the modes of analysis in U.S. antitrust law concerning the *per se* rule versus the rule of reason. For more on this, see ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 168 (4th ed. 1994).

fair competition, which more explicitly focus on protecting competitors.<sup>97</sup> Accordingly, the Commission denies that European merger control is about protecting competitors instead of consumers.<sup>98</sup> Nevertheless, E.U. competition policy is closer to the “protecting competitors” end of the continuum than U.S. antitrust policy is, thus critics see a “longing for a world in which artisans make leather artifacts in tiny shops.”<sup>99</sup>

The anti-efficiency stance, in which possible efficiencies either play no role in merger analysis or could be the reason for barring a merger, was once the state of U.S. antitrust law. This was embodied in *Federal Trade Commission v. Procter & Gamble*.<sup>100</sup> In this case, Procter & Gamble (“Procter”), a large and diversified manufacturer of household products, acquired Clorox Chemical Co. (“Clorox”), the leading manufacturer of household liquid bleach, through a merger.<sup>101</sup> The Federal Trade Commission (“FTC”) brought suit, claiming that the merger was in violation of section 7 of the Clayton Act. The Supreme Court noted that both companies were in highly concentrated industries. Procter accounted for 54.4% of its market, and with its two nearest competitors, accounted for 80% of the market.<sup>102</sup> Clorox and its five nearest competitors accounted for almost 80% of their market.<sup>103</sup>

The Court found that this merger would be anticompetitive in two ways: “[t]he substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing [and] . . . the acquisition eliminates the potential competition of the acquiring firm.”<sup>104</sup> The concern here was that the market would grow even more concentrated, and competitors would die away. The assets and advertising advantages of Procter would create entry barriers, the Court reasoned.<sup>105</sup> The Court of Appeals had determined otherwise. It found that the existence of over 200 smaller producers of bleach indicated that there did not seem to be anything unhealthy about the market.<sup>106</sup> It noted that there was no evidence that Procter could leverage its assets into any gain that Clorox did not already have, or that Procter had planned on entering the bleach market on its own. Illegality, it further

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<sup>97</sup> ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES, EUROPEAN UNION 14 (2001).

<sup>98</sup> E.U. PR 2, *supra* note 16.

<sup>99</sup> Easterbrook, *supra* note 55, at 1697.

<sup>100</sup> 386 U.S. 568 (1967) [hereinafter *FTC v. P&G*].

<sup>101</sup> *Id.* at 571, (indicating that Clorox had 48.8% of national sales).

<sup>102</sup> *Id.* at 573.

<sup>103</sup> *Id.* at 571.

<sup>104</sup> *Id.* at 578.

<sup>105</sup> *FTC v. P&G*, *supra* note 100, at 575.

<sup>106</sup> *Id.* at 576.

noted, could not be found on the basis of advertising advantages.<sup>107</sup>

But the Supreme Court rejected these conclusions by stating that the core question concerned incipency.<sup>108</sup> Illegality, the Court held, is based on whether the merger could have anticompetitive effects, regardless of any efficiencies that may arise. The Court stated that “[p]ossible economies cannot be used as a defense to illegality.”<sup>109</sup> In this case, the Court held efficiencies *against* Procter, saying that the merger would allow Procter to be a superior competitor. The Court cited *Brown Shoe Co. v. United States*, which suggested that Congress was concerned with market concentration rather than consumers.<sup>110</sup>

The Court’s decision in *Federal Trade Commission v. Procter & Gamble* no longer accurately portrays the state of U.S. antitrust law. A company’s efficiencies may “hurt” other competitors, but efficiencies benefit consumers. Timothy Muris, Chairman of the Federal Trade Commission, stated “[t]he focus is clearly on consumers, and that debate is over.”<sup>111</sup> The 1997 amendments to the Merger Guidelines recognize efficiencies as relevant in determining whether a merger is anticompetitive.<sup>112</sup> The European Union seems to still be in the realm of *Federal Trade Commission v. Procter & Gamble*. Like the Court in that case, the Commission essentially punished GE for its size and financial assets, which GE could use to beat out competitors in Honeywell’s lines of business.<sup>113</sup> This is a focus on competitors, not competition. While the differing foci may seem like splitting hairs, it is “clear in practice and is recognized by enforcement officials.”<sup>114</sup> The emphasis in the European Union is on competitors and competitive leverage,<sup>115</sup> while the emphasis in the United States on the effect of a merger is future prices.<sup>116</sup> In terms of preventing harm from mergers, E.U. competition law centers more on single firm dominance “while U.S. antitrust law

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 577.

