

# The European Commission's Extraterritorial Jurisdiction over U.S. Mergers and Acquisitions: Closing the Gap Between Brussels and D.C.

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## Introduction

A merger between international companies easily crosses borders and affects economies beyond their own country of incorporation—even when the merger takes place between companies located entirely within a national market and incorporated under the same laws.<sup>1</sup> Because a particular antitrust law applies when a merger has effects on the market that the antitrust law strives to protect, domestic mergers of multi-national corpora-

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1. See Norbert Horn, *Cross-Border Mergers and Acquisitions and the Law: A General Introduction*, in *CROSS BORDER MERGERS AND ACQUISITIONS AND THE LAW* 3, 16 (Norbert Horn ed., 1988).

tions trigger antitrust issues in foreign jurisdictions.<sup>2</sup> For example, a merger between North American entities can impact the European Common Market and, as such, can easily fall within the European Commission's jurisdiction.

Indeed, the European Union Merger Regulation (Merger Regulation),<sup>3</sup> which came into force in 1990 and was revised in 2004, gives the European Commission the authority to review any concentration which is deemed to have a "Community" (or "EU") dimension.<sup>4</sup> In the words of the Commission, the Merger Regulation is a "vital additional instrument made available . . . to ensure a system of undistorted competition in the Community."<sup>5</sup> The fundamental objective of the Commission's merger review is thus to protect EU consumers against the effects of monopoly power that mergers can induce (including "higher prices, lower quality, lower production, and less innovation").<sup>6</sup> While some in the United States viewed the Merger Regulation as an attempt to reinforce EU protectionism,<sup>7</sup> the Commission constantly emphasized that it would not take into consideration industrial, social, or employment consequences when it examined a transaction.<sup>8</sup>

The Commission's external merger review relies on four key principles: "(1) the exclusive competence of the Commission to review concentrations of Community dimension; (2) the mandatory notification of such concentrations; (3) the consistent application of market-oriented, competition-based criteria; and (4) the provision of legal certainty through timely decision making."<sup>9</sup> The first of these four elements, the European Commission's jurisdiction, is established when the transaction meets a set of conditions. The Merger Regulation applies to any concentration with an EU dimension.<sup>10</sup> The term "concentration" covers mergers, acquisitions of direct or indirect control, and the creation of full-function joint ventures.<sup>11</sup> A transaction has an EU dimension if it meets certain turnover thresholds.<sup>12</sup> These thresholds are completely independent from substantive

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

3. See Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 (EC) [hereinafter EC Merger Regulation].

4. *Id.* at art. 1.

5. *Commission of the European Communities, XXth Report on Competition Policy*, at para. 20 (1991).

6. See *European Commission, XXXIst Report on Competition Policy*, at para. 252 (2001).

7. See David J. Feeney, *The European Commission's Extraterritorial Jurisdiction Over Corporate Mergers*, 19 GA. ST. U.L. REV. 425, 485 (2002).

8. See NICHOLAS LEVY, *EU MERGER CONTROL: A BRIEF HISTORY* 11-12 (2004), [http://www.cgsh.com/files/Publication/39346756-bc80-4fd2-9584-f358ffc72239/Presentation/PublicationAttachment/05b61f33-f646-4c9e-a7ec-f6b8b0bfce4f/CGSH\\_CGSH\\_Paper\\_IBC\\_Conference\\_EU\\_Merger\\_Control\\_-\\_A\\_Brief\\_History.pdf](http://www.cgsh.com/files/Publication/39346756-bc80-4fd2-9584-f358ffc72239/Presentation/PublicationAttachment/05b61f33-f646-4c9e-a7ec-f6b8b0bfce4f/CGSH_CGSH_Paper_IBC_Conference_EU_Merger_Control_-_A_Brief_History.pdf).

9. *Id.* at 3.

10. See EC Merger Regulation, *supra* note 3, at art. 1.

11. *Id.* at art 3.

12. See *id.* at art 1. There are two alternative sets of thresholds: original thresholds and alternative thresholds. Under the Merger Regulation's original thresholds (which date back to 1989 and remain in force today), a transaction has an EU dimension if (1)

competition issues, the parties' nationalities, the country where the transaction takes place, or the law that applies to the transaction.<sup>13</sup> The Merger Regulation thus applies to transactions with little or no EU connection, including mergers between U.S.-based companies. Furthermore, the European Commission can also examine transactions that do not originally meet the EU-dimension thresholds.<sup>14</sup> If Member States refer the transaction to the Commission under the conditions detailed in Article 4(5) of the Merger Regulation, the concentration is deemed to have a Community dimension.<sup>15</sup>

If a merger meets both the concentration and the EU dimension requirements, it falls under the European Commission's jurisdiction,<sup>16</sup> and the Commission will have to approve the transaction before implementation.<sup>17</sup> The Commission has exclusive jurisdiction to investigate.<sup>18</sup> This means national competition authorities cannot apply their national merger control rules to the merger under Commission review,<sup>19</sup> and national authorities in the European Union can only investigate mergers that do not have an EU dimension.<sup>20</sup> Lastly, the General Court (formerly the Court of First Instance) has the authority to review the Commission's decisions on mergers.<sup>21</sup>

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the combined worldwide turnover of all the undertakings concerned is more than €50,000 (worldwide turnover test); or (2) if each of at least two of the undertakings concerned have an EU-wide turnover of more than €250 million (EU-wide turnover test); "unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State" (two-thirds rule). *Id.* Furthermore, deals which do not meet the original thresholds may nonetheless have an EU dimension if they meet the other set of alternative thresholds. The European Commission adopted the alternative thresholds in 1998 and they remain in place under the current Merger Regulation. Under the alternative thresholds, a transaction has an EU dimension if (1) "the combined worldwide turnover of all the undertakings concerned [is] more than €2,500 million" (the lower worldwide turnover test); or (2) "[e]ach of at least two of the undertakings concerned [has] EU-wide turnover of more than €100 million" (the lower EU worldwide turnover test); or (3) if, in "[e]ach of at least three EU Member States[,] the combined national turnover of all the undertakings concerned [is] more than €100 million[,] and each of at least two of the undertakings concerned [has a] national turnover of more than 25 million" (the additional three Member States test). SLAUGHTER & MAY, *The EU Merger Regulation: An overview of the European merger control rules 5-6* (2012), <https://www.slaughterandmay.com/media/64572/the-eu-merger-regulation.pdf>. The alternative thresholds are also subject to the two-thirds rule. *See id.*

13. *See* EC Merger Regulation, *supra* note 3, at art. 5-7. *See also* SLAUGHTER & MAY, *supra* note 12, at 5.

14. EC Merger Regulation, *supra* note 3, at art. 4(5).

15. *Id.* *See also* SLAUGHTER & MAY, *supra* note 12, at 9 (outlining the pre-notification referral process).

16. *See* Feeney, *supra* note 7, at 440.

17. *See* SLAUGHTER & MAY, *supra* note 12, at 2.

18. *See id.* at 9.

19. *See id.*

20. *See id.*

21. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 19, May 9, 2008, 2008 O.J. (C 115) 47. The General Court has competency to review Commission decisions on any of the grounds set out in the Treaty Establishing the European Community: "lack of competence, infringement of an essential procedural

Although the U.S. antitrust agencies and the European Commission have entered into several antitrust agreements, such as the agreement on the application of positive comity principles in the enforcement of competition laws,<sup>22</sup> these agreements do not include cooperation in merger control. When reviewing mergers and acquisitions of U.S.-based multinational companies, the Commission has often disagreed with the Department of Justice (DOJ)<sup>23</sup> and the Federal Trade Commission (FTC)<sup>24</sup> by refusing to give clearance to transactions previously approved on the American side. The European Commission's jurisdiction to scrutinize mergers has therefore given rise to criticism in the United States. Rather than focusing on the reach of the Commission's extraterritorial jurisdiction, these comments have honed in on the Commission's method of analysis. U.S. commentators and officials have constantly underscored the differences between the two systems and pointed out that these conflicting decisions could be worrisome for U.S.-based global companies preparing for a merger or an acquisition.<sup>25</sup> It became necessary to structure the merger or the acquisition in a way that complied with both American and European antitrust standards, thereby imposing additional costs on the parties.<sup>26</sup>

Hence, a key issue regarding the European Commission's extraterritorial jurisdiction over U.S. mergers and acquisitions is whether the U.S. and EU merger review regimes are becoming more similar (converging),<sup>27</sup> or whether they are evolving in different directions (diverging).<sup>28</sup> This Note takes the view that the initial conflict between the U.S. antitrust agencies

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safeguard, infringement of [the] Treaty . . . or misuse of power." See Consolidated Version of the Treaty Establishing the European Community art. 230, Dec. 24, 2002, 2002 O.J. (C 325) 33. Parties to the merger, as well as third parties meeting certain requirements, can challenge decisions of the Commission and seek annulment of the decision. See Nathan R. Viavant, Comment, *Agreeing to Disagree?: Continuing Uncertainties in Transatlantic Merger Clearance Post-EC Merger Regulation*, 17 TUL. J. INT'L & COMP. L. 177, 191 (2008).

