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Cento Veljanovski

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Cento Veljanovski*

The EC Commission's decision to block the GE/Honeywell merger ignited a wave of criticism from the US not seen since the Boeing/McDonnell Douglas[1] merger in the mid-90s. While EC Commission officials have reacted by denying that there were fundamental differences and stressing the unprecedented level of cooperation with the US antitrust authorities,[2] their US counterparts launched a vigorous attack on the decision, EU law, and the EC Commission's competence and credibility.[3] If this were

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* Managing Partner, Case Associates (London) and Associate Research Fellow, Institute of Advanced Legal Studies, University of London. Contact: cento@casecon.com.

[1] Case No. IV/M 877 Boeing/McDonnell Douglas (1996); *Symposium: Conflicts, Contradictions, Differences - Coordinating U.S./EC Merger Enforcement,* XLV ANTITRUST BULL. 1 (2000).

[2] M. Monti *The Future for Competition Policy in the European Union (Extracts): Merger control: Issues highlighted in the context of the GE/Honeywell Merger; Antitrust and financial services: clearing and settlement arrangements* speech at Merchant Taylor's Hall London, 9 July 2001. http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN; M. Monti "The Commission notice on merger remedies - one year after " speech to CERNA (Centre d'économie industrielle, Ecole Nationale Supérieure de mines) Paris, 18 January 2002 http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/10|0|RAPID&lg=EN; A. Schaub "Antitrust law enforcement - a shared trans-Atlantic vision" Biannual Conference of the Council for the United States and Italy, New York 25 January 2002; http://www.europa.eu.int/comm/competition/speeches/text/sp2002_002_en.pdf;
M. Monti, "Antitrust in the US and Europe: A History of convergence" General Counsel Roundtable American Bar Association Washington DC, 14 November 2001. http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/540|0|RAPID&lg=EN.

[3] W. J. Kolasky, *North Atlantic Competition Policy: Converging Toward What?* BIICL Second Annual International and Comparative Law Conference London, England, 17 May 2002; *Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks* (24 April 2002); *United States and European Competition Policy: Are There More Differences Than We Care to Admit?* (10 April2002); *International Convergence Efforts: A U.S. Perspective before the International Dimensions of Competition Law Conference* (22 March 2002); *Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies - New and Old* (18 March 2002); *U.S. and EU Competition Policy: Cartels, Mergers, and Beyond* (25 January 2002); *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels* (9 November 2001). These speeches can all be found on the Department of Justice's website at www.usdoj.gov

not enough,[4] the EC Commission suffered a further set back - gleefully referred to by its critics as a “hammer blow” - when in June 2002 the European Court of First Instance (CFI) overturned its decision to block the Airtours/First Choice merger.[5] This was the first time that the EC Commission lost an appeal against one of its merger decisions, and was followed in rapid succession by the annulment of two further merger decisions,[6] with appeals against another two, including GE/Honeywell pending. To many, the CFI’s judgments confirmed that the EC Commission’s internal procedures and analysis were poor.

The CFI’s decisions have altered the debate over the reform of EC merger policy. It coincided with the EC Commission’s review of the EC Merger Regulation (ECMR)[7] following its publication of a Green Paper.[8] Despite initially complacent comments of senior officials on the depth of reform, the CFI’s scathing decisions resulted in a more critical and responsive approach, together with candid admissions of past failures. At the time of writing draft EC Merger Regulation[9] and Horizontal Merger Guidelines[10] have been circulated for consultation, and procedural and organisational reforms proposed, including the surprising decision to close the merger division (Merger Task Force). Indeed, events have moved so fast that the original criticisms of the GE/Honeywell decision which were to be the focus of this article, have now receded as a few among many more significant issues raised in the current debate over merger reform in Europe.

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[4] A more balanced view can be found from other US antitrust officials: T. J. Muris, *Merger Enforcement in a World of Multiple Arbiters,* prepared Remarks before Brookings Institution Roundtable on Trade and Investment Policy Washington, DC December 21, 2001; C. A. James, *Antitrust In The Early 21st Century: Core Values And Convergence* presented at The Program On Antitrust Policy In The 21st Century sponsored by The DG- Comp at The European Commission & The U.S. Mission to the European Union Brussels, Belgium (May 15, 2002)

[5] Case T-342/99 Airtours v Commission (2002). Re Case No. IV.M1524 Airtours/First Choice (1999).

[6] Case T-310/01 Schneider Electric v Commission (2002); Case T-5/02 Tetra Laval BV v Commission (2002).

[7] COUNCIL REGULATION (EEC) NO 4064/89/EEC (21 December 1989) OJ 1989 L 395, p.1, corrected version in OJ 1990 L 257, p. 13, as most recently amended by Council Regulation(EC) No 1310/97 of 30 June 1997, 1997 L 180, p. 1.

[8] GREEN PAPER ON THE REVIEW OF COUNCIL REGULATION (EEC) No 4064/89 COM(2001) 745/6 Final Brussels, 11.12.2001 <http://europa.eu.int/comm/competition/mergers/review/green_paper/en.pdf>

[9] PROPOSAL FOR A COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (“Merger Regulation” Brussels, 11.12.2002 COM(2002) 711 Final 2002/0296 (CNS); http://www.europa.eu.int/comm/competition/mergers/review/merger_review.pdf.

[10] DRAFT COMMISSION NOTICE ON THE APPRAISAL OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS Brussels, 11.12.2002 COM(2002) http://www.europa.eu.int/comm/competition/mergers/review/final_draft.pdf

IS THE EC MORE INTERVENTIONIST?

It is widely believed that the EC Commission is more interventionist than its US counterparts. Superficially, the evidence gives credence to this claim.[11] Using data for 2000, the EC Commission appears around 10 times more likely to intervene than its US counterparts, and about 9 times as likely to block a merger (Table 1).

Table 1: Comparison of EU and US merger intervention, 2000

	EU	US (1)
Number of notified cases	345	4,749 (2)
Cleared at Phase I with remedies	8.1%	Not possible
Referred to Phase II/Second Request	4.9%	2.1%
of which:		
cleared	27.3%	18.4% (3)
withdrawn	54.5%	25.5% (4)
prohibited	18.2%	2.0% (6)
Notified cases where intervention occurred (7)	12.2%	1.2%

(1) *For fiscal year 1 Oct 1999 to 30 Sept 2000.*

(2) *Adjusted to cases whereSecond Request could have been issued.*

(3) *Second Request not challenged.*

(4) *Includes following: FTC - 9 abandoned after Second Request & 3 abandoned after a preliminary injunction authorised; DoJ - 2 abandoned after DoJ filed a complaint in US District Court & 11 abandoned after parties were informed that the DoJ would file a*

(5) *Includes following: FTC - 18 consent orders & 1 negotiated a consent agreement after a preliminary injunction authorised; DoJ - 18 settled by consent decree after DoJ filed a complaint in US District Court & 16 restructured after parties were informed*