<sup>109</sup> *Id.* at 580.

<sup>110</sup> *FTC v. P&G*, *supra* note 100, at 580 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, at 344 (1962)).

<sup>111</sup> *Interview with Timothy J. Muris, Chairman of the FTC*, ANTITRUST, Fall 2001, at 52.

<sup>112</sup> *See* Merger Guidelines, *supra* note 80, at § 4.

<sup>113</sup> Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST, Fall 2001, at 18, 19.

<sup>114</sup> Stock, *supra* note 83, at 833.

<sup>115</sup> “[G]iven the increased incentives to leverage market power in Europe ... Our legal mandate is to stop the emergence of” unfavorable “market structures”, Deborah A. Garza, *Roundtable Discussion*, ANTITRUST, Fall 2001, at 9 (Francisco-Enrique Gonzalez-Diaz, Head of Unit of the Merger Task Force, DG Comp, European Commission, and lead attorney on *GE-Honeywell*) [hereinafter Roundtable].

<sup>116</sup> Robert Pitofsky, Address Before the Business Development Associates, Staples and Boeing: What They Say About Merger Enforcement at the FTC (Sept. 23, 1997), at <http://www.ftc.gov/speeches/pitofsky/STAPLESspc.htm>.

concentrates on the market more generally.”<sup>117</sup> The notion of “restraint of competition” is given an “extremely broad interpretation” by the Commission and European Courts.<sup>118</sup> E.U. competition law is less influenced by the Chicago School, which posits that a monopoly tends to be self-correcting (due to the monopolist’s profits attracting new entrants) and that barriers to entry are not prominent in the long term.<sup>119</sup>

A significant difference in Europe is that the aims of its competition policy are economic, political, and social.<sup>120</sup> Of course, this can also be said of the Sherman Act.<sup>121</sup> But while the debate continues in the United States concerning what the aims of antitrust policy should be, there is no such debate in Europe. The E.U. competition policy is subservient to the E.C.’s Treaty of Rome.<sup>122</sup> Mario Monti, the E.U. Competition Commissioner, states that “[c]ompetition policy is also strictly connected with another of the fundamental objectives of the E.C. Treaty, namely the creation of the Single Market.”<sup>123</sup> Commissioner Monti’s predecessor, Karel Van Miert, stated that this necessitates “the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power.”<sup>124</sup> A resulting implication is that E.U. law may protect competitors at the expense of consumers. Occasionally, pure economic competition concerns take a back seat to the overriding integration imperative fueling all of E.U. law.<sup>125</sup> The European Union is not as free-market oriented as the United States.<sup>126</sup> Commissioner Monti has extolled the E.C. Treaty as acknowledging the fundamental role of the market and competition to promote consumer welfare, optimal allocation of resources, and incentives for efficiency and innovation.<sup>127</sup> However, at the same time, he has iterated his personal belief that this fundamental principle of an open market economy “does not

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<sup>117</sup> Stock, *supra* note 83, at 834.

<sup>118</sup> See Fiebig, *supra* note 94.

<sup>119</sup> See Per Jebsen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L.J. 443, 456, 458 (1996).

<sup>120</sup> Stock, *supra* note 83, at 835-36.

<sup>121</sup> See GELLHORN & KOVACIC, *supra* note 96, at 20-22.

<sup>122</sup> Waller & Stoner, *supra* note 75, at 67.

<sup>123</sup> Mario Monti, *European Competition for the 21<sup>st</sup> Century*, 24 FORDHAM INT’L L.J. 1602, 1604 (2001).

<sup>124</sup> Jebsen & Stevens, *supra* note 119, at 450.

<sup>125</sup> Waller & Stoner, *supra* note 75, at 67; Neal R. Stoll & Shepard Goldfein, ... *In With the New*, 8/21/2001 N.Y.L.J. 3, (col. 1) (U.S. regulators are not immune from using antitrust laws for “social engineering.” But while the U.S. regulators are merely susceptible, E.U. regulators are anything but shy about “holding transactions hostage to address conduct ancillary to the matter under review”).

<sup>126</sup> *GE Pessimistic on Merger* (June 14, 2001), at <http://www.cnn.com/2001/BUSINESS/06/14/ge/index.html> (quoting A.G. Edwards analyst Kent Newcomb).