22. See generally Agreement on the Application of Positive Comity Principles in the enforcement of Competition Laws, U.S.-E.C., 1998 O.J. (L 73) 28 (referencing the 1991 agreement between the European Commission and the United States "regarding the application of their competition laws and the exchange of interpretative letters").

23. See, e.g., Commission Decision of 03/07/2001 Declaring a Concentration to be Incompatible with the Common Market and the EEA Agreement, Case COMP/M.2220—General Electric/Honeywell [hereinafter General Electric/Honeywell].

24. See, e.g., Commission Decision of 30 July 1997 Declaring a Concentration to be Incompatible with the Common Market and the Functioning of the EEA Agreement, Case IV/M.877—Boeing/McDonnell Douglas [hereinafter Boeing/McDonnell Douglas].

25. See Kevin J. Arquit, Keynote Address, *Comparative Antitrust Policies in Mergers and Acquisitions*, 43 CORNELL INT'L J. 1, 2 (2009) (explaining that U.S. officials have repeatedly criticized the European Commission decisions in press conferences and suggesting that Europe should move closer to the U.S. model).

26. Cf. W. Adam Hunt, Comment, *Business Implications of Divergences in Multi-Jurisdictional Merger Review by International Competition Enforcement Agencies*, 28 NW. J. INT'L L. & BUS. 147, 147 (2007) (emphasizing the transaction costs that accompany numerous antitrust regulations where mergers must comply with several antitrust standards).

27. See Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 19 ANTITRUST ABA 25, 25 (2005).

28. See Arquit, *supra* note 25, at 1-2.

and the European Commission in assessing cross-border mergers has progressively disappeared. Instead, the European Commission is striving towards convergence with the United States and, therefore, facilitating the implementation of U.S. mergers. Part I narrates the history of conflict between the U.S. antitrust agencies and the European Commission, explaining the divergence and analyzing hallmark cases on this issue. Part II shows that the U.S. and European Commission antitrust regimes have been moving closer together since 2004, which gives rise to an efficient transatlantic cooperation regarding U.S. mergers and acquisitions.

## I. A History of Conflict Between the U.S. Antitrust Agencies and the European Commission

Comparing U.S. and EU antitrust principles illustrates many differences between these two legal regimes that may even lead to conflicting results when it comes to merger review. Several landmark Commission decisions reveal this conflict.

### A. Divergent Antitrust Philosophies

The European Union and the United States have approaches to antitrust with different underpinnings. The U.S. merger policy has followed a consistent approach since the adoption of the 1984 formal guidelines.<sup>29</sup> These guidelines reflect the approach of the Chicago school of economics<sup>30</sup> (often described as conservative economics),<sup>31</sup> under which a free market best allocates resources in an economy and governmental intervention should thus be rare.<sup>32</sup> The Chicago school promotes economic efficiency as the purpose of antitrust laws.<sup>33</sup> Under the American view, a single firm that occupies one hundred percent of the market is not problematic if the firm won the competition because it offers a cheaper and better product—in other words, if all other firms had to exit the market solely because of the winning firm's efficiency.<sup>34</sup> In this situation, antitrust laws exist merely to ensure that parties begin on an equal playing field, after which the market decides their fates.<sup>35</sup> In a nutshell, the proper

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29. 1984 Merger Guidelines, U.S. DEP'T OF JUSTICE ANTITRUST DIV., <http://www.justice.gov/atr/hmerger/11249.htm> (last updated Aug. 4, 2015).

30. See Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L. J. 937, 947 n.43 (1984) ("The 1984 Merger Guidelines are a product of the new economic orientation in antitrust law, if not an outright product of Chicago School economic theories.").

31. Definition of "Chicago School of Economics," BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/Chicago-school-of-economics.html> (last visited Nov. 22, 2015).

32. See Daniel Rubinfeld, *On the Foundations of Antitrust Law and Economics*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 51, 51 (Robert Pitofsky ed., 2008).

33. See Hovenkamp, *supra* note 30, at 939.

34. See Arquit, *supra* note 25, at 3.

35. See About the Division: Mission, U.S. DEP'T OF JUSTICE ANTITRUST DIV., <http://www.justice.gov/atr/mission> (last visited Nov. 30, 2015).

aim of antitrust law is “the protection of *competition*, not *competitors*.”<sup>36</sup>

On the other hand, the European view, which is more policy oriented,<sup>37</sup> does not share the same assumptions regarding free markets. Government interventions are deemed necessary,<sup>38</sup> and the market should be a “level playing field” for competing firms.<sup>39</sup> Regarding merger review, this approach focuses on whether the resulting firm creates or strengthens a dominant position in the market.<sup>40</sup> Thus, the analysis scrutinizes the impact of the merger on competitors—the rationale being that a merger that reduces competition, even if it brings efficiency, eventually threatens consumer welfare.<sup>41</sup> The same purpose (the protection of consumer welfare) is therefore achieved through two different analyses: efficiency in the United States and dominance in the EU. These divergent philosophies translate into key differences in antitrust policies regarding merger control in the European Union and the United States.

## B. Divergent Merger Review Policies

Mergers, be they horizontal, vertical, or conglomerate, can easily impact competition in the U.S. or the EU markets. Horizontal mergers refer to mergers of competitors,<sup>42</sup> and non-vertical mergers refer to mergers of firms not operating in the same market.<sup>43</sup> Horizontal mergers are particularly threatening to competition, as they cause one competitor (the firm that gets subsumed under the new entity) to leave the market, “thereby deadening rivalry and raising prices.”<sup>44</sup> Vertical mergers (mergers between two companies producing different goods or services for one finished product)<sup>45</sup> and conglomerates (mergers that are neither horizontal nor vertical)<sup>46</sup> are not as troubling as horizontal mergers with regard to

36. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

37. See Douglas K. Schnell, Note, *All Bundled Up: Bringing the Failed GE/Honeywell Merger in from the Cold*, 37 CORNELL INT'L L. J. 217, 227 (2004).

38. See, e.g., Todd R. Overton, *Substantive Distinctions Between United States Antitrust Law and the Competition Policy of the European Community: A Comparative Analysis of Divergent Policies*, 13 HOUS. J. INT'L L. 315, 318 (1991).

39. See Schnell, *supra* note 37, at 227.

40. See *id.* at 231.

41. See Overton, *supra* note 38, at 317.

42. Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, in *ANTITRUST STORIES* 331, 334 (Eleanor M. Fox & Daniel Crane eds., 2007).

43. See Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6, 6 [hereinafter *Non-Horizontal Guidelines*], [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEX:52008XC1018\(03\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEX:52008XC1018(03)).

44. See Fox, *supra* note 42, at 334.

45. See ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 409 (5th ed. 2004). See also Patrick M. Cox, Note, *What Goes Up Must Come Down: Grounding the Dizzying Height of Vertical Mergers in the Entertainment Industry*, 25 HOFSTRA L. REV. 261, 262 (1996) (distinguishing among vertical mergers between acquisition of a supplier by a customer—backward vertical merger—and acquisition of a customer by a supplier—forward vertical merger).