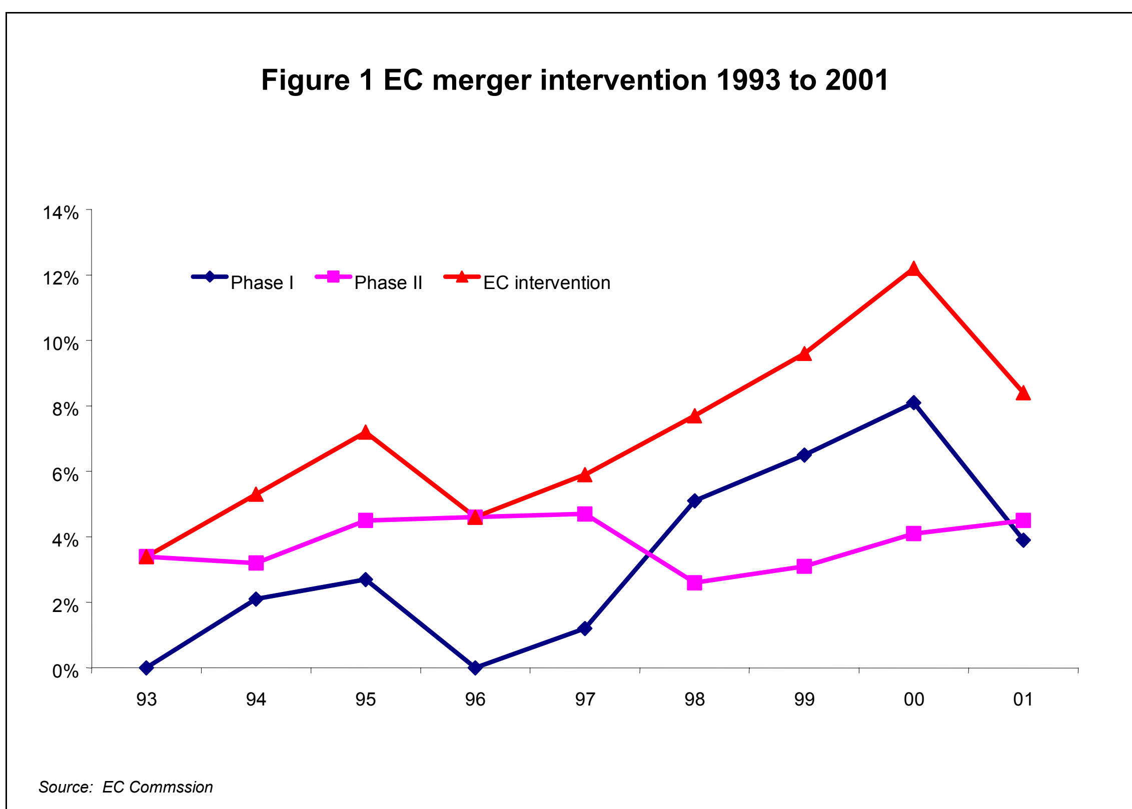
(6) *Includes following: FTC - 1 preliminary injunction authorised and still pending; DoJ - 1 filed a complaint in US District Court, litigated and won.*

(7) *Assumes unrealistically that withdrawn cases not due to antitrust intervention.*

The data also show that intervention has increased over the 1990s. In the early 1990s the EC Commission was intervening in about 4% of all notified mergers and joint ventures, which had risen to twice that figure by the end of the decade. EC merger procedure is a two-phase process: – six weeks Phase I where the Parties file a Form CO and the merger screened; if there are "serious doubts" about the compatibility of the merger with the ECMR, it proceeds to a four-month Phase II

[11] For a now dated analysis of the initial years of the ECMR see D. Neven, R. Nuttall & P. Seabright, MERGER IN DAYLIGHT – THE ECONOMICS AND POLITICS OF EUROPEAN MERGER CONTROL (1993).

investigation.[12] Under the reform of the ECMR enacted on 1st March 1998[13], the EC Commission can accept or impose undertakings or conditions which deal with any competition concerns in lieu of referring the transaction to Phase II.[14] Figure 1 separates out the Phase I and Phase II intervention for the period 1993 to 2001. It shows that intervention at Phase I have been principally responsible for the EC Commission's more interventionist stance in recent years. In the US, the authorities are unable to accept undertakings during the initial 30-day review period.



The above analysis is misleading because the EC thresholds for notification are considerably higher than those under US laws.[15] If data on intervention for

[12] For EU merger statistics see http://www.europa.eu.int/comm/competition/mergers/cases/stats.html.

[13] Regulation (EC) 4064/89 (O.J. L 395 of 30 December 1989, p.1; corrected version O.J. L 257 of 21.9.1990, p.13) as last amended by Regulation (EC) No. 1310/97, O.J. L 180 of 9.7.1997, p. 1; corrigendum in O.J.L 40 of 13.2.1998, p. 17.

[14] This effectively swept away the distinction between concentrative and cooperative joint ventures, and made both subject to the ECMR, and hence the dominance test COMMISSION NOTICE ON THE CONCEPT OF FULL-FUNCTION JOINT VENTURES UNDER COUNCIL REGULATION NO. 4064/89 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS OJ [1998] C6/1; [1998] 4 CMLR 581.

[15] The 1998 revision of Article 1(2) set the thresholds as follows: *"For the purposes of this Regulation, a concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."*

transactions which meet US thresholds are applied to the merger intervention by the EC Commission, the level of intervention appears broadly similar.

Unfortunately there has not been much systematic research on the effectiveness and effects of EC merger controls. The limited amount that does exist paints a mixed picture. The statistical data, such as it is, suggests that the EC Commission is not significantly more interventionist than its US counterparts, but that the level of intervention has increased over the decade. Recent research by Neven and Roller[16] covering the first decade of the ECMR (1990-1999) also does not support the view that the EC Commission has blocked pro-competitive mergers. Using stock market data, Neven and Roller find that there are few instances of Type 1 errors, i.e. where the EC Commission blocks a merger that was pro-competitive; and many more instances of Type II errors, i.e. clearing a merger with anticompetitive effects. This suggests that the bias is the other way.

It must be said that these finding contrast with the impressionistic view and controversy over the enforcement policy of the EC Commission. This suggests that it approach is flawed and misconceived.

US/EC DIFFERENCES IN PERSPECTIVE

It is also the case that notwithstanding the hiatus over GE/Honeywell there has been broad and growing cooperation between EC and US officials. There have over the last decade been few public disagreements between Brussels and Washington. Only two mergers involving US companies have been blocked, MCIWorldCom/Sprint and GE/Honeywell, with the former also blocked in the US. The only other EC decision which has drawn significant criticism from US officials was Boeing/McDonnell Douglas. But, as Timothy Muris, Chairman of the Federal Trade Commission (FTC), has observed, disagreement between antitrust authorities in the US is not uncommon, as it is between the authorities and the Courts.[17] The FTC and Department of Justice (DOJ) both enforce the Clayton Act which covers mergers, and have struggled to achieve consistent interpretations, and the FTC, whose commissioners must decide collectively whether enforcement is warranted, have often had split decisions.

In the last several years EC Commission and US antitrust officials have increased their cooperation, and it has been claimed (at least in Brussels) that the two systems of competition laws were converging.[18] The 1998 adoption of the EC Commission

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[16] D. J. Neven & L-H. Roller, *Discrepancies between markets and regulators: An analysis of the first en years of EU merger control* THE PROS AND CONS OF MERGER CONTROL, Konkurrensverket (Swedish Competition Authority) (2002).

[17] Muris, *Merger Enforcement in a World of Multiple* Arbiters, supra n. 4.op cit

[18] Such as the formation of Global Antitrust Forum in January 2002.

notice on market definition,[19] which was based on the US DOJ/FTC Horizontal Merger Guidelines,[20] was an important step along this road. The increased cooperation was also evident in the handling of a number of transatlantic mergers, culminating in MCI/WorldCom (and the later MCI/WorldCom/Sprint merger) where the EC Commission set the pace even though the merger involved two US corporations. The decisions also marked a clear convergence of antitrust principles, economics and approach to "new economy" mergers.[21]

The EC Commission prior to the CFI decisions referred to above was adamant that there was little practical difference between dominance and the US merger standard of "Substantially Lessening Competition" (SLC). EC Competition Commissioner, Mario Monti was firmly of this view in early 2001:

> "Our rules prohibit mergers that lead to the creation or straightening of a dominant position, while US law prohibits mergers where the effect "may be substantially to lessen competition, or tend to create a monopoly". While you might think that the application of these seemingly different tests would at times lead to divergent outcomes, that has not been our experience. The main reason why we do not see such divergence, in my view, is that both EU and US authorities are applying the same analytical framework when examining the competitive effects likely to result from a proposed merger: We share a common understanding of what the correct micro-economic analysis of these operations should be. "[22]

Toward the end of the same year Charles James, then Assistant Attorney General for Antitrust Division in the US Department of Justice, was equally clear that the differences over GE/Honeywell arose from:

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[19] EC Commission NOTICE ON THE DEFINITION OF THE RELEVANT MARKET FOR THE PURPOSES OF COMMUNITY COMPETITION LAW, OJ C 372/05, 9 December 1997. (Hereinafter Market Definition Notice). http://www.europa.eu.int/comm/competition/antitrust/relevma_en.html.