<sup>127</sup> Monti, *supra* note 123, at 1603.

imply an attitude of unconditional faith with respect to the operation of market mechanisms. It requires a serious commitment . . . by public powers."<sup>128</sup> In other words, strong intervention is necessary to maintain an open economy (not quite the full "invisible hand" view of capitalism).<sup>129</sup>

#### IV. ECONOMIC, PROCEDURAL, AND POLITICAL CRITICISMS

##### A. Economic Analysis

The European Union's goal of a common market in no way implies that the Commission does not partake in sophisticated economic analysis. The European Union has "moved to a more American, economics-based approach."<sup>130</sup> Although the Chicago School may sometimes scoff at the proposition, it is apparent that protecting competitors can be a means of protecting competition,<sup>131</sup> and accusations that the Commission concentrated on protecting competitors does not mean that it eschewed economic analysis. However, a problem arises when the focus on market structure dissipates obvious benefits to consumers. Because suspect economic theories can have the effect of ignoring benefits to consumers, U.S. antitrust observers have issues with the kind of economic analysis that is sometimes applied by the Commission. The GE-Honeywell merger decision was based on such an analysis, an economic theory that U.S. practitioners view as dubious.<sup>132</sup> This theory, called the "range effects" or "portfolio power" theory, is not accepted in the U.S. antitrust community.<sup>133</sup> In fact, it is antithetical to U.S. antitrust policy.<sup>134</sup>

In essence, the range effects theory posits that a combination of complementary products would give the firm an opportunity to bundle products at lower prices than if the products were sold separately.<sup>135</sup> This use of a company's "range" or "portfolio" of products would hurt competition in the long run because of the possibility that weaker competitors would be mar-

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<sup>128</sup> *Id.*

<sup>129</sup> Intervention can also be a staple in the United States, but the E.U. intervention does not have the same goals and is not under the same policies as the United States, which are more free-market oriented and less pluralistic.

<sup>130</sup> James Graff, *Exclusive Interview: How the G.E.-Honeywell Merger Was Killed*, TIME EUROPE (Nov. 20, 2001), at <http://www.time.com/time/europe/biz/interview/0,9868,166778,00.html> (quote by Mario Monti).

<sup>131</sup> And, of course, the more concentrated the market, the more this can be true. This was not lost in GE-Honeywell. Roundtable, *supra* note 115, at 10.

<sup>132</sup> Fiebig, *supra* note 94.

<sup>133</sup> *Id.*

<sup>134</sup> William J. Kolasky & Leon B. Greenfield, *A View to Kill: The Lost GE/Honeywell Deal Reveals a Trans-Atlantic Clash of Essentials*, LEGAL TIMES, July 30, 2001, at 28.

<sup>135</sup> Charles River Associates, *The Proposed GE/Honeywell Acquisition*, CRA INSIGHTS, Fall 2001, at 5 [hereinafter CRA].

ginalized or pushed out of the market.<sup>136</sup> The range effects theory is hostile to a merger for the exact reason that modern U.S. policy would favor it—the merger “will generate lower prices for consumers and require competitors to work harder to keep up.”<sup>137</sup>

Is there a better definition of competition than this? Remarkably, the range effects theory penalizes a firm for doing what it is supposed to do—namely, competing. Since when is it a firm’s responsibility to make life easier for its rivals? Imagine a hypothetical merger between complementary firms—a video game console maker and a software company—and its potential efficiencies. The merger could bring about: (a) product integration, such as compatible processors and chipsets; (b) economies of scale and scope, by allowing production under one roof and a more efficient dedication of research and development; (c) distribution efficiencies, by showcasing and delivering products at the same time; (d) one-stop shopping, saving wholesalers and retailers transaction costs; and (e) discounting, by giving suppliers an incentive to offer discounts on one product for buyers of the other product.<sup>138</sup> Consumers would get better products at cheaper prices due to both the efficiencies of the merged firm and the innovation necessary for other firms to compete. Those firms who fail to innovate would lose market share. That is the essence of competition.<sup>139</sup>

Bundling could result in anticompetitive effects if, for instance, the console maker with a monopoly required consumers to purchase the poor quality games of the software company. However, this would only be an issue if the consumer has no competing product from which to choose. The Commission disregarded the potential benefits of the GE-Honeywell merger even though forced buying was not the case. The concern, *inter alia*, was that GE-Honeywell would engage in “mixed bundling” in existing markets, meaning that individual components would still be sold separately, just not as cheaply as a bundle.<sup>140</sup> Absent unreasonable prices for the products sold individually (which would virtually exclude the separate product as a viable choice), no reasonable claim can be made that mixed bundling is not competition on the merits.