46. See GELLHORN, *supra* note 45, at 409.

competition.<sup>47</sup> They can be problematic, however, when the merger allows a firm, already dominant in one market, to leverage its market power and extend its dominance from one market to the other—thus foreclosing rivals.<sup>48</sup> When analyzing these anticompetitive merger effects, the U.S. and EU antitrust agencies have adopted different approaches.

Prior to 2004, the European Commission applied a “dominance” test.<sup>49</sup> Under this test, the Commission would declare a merger incompatible with the Common Market if: (1) the merger would establish or strengthen a dominant position, and (2) this merger resulted in a significant impediment to competition.<sup>50</sup> The analysis under dominance largely relied on post-merger market shares,<sup>51</sup> although the Commission quickly started to consider other factors and prohibit mergers which, without necessarily allowing the resulting firm to occupy a larger market share, “create[d] a market structure conducive to tacit collusion or coordinated effects.”<sup>52</sup> The dominance test was subject to harsh criticism during its implementation.<sup>53</sup> Commentators argued, *inter alia*, that despite the Commission’s efforts to make its approach more flexible, the test still created a “gap” by failing to encompass situations where “the post-merger entity’s market share falls below the level required for dominance [but] the merger nonetheless leads to unilateral effects.”<sup>54</sup> Others noted that the Commission’s view excessively focused on the notion of collective dominance, a “legal term,” instead of dealing with “the real economic issue at stake—whether or not the concentration significantly impede[d] competition.”<sup>55</sup>

The United States primarily regulates mergers through the pre-merger notification provisions of the Hart-Scott-Rodino Act<sup>56</sup> and through the legal standard provided by Section 7 of the Clayton Act.<sup>57</sup> In doing so, U.S.

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47. See Non-Horizontal Guidelines, *supra* note 43, at 6.

48. See Fox, *supra* note 42, at 334.

49. Council Regulation 4064/89 of December 21, 1989 on the control of concentrations between undertakings, 1990 O.J.L257/13, art. 2(3), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML>.

50. See *id.*

51. See Neil Horner, *Unilateral Effects and the EC Merger Regulation—How the Commission Had its Cake and Ate it Too*, 2 HANSE L. REV. 23, 24 (2006), <http://www.hanselawreview.org/pdf3/Vol2No1Art03.pdf> (citing Kyriakos Fountoukakos et al., *A New Substantive Test for EU Merger Control*, 26 EUR. COMPETITION L. REV. 284 (2005)).

52. See *id.* at 25.

53. See *id.* at 24.

54. Ioannis Kokkoris & Krisztian Katona, *Critical Analysis of the ECMR Reform, in THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES* 437, 449 (Ioannis Lianos & Ioannis Kokkoris eds., 2010).

55. EUGENE BUTTIGIEG, *COMPETITION LAW: SAFEGUARDING THE CONSUMER INTEREST—A COMPARATIVE ANALYSIS OF US ANTITRUST LAW AND EC COMPETITION LAW* 282 (2009) (arguing that the focus on the notion of dominance under the previous Merger Regulation prevented the Commission from developing a satisfactory economic analysis and from adequately protecting consumer interests).

56. Hart-Scott-Rodino Act, 15 U.S.C. § 18a (2006).

57. See Clayton Antitrust Act, 15 U.S.C. 12, 13, 14–19, 20, 21, 22–27 (1914); Norton Rose Fullbright, *Merger Control Survey 2015*, 55, <http://www.nortonrosefulbright.com/files/merger-control-survey-2015-united-states-127392.pdf>.

merger law applies the Substantial Lessening of Competition (SLC) test,<sup>58</sup> which focuses on “increased economic efficiency leading to an increase in consumer welfare.”<sup>59</sup> Market power is defined in the United States under a microeconomic approach.<sup>60</sup> Hence, the SLC test prohibits mergers “detrimental to consumer interests by increasing prices or otherwise harming competition”—whereas the dominance test only precludes these mergers if they create or strengthen a dominant position.<sup>61</sup> Furthermore, the U.S. agencies and the Commission do not share the same presumptions regarding dominance and market shares. A company would be dominant under EU law starting at fifty percent, or even forty percent of the market,<sup>62</sup> whereas the U.S. dominance presumption requires considerably larger market shares.<sup>63</sup>

This divergence in merger policies between the U.S. and EU antitrust agencies appears clearly in several landmark European Commission cases. The rest of this Part focuses on the two most renowned conflicts between the United States and the European Union regarding merger review: the Boeing/McDonnell Douglas<sup>64</sup> and the General Electric/Honeywell<sup>65</sup> merger decisions.

### C. Boeing/McDonnell Douglas Merger

In 1997, the European Commission opposed the merger of Boeing and McDonnell Douglas (two aerospace giants), by which Boeing was to acquire McDonnell Douglas.<sup>66</sup> This decision came after the FTC approved the merger on the grounds that the transaction would not substantially reduce competition due to Boeing’s existing market dominance.<sup>67</sup> Although the companies had neither assets in the European Union nor any European subsidiaries,<sup>68</sup> the merger satisfied the financial threshold to establish a Community dimension.<sup>69</sup> As to the substantive inquiry, the

58. See BUTTIGIEG, *supra* note 55, at 283.

59. Krzysztof Kuik, Lecture, *Recent Developments in EU/US Trade Relations*, 79 U. DET. MERCY. L. REV. 433, 442 (2002). Other jurisdictions also apply the SLC test, such as Canada and Australia. See Peter Maunder, *UK Merger Policy*, in *NEW DEVELOPMENTS IN UK AND EU COMPETITION POLICY* 51, 74 (Roger Clarke & Eleanor J. Morgan eds., 2006).

60. U.S. Dep’t of Justice Antitrust Division, Final Report to the Attorney General and Assistant Attorney General for Antitrust, ch. 2 (2000) [hereinafter *International Policy Advisory Committee Report*], <http://www.justice.gov/sites/default/files/atr/legacy/2006/06/01/chapter2.PDF>.

61. BUTTIGIEG, *supra* note 55, at 283.

62. See *International Policy Advisory Committee Report*, *supra* note 60, at 48 (noting that the presumption on market share can fall to forty percent if “the next largest company is far behind”).

63. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (stating that whereas a market share of ninety percent would be enough, it is “doubtful whether sixty . . . percent would be enough; and certainly thirty-three percent is not”).

64. *Boeing/McDonnell Douglas*, *supra* note 24.

65. *General Electric/Honeywell*, *supra* note 23.

66. *Boeing/McDonnell Douglas*, *supra* note 24, ¶¶ 3–4.

67. See *id.* ¶ 124.

68. See IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 157 (4th ed. 2005).

69. See *Boeing/McDonnell Douglas*, *supra* note 24, ¶ 7.

Commission decided the case before the issuance of the revised Merger Regulation in 2004 and, therefore, applied the dominance test to the merger.<sup>70</sup> The Commission noted that “initial development and investment costs [in this industry] are huge” and that new entrants cannot realize economies of scope and scale in the short term.<sup>71</sup> In addition to these massive barriers to market entry, the Commission reasoned that the resulting company would occupy seventy percent of the global market.<sup>72</sup> Hence, the Commission concluded the merger would allow Boeing to strengthen its dominant position in the European market.<sup>73</sup>

The Boeing/McDonnell Douglas decision plainly illustrated the clash between the dominance test and the SLC test. It also demonstrated the political pressures surrounding the Commission’s extraterritorial jurisdiction over U.S. mergers. When the Commission rejected the merger, a “transatlantic trade dispute almost erupted.”<sup>74</sup> Suspicions of protectionism arose on the American side.<sup>75</sup> Members of Congress claimed that the Commission was trying to protect Airbus Industries (a European corporation and the second largest producer of civilian jets) against the competition of Boeing and McDonnell Douglas (respectively the first and third largest producers).<sup>76</sup> The Commission defended against these accusations, declaring that “[n]ational champions are for sport, not economics.”<sup>77</sup> U.S. criticism of this rationale was quick to follow.<sup>78</sup> Because Boeing made concessions, and changed its proposed transaction in order to comply with the Commission’s antitrust policies, the Commission ultimately did not block the merger, and the crisis was averted.<sup>79</sup> The divergence continued after Boeing/McDonnell Douglas and reached its apex with the planned merger of General Electric and Honeywell, outlined below.