[20] US Department of Justice/Federal trade Commission, HORIZONTAL MERGER GUIDELINES issued April 2, 1992; revised April 8, 1997; www.usdoj.gov/atr/public/guideliens/hmg

[21] Antitrust authorities on both sides of the Atlantic have now adopted this framework see C. K. Robinson, *Network Effects in Telecommunications Mergers - MCI WorldCom Merger: Protecting the Future of the Internet,* Address to the Practising Law Institute, San Francisco August 23, 1999 (Robinson is Director of Operations & Merger Enforcement, DoJ Antitrust Division); A. D. Melamed, *Network Industries and Antitrust*, Address to the Federalist Society, 10 April, 1999; D. Rubinfeld, *Competition Innovation, and Antitrust Enforcement in Dynamic Network Industries*, Address to the Software Publishers' Association, 24 March, 1998. C. Shapiro, *Antitrust in Network Industries* paper to ALI/ABA Antitrust Intellectual Property Claims in High Technology Markets, San Francisco, 1996. C. G. Veljanovski, *EC Antitrust in the New Economy – Is the European Commission's View of the Network Economy Right?,* 9 EU. COMP. LAW REV. 115 (2001); R. A. Posner, *Antitrust and the New Economy*, 68 ANTITRUST LAW J. 925 (2001).

[22] M. Monti, *EU-US Cooperation in the Control of International Mergers: Recent Examples and Trends*, talk to Institute for International Economics, Washington D.C 30 March 2001 http://www.eurunion.org/new/speech/2001/010330mm2.htm.

> "… a simple, but rather fundamental doctrinal disagreement over the economic purpose and scope of antitrust enforcement. What led the U.S. to clear the transaction – the prospect that it would make the combined firm a more effective competitor – was the very reason the E.U. opposed it. The E.U. believed that a more effective GE would discourage its rivals, prompting disinvestments or exit from the market. In sum, we appear to disagree over the meaning of competition."[23]

James's view was mild in comparison to Deputy Assistant Attorney General William Kolasky who appeared to devote the early part of his tenure at the DOJ attacking the EC Commission. The trans-Atlantic controversy over GE Honeywell was rapidly replaced by a more deadly domestic variety in the form the CFI's decisions referred to above which destroyed the EC Commission's attempt to portray the American attack as overstated. Yet ironically, while the CFI agreed that the EC Commission had got its analysis seriously wrong; it upheld the doctrinal difference which lay at the heart of the GE/Honeywell debate - portfolio effects and leveraging.

Notwithstanding this, there are a number of substantive and procedural differences between US and EC laws.

The first, and most obvious, the different merger standard or test are applied in the two jurisdictions. In the US, and increasingly in other jurisdictions (Australia) and within the EU (UK, Ireland)[24] the "substantially lessening competition" (SLC) test is used. In the EU, and most of its Member States, the test is dominance, or more specifically "creating or enhancing a dominant position." As discussed below this test, which until recently has been confined to single-firm dominance, was never devised for merger analysis, and has the disadvantage of focusing on a firm alleged to be dominant rather than the impact on competition.

Secondly, EU and US antitrust have different objectives. According to senior DOJ officials the "singular objective" of US antitrust law is to protect consumers. While their characterisation of US antitrust is simplistic, there is little doubt that the EC Commission's approach to competitive analysis has a different emphasis at times. This is because EC merger law has no "singular" objective, and some would argue, no clear objective. The competition provisions of the EU Treaty state two objectives – competition and the creation of a common market among the Member States of the EU. The various EC Commission Annual Reports on Competition Policy state a variety of goals. The key concept of "effective competition" (see below) was originally framed in terms of freedom of action. The Commissions XV Annual Report in 1985, states that effective competition "… preserves the freedom and right of

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[23] C. A. James, *Reconciling Divergent Enforcement Policies: Where do we go from here?* Address to Fordham Corporate Law Institute 28th Annual Conference on International Law & Policy, New York, October 25, 2001.

[24] The Enterprise Act 2002 changed UK merger law from a public interest test to SLC. Also UK Department of Trade & Industry, A World Class Competition Regime, Cm 5233 (July 2001).

initiative of the individual economic operators and it fosters the spirit of enterprise. It creates an environment within which European industry can grow and develop in the most efficient manner and at the same time take account of social goals". In subsequent Competition Annual Reports market integration, protection of small and medium sized enterprises, promotion of innovation and promotion of competition have been listed. This explains some, and at times, major differences with other merger laws where the EC Commission has pursued these different objectives.[25] The common market objective itself explains why under EC law there is greater willingness to regard restrictions on or different treatment of competitors in different Member States as violations of antitrust law.

Thirdly, the EC Commission's competition test is unclear. Both EU and US antitrust laws seek to prevent actions or mergers which impede the maintenance of effective competition. It is also common ground between the two jurisdictions that competition is not an end in itself, but the means to a superior goal such as efficiency, consumer welfare or other public interest criteria. But while US antitrust law looks at markets measured against consumer welfare test, the EC Commission looks at the way a dominant firm can harm its competitors. One does not see in EC Commission decisions, official statements, let alone the law, strong consumer welfare language, which would serve as a beacon for a consumer welfare model of antitrust enforcement,[26] as one does in US antitrust law.[27] As James observed in the quotation above, at the heart of the differences between US and EC merger control are different models of competition, and measures of anticompetitive harm. The EC Commission adopts a more structural view of competition where the goal is almost that of creating a level playing field among competitors, and where large firms should not be permitted to gain through merger advantages over their smaller rivals. Looked at through the US lens, it appears that the EC Commission has adopted "discredited" US antitrust doctrines of the 60s and 70s, such as range effects, leveraged dominance, shared monopoly and specifically (as regards Airtours/First Choice) a structural view of oligopolistic dominance (coordinated effects) akin to the concept of "entrenchment" rejected in the US.

Finally, a large proportion of the problems surfacing in the enforcement policy of the EC Commission arise from its lack of empirical rigour and economics input. This, in turn, is a consequence of the absence of any clear burden and standards of proof. As the CFI judgment in Airtours set out in brutal language, the EC Commission's Merger Task Force ignored most of the evidence presented by the parties, and failed

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[25] Neven *et. al.* *"… these objectives are so varied that competition authorities have a very considerable discretion in the weight they give to each objective in any particular case"* D. Neven, P. Panpadropoulous & P. Seabright, TRAWLING FOR MINNOWS – EUROPEAN COMPETITION POLICY AND AGREEMENTS BETWEEN FIRMS 15 (1998).

[26] Although it has to be pointed out that formally Article 82 (b) (*"limiting production, markets or technical developed to the prejudice of consumers")* and in United Brands (*"ultimately the consumer"*) the consumer is the relevant party.

[27] R. H. Bork, THE ANTITRUST PARADOX (1978). Also R. A. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1978).

to properly examine the rest. The loose procedural and evidentiary constraints on the merger process, coupled with the absence of an effective appellate process until recently, has allowed the EC Commission to justify its interventions, and indeed to clear mergers, on the basis of speculative theorising.

THE COMPETITION TEST

A major difference between EC and US merger law is the substantive test triggering competition concerns. Under EC law the competition test is dominance, whereas in the US it is "substantially lessening competition" (SLC). There has as part of the reform consultations been a healthy debate over the difference and attractions of SLC. One camp sees SLC as a superior and economically sound competition test, which will inevitably be used. Others see the position as more complex, arguing that dominance has evolved to a position that it is more or less identical to SLC, and that the any terminological precision that would be gained from moving to SLC is far outweighed by the loss in legal certainty and precedent. The EC Commission's has decided to retain the dominance test but to amend the ECMR to deal with transactions falling short of single-firm dominance but which do not constitute collective dominance as would arise when the facts are similar to the much cited US case of Heinz/Beech-Nut.[28]

Nature of Dominance

Article 2(3) of the ECMR prohibits "a concentration … which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded …". This wording is fairly close to that of the SLC test. It focuses on the extent to which "effective competition … is significantly impeded" by a concentration which "creates or strengthens a dominant position". If dominance is seen as approximating the economist's notion of market power, and effective competition measured in terms of the impact on consumer welfare, one would come close to the SLC standard. This is more or less the EC Commission's position as it has sought to clarify the purpose of EC competition policy in response to the controversy over GE/Honeywell.