The Commission was concerned that GE-Honeywell, due to efficiencies and economies of scale, could offer a combination of jet engines and avionics at lower prices.<sup>141</sup> The speculation was that those firms who offer

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<sup>136</sup> Kolasky & Greenfield, *supra* note 134.

<sup>137</sup> *Id.*

<sup>138</sup> *See id.* Kolasky and Greenfield offer a very good example of a merger between television and DVD producers.

<sup>139</sup> *Id.*

<sup>140</sup> Jay Pil Choi, *A Theory of Mixed Bundling Applied to the GE/Honeywell Merger*, ANTITRUST, Fall 2001, at 32.

<sup>141</sup> CD GE, *supra* note 45, ¶ 391.

only engines or only avionics would be at a disadvantage, and thus lose market share.<sup>142</sup> In the long run, then, GE-Honeywell would yield enough market power to raise prices and receive monopoly profits. The Commission's analysis is imperfect, stating that even if the policy concerns were set aside, the range effects theory only works "in those rare circumstances where the likelihood of long-run harm outweighs any short-run benefits."<sup>143</sup> In the past, both the United States and the European Commission have focused on probable short- or medium-term effects stemming from a merger, rather than any distant speculative possibilities.<sup>144</sup> Unfortunately, the GE-Honeywell decision shows the European Commission's willingness to block a merger based on low and speculative probability of long-term consumer harm,<sup>145</sup> which U.S. antitrust authorities would be unlikely to do.

For the portfolio power theory to be valid, certain circumstances must be evident. First, short-run benefits to the merged entity must be substantial and produce significant advantages for the firm (and significant disadvantages for competitors). Second, rivals must do nothing to respond to the challenge, to innovate by offering better products, or to lower costs. Third, competitive harm must be large, likely, and soon (or else the present value of the short-run benefits will outweigh the present value of the future harm).<sup>146</sup> An analysis of the conditions in the GE-Honeywell merger shows that these conditions are not evident.

First, the benefits of bundling are far from certain. The European Commission stated that bundling would allow GE-Honeywell to induce customers to purchase GE-Honeywell products.<sup>147</sup> This would increase their market share, and cause "damaging profit shrinkage" for competitors.<sup>148</sup> But if bundling products is so beneficial to companies, why is it not widespread? The Commission cited only scant evidence of instances in which bundling had occurred.<sup>149</sup> The bundling theory does a very poor job of "predicting the past."<sup>150</sup> The Commission noted that competing bundles would not be as cheap as packages offered by GE-Honeywell,<sup>151</sup> but certainly bundled products are cheaper than stand alone products. Yet there is no evidence that bundling has allowed a firm to gain significant market

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<sup>142</sup> See Kolasky & Greenfield, *supra* note 134.

<sup>143</sup> CRA, *supra* note 135, at 5.

<sup>144</sup> Kolasky & Greenfield, *supra* note 134.

<sup>145</sup> Stoll & Goldfein, *supra* note 125.

<sup>146</sup> CRA, *supra* note 135, at 5.

<sup>147</sup> CD GE, *supra* note 45, ¶ 360.

<sup>148</sup> *Id.* ¶ 355.

<sup>149</sup> *Id.* ¶¶ 362-73.

<sup>150</sup> CRA, *supra* note 135, at 6.

<sup>151</sup> CD GE, *supra* note 45, ¶ 378.

shares.<sup>152</sup> In an earlier merger between Allied Signal and Honeywell, the Commission found that “although packages of non-avionics and avionics have existed, they are nevertheless rare.”<sup>153</sup> For instance, Honeywell, whom the Commission found to possess monopoly position in some products,<sup>154</sup> has not been more successful in selling its components on aircraft for which it offers engines than for aircraft in which it does not.<sup>155</sup> Snecma, a French company, offers another example. Snecma owns 50% of CFMI, a joint venture with GE that has accounted for a high percentage of large commercial aircraft engine sales.<sup>156</sup> Snecma, like GE-Honeywell would, sells aircraft parts other than engines. But there was no evidence that Snecma was bundling products, nor was there evidence that Snecma used its 50% share of CFMI to gain dominance in any related component industry or that Snecma’s competitors were being damaged or forced out of the market.<sup>157</sup>