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70. See *id.* ¶ 37.

71. *Id.* ¶ 49.

72. *Id.* ¶ 55.

73. See *id.* ¶ 113.

74. Barbara Crutchfield et al., *Increasing Extraterritorial Intrusion of European Union Authority into U.S. Business Mergers and Competition Practices: U.S. Multinational Businesses Underestimate the Strength of the European Commission from G.E.-Honeywell to Microsoft*, 19 *CONN. J. INT’L L.* 571, 574 (2004).

75. See Amy Ann Karpel, Comment, *The European Commission’s Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 *AM. U.L. REV.* 1029, 1031–32 (1998).

76. See *id.* at 1030–31.

77. See George S. Cary & Elaine Ewing, *Divergence Then and Now: What does the U.S./EU Experience Tell Us About Convergence With MOFCOM?*, in WILLIAM E. KOVACIC, AN ANTITRUST TRIBUTE, *LIBER AMICORUM VOLUME II* 147, 152 (Nicholas Charbit & Elisa Ramundo eds., 2014) (quoting European Competition Commissioner Karl Van Miert).

78. See Karpel, *supra* note 75, at 1033. See, e.g., Editorial, *A ‘Dangerous’ Merger?*, *WALL ST. J.* (July 21, 1997), <http://www.wsj.com/articles/SB869410290502431500> (noting the shock of U.S. lawmakers at the “audaciousness” of the EU’s attempt to block the merger between two American companies).

79. See Peter Pae, *EU Rejects GE Acquisition of Honeywell*, *L.A. TIMES* (July 4, 2001), <http://articles.latimes.com/2001/jul/04/business/fi-18495>. See also Boeing/McDonnell Douglas, *supra* note 24, ¶ 124 (concluding that the transaction would not harm competition if Boeing fulfilled its commitments).

#### D. General Electric/Honeywell Merger

The Department of Justice and the European Commission came into direct conflict in the General Electric (GE)/Honeywell decision in 2001, when the Commission rejected a merger previously approved by the DOJ.<sup>80</sup> The transaction consisted of GE's (the world's biggest producer of jet engines) purchase of Honeywell (the world's biggest producer of aerospace products),<sup>81</sup> whereby Honeywell would become a wholly-owned subsidiary of GE.<sup>82</sup> The Commission established that this vertical merger would produce a concentration pursuant to Article 3(1)(b) of the Merger Regulation, and that a Community dimension existed in this case because the transaction satisfied the threshold requirements under Article 1.<sup>83</sup> Thus, the European Commission had jurisdiction over the merger.

The Commission determined that the merger would impact two markets: the market for aircraft engines, and the market for avionics (navigation and communication equipment) and non-avionics (the rest of the equipment, such as the aircraft wheels).<sup>84</sup> First, the merger "would have the effect of combining Honeywell's activities with GE's financial strength and financial services."<sup>85</sup> Additionally, the Commission reasoned that the merged entity would be able to sell GE's and Honeywell's complementary avionics and non-avionics products together, thus offering lower prices for a package deal against which other competitors would be unable to compete.<sup>86</sup> Bundling of products would allow the merged entity to gain market share; the resulting firm would threaten competitors' profitability and could even force them out of the market.<sup>87</sup> This would strengthen GE's dominant position in engine products and help create a dominant position for Honeywell in both engine and non-avionics products.<sup>88</sup> Furthermore, the Commission concluded that the remedies proposed by GE (like promises not to bundle) did not sufficiently address the competitive threat raised by the transaction.<sup>89</sup> Given these concerns, the Commission blocked the transaction.

In sharp contrast, the DOJ concluded that the market for aircraft engines and the market for avionics and non-avionics were intensely competitive.<sup>90</sup> Therefore, the transaction would not harm competition, aside from a horizontal overlap in two markets ("military helicopter engines,"

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80. See Fox, *supra* note 42, at 331, 338.

81. See *id.* at 335.

82. See General Electric/Honeywell, *supra* note 23, ¶ 5.

83. See *id.* ¶¶ 6-7.

84. See BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 99 (2002).

85. *Id.*

86. See *id.*

87. See *id.*

88. See *id.*

89. See Fox, *supra* note 42, at 340-41.

90. See Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Remarks Before the Antitrust Law Section of the State Bar of Georgia, GE-Honeywell: The U.S. Decision, (Nov. 29, 2001), <http://www.justice.gov/atr/speech/ge-honeywell-us-decision>.

and “maintenance and servicing of small jet engines and auxiliary power units”), where the DOJ required a limited divestiture.<sup>91</sup> Furthermore, like the Commission’s decision in Boeing/McDonnell Douglas, the Commission’s decision in GE/Honeywell was contrary to U.S. antitrust law, which does not object to bundling to lower prices.<sup>92</sup>

American politicians and lawmakers reacted violently to the Commission’s GE/Honeywell decision.<sup>93</sup> The GE/Honeywell case was the first European Commission merger veto after U.S. approval and the second time since 1990 that the European Commission blocked the merger of two American companies.<sup>94</sup> Whereas critics focused on protectionism with regard to Boeing/McDonnell Douglas, concerns shifted in the GE/Honeywell merger to the analytical method that the Commission applied to review mergers.<sup>95</sup> The DOJ accused the Commission of “coddling competitors and ignoring fundamental economic analysis.”<sup>96</sup> Likewise, U.S. Trade Representative Robert Zoellick criticized what he interpreted as the European emphasis on the effect of competition in this case, whereas the U.S. agencies put the consumers’ interests at the center of their analysis.<sup>97</sup>

GE/Honeywell accelerated the need for a revision of the EU Merger Regulation—not as to the Commission’s jurisdiction over the proposed mergers, but as to the Commission’s substantive test for merger review. Instead of illustrating irreconcilable transatlantic differences, GE/Honeywell acted as a “wake-up call for both jurisdictions.”<sup>98</sup> This gave the EU and the U.S. the incentive to move towards more cooperation and convergence in antitrust regulation for cross-border mergers.

## II. Towards a Transatlantic Antitrust Authority?

Reacting to these inconsistent outcomes, the U.S. and EU antitrust authorities realized the need for convergence between both antitrust

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91. See Fox, *supra* note 42, at 338.

92. See Cary & Ewing, *supra* note 77, at 154 (explaining that U.S. law sees bundling as anticompetitive only when causing price increases, and citing as an example the Time Warner/Turner merger, for which “the FTC required a consent decree prohibiting bundling out of concern that the combined entity would use ‘its newly-acquired stable of “marquee” channels to raise prices by bundling’”) (quoting Analysis of Proposed Consent Order to Aid Public Comment, *In re* Time Warner, Inc., et al., Docket No. C-3709 (Sept. 12, 1996), <https://www.ftc.gov/sites/default/files/documents/cases/1996/09/twanalys.pdf>).

93. See *id.*

94. See *EU Blocks \$41 Billion GE-Honeywell Merger*, FOX NEWS (July 3, 2001), <http://www.foxnews.com/story/2001/07/03/eu-blocks-41-billion-ge-honeywell-merger.html> (mentioning that the WorldCom/Sprint deal had been the only U.S. deal blocked by the Commission since 1990).

95. See Cary & Ewing, *supra* note 77, at 154-55.

96. See Jonathan Krim, *Microsoft and the Big Pond*, THE WASH. POST (May 17, 2002), <https://www.washingtonpost.com/archive/business/2002/05/17/microsoft-and-the-big-pond/603b1b00-4a23-4ce7-8665-04ab5f159f6d/>. See also Arquitt, *supra* note 25, at 2 (explaining that U.S. officials have heavily criticized the Commission’s decisions and suggested that “once Europe gets it right it will adopt the U.S. approach”).

97. See Crutchfield et al., *supra* note 74, at 597.

98. Cary & Ewing, *supra* note 77, at 155.

regimes.<sup>99</sup> If the divergence had continued, it could have deterred firms from engaging in these cross-border transactions and thus would have negatively impacted the world economy.<sup>100</sup> A practice of “soft convergence”<sup>101</sup> was progressively established, whereby the Commission’s review of U.S. mergers began moving closer towards the American standard of merger review.