The position is, however, not as clear-cut as this statement would suggest.[29] Dominance is not an economic concept, nor is it defined in the ECMR. The standard

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[28] FTC v. H. J. Heinz & Co., D.C. Circuit Docket No. 00-5362 (decided April 27 2001).

[29] "… the concept of a dominant position is only an empty verbal shell until filled with economic meaning" stating that it is akin to market power, and that unilateral effects and coordinated effects map single firm dominance and collective dominance respectively. It is not clear whether this is the case in law and practice, or the authors hope that it should be the case. K-U Kuhn, *Closing Pandora's Box? Joint dominance after the Airtours judgment* in THE PROS AND CONS OF MERGER CONTROL, Konkurrensverket (Swedish Competition Authority) 39, 47 (2002).

definition of dominance is that of the European Court of Justice (ECJ) in United Brands. It defined dominance (under Article 82 of the EU Treaty which covers monopolisation) as:

> "… a position of economic strength enjoyed by the undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers." [30]

This definition adds one crucial element to the definition – the term "ultimately consumers" missing from the ECMR formulation which it pre-dates.

The United Brands definition of dominance and the ECMR formulation of the merger test under Article 2, consist of at least three elements which can be assessed separately (slightly reordered):

"on the relevant market"

A pre-requisite for the determination of dominance is the delineation of a relevant product and geographical markets.[31] This was clearly laid down in Continental Can,[32] and applies to Article 82, and the ECMR. Indeed, the importance of market definition as a basis for EC competition law has expanded significantly in the last decade, and brings it in greater conformity with US practice.[33]

Under EC law a relevant product market consists of products (or services), which are close substitutes in consumers' eyes under conditions of effective competition. The EC Commission's decisional practice, and the case law, uses a multifaceted approach to determine product substitution. The EC Market Definition Notice of 1997 which sets out the (then) principles for market definition states that the relevant "market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use." [34] It continues that the relevant

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[30] Case 27/76 United Brands v Commission [1978] ECR 207, [1978] 1 CMLR 429.

[31] See Office of Fair Trading, MARKET DEFINITION IN UK COMPETITION POLICY - OFT RESEARCH PAPER 1 (1992).

[32] Case 6/72 Continental Can v Commission [1973] ECR 215; [1873] CMLR 199.

[33] These are now pivotal concepts in the application of EC competition law on vertical restraints, R&D agreements, specialisation agreements, and telecommunications regulation. *See* COMMISSION NOTICE - GUIDELINES ON VERTICAL RESTRAINTS, OJ No. C 291/1, 13/10/2000; GUIDELINES ON THE APPLICABILITY OF ARTICLE 81 OF THE EC TREATY TO HORIZONTAL COOPERATION AGREEMENTS, OJ No. C 3/2, 6/1/2001; COMMISSION REGULATION (EC) NO 2659/2000 OF 29 NOVEMBER 2000 ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY TO CATEGORIES OF RESEARCH AND DEVELOPMENT AGREEMENTS, OJ No. L 304/7, 5/12/2000: COMMISSION REGULATION (EC) NO 2658/2000 OF 29 NOVEMBER 2000 ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY TO CATEGORIES OF SPECIALISATION AGREEMENTS, OJ No. L 304/3, 5/12/2000. EC Commission, COMMISSION GUIDELINES ON THE APPLICATION OF EEC COMPETITION RULES IN THE TELECOMMUNICATIONS SECTOR OJ 233, 6 Sept.1991.

[34] MARKET DEFINITION NOTICE, para 7.

"market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."[35]

The publication of the EC Commission Market Definition Notice in 1997, has moved the EC Commission's approach closer to that of the US antitrust authorities. Indeed, the Notice, which is not legally binding, is based on the US DOJ/FTC Horizontal Merger Guidelines.[36]

The EC Market Definition Notice refers to the hypothetical monopolist test (HMT), or as it is termed in the US the SSNIP (Small but Significant and Non-transitory Increase in Price) test to define relevant product and geographical markets. This examines whether a hypothetical monopolist could raise relative prices by 5% to10% above the "prevailing price". This focuses market definition on price competition, and added some rigour to the market definition exercise which had hitherto been based on product characteristics and absolute price differences.

In practice the EC Commission does not routinely apply the HMT. It is viewed as one approach to market definition. Even the EC Market Definition Notice cannot be said to fully embrace the HMT. It is not central to the discussion of the market, although it is the only "test" set out. A cursory review of reported decisions reveals that market definition is rarely a) rigorously and quantitatively analysed; and/or b) focused on whether an undertaking can profitably raise price above the competitive level. Rather, at the market definition stage the principal focus on the informal assessment of exchangeability in use, similarity of characteristics, and absolute prices. That there is no need for the EC Commission to adopt the HMT was affirmed in Airtours, where the European Court rejected the appellant's claim on this point.[37]

While the rigour may be lacking in the EC Commission's decisions, the approach to market definition, and the factors taken into account are similar in EC and US antitrust laws. Also the criticisms of market definition are common to both jurisdictions. The EC Commission is frequently criticised for adopting unduly narrow product and geographical market definitions in order to find a merger incompatible with Community law, or alternatively working back from its conclusions to define a relevant product market. However, since it is inherent that a relevant product market consists of the narrowest products grouping over which the hypothetical monopolist

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[35] MARKET DEFINITION NOTICE, para 8.

[36] US Department of Justice/Federal Trade Commission, HORIZONTAL MERGER GUIDELINES issued April 2, 1992, and revised April 8, 1997. www.usdoj.gov/atr/public/guideliens/hmg. For a review of the operation of the guidelines see DOJ MERGER GUIDELINES SYMPOSIUM (2002) http://www.usdoj.gov/atr/hmerger.htm#papers.

[37] Case T-342/99 Airtours v Commission 20-48 (2002).

can profitably raise price above the competitive price – this is not a surprising criticism. There is no hard evidence that the EC Commission systematically adopts narrower market definitions than those in other antitrust authorities such as the US and Australia[38] and it is a matter that warrants research. What is probably the case is that in judicial systems where the Courts play a central enforcement role the approach to market definition, and the definitions themselves, may often be broader as more "common sense" ideas and evidence of markets are adopted.[39] It is, however, the case that due to the preponderance of Phase I merger decisions, much of the reported market definitions in EC merger decisions have not been based on substantial or rigorous market investigations. This, combined with the EC Commission's tendency to use these as "precedents", could potentially give rise to difficulties, as have several other developments related to new economy mergers (see below).

Where there has been recent criticism, is the alleged narrowness of the EC Commission's geographical market definition, or what could be called the "Nordic" or small country complaint. It has been claimed at the highest political levels, that the EC Commission's approach to geographical market definition is biased against smaller (Nordic) countries following the blocked Volvo-Scania[40] merger and the later (abandoned) merger between the two leading Swedish banks SEB and FSB.[41] However, it would not be surprising given that one of the objectives of EC competition law is to remove barriers to internal trade that the Commission would tend to define markets more narrowly than say US antitrust authorities. Although it should be said that despite the common market, there remains very major structural and institutional differences within Europe which would provide objective justification for narrower geographical market definition than in the US. Notwithstanding this, the Commission has strongly rebuffed this criticism.[42]

[38] For example a recent survey reveals both similar market definitions and equally narrow ones across jurisdictions. M.I. Algie & B. D. Kewley, MARKET DEFINITION - COMPETITION LAW AND PRACTICE (1998).

[39] In Australia the Courts adopt a wider view of market definition in News Ltd v Australian Rugby Football League (1995) 58 FCR 447. For an attack on this position see Gyles J in Australian Rugby Union Ltd v Hospitality Group Pty Ltd [2000] FCA 823; affirmed on appeal Australian Rugby Union Ltd v Hospitality Group Pty Ltd [2001] FCA 1040. See analysis in C. Beaton-Wells & D. K. Round, *Australian Rugby Union Ltd v Hospitality Group Pty Ltd: A Salient Reminder of the Perils Facing Parties in Proving the Market under the Trade Practices Act 1974 (Cth)*, 29 AUST. BUS. LAW REV. 211(2001) and C. G. Veljanovski, *Markets in Professional Sports Hendry & ors v WPSBA and the Importance of Functional Markets*, 10 EU. COMP. LAW REV. 5 (2002).