Due to the fact that bundling is lawful competition, those evidentiary points need not be discussed. Bundling, especially mixed bundling, is not an illegal activity, it is just another way of offering a service to customers. If it is a better way to offer products, then consumers will opt for it, while if it is not, consumers will opt for individual products of the seller or another suppliers. The Commission essentially punished GE-Honeywell for being a potential<sup>158</sup> effective competitor, much like the Court in *FTC v. Procter & Gamble*.<sup>159</sup> Incredibly, conclusions such as “[c]ustomers . . . appear to have a strong preference for GE’s products and services”<sup>160</sup> and “the merged entity is likely to attract more customers than its competitors,”<sup>161</sup> without any allegations of illegal anticompetitive behavior, were used to fault GE and Honeywell throughout the Commission’s decision.

Second, the Commission’s assumption that rivals would respond by exiting the market is not economically rational. The point of competition is to force firms to respond to their competitors’ lower costs or better quality with innovations of their own.<sup>162</sup> The Commission decided that as GE-

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<sup>152</sup> See CRA, *supra* note 135, at 6.

<sup>153</sup> Commission Decision of 1 December 1999 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, 1999 O.J. (L 152) 1, 17.

<sup>154</sup> CD GE, *supra* note 45, ¶ 358.

<sup>155</sup> CRA, *supra* note 135, at 6.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> It makes sense for antitrust regulators to resolve potential anticompetitive behavior with conduct remedies, such as consent decrees not to engage in bundling. Conduct remedies, however, are not available to the Commission. See text, *infra* Part IV.B.

<sup>159</sup> See text *supra*, Part III.B.

<sup>160</sup> CD GE, *supra* note 45, at ¶ 225.

<sup>161</sup> *Id.* at ¶ 378.

<sup>162</sup> Kolasky & Greenfield, *supra* note 134.

Honeywell's rivals were foreclosed, it would have less capital to spend on research and development, thus stunting its ability to innovate and leap-frog.<sup>163</sup> But that argument also works the other way around—the better a firm does in the market, the more funds it can use for future innovation, which in turn allows it to compete more effectively. Research and development funds are a part of competition, not separate from it. This cycle of incentives is what drives competition. Range effects theory inverts this cycle on incentives. It bars efficiency-creating deals that would spur competitive behavior. This is a downward spiral in which competitors have more incentives to rely on regulators than to innovate their products and services.<sup>164</sup> It denies consumers the benefits of almost certain lower prices and better quality and justifies the denial with speculative long-term concerns that competition would force some firms to leave the market. Range effects theory opens the possibility that a firm's efficiencies may be anticompetitive.

Third, while foreclosure may have been the stated concern,<sup>165</sup> the manner in which the Commission used the term "foreclosure" is different than the traditional economic usage. In antitrust, foreclosure results when a firm shuns competition on the merits and illegally uses monopoly power to restrict the ability of competitors to compete with it.<sup>166</sup> The Commission, in its decision, alleges no illegal acts, or acts that eschew competition on the merits, but concludes that competition would be harmed because competitors would be foreclosed.<sup>167</sup> For example, the Commission stated "[t]he ability of the merged entity to engage in profitable forms of packaged sales" would likely lead to "market foreclosure."<sup>168</sup> Competitors would be foreclosed (in the form of lower market share and profits) not because of any illegal activity of GE-Honeywell, but because of the Commission's perception that GE-Honeywell's competitors are inferior.<sup>169</sup> Even if this is true, the fact that one competitor is superior on the merits to other competitors is hardly a substantial harm that warrants the concern of regulators.

Range effects doctrine resembles antitrust doctrine in the United States during the 1960s,<sup>170</sup> when structure-conduct-performance theory had influence.<sup>171</sup> Regulators challenged mergers that would create a firm whose size and scope of activities would create a market structure favorable to poten-

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<sup>163</sup> CD GE, *supra* note 45, at ¶ 384.

<sup>164</sup> Kolasky & Greenfield, *supra* note 134.

<sup>165</sup> Roundtable, *supra* note 115, at 7 (Gonzalez-Diaz).

<sup>166</sup> Patterson & Shapiro, *supra* note 113, at 20.