#### A. A Strengthened Transatlantic Cooperation

Several elements point towards greater convergence and cooperation between the U.S. and EU competition agencies. As early as 1991, the United States and the European Union entered into several bilateral agreements, including the an agreement regulating the application of competition laws.<sup>102</sup> In 1999, in order to enhance cooperation in merger review, the United States and the European Union created a “Merger Working Group,”<sup>103</sup> with the purpose of sharing their respective experiences on merger review. The group issued a best practices document in 2002 concerning bilateral cooperation in merger cases.<sup>104</sup> This document covers communication between the reviewing agencies, coordination on timing, collection and evaluation of evidence, and the consistency of remedies when both the United States and European Commission review the same merger transaction.<sup>105</sup>

Real change occurred, however, after the GE/Honeywell case. In 2001, the Commission adopted a Green Paper on the review of the Merger Regulation, the goal of which was to modify the Merger Regulation so as to “meet the challenges posed by global mergers, monetary union, market integration, enlargement and the need to cooperate with other jurisdic-

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99. See, e.g., Mario Monti, Address Before the UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, *Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: An EU Perspective*, (Feb. 28, 2004). See also Mario Monti, *Policy Briefs: Prospects for Transatlantic Competition Policy*, PETERSON INST. FOR INT’L ECON. (May 2001), <http://www.iie.com/publications/pb/print.cfm?ResearchId=74&doc=Pub>. Monti states:

Globalization and the growth in these cross-border mergers present major challenges for competition authorities around the world and have highlighted the importance of seeking to ensure a degree of convergence and coordination among the world’s competition law enforcement systems, particularly between the EU and US antitrust authorities. *Id.*

100. See Tritell, *supra* note 27, at 25.

101. See *id.*

102. See Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, U.S. Dep’t of Justice, Remarks at a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, *Improving Bilateral Antitrust Cooperation*, (June 23, 2000), <http://www.justice.gov/atr/speech/improving-bilateral-antitrust-cooperation>.

103. See John J. Parisi, *International Regulation of Mergers: More Convergence, Less Conflict*, 61 N.Y.U. ANN. SURV. AM. L. 509, 521 (2005).

104. U.S.-EU MERGER WORKING GROUP, BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS (2002), [http://ec.europa.eu/competition/mergers/legislation/best\\_practices\\_2011\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf). Another revised version of the Best Practices was issued in 2011.

105. See *id.*

tions.”<sup>106</sup> The Green Paper invited a “thorough debate” of the substantive test of the Merger Regulation, and discussed the respective merits of the dominance test and the SLC test.<sup>107</sup>

In 2004, the Commission adopted a new test, the Significant Impediment to Effective Competition (SIEC) test.<sup>108</sup> The SIEC test focuses on a transaction’s effects on competition, rather than on the structure of the market.<sup>109</sup> The Commission intended with this new test to fill the aforementioned “gap” in the dominance test.<sup>110</sup> The test prohibits mergers that “significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position . . . .”<sup>111</sup> The Commission presented the SIEC test as a *reformed* dominance test,<sup>112</sup> thus indicating that the SIEC test preserved continuity with its predecessor. The creation or strengthening of a dominant position, however, which was at the core of the SLC test, is only one example of a significant impediment to effective competition under the new approach, and the SIEC lists other factors for the appraisal of mergers.<sup>113</sup> These factors include: (1) “the market position of the undertakings concerned and their economic and financial power,” (2) “the alternatives available to suppliers and users,” (3) “their access to supplies or markets,” (4) “any legal or other barriers to entry,” (5) “supply and demand trends for the relevant goods and services,” (6) “the interests of the intermediate and ultimate consumers,” and (7) “the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.”<sup>114</sup> Despite these differences, the SIEC test is fairly similar to the SLC test—some commentators even find them to be “substantively identical.”<sup>115</sup>

The major shift occurred when the Commission issued the Horizontal Merger Guidelines in 2004, providing an economic framework for the application of its new merger control policy.<sup>116</sup> The Commission’s 2004

106. Commission Green Paper on the Review of Council Regulation (EEC) No 4064/89, at 4, COM (2001), 745/6 final (Dec. 11, 2001), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0745&from=EN>.

107. See *id.* at 36–40.

108. See EC Merger Regulation, *supra* note 3, at art. 2(3).

109. See IOANNIS KOKKORIS, MERGER CONTROL IN EUROPE: THE GAP IN THE ECMR AND NATIONAL MERGER LEGISLATIONS 45 (2011).

110. See *id.*

111. See EC Merger Regulation, *supra* note 3, at art. 2(3).

112. See KOKKORIS, *supra* note 109, at 45.

113. See EC Merger Regulation, *supra* note 3, at art. 2(1)(b); KOKKORIS, *supra* note 109, at 45.

114. *Id.*

115. See Philip Marsden & Peter Whelan, *Re-Examining Trans-Atlantic Similarities and Divergences in Substantive and Procedural Competition Law*, 10 SEDONA CONF. J. 23, 31 (2009).

116. Commission Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) [hereinafter Horizontal Guidelines], [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN).

Guidelines lay out a six-step analysis for reviewing horizontal mergers.<sup>117</sup> First, the Commission considers the impact of the transaction on competitors through the analysis of the resulting market share and concentration levels;<sup>118</sup> second, the Commission asks whether the merger is likely to result in anti-competitive effects;<sup>119</sup> third, whether customers will likely counter the buyer's increased market power;<sup>120</sup> fourth, whether new competitors will be able to enter the post-merger market;<sup>121</sup> fifth, whether the transaction will result in efficiencies;<sup>122</sup> and sixth, whether a failing firm defense applies.<sup>123</sup> This analysis seems directly comparable with provisions in the U.S. merger guidelines issued in 1992 and revised in 1997—particularly the analytical steps for the failing firm defense and efficiencies.<sup>124</sup> In 2008, the Guidelines on the assessment of non-horizontal mergers (in other words, vertical and conglomerate mergers) complemented the Horizontal Merger Guidelines.<sup>125</sup> Here again, commentators emphasized that the non-horizontal merger Guidelines were progressively embracing the U.S. approach by moving away from the conglomerate effects theories.<sup>126</sup> Furthermore, the Commission's analyses, for example in decisions such as Oracle/Soft<sup>127</sup> and Sony/BMG,<sup>128</sup> have shown “increasing sophistication,”<sup>129</sup> with a substantial reliance on empirical data—thus getting closer to the U.S. agencies' method of merger review.<sup>130</sup> Thanks to the changes that the Commission made to the legal standard, the European Commission and the FTC (or DOJ) now usually agree on U.S. mergers.<sup>131</sup> Notably, they have reached consistent outcomes in subsequent conglomerate and vertical merger cases, which used to be particularly conflicting

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117. See *id.* ¶¶ 14–91. See also Kathryn Fugina, Comment, *Merger Control Review in the United States and the European Union: Working Towards Conflict Resolution*, 26 Nw. J. INT'L L. & BUS. 471, 478–79 (listing slightly different steps for the Commission's analysis).

118. See Horizontal Guidelines, *supra* note 116, ¶¶ 14–21.

119. See *id.* ¶¶ 22–63.

120. See *id.* ¶¶ 64–67.

121. See *id.* ¶¶ 68–75.

122. See *id.* ¶¶ 76–88.

123. See *id.* ¶¶ 89–91.

124. See *Horizontal Merger Guidelines*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N ¶ 5.1 (2010), <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

125. Non-Horizontal Guidelines, *supra* note 43.

126. See Cary & Ewing, *supra* note 77, at 156.

127. Commission Decision of 26 Oct. 2004 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement, Case COMP/M.3216—Oracle/PeopleSoft.

128. Commission Decision of 19 July 2004 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement, Case COMP/M.333—Sony/BMG.

129. Nicholas Levy, *Evidentiary Issues in EU Merger Control*, in INTERNATIONAL ANTI-TRUST LAW AND POLICY 81, 147 (Barry E. Hawk ed., 2008); Marsden & Whelan, *supra* note 115, at 29.