[40] Case COMP/M.1672 Volvo-Scania (2000).

[41] Case COMP/M.2380 FöreningsSparbanken/SEB. Also EC Commission PRESS RELEASE IP/01/1290, 19/09/2001.

[42] M. Monti, MARKET DEFINITION AS A CORNERSTONE OF EU COMPETITION POLICY, Speech at EU Competition Policy Workshop on Market Definition, Helsinki, 5 October 2001. http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/439|0|RAPID&lg=EN.

"power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers"

This phrase is often taken as the definition of dominance by the Courts, in the decisional practice of the EC Commission, and in the EC Commission's Notices. In Continental Can[43] the Court impliedly accepted the Commission's definition of dominance as based on the economists' concept of control over price, and this is reiterated to some extent in the Commission's Market Definition Notice. In United Brands the court stressed the use of economic power to prevent effective competition by excluding other firms.

The formulation of dominance has been criticised as making little economic sense. [44] No firm can act independently of its competitors or suppliers since ultimately they will have a constraining effect, if only on the extent to which a monopolist can raise price above the competitive level. However, this criticism is weakened by the fact that the phrase upon which it relies is taken out of context. The judicial formulation ties the ability to act independently to an "appreciable extent" that gives the undertaking(s) the ability to "significantly … impede effective competition". Dominance thus not, as claimed, simply the ability to act independently; the judicial formulation properly applied is arguably an effects-based test which looks at the ability of the firm to adversely affect competition on a market or markets.

Dominance under the ECMR differs from (single firm) dominance under Article 82 in several key respects:

- First, under the ECMR, dominance is a forward-looking concept. A merger infringes the ECMR (Article 2) if it "creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded …". This contrasts with dominance under Article 82 (monopolisation) which examines past conduct and whether a firm was dominant. The forward-looking nature of dominance flows naturally out of merger analysis which requires consideration of the likely competitive impact of a proposed merger between two (or more) undertakings.

- Second, it is frequently argued that unlike Article 82, dominance per se constitutes an infringement of the ECMR. This draws on the words that creating or maintaining a dominant position is the "abuse". Under Article 82, dominance is not illegal, only its abuse. The difference between this and Article 82 may be little more than semantic, since a merger involves a structural change in the market, and it is this which the ECMR seeks to control by structural remedies –

[43] Case 6/72 Continental Can v Commission [1973] ECR 215; [1873] CMLR 199.

[44] As Professor Korah has observed: "Given the fluidity of the indications of dominance, it is not easy, especially for jurists, to determined how dominant a firm may be, and both the Commission and Court have failed to make clearly and cogently reasoned decisions." V. Korah, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 77 (6th edn. 1997).

prohibition, divestiture and/or access to gateway monopoly assets. On the other hand, this is only part of the test - dominance is a necessary trigger, as it is for Article 81, but under Article 2(3) the proposed merger must also be shown to adversely affect the maintenance of effective competition (see below).

Another One difference between US and EC law is the way market share statistics are used to trigger competition concerns. Determining dominance in EC competition law is not a mechanistic exercise based on pre-determined market shares. Rather the market share varies with the conditions of competition on the relevant market. Thus in theory, a firm with a 100% market share in a contestable market where entry (and exit) is relatively costless, would not be dominant.[45] In practice, dominance is rarely found under 25% market share (ECMR Recital 15), and is fairly certain above 60%, but is determined on a case-by-case basis taking into account a number of factors which would indicate inadequate competitive constraints on a firm. As a rule of thumb, most practitioners would advise that a proposed merger will be treated as dominant if its market share exceeds 40% of a relevant product market, although other factors will be taken into account such as the relative size of and market shares of the second and third largest firms. . There is an open question here about the interrelation between dominance and the assessment of the merged entity's impact on competition, and market share. To the extent that the market share which triggers a finding of dominance varies, it must (at least on an economic interpretation) be, because market conditions limit a firm with a large market share in a more intensely competitive market. Thus, the distinction between dominance and its impact on effective competition is not clear-cut in law, and certainly not in economics.

The US approach is more specific about the increase in concentration resulting from a merger which will trigger competition concerns. First, the US authorities use the Hirschman Herfindahl Index (HHI) which takes into account the number and relative size of all firms in the market not just the largest. The HHI is not used in EC merger analysis, although it has recently appeared in the EC Commission's notice on horizontal agreements[46] published in 2001, and the draft EC Horizontal Merger Guidelines.

Over the last decade dominance has expanded from single-firm dominance to cover oligopolistic markets ("collective dominance" or "joint dominance"), and the leveraging of a dominant position in one market onto another. These concepts throw the net wider than the focus on the direct impact of the proposed merger on concentration (and unilateral effects); to the impact on the behaviour of all firms in the market (coordinated effects) and the way a dominant entity can affect related markets (leveraging).

[45] Case No. IV/M/042 Alcatel/Telettra (1991) (which would have 80% of Spanish telephone equipment market cleared because monopoly buyer Telefonica was diversifying purchasing policy); Case No. VI/M.222 Mannesmann/Hoesch (1992) (which would have had 90% of German market for gas pipe cleared because EC Directive would allow open tendering and entry of large pipe suppliers).

[46] COMMISSION NOTICE GUIDELINES ON THE APPLICABILITY OF ARTICLE 81 OF THE EC TREATY TO HORIZONTAL COOPERATIVE AGREEMENTS 2001/C3/02 (2001).

The EC concept of collective dominance is designed to deal with situations where a small number of firms increase, or are highly likely to increase the possibility of collusion.[47] In Gencor/Lonhro[48] and Compagnie Maritime Belge[49], collective dominance was defined as a situation where:

- the existence of certain structural links between the undertakings mean that they take the same position vis-à-vis customers and competitors as a single undertaking, and there is no effective competition between them; or

- there is no effective competition between the undertakings and they adopt uniform conduct or a common policy in the relevant market as a result of economic links deriving from market characteristics such as transparency, market concentration and product homogeneity that lead to the ability of the undertakings to anticipate one another's behaviour and the incentive to align their conduct on the market.[50]

The EC Commission's approach to collective dominance has been based on a checklist of factors which can be found in industrial economics texts; such that of Scherer[51] or Posner.[52] Prior to Airtours/First Choice[53], it was widely accepted that "tacit collusion" was the fundamental economic principle behind collective dominance. This was the position in Gencor/Lonrho[54] which the EC Commission seemed to accept.[55] However, in Airtours/First Choice, the EC Commission stated the collective dominance was not just about tacit collusion but that it was "sufficient for oligopolists to act – independently – in ways which reduce competition." That is, it was sufficient to show the mere possibility of collusive or parallel behaviour without showing that there was a real likelihood given market and firm specific conditions.

As the CFI found in Airtours, the EC Commission failed to provide evidence to satisfy the conditions for tacit coordination. Further, and of equally significance, the EC Commission's theory relied ultimately on non-cooperative behaviour. Yet the post-

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[47] *Symposium: Oligopoly* 3 OECD J. COMP. LAW & POLICY, 137-212 (2001).

[48] CaseT-102/96 Gencor/Lonrho [1999] 4 CMLR 971.

[49] Compagnie Maritime Belge v Commission [1996] ECR II-1019.

[50] See Case IV/M.308 Kali+Salz MdK/Treuhand and CaseT-102/96 Gencor/Lonrho [1999] 4 C.M.L.R. 971.

[51] F. M. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (2nd edn, 1980).

[52] R. A. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1978).

[53] Case COMP/M.1524 Airtours/First Choice (19##).

[54] CaseT-102/96 Gencor/Lonrho [1999] 4 CMLR 971.

[55] E.g. *"the question to assess in cases concerned with collective dominance is the likelihood of tacit collusion on the market."* P. Christensen & P. Owen, EC COMPETITION POLICY NEWSLETTER 23 (June 1999).

merger market shares of 32% of Airtours/First Choice, 27% for Thomson and 20% for Thomas Cook, meant that no single firm was dominant. In this setting, the alleged anticompetitive effects of the merger rest on the unilateral ability of the merged entity to raise price by restricting output; a finding which under EC law would have required the EC Commission to find that the merged entity had single-firm dominance.