<sup>167</sup> *Id.* (citing ¶ 163 of CD GE).

<sup>168</sup> CD GE, *supra* note 45, ¶ 398.

<sup>169</sup> *Id.* ¶ 355.

<sup>170</sup> *Id.*

<sup>171</sup> See text, *supra* pp. 19-21.

tial exclusionary unilateral conduct. The European Commission used this kind of structural market logic to deem GECAS's buying practices as harmful.<sup>172</sup> Antitrust regulators and pundits came to realize that this was "not a good measure of how competitive an industry is and what constraints there are on the firm in terms of setting price[s] or providing quality products to consumers."<sup>173</sup> The Commission's decision is consistent only with the belief that merger policy is intended to protect competitors from competition, not competition from competitors. Even if competitors are marginalized and forced out of business,<sup>174</sup> any attempt to raise profits would induce competitors into the market.<sup>175</sup> Their cost of being in the market would be the same as the monopolists.<sup>176</sup>

### B. Processes and Politics

There are other important differences between the U.S. antitrust authorities and the Commission. In the European Union, the Commission has sole jurisdiction in merger review,<sup>177</sup> which is a significant difference. In the United States, the FTC, DOJ, and State Attorneys General can move to block a merger, and the fact that a proposed merger is allowed is no bar to regulators bringing a suit *ex post*. The Commission, however, has more pressure to be correct, because the initial review is the only review. The Commission cannot revisit a merger after approval is granted, nor can it clear mergers by utilizing conduct-based remedies (for example, an agreement not to engage in bundling). This may explain why the Commission is more willing to accept speculative possibilities and weigh long-term effects more heavily.<sup>178</sup>

In the United States, antitrust authorities must bring action in court, and it is the judiciary that decides cases. This affords an appeals process. In the European Union, courts have a much smaller role, and there is no step for interlocutory judicial review of the Commission's decisions. There is an appeals process, but an appeal will not restore a merger that was barred.<sup>179</sup> Commissioner Monti responded to the criticism that the European Union lacks effective judicial control of the Commission's merger de-

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<sup>172</sup> Goldhaber, *supra* note 12.

<sup>173</sup> Baker, *supra* note 9.

<sup>174</sup> Kolasky & Greenfield, *supra* note 134.

<sup>175</sup> See Posner, *supra* note 56, at 929.

<sup>176</sup> See discussion, *supra* Part III.A.

<sup>177</sup> Council Regulation 17/62/EEC, First Regulation implementing Articles 85 and 86 of the Treaty, 1962 O.J. (L 13) 204 (as amended), available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31962R0017&model=g](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31962R0017&model=g) uichett.

<sup>178</sup> Roundtable, *supra* note 115, at 14-15 (Gonzalez-Diaz).

<sup>179</sup> Goldhaber, *supra* note 12, at 116.

cisions by saying that 40% of its prohibition decisions were subject to judicial scrutiny, and 87% of those decisions were upheld.<sup>180</sup> Yet he noted that the appeals take a long time, which leads some parties to abandon the cause. Monti also claims that there is an elaborate system of checks and balances because the Competition Commissioner only proposes a decision, and the College of Commissioners decides the final outcome. Also, Commissioner Monti noted that the E.C.'s system ensures a high level of transparency, because parties are informed in detail of any objections the Commission might have, and unlike the DOJ, is required to publicize its decision.<sup>181</sup> This ignores the practical reality of communication between the DOJ or FTC and merging companies, and the fact that since U.S. authorities can bring suit against companies even after mergers are approved, courts would produce a public decision.

Perception-wise, perhaps the difference that causes the most problems is that the European Commission is seemingly more apt to listen to competitors' concerns.<sup>182</sup> While this is an inevitable result since the Commission has a monopoly on enforcement, antitrust observers did not fail to point out the Commission's open ear to competitors.<sup>183</sup> U.S. authorities may contact firms in a given industry in preliminary investigations, but the competitors in the European Union are given a formal opportunity to voice opposition. Commissioner Monti voiced strong opposition to the notion that complaints from competitors had any impact on the decision, stating "[t]he test for considering a complaint is not whether it originates from a customer or a competitor but rather whether it is based on accurate factual information and well-supported and acceptable economic reasoning."<sup>184</sup> Yet if accurate factual information is the goal, why was GE not allowed to present counter-evidence? In the days leading up to the decision, Commissioner Monti himself noted that the proposed merger had raised strong enough concerns among United States and European competitors to justify the Commission's reservations about the deal.<sup>185</sup> Whatever the extent of the competitors' sway, it left a bad taste in the mouth of observers.