130. See William Kolasky, *GE/Honeywell: Narrowing, But Not Closing, the Gap*, ANTI-TRUST MAG., Spring 2006, at 69.

131. See Panel Discussion, *Global Antitrust Policies: How Wide is the Gap?*, Sept. 6, 2011, at 2, <http://www.justice.gov/sites/default/files/atr/legacy/2012/05/04/282930.pdf>.

issues. The GE/Amersham<sup>132</sup> and Google/DoubleClick<sup>133</sup> merger cases, both decided after the new Merger Regulation, perfectly illustrate the U.S.-EU convergence in this area of merger review.

## B. GE/Amersham Merger

General Electric (GE) is an American manufacturing, technology, and service company, active in the medical systems business.<sup>134</sup> Amersham is a British healthcare and life sciences company that manufactures pharmaceuticals and biopharmaceuticals.<sup>135</sup> GE proposed to acquire Amersham.<sup>136</sup> The Commission, noting that the relevant products were complementary, did not concern itself with the existence of horizontal overlapping, and focused rather on “whether or not the merged entity may acquire . . . the ability and the economic incentive to foreclose competition, by leveraging its pre-merger market power from one market to another through exclusionary practices, such as bundling and/or tying.”<sup>137</sup> Regarding commercial bundling, which was at the core of the GE/Honeywell merger, the Commission first noted that this strategy would be uncommon in the market due to “significant differences in the procurement procedures and supply chains . . . as well as completely different procurement timelines.”<sup>138</sup>

The Commission, however, explained that leveraging power is anticompetitive when it meets certain conditions.<sup>139</sup> First, the merged entity must be able to extend its dominance in one product to another complementary product thanks to the merger.<sup>140</sup> Second, there must be a reasonable expectation that other firms in these markets will not be able to compete and will therefore have to exit the market.<sup>141</sup> Third, after the rival firms have exited the market, “the merged firm must be able to implement unilateral price increases.”<sup>142</sup> These increases “need to be sustainable in

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132. Commission Decision of 21 Jan. 2004 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement, Case COMP/M.3304—GE/Amersham [hereinafter GE/Amersham].

133. Commission Decision of 11 Mar. 2008 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement, Case COMP/M.4731—Google/DoubleClick [hereinafter Google/DoubleClick].

134. GE/Amersham, *supra* note 132, ¶ 3.

135. *See id.* ¶ 4.

136. *See id.* ¶ 5.

137. *Id.* ¶ 31.

138. *Id.* ¶ 35.

139. *Id.* ¶ 37. Leverage in this context means “a firm’s ability to use restrictive practices to leverage its monopoly power from one (already dominated) market to another (non-dominated) market.” Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515 (1985) (explaining that leverage can be accomplished through the use of tying arrangements, which is when “a firm with monopoly power over one product is observed selling it to customers only on the condition that they purchase another of the firm’s products as well[.]” and also that non-horizontal mergers are often anticompetitive because they are conducive to leveraging practices).

140. GE/Amersham, *supra* note 132, ¶ 37.

141. *Id.*

142. *Id.*

the long term, without being challenged by the likelihood of new rivals entering the market or previously marginalized [rivals] re-entering the market.”<sup>143</sup>

In this case, the European Commission held that the merger did not meet those three conditions.<sup>144</sup> The Commission concluded that GE and Amersham did not hold a dominant position in their respective pre-merger markets.<sup>145</sup> It also noted that there were enough rivals that would be able to respond to any bundling attempts.<sup>146</sup> Market conditions would thus not foreclose competitors by pushing them out of the market. Finally, even if bundling could actually threaten competitors’ market share in the short term and in the national markets, it would neither do so globally nor in the long term.<sup>147</sup> The markets are characterized by low barriers to entry; in the long term, other firms are likely to enter or re-enter the markets, thus forcing the competitors to lower their high prices.<sup>148</sup> The Commission hence concluded that the merger did not raise serious doubts as to its compatibility with the common market, and it approved the transaction.<sup>149</sup>

Although Amersham is a British company and the transaction is not technically a merger of two U.S. companies, the European Commission’s analysis is significant because it shows how the Commission began following an approach closer to U.S. antitrust analysis. With this case, the Commission started to de-emphasize conglomerate effects in its merger review.<sup>150</sup> Instead of blankly rejecting all conglomerate mergers as anticompetitive, the Commission carefully outlined the conditions under which these kinds of mergers can allow the resulting firm to leverage market power.<sup>151</sup> Likewise, the 2008 Guidelines on non-horizontal mergers emphasized that “conglomerate mergers in the majority of circumstances will *not* lead to any competition problems,”<sup>152</sup> although without plainly rejecting conglomerate effects theories as a basis for blocking mergers.<sup>153</sup> This evolution in the Commission’s assessment of conglomerate mergers is in line with the American approach. U.S. agencies traditionally consider that most of the conglomerate mergers do not harm competition, as they recognize the efficiencies created by some conglomerate mergers.<sup>154</sup>

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143. *Id.*

144. *See id.* ¶¶ 38–42.

145. *See id.* ¶ 38.

146. *See id.* ¶ 39.

147. *See id.* ¶ 40.

148. *See id.* ¶ 41.

149. *See id.* ¶ 62.

150. *See Cary & Ewing, supra* note 77, at 156.

151. GE/Amersham, *supra* note 132, ¶¶ 38–41.

152. Non-Horizontal Guidelines, *supra* note 43, at 21 (emphasis added).

153. *See Cary & Ewing, supra* note 77, at 156.

154. *See* William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, Address Before the George Mason University Symposium, Conglomerate Mergers and Range Effects: It’s a Long Way From Chicago To Brussels (Nov. 9, 2001), <http://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels>.

Furthermore, the Google/DoubleClick merger case illustrates the convergence between U.S. antitrust agencies and the European Commission in another type of mergers—vertical mergers.

### C. Google/DoubleClick Merger

This planned merger involved two U.S. corporations.<sup>155</sup> Google is the most well-known Internet search engine in use today, and is used free of charge.<sup>156</sup> The company collects almost all of its revenues from online advertising.<sup>157</sup> Google provides space for advertisements on its websites (as a publisher) or through its AdSense network (as an intermediary).<sup>158</sup> Google allows advertisers to place their ads on Google pages, while AdSense allows participating publishers to have targeted ads placed on their websites.<sup>159</sup> Google thus sells ad space on partner websites thanks to AdSense.<sup>160</sup> Conversely, DoubleClick offers online advertising tools to website publishers, advertisers, and advertising agencies, so that the ad “appears . . . onto the publisher website space at the right place at the right time.”<sup>161</sup> Google planned to acquire DoubleClick.<sup>162</sup>

Five European Community Member States (Germany, Spain, Greece, Portugal, and the United Kingdom) chose to refer the case to the Commission under Article 4(5) of the Merger Regulation because of the proposed merger’s potential impact.<sup>163</sup> The Commission found that Google and DoubleClick had a vertical relationship.<sup>164</sup> Google and DoubleClick were acting in two distinct markets, so they were not direct competitors.<sup>165</sup> Rather, the two companies’ roles were complementary—an advertiser (like Google) selling ad space subsequently used ad service technology (like the one provided by DoubleClick).<sup>166</sup> In other words, the products sold by ad serving space suppliers and ad serving technology suppliers do not overlap even though they are related.<sup>167</sup>

In line with the Non-Horizontal Merger Guidelines, the Commission examined the merged entity’s incentive and ability to engage in exclusionary strategies.<sup>168</sup> Firstly, the Commission noted that DoubleClick “face[d]

155. See Google/DoubleClick, *supra* note 133, ¶¶ 4–5.

156. See *id.* ¶ 4; FRANCESCO RUSSO ET AL., EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES 148 (2010).

157. See Google/DoubleClick, *supra* note 133, ¶ 4; RUSSO, *supra* note 156, at 148.

158. *Id.*

159. See *id.* ¶ 93.

160. See *id.* ¶¶ 92–93.

161. See *id.* ¶¶ 26–27.

162. *Id.* ¶ 6.