The Airtours/First Choice provides an example of EC Commission's tendency inferred anti-competitive harm from market structure without the need to establish evidence that in the specific case, significant competitive harm is likely. In this respect, the EC Commission's approach to collective dominance in Airtours/First Choice was similar to that of "shared monopoly" used in the 1970s by the FTC, and subsequently the Department of Justice, against the US petroleum and cereal industries. This adopted a structural approach looking at market structure rather than specific anticompetitive conduct. This approach was abandoned in the US in the face of economic and judicial criticism.

In Airtours, the CFI re-established that collective dominance must be based on "tacit collusion".[56] It clarified the law by clearly stating three conditions which the EC Commission would in future have to establish:

1. "First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether they are adopting a common policy …"

2. "Second, the situation of tacit collusion must be sustainable over them, that is to say, there must be an incentive not to depart from the common policy on the market."

3. Third there must be adequate deterrence to ensure a long term incentive of the members not to depart from the common policy. In summary, tacit collusion must be sustainable, and this means that the alleged common policy can be monitored and effectively policed by its members.

In the consultations over the reform of EC merger controls, considerable debate has been devoted on whether there is an "enforcement gap" in EC merger control. This would arise where a proposed merger did not give rise to single firm dominance or collective dominance, but nonetheless the merged entity had the power to unilaterally raise price above the competitive level in an oligopolistic market. The example used to point to a "gap" is the US Heinz/Beech-Nut[57] baby food transaction where there

[56] In Italian Flat Glass (Case T-68/89 Societa Italiano Vetro v Commission, [1992] ECR II 1403) the Court required economic links between the undertakings in order to find collective dominance such as cross-shareholdings or other legal or contractual links. This altered in Companie Maritime Belge v Commission (395/96 [2000] 3 CMLR 1076) where the European Court widened the doctrine to include economic links and "connecting factors". The ambiguity of the latter phrase has led to considerable uncertainty about which oligopolies could be caught by collective dominance.

[57] FTC v. H. J. Hienz & Co. D.C. Circuit Docket No. 00-5362 (decided April 27, 2001).

was a market leader with 65% of sales and vigorous competition between the second (17%) and third (15%) parties to be second baby food products on the supermarket shelf. Given the second and third largest firms' market shares, it would have been unlikely that their proposed merger would have led to a finding under EC law of single-firm or collective dominance. Thus, it is argued, in oligoplistic markets, dominance does not deal with all mergers which have anticompetitive effects.

Views differ as to the practical significance of the "gap". The EC Merger Green Paper states that "… while interesting as a hypothetical discussion, the [EC] Commission has so far not encountered a situation of this kind".[58] This contrasts with John Vickers' view, Director General of the UK Office of Fair Trading, that "… it cannot be safely assumed that the existing ECMR dominance test covers all anti-competitive mergers of concern." [59] Notwithstanding the EC Commission's view, Airtours appears to be one such fact situation, as was the merger between Lloyds and Abbey National, which was prohibited by the UK Competition Commission but most likely would not have been captured under the ECMR.[60]

At the time of writing, the EC Commission proposed to "plug the gap" by re-drafting the ECMR to include a new Article 1(2):

> "For the purpose of this Regulation, one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition."

At Recital 21 of the proposed re-draft ECMR, it is explained that:

> (21) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, the elimination of important competitive constraints that the merging parties exerted on each other, as well as the reduction of competitive pressure on the remaining competitors, may, particularly in these markets, be detrimental to competition unless these effects would be constrained by the reaction of competitors, customers or consumers. For that purpose, the notion of dominance within the meaning of this Regulation should, therefore, encompass situations in which, because of the oligopolistic structure of the relevant market and the

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[58] EC MERGER GREEN PAPER, para 166.

[59] J. Vickers, *How to reform the EC merger test*? speech to the EC Commission/International Bar Association merger control conference, Brussels 8 Nov. 2002. Vicker's continues "[W]hether or not there is a gap between dominance and SLC tests depends in good part whether, in situations of oligopoly, 'dominance' goes beyond tacit coordination."

[60] ABBEY NATIONAL/LLOYDS, Cm. 5208 (2001).

resulting interdependence of the various undertakings active on that market, one or more undertakings would hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, even without coordination by the members of the oligopoly. In making this appraisal, account should be taken of the specific features of the markets under examination, such as the level of capacity constraints, the degree of product differentiation, or the functioning of the bidding process. Consideration should also be given to, inter alia, the likely reactions of actual and potential competitors, as well as of customers, and any efficiencies brought about by the merger."

However, the draft EC Horizontal Merger Guidelines develops a complex and untidy framework to deal with uncoordinated oligopoly problems. It proposes a three-way classification of dominance: paramount market position (= single firm dominance), uncoordinated dominance (unilateral effects in an oligopolistic market or "the gap") and collective dominance.[61] This seems an unnecessarily cumbersome approach. The terms "paramount market position" and "paramount firm" are new, undefined terms. A more efficient way of dealing with the matter would have simply been to adopt the language of unilateral and coordinated effects (or just SLC).

"enables it to prevent effective competition being maintained"

While the term "effective competition" appears in Article 82, the ECMR, and judicial statements, it is not given prominence, and remarkably is not seen as a critical component of the determination of whether or not there is an infringement. For example, Professor Richard Whish in his text refers to "effective competition" as a useful benchmark found in regulatory areas. In relation to the term as used in the standard judicial definition of dominance he states that "[T]he inclusion of the phrase in the United Brands judgment is to … be regarded as descriptive rather than prescriptive: it may have been inserted because of the application of Article 82 to anti-competitive conduct as well as exploitative behaviour".[62] This is strange given its central role in the standard definition of dominance - United Brands definition of dominance and ECMR refer to hindering the maintenance of effective competition[63] - and the fact that most abuses dealt with under Article 82 are "exclusionary abuses."

The confusion is deepened by a debate over the relationship between dominance and "effective competition" under the ECMR. This centres on whether Article 2 of the ECMR sets out one or two tests. The debate seems to have settled on a relatively

[61] Draft EC MERGER GUIDELINES (2003), para. 11.

[62] R. Whish, COMPETITION LAW, 153 (4th Edn., 2001).

[63] J. Faull & A Nikpay, THE EC LAW OF COMPETITION, paras 3.10-3.24 (1999). Reference is made to ECC COMMISSION, CONCENTRATION OF ENTERPRISES IN THE COMMON MARKET: MEMORANDUM OF THE GOVERNMENTS OF THE MEMBER STATE, 121, n. 8 (1965).

trivial reconciliation that the wording of Articles 2(2) and 2(3) requires the Commission to determine whether the harm to competition is likely to be transitory or permanent. This was the position taken in Aerospatiale-Alenia/de Havilland where it was held that "this dominant position is not merely temporary and will therefore significantly impede effective competition".[64] This seems a trivial reconciliation. It also appears not to be the correct legal interpretation. In Air France, the CFI stated that:

> "… the Commission is bound to declare a concentration compatible … where two conditions are fulfilled, [1] the transaction … should neither create nor strengthen a dominant position and [2] competition … must not be significantly impeded by the creation or strengthening of such position"[65].

The Court continued that: "If therefore, there is no creation or strengthening of a dominant position, the transaction must be authorised, without there being any need to examine the effects of the transaction on effective competition". In Endemol Entertainment[66], the Court appears to confirm that two conditions must be satisfied: "[T]he effect of the concentration would be to strengthen the applicant's dominant position … and effective competition in the market would thus be significantly hindered". The CFI in Schneider removes the doubt: "In addition, even supposing it were established, any dominant position that the merged entity might have must be shown by the [EC Commission's] Decision to constitute a significant impediment to effective competition for the purposes of Article 2(3) …"[67].

This confirms that the merger competition test under the ECMR is a sequential two-part test which requires both that a dominant position be found, and having found a dominant position, that this is highly likely to significantly impede the maintenance of "effective competition". This judicial position appears to have been imperfectly mirrored by the Commission's decisional practice in merger cases, and in the writings of commentators.

A further complication or "gap" is the absence of a definition of the term "effective competition". It is routine in EC competition law texts to have an introductory chapter on economics which list the different theories or definitions of competition. These usually observe that competition can be defined in a number of different ways as 1) rivalry, 2) the absence of constraint, 3) an outcome or condition on the market where individual firms or buyers do not have influence over price, 4) an atomistic market structure,[68] and/or 5) a state of affairs where consumer welfare cannot be further

[64] Case No UV/M.53 (1991) para 72.