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<sup>180</sup> Monti Speech, *supra* note 93, at question 2. As noted before, while courts can review the Commission's decisions, barred mergers cannot be overturned.

<sup>181</sup> *Id.*

<sup>182</sup> Perhaps this is because it lacks adequate staff. Goldhaber, *supra* note 12, at 117; see also Patterson & Shapiro, *supra* note 113, at 25.

<sup>183</sup> Stoll & Goldfein, *supra* note 125; Steven Andersen, *Monti Stalls GE's Bid For Honeywell: Merger Put Under E.U. Antitrust Microscope*, CORP. LEGAL TIMES, May 2001, at pBWB 9 (col. 1).

<sup>184</sup> Monti Speech, *supra* note 93, question 1.

<sup>185</sup> *E.U. Poised to Block GE Merger Deal* (June 20, 2001), at <http://www.cnn.com/2001/WORLD/europe/06/20/honeywell.merger/index.html>.

## V. TRADE RELATIONS AND CONVERGENCE

While the Commission was reviewing the merger, U.S. Treasury Secretary Paul O'Neill remarked that the European Commission was meddling "outside its jurisdiction"<sup>186</sup> and that a rejection would be "off the wall."<sup>187</sup> President Bush, speaking in Warsaw, expressed his concern that the E.C. rejected a merger passed by United States and Canadian authorities.<sup>188</sup> Commissioner Monti lashed out at those critical of the European Commission's handling of the deal, calling any "political interference" in the case deplorable, with no place in an antitrust case.<sup>189</sup> This must have been an interesting accusation for the U.S. regulators and politicians who often view E.U. enforcement decisions as "instruments of European industrial policy."<sup>190</sup> An allegation arose that a young E.U. staff wanted to take on the "Great Jack Welch" and saw an opportunity to introduce their new antitrust ideas,<sup>191</sup> which, if true, would "make U.S. companies wary of Europe."<sup>192</sup> Whether the allegations were true or not, it demonstrates the general level of distrust between the two jurisdictions.

As much as GE and Honeywell seem to be the losers here, a more significant loser might be trade relations. If nothing is done to move towards convergence, the larger relationship may suffer, inviting retaliation.<sup>193</sup> Indeed, several U.S. Senators accused the European Commission of protectionism, and warned of a "chilling effect" on trade relations<sup>194</sup> and possible retaliation from Washington.<sup>195</sup> Senator Phil Gramm, ranking member of the Committee on Banking, Housing and Urban Affairs, released a statement expressing his concern that bad policies will be imposed on the United States as the European Union tries to protect itself from a loss of competitive edge. There is "less and less such a thing as a purely American company any more. These are world companies."<sup>196</sup>

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<sup>186</sup> Graff, *supra* note 130.

<sup>187</sup> *Blocked Merger*, *supra* note 1.

<sup>188</sup> Associated Press, *GE, Honeywell Refuse to Meet European Conditions For Merger*, ROCKFORD REGISTER STAR, at <http://www.rrstar.com/business/manufacturing/615honeywell.shtml> (last visited Nov. 15, 2001).

<sup>189</sup> *E.U. Slams GE-Deal Critics* (June 18, 2001), at <http://www.cnn.com/2001/Business/06018/ge.honeywell/index.html>.

<sup>190</sup> Fiebig, *supra* note 94.

<sup>191</sup> *Kaput*, *supra* note 6 (citing anonymous source).

<sup>192</sup> *Id.* (citing anonymous source).

<sup>193</sup> Anna Maria Virzi, *Why the GE-Honeywell Merger Will Fly* (June 15, 2001), at <http://www.forbes.com/2001/06/16/0615honeywell.html> (citing Paul Nisbet, analyst at JSA Research).

<sup>194</sup> Alan Clendenning, *E.U. Blocks \$41B GE-Honeywell Merger* (July 5, 2001), at [http://www.mddailyrecord.com/archives/2\\_3\\_offrecord/internationalnews/](http://www.mddailyrecord.com/archives/2_3_offrecord/internationalnews/).

<sup>195</sup> *Blocked Merger*, *supra* note 1.