163. *Id.* ¶ 7; Russo, *supra* note 156, at 355.

164. See Google/DoubleClick, *supra* note 133, ¶ 286; Russo, *supra* note 156, at 355.

165. See Google/DoubleClick, *supra* note 133, ¶ 192; Russo, *supra* note 156, at 355.

166. See Google/DoubleClick, *supra* note 133, ¶ 26; Russo, *supra* note 156, at 355.

167. See Google/DoubleClick, *supra* note 133, ¶ 192; Russo, *supra* note 156, at 355.

168. See Summary of Commission Decision of 11 Mar. 2008 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, Case COMP/M.473—Google/DoubleClick, at ¶¶ 17–24 [hereinafter Google/DoubleClick Summary].

a number of competitive restraints and [was] unlikely to be able to exercise any significant market power.”<sup>169</sup> Secondly, because the costs of ad serving tools are not particularly high for advertisers and publishers, it was unlikely that price variations for these tools would cause customers to switch ad networks.<sup>170</sup> This lack of elasticity also explains why the merged entity would have “no incentive to offer DoubleClick’s display ad serving technology to publishers at a lower price . . . when used in combination with AdSense” (through mixed bundling).<sup>171</sup> Thus, the Commission concluded that the merged entity was unlikely to engage in foreclosing strategies.

Finally, the Commission assessed the anticompetitive effects of the merged entity’s foreclosure strategies.<sup>172</sup> It determined that the resulting firm would still have to face competition from other firms offering the same kind of bundled products (“bundle competition”),<sup>173</sup> and that the evidence did not support the theory according to which the merged entity would be able to “exert market power in the long-term due to high barriers to re-entry.”<sup>174</sup> The Commission therefore concluded that the implementation of a foreclosing strategy would not harm competition, and that the new entity had neither the incentive nor the ability to foreclose competitors<sup>175</sup>—the three necessary conditions to block the merger.<sup>176</sup> Hence, it declared the merger “compatible with the Common market” and authorized its implementation.<sup>177</sup>

In this case, the Commission’s analysis is strikingly similar to the FTC’s approach. Like the Commission, the FTC examined first the possibility of horizontal competitive harm and concluded that it was not a concern because the merging entities’ products were complementary.<sup>178</sup> The FTC noted that, although Google had been developing a third-party ad serving solution and DoubleClick an ad exchange product that would potentially compete with AdSense and other intermediation firms, these strategies would not by themselves justify precluding the merger, given that “the third-party ad serving markets are competitive.”<sup>179</sup> As to the merger’s vertical consequences, the FTC examined whether the resulting firm would bundle Google’s AdSense and DoubleClick’s tools in one product, thus forcing publishers to use AdSense and foreclosing the market.<sup>180</sup> Like the Commission, the FTC noted that DoubleClick did not have significant mar-

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169. *Id.* ¶ 18.

170. *Id.* ¶ 19.

171. *Id.*

172. *See* Google/DoubleClick, *supra* note 133, ¶ 325-28.

173. *See id.* ¶ 327.

174. *See id.* ¶ 328.

175. *See id.* ¶ 329.

176. *See id.* ¶ 293 (citing Non-Horizontal Guidelines, *supra* note 43, at 22).

177. *See* Google/DoubleClick Summary, *supra* note 168, ¶ 27.

178. *See* Statement of the Fed. Trade Comm’n Concerning Google/DoubleClick, F.T.C. File No. 017-0170, at 6-8 (Dec. 20, 2007), [https://www.ftc.gov/system/files/documents/public\\_statements/418081/071220googledc-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf).

179. *See id.* at 8-9.

180. *See id.* at 9.

ket power and that there was no real incentive to tie or bundle Google's AdSense with DoubleClick's ad servers.<sup>181</sup> It added that there were already multiple competitors selling both of these products, therefore precluding a potential bundled product from harming competition.<sup>182</sup> Hence, the FTC concluded that the merger did not create antitrust concerns and it authorized the transaction.<sup>183</sup> With this decision, the U.S. and European antitrust entities reached a perfect convergence regarding vertical mergers.

More generally, after GE/Honeywell, the U.S. agencies and the European Commission have come to the same conclusions while reviewing mergers.<sup>184</sup> In case of disagreement, they have distinguished the reasons for their decisions and have even explained that the other agency's remedy actually precluded the transaction from harming competition.<sup>185</sup> This was the case in the Cisco/Tandberg merger, for which the Commission had required a remedy.<sup>186</sup> The DOJ cleared the transaction without conditions, and it motivated its conclusion by reference to the "evolving nature of the videoconferencing market" but also to the "the commitments that Cisco has made to the European Commission (EC) to facilitate interoperability."<sup>187</sup>

The most recent problematic merger case that the U.S. and the EU faced came in 2009, when the Commission objected to Oracle's proposed acquisition of Sun,<sup>188</sup> which the DOJ had cleared without remedy.<sup>189</sup> Oracle was one of three major database providers and Sun, which was competing on the same market with its open source database MySQL, had much smaller market shares.<sup>190</sup> Hence, the major concern in this case was horizontal, as the merger involved two players in the same market. The Commission explained that MySQL and Oracle were not competitors in the "high end segment" of the market.<sup>191</sup> Regarding the database market, on which MySQL and Oracle were competitors, another open source database, PostgreSQL, could be an alternative to MySQL.<sup>192</sup> Finally, the Commis-

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181. *Id.* at 10, 12.

182. *See id.* at 9-12.

183. *See id.* at 12-13.

184. *See Cary & Ewing, supra* note 77, at 156.

185. *See id.* at 157.

186. *See id.*

187. *Id.* at 157. *See* Press Release, Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg; Justice Department and European Commission Cooperate Closely to Resolve Competition Issues (Mar. 29, 2010), [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm).

188. *See* Lance Whitney, *Oracle-Sun deal gets EU approval, finally*, CNET.COM (Jan. 21, 2010), <http://www.cnet.com/news/oracle-sun-deal-gets-eu-approval-finally/>.

189. *See* Press Release, European Comm'n, Mergers: Commissions Opens In-Depth Investigation into Proposed Takeover of Sun Microsystems by Oracle (Sept. 3, 2009) [hereinafter Press Release, Sun Microsystems], [http://europa.eu/rapid/press-release\\_IP-09-1271\\_en.htm](http://europa.eu/rapid/press-release_IP-09-1271_en.htm). *See* Cary & Ewing, *supra* note 77, at 157.

190. *See* Press Release, Sun Microsystems, *supra* note 189.

191. Press Release, European Comm'n, Mergers: Commission Clears Oracle's Proposed Acquisition of Sun Microsystems (Jan. 21, 2010), [http://europa.eu/rapid/press-release\\_IP-10-40\\_en.htm](http://europa.eu/rapid/press-release_IP-10-40_en.htm).

192. *See id.*

sion considered the transaction's impact to be limited regarding "important [Java] IP rights" that might involve Oracle's competitors.<sup>193</sup> Oracle "would not have the incentives to restrict its competitors' access to the Java IP rights as this would jeopardiz[e] the gains derived from broad adoption of the Java platform. . . ."<sup>194</sup> For these reasons, the Commission eventually authorized the Sun/Oracle merger in January 2010.<sup>195</sup> Thus, the U.S. and EU antitrust agencies seem now to be aligned closely.

The consensus was that a greater transatlantic convergence was necessary, but questions remain as to the nature of the convergence process itself. Was it unavoidable that the European Commission moved closer to the United States? Is "soft convergence" sufficient, or should the United States and the European Union aim for a greater level of harmonization between antitrust agencies by enacting transnational rules? The following section provides a brief overview of these issues. A full analysis of these topics, however, is beyond the scope of this Note.