[65] Case T-2/93 Air France v. Commission ECR 1994, II-00323, para79; confirmed Case T-290/94 Kaysersberg v Commission- ECR 1997, II-2137 para 184.

[66] Case T-221/95 Endemol v. Commission ECR 1999, 169.

[67] Case T-310/01 Schneider v. Commission (2002). Also see para 349 & 402.

[68] F. M. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, (2nd edn, 1980).

improved.[69] To this should be added the Heyakian/Schumperterian notion of competition as a dynamic discovery process. Some have suggested that, at least historically, a combination the workable competition concept developed in the 1930/40s, and the German approach which takes a more structural and formal approach, with the addition of the political (and economic) objective of creating a single market, underpinning the European approach to competition.[70] Yet it is rare finds in EC antitrust texts, or statements by the EC Commission, is a clear expression to be given to the nature of effective competition.

This has led to the criticism that the EC Commission works with a structural view of competition where harm to competitors is treated as synonymous with harm to competition. The EC Commission is frequently seen to argue that a merger that makes a dominant entity a more effective competitor is likely to have advantages which will weaken its rivals and hence competition. That is a merger that generates advantages, such as a larger product range, greater efficiencies, lower prices, new products; better distribution system, are seen as factors which will entrench or enhance its dominance irrespective of whether, argue the critics any considerations of the fact that these benefit consumers. In a sense the consumer benefits will not be adequate to override the fact that these harm competitors.

It would be an exaggeration to claim that this is the way the EC Commission routinely examines mergers, but there are nonetheless sufficient instances of this type of logic to support the general criticism. This logic came to light in the GE/Honeywell merger.[71] It is seen in the different treatment of loyalty or fidelity rebates in EC and US antitrust law. British Airways use of such rebates to travel agents meeting targets was treated as an abuse by the EC Commission,[72] whereas when Virgin sued BA using the same theory in the US, the claim was rejected.[73] In the US such discounts are seen as benefiting consumers and are rarely successfully challenged as long as they are not predatory, although some commentators regard the law as excessively

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[69] To this can be added more contemporary concepts of competition such as contestability, efficient entry, and the Austrian view of competition as a discovery process. W. J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 Amer. Econ. Rev.1 (1982); W. J. Baumol, J.C. Panzar, & R. D. Willig, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1988); W. A. Brock, *Contestable Markets and the Theory of Industry Structure: A Review Article*, 91 J POLIT. ECON. 1055 (1983).

[70] EC competition law is more multi-purpose than those of many other countries. So it is legitimate of question whether the one-dimensional economic efficiency as no restriction on output can be used as the sole goal of EC competition law. See G. Amato ANTITRUST AND THE BOND OF POWER – THE DILEMMA OF LIBERAL DEMOCRACY IN THE HISTORY OF THE MARKET (1997).

[71] D. S Evans, *The New Trustbusters – Brussels and Washington may Part Ways*, FOREIGN AFFAIRS 14 (2002). Some have argued that the DOJ under the Clinton Administration sought to persuade the US Courts that harm to competitors was equivalent to harm to competition and consumers in the Microsoft and Visa USA, thereby the modify the standard governing monopolisation cases. See H. H. Chang, D. S. Evans & R. Schmalensee, *Has the Consumer Harm Standard Lost its Teeth?* AEI-BROOKINGS JOINT CENTRE FOR REGULATORY STUDIES (2002).

[72] Case No. IV/D-2/34.780 Virgin/British Airways (1999).

[73] Virgin Atlantic Airways LTD v. British Airways PLC, 257 F.3d 256, (2d Cir. 2001).

permissive.[74] Another area where the US and EC laws differ is the test for predation. Under US antitrust law a two-part test must be satisfied: (1) the price must be below an appropriate measure of cost, and (2) there must be a dangerous probability that the alleged predator will be able to recoup its losses through higher prices once its rivals exit the market. The European Court of Justice (ECJ), while accepting the first element of the test, has held that recoupment is not necessary for predation under Article 82. In addition, whereas most U.S. courts have held that the appropriate measure of cost is average variable cost, the ECJ left open the possibility of finding prices above average variable cost but below average total cost predatory if they are part of a plan for eliminating a competitor.[75] This, again, gives a wider scope for a finding of predation and the possibility that it will protect smaller rivals at the expense of consumers.

EC Competition Commissioner Monti has responded to critics by observing that protecting competitors is often equivalent to protecting competition. While it is true that protecting competitors may not be inconsistent with protecting effective competition, the opposite is not the case. Harm to competitors is not an adequate or appropriate competition test since the vigorous competition is designed to harm competitors. Harm to competition can only be evaluated by the effects on allocative efficiency or traditional monopoly concerns that an action or practice will increase prices by reducing output. Thus this response is inadequate. Second, he has argued that: "[T]he goal of competition policy is consumer welfare." [76] While this was seized on by some US antitrust officials in the GE/Honeywell controversy, it went largely unnoticed in Europe where it was recognised as an incorrect statement of law and certainly of EC Commission enforcement practice.

CONGLOMERATE MERGERS AND PORTFOLIO EFFECTS

In GE/Honeywell decision, the US antitrust authorities were particularly incensed by the EC Commission's acceptance and use of "portfolio effects" as a major anti-competitive consequence of the merger. The EC Commission has applied this concept in a number of mergers in the beverage sector - Coca-Cola

[74] *See* W. K. Tom, D. A. Balto, & N. W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L. J. 615 (2000); D. W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal -- Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L. J. 659 (2001).

[75] Case C-62/86 *AKZO v. European Commission* [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215, ECJ.

[76] M. Monti, *The Future for Competition Policy in the European Union (Extracts): Merger control: Issues highlighted in the context of the GE/Honeywell Mer*ger; Antitrust and Financial services: clearing and settlement arrangements speech at Merchant Taylor's Hall London, 9 July 2001. http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN

Enterprises/Amalgamated Beverages GB,[77] Coca-Cola/Carlsberg A/S[78], Guinness/Grand Metropolitan[79].

Under EU law it is an abuse for a firm dominant in one market to use that position to gain a competitive advantage in a neighbouring market, unless the dominant firm can show a legitimate business justification for its conduct.[80] In Tetra Pak II,[81] a firm dominant in one market was found to have abused its dominance in a closely related market where it was not dominant. Applied to mergers, this moves the analysis away from concerns over increased concentration in a defined product and geographical market to the alleged ability of a dominant firm in one market to leverage its market power on to related markets as they apply to mergers with conglomerate and vertical aspects involving potential substitutes and complements. The concerns here are not of the immediate impact on consumer welfare, but the exclusionary or foreclosure effect on rivals which would compete not with the product in which the merged entity is dominant but the one in which it is not (the leverage on market). The Courts have said that this approach should only be applied in exceptional circumstances.

In Guinness/Grand Metropolitan, the EC Commission held that where a merger enhances the range of products which consumers see as “complementary” this may entrench its market.[82] The merged entity would have the ability to leverage its market power in strong brands onto weak brands by in effect tying them together, and as a result “squeeze” competing brands from shelf space. In Guinness/Grand Metropolitan, one of the parties was strong in the provision of gin, while weak in vodka; the other the opposite. As a result, claimed the EC Commission, the merged firm would increase its market power since it would be able to sell the full line of drinks to the same customers (Greek night-clubs). According to the EC Commission the dominant entity would:

> “… have greater flexibility to structure his prices, promotions and discounts. He will have greater potential for tying, and he will be able to realise economies of scale and scope in his sales and marketing activities. Finally, the implicit (or explicit) threat of refusal to supply is more potent”.[83]

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[77] Case No. IV/M.794 Cola Enterprises/Amalgamated Beverages GB, OJ L218 (1997.

[78] Case No. IV/M.833 Coca-Cola/CarlsbergA/S, OJ l145 (1998).

[79] Case No. IV/M.938 Guinnes/Grand Metropolitan, OJ L288 (1998). The merger was approved on the Greek issue subject to the condition to divesting Bacardi distribution in Greece.