<sup>196</sup> Press Release, Senate Banking Committee, Gramm Questions E.U. Interference in GE-Honeywell Merger, Financial Supervision (June 20, 2001), at <http://banking.senate.gov/>

Therein lies the need for convergence. As companies increasingly operate across borders, divergent standards cause problems in three ways: (1) uncertainty adds to the cost of doing business by dissipating the rents that the synergies of any efficient merger would create; (2) antitrust laws will operate on the lowest common denominator, where the least efficient system will create opportunity costs; and, (3) political tensions can incite retaliation that decreases societal welfare.

Nearly seventy countries administer some form of merger review.<sup>197</sup> Some countries, like South Africa, specifically seek to empower disenfranchised groups, while some, like Iceland and Canada, explicitly state efficiency as their goal.<sup>198</sup> Currently only the United States and the European Union exercise veto power due to their economic and political power, but international markets are dynamic. And, while the European Union may not yet flex the economic power of the United States, the E.U. version of competition policy may be more influential worldwide because the E.U. member states have aligned their laws to match the European Union, and as more countries seek membership into the European Union, their model may grow.<sup>199</sup>

Policy must be geared towards efficiency.<sup>200</sup> Over time, "consumers gain the most from a policy that emphasizes allocative and productive efficiency."<sup>201</sup> The European Union could start by recognizing an efficiency defense for mergers that enhance market power. But policy differences are not the only "brick in an ever-growing wall of regulation."<sup>202</sup> There are also structural differences as well. The Commission is unwilling to take the wait-and-see approach available to U.S. regulators because it lacks post-transaction remedies. Thus, the Commission is more willing to block a merger with uncertain and speculative outcomes.<sup>203</sup>

On a practical level, the Commission is less subject to a check on its decisions. It wears the hats of investigator, prosecutor, and judge in merger reviews.<sup>204</sup> Any convergence between United States and European Union

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gramm/0620ge.htm.

<sup>197</sup> Janet L. McDavid & Lynda K. Marshall, *Global Review Regimes*, NAT'L L.J., September 24, 2001, at A23 (col. 1).

<sup>198</sup> Waller & Stoner, *supra* note 75, at 66.

<sup>199</sup> *Id.* at 67.

<sup>200</sup> The more difficult question is one of sovereignty, "Efficiency in what jurisdiction?" Will the U.S. accept policies that hurt American companies yet increase welfare worldwide?

<sup>201</sup> Easterbrook, *supra* note 55, at 1703. For a discussion of the benefits of an efficiency-based model for international antitrust laws, see Daniel J. Gifford & E. Thomas Sullivan, *Can International Antitrust Be Saved for the Post-Boeing Merger World? A Proposal to Minimize International Conflict and to Rescue Antitrust From Misuse*, 45 ANTITRUST BULL. 55 (2000).

<sup>202</sup> McDavid & Marshall, *supra* note 197.

<sup>203</sup> Stoll & Goldfein, *supra* note 125.

<sup>204</sup> Patterson & Shapiro, *supra* note 113, at 22.

antitrust policies must entail both policy and process. A significant step would be to authorize the Commission to utilize conduct remedies in its merger review process. This procedural step would likely alleviate some of the substantive issues concerning E.U. merger policy by allowing the Commission to rely less on the speculative effects a merger may have.

U.S. antitrust authorities and the European Commission are beginning to undertake coordinated efforts in antitrust policies. While increased communication is a start, more will be needed due to the rooted economic and social differences between the United States and the European Union. While a wait-and-see approach might in the end be successful (indeed, the United States just a few decades ago followed the very economic principles it criticizes today), it could prove too costly in the growing and dynamic nature of today's international market.

## VI. CONCLUSION

The Commission based its decision to block the GE-Honeywell merger on tenuous economic grounds that are at their best indifferent, and at their worst hostile, to efficiencies that benefit customers. The willingness to apply the range effects theory shows a skepticism towards the ability of markets to foster competition in the long term. The Commission's unwarranted regulatory action in the GE-Honeywell merger discounts the ability of competitors to create innovation and efficiencies that would match any short-term advantages a conglomerate merger may create for the merged company. The very idea of competition is turned on its head.

The failed GE-Honeywell merger "points to the continuing need for consultation to move toward greater policy convergence."<sup>205</sup> As the world seeks free trade in a global economy, nations must realize that faulty anti-trust policy and protectionism, real or perceived, will only hinder efficiency.

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<sup>205</sup> See GE PR 2, *supra* note 36.