#### D. Convergence or Harmonization? Taking a Step Back

After Sun/Oracle, it seemed clear that the EU had moved closer towards the American view on merger regulation. Strictly speaking, however, the Commission's policy is still not identical to the U.S. model—it instead underwent a "process of careful tailoring with both procedural and substantive dimensions."<sup>196</sup> Indeed, instead of directly adopting the SLC test, the European Commission chose to compromise with the SIEC test. Some theoretical differences also remain, for example, regarding the factors that the Commission under the Merger Regulation must consider, "including the 'economic and financial power' of the merging parties."<sup>197</sup> This "deep pocket theory" would probably not be to the liking of American antitrust agencies.<sup>198</sup>

These differences could explain why commentators comparing the U.S. and EU merger standards use the term "convergence" rather than "harmonization," as harmonization implies uniformity in legal provisions or their application. It could even be argued that uniformity between U.S. and EU antitrust regulation is not a realistic goal because of historic and legal differences, as well as the U.S. and EU's different economic structures.<sup>199</sup> Some commentators, however, also note that market structure differences are irrelevant for U.S. mergers falling within the European Commission's jurisdiction—where the scope of the geographic market impacted by the merger is global, U.S. agencies and other national agencies should logically

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193. *Id.*

194. *Id.*

195. *Id.*

196. George S. Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 992 (2007).

197. Parisi, *supra* note 103, at 523.

198. *See id.*

199. *See* Arquit, *supra* note 25, at 3 (discussing the different "underpinnings" of the European and American market systems).

come to the same conclusion.<sup>200</sup> If that is the case, why focus exclusively on convergence and dismiss the possibility of transatlantic harmonization on merger review?

If the difference in market structure does not offer a satisfactory explanation, other factors can be considered. In order to achieve complete harmonization, it would probably be necessary to draft an U.S.-EU Merger Control Code,<sup>201</sup> or to create a transatlantic antitrust regulator for mergers likely to produce effects on both the U.S. market and the Common market. Given the U.S. reluctance towards international institutions (seen as infringing upon U.S. sovereignty),<sup>202</sup> the idea of a superior international institution reviewing U.S. mergers is unlikely to find support in the United States. Furthermore, harmonization would require lengthy negotiations between the European Union and the United States, which would generate transaction costs on both sides. Therefore, the compromise that constitutes convergence, while not the paramount goal, is less controversial than a complete harmonization of antitrust standards, as it can achieve a similar result at a lower cost.<sup>203</sup>

Moreover, it is not the case that technical difficulty is the sole obstacle to the desired goal of complete harmonization; rather, “some degree of difference” is actually necessary—and even “healthy.”<sup>204</sup> William Kovacic, the former chairman of the FTC, notes that antitrust law has a “strong experimental aspect” in that optimal rules are only achieved through incremental and pragmatic adjustments by antitrust authorities.<sup>205</sup> The DOJ’s adoption of revised merger guidelines in 1982 and the creation of a mandatory premerger notification in the United States in the 1970 (with the enactment of the Hart-Scott-Rodino Act) are two examples among others of this “continuous, decentralized experimentation” that has benefitted U.S. antitrust law.<sup>206</sup> A transatlantic harmonization, which would rely on global consensus from international antitrust authorities, would prove to be less flexible and, in turn, would hinder the ability to carry on these experimentations.<sup>207</sup>

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200. See Parisi, *supra* note 103, at 519 (noting that this is also the case for mergers, including some pharmaceutical mergers, where the effects in separate national geographical markets are the same).

201. See CATALIN STEFAN RUSU, *EUROPEAN MERGER CONTROL: THE CHALLENGES RAISED BY TWENTY YEARS OF ENFORCEMENT EXPERIENCE* 61 (2010).

202. A full defense of this claim is beyond the scope of this Note. But the fact that the United States supports a dualist conception of international law, and the American refusal to participate in the International Criminal Court, are examples of American law’s general reluctance towards international law and institutions. For a more detailed justification of this assertions, see, e.g., JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004).

203. See Fox, *supra* note 42, at 357.

204. William E. Kovacic, Chairman, U.S. Fed. Trade Comm’n, Address at Bates White Fifth Annual Antitrust Conference, Competition Policy in the European Union and the United States: Convergence or Divergence?, at 5 (June 2, 2008).

205. See *id.*

206. *Id.*

207. See *id.*

Lastly, when comparing U.S. and EU merger review standards, commentators consistently ask whether the European antitrust model is moving closer to the U.S. model.<sup>208</sup> But few consider whether the alternative—the U.S. model moving closer to the EU model—would be plausible or desirable.<sup>209</sup> Several factors explain the direction taken by the transatlantic relationship regarding merger review. The Court of First Instance's annulment decisions pertaining to three Commission merger assessments<sup>210</sup> in the summer and fall of 2002, after the GE/Honeywell fiasco, were essential to the European Commission's accelerated move towards a U.S.-centric approach.<sup>211</sup> Furthermore, commentators have noted that a more economic approach has been gaining popularity in Europe, and it seems only natural that it is now reflected in Court of First Instance judgments, Directorate General Competition principles, and Commission decisions<sup>212</sup>—“much like Chicago School insights and claims of the 1960s found their way into U.S. court decisions and agency initiatives in the 1980s and beyond.”<sup>213</sup> Nevertheless, the reasons behind this European move towards the principles of the Chicago school of economics remain to be established. It is unclear whether the shift was due to pressure from U.S. government officials in repeated press conferences decrying adverse decisions of the European Commission,<sup>214</sup> or a change in European public opinion as to the government's role in market regulation.

## Conclusion

Global U.S. companies that plan to merge should be aware of the European Commission's jurisprudence, as the Commission can exercise its jurisdiction over the merger and prevent the deal from moving forward. The Commission's jurisdiction used to be worrisome for U.S. companies because of the Commission's divergence with U.S. antitrust standards, but this has become less problematic as the Commission's antitrust policy progressively aligned with the U.S. view.

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208. See Arquit, *supra* note 25, at 2.

209. See *id.* Eleanor Fox's comment on antitrust convergence sums up the American view: “Although there is much talk among antitrust authorities and the bar that convergence of the antitrust laws of the various jurisdictions is the principal goal of ‘international’ antitrust, enthusiasm for the goal seems to diminish when convergence is taken to mean anything other than ‘Converge to my way.’” Fox, *supra* note 42, at 358.

210. Competition Regulation 4064/89, Decision Declaring a Concentration to be Incompatible with the Common Market, Case T-342/99—Airtours v. Commission; Competition Regulation 4064/89, Decision Declaring a Concentration to be Incompatible with the Common Market, Case T-310/01—Schneider Electric v. Commission; Competition Regulation 4064/89, Decision Declaring a Concentration to be Incompatible with the Common Market, Case T-5/02—Tetra Laval v. Commission.

211. See Kolasky, *supra* note 130, at 69.

212. See, e.g., Nicholas Forwood, *The Commission's More Economic Approach*, EUROPEAN UNIV. INST. 1 (2009), <http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forwood.pdf>.

213. Fox, *supra* note 42, at 359.

214. See Arquit, *supra* note 25, at 2.

More generally, divergence between national antitrust authorities is a central issue in today's world. While it has been partially resolved between the United States and the European Union, protectionism now comes from different corners of the globe. For example, China's Ministry of Commerce (MOFCOM) in charge of merger review has been regularly in conflict with U.S. antitrust authorities these past few years.<sup>215</sup> In this regard, the lessons from the U.S.-EU experience could aid convergence with MOFCOM. Furthermore, many transition countries which are trying to develop new competition laws have their origins in a civil law tradition.<sup>216</sup> The prosecutorial model offered by the common law in general, and employed by the DOJ specifically, is foreign to them, and they are therefore looking first at the European model as a source of inspiration for their new antitrust regimes.<sup>217</sup> Consequently, EU antitrust law "tend[s] to be more readily absorbed into the newer competition policy regimes," and a convergence between U.S. and EU regimes thus guarantees a broader uniformity in antitrust enforcement around the world.<sup>218</sup>

Convergence between the U.S. and EU systems has substantial practical and economic consequences, which justify the special attention that it has received and continues to receive from both antitrust agencies and commentators. From merger clashes to cooperation agreements and shared conclusions on merger review, a "genuine success story in the modern transatlantic relationship"<sup>219</sup> writes itself, which hopefully will last and grow.

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215. See Cary & Ewing, *supra* note 77, at 158.

216. See Kovacic, *supra* note 204, at 3-4.

217. See *id.* at 4.

218. *Id.*

219. *Id.* at 2.