[80] Case C-333/94P Tetra Pack Rausing S.A v. Commission [1996]; ECR I-5951 (1996).

[81] Case C-333/94 Tetra Pak v Commission [1996] ECR 1-5951.

[82] OECD SYMPOSIUM ON PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS (2002) web. *Portfolio Effects in Conglomerate Mergers,* 4 OECD J COMP. LAW & POLICY, 59-152 (2002).

[83] Guinness/Grand Metropolitan, para 40.

The EC Commission analysis of portfolio effects consisted of several elements/assumptions:

1. greater flexibility to structure its prices, promotions and discounts;
2. economies of scale and scope in sales and marketing;
3. greater potential for tying; and
4. the threat of refusal to supply becomes stronger.

These factors are not compelling. Factor 1 is not anticompetitive, while factor 2 merely reflects the EC Commission's view that efficiencies arising from mergers are anticompetitive rather than increasing consumers' welfare via lower costs and prices. Factors 3 and 4 could provide grounds for legitimate concerns by tying the sale of weaker products to the purchase of the brand where it had market power. Tying, or "pure bundling"[84] and "full line forcing" are legitimate concerns which however do not always constitute anti-competitive effects.[85]

The same logic was used by the EC Commission in GE/Honeywell and Tetra Leval/Sidel. Both decisions were based on leveraged dominance across two separate relevant product markets giving rise to the possibility of exclusionary behaviour. In GE/Honeywell, the merger brought together products which were complements, for example GE's aero engines and Honeywell's avionics systems. Since the CFI has still to rule on the GE/Honeywell appeal, the focus is on the analysis in Tetra.

Tetra Laval/Sidel involved carton and plastic packaging; Tetra made aseptic carton packaging equipment and consumables, and Sidel was the main producer of PET packaging equipment, in particular the Stretch Blow Moulding (SBM) machines which make plastic packaging. The EC Commission found that there were two separate packaging markets – for carton and PET packaging (plastic). It then defined "sensitive sector" of beverages – milk, juices, tea/coffee based brinks – where in the future, cartons and plastics packaging would be alternatives. On this basis the merger caused future competition concerns on two grounds. First, the elimination of Sidel as a competitor would reduce competitive pressures in the future. Second, the EC Commission alleged that the merged entity would leverage its dominance in cartons onto the SBM machines market by offering customers a good deal on future carton purchases. The merged entity would be above to develop its market position in the SBM machines, and thereby harm and eventually marginalise its rivals.

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[84]Under pure bundling, two or more products are only offered as a bundle and not sold separately. Mixed bundling refers to a situation where the bundle is offered alongside its individual components.

[85] D. W. Carlton & M. Waldman, *The Strategic Use Of Tying To Preserve And Create Market Power In Evolving Industries*, NEBR WORKING PAPER W6831 (1998); M.D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990).

In Tetra Laval the CFI did not deny the existence of such anticompetitive effects, but that the EC Commission had committed a number of "manifest errors of assessment". While it agreed that the merger would create the conditions for potential leveraging of its market power, the EC Commission had failed to identify how Tetra could have done so. Further, the EC Commission could not simply assume that, because Tetra was dominant, that it would engage in practices which abuse its dominance infringing Article 82.

The CFI/EC Commission's acceptance of leveraging and portfolio effects contrasts with the present position in the US, and mirrors that of the 1960/70s. During the conglomerate merger boom in the US (1965-1975), the Supreme Court in FTC v. Procter & Gamble, [86] set out the entrenchment doctrine whereby a merger could be condemned if they strengthened an already dominant firm through greater efficiencies, a broader range of products or financial resources.[87] In response to legal and economic criticisms[88] the 1982 DOJ/FTC Horizontal Merger Guidelines eliminated entrenchment as a basis for blocking a merger; "we did so because we recognised that efficiency and aggressive competition benefits consumers, even if rivals that fail to offer an equally "good deal" suffer loss of sales or market share." [89] The position taken is that even a "dominant firm" should be permitted to "seek the competitive advantages of its broad-based activity -- more efficient production, greater ability to develop complementary products, reduced transactions costs, and so forth" [90] which would ultimately benefit consumers. The U.S. courts have held that it is not unlawful for a firm dominant in one market to use its market power to gain a competitive advantage in neighbouring markets, unless this either protects its

[86] In Procter & Gamble Clorox (the acquired firm) was the leading manufacturer in the "heavily concentrated" household bleach market, with a 49% (and growing) share of national sales and higher shares in some local markets. Procter & Gamble (P&G) was a large, diversified manufacturer of other household products, primarily soaps and detergents, but did not produce bleach. The Supreme Court agreed with the FTC's assessment that the acquisition might substantially lessen competition both because it would eliminate P&G as a potential entrant into the bleach market and because "the 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." In this regard, the Court focused on the importance of advertising as "the major competitive weapon" in the bleach market. According to the Court, P&G had a larger budget than Clorox and could use it to defeat "the short term threat of a new entrant"; it could also "use its volume discounts to advantage in advertising Clorox". The Court was concerned, therefore, that the acquisition might lessen competition because new entrants - whether new firms or small firms expanding geographically - would be "much more reluctant to face the giant Procter than . . . the smaller Clorox." Id

[87] *See, e.g.,* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 70 (10th Cir. 1972); Allis-Chalmers Mfg. Co. v. White Consol. Ind., 414 F.2d 506, 578 (3d Cir. 1969); General Foods v. FTC, 386 F.2d 936, 943-46 (3d Cir. 1967).

[88] By the mid-1970s, the courts also seemed to have abandoned this theory. See Emhart Corp. v. USM Corp., 527 F.2d 177 (1st Cir. 1975); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir. 1974).

[89] idem 2.

[90] Berkley Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

existing monopoly or to create a dangerous probability of gaining a monopoly in the adjacent market.[91]

It is therefore not surprising, returning to GE/Honeywell, that EC Commission's decision met with strong criticism form US antitrust authorities,[92] and EC antitrust practioneers alike.[93] The DOJ has stated that:

> "In summary, we found no factual support for any of the key elements of the range effects theories of competitive harm with respect to the GE/Honeywell merger. To the contrary, we concluded that to the extent those theories were based on the argument that the merged firm would have the ability and incentive to offer customers lower prices and better products, that meant the merger should benefit customers both directly -- through the lower prices and better products offered by the merged firm -- and indirectly -- by inducing rivals to respond with their own lower prices and product improvements. That, in our view, was a reason to welcome the merger, not condemn it." [94]

It went on to comment, foreshadowing the CFI's assessment in Tetra Laval, that "without a high standard of proof, range effects theory runs the risk of becoming an ill-defined, catch-all theory that allows antitrust regulators to challenge virtually any merger on the basis of vague fears of 'dominance'".

DOMINANCE BEYOND MARKETS

One troubling area is the EC Commission's tendency to see product innovation arising from a proposed merger defining a narrow market and a presumption of dominance. This is best illustrated, to the EC Commission's approach in Vodafone AirTouch/Mannesmann. [95] The proposed merger would (and did) create the largest pan-European mobile footprint. With this came the prospect of a seamless pan-European mobile service instead of one based on international roaming agreements between separately owned national networks. The EC Commission's concern arose from the large expansion of Vodafone's geographic footprint and customer base, and the perceived way this would be "leveraged" to create a dominant position in the

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[91] *See* ABA SECTION OF ANTITRUST LAW, I ANTITRUST DEVELOPMENTS 282-85 (4th ed. 1997).

[92] See n. 3 above.

[93] A. Burnside, *GE, Honey, I sunk the Merger*, 23 EU COMP LAW REV. 107 (2002); M. Pflanz & C. Caffara, *The Economics of GE/Honeywell,* 23 EU. COMP. LAW REV. 115 (2002). Cf D. Giotakos, I. Petit, G. Garnier & P. De Luyck, *General Electric/Honeywell — An insight into the Commission's investigation and decision,* No. 3 COMP. POLICY NEWSLETTER 5 (2001).

[94] DOJ, *Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers. Range Effects: The United States Perspective*, OECD SYMPOSIUM ON PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS 23 (2002).

[95] Case No. COMP/M.1795 Vodafone AirTouch/Mannesmann (2000).

provision of a specific new "niche" service defined as a "seamless pan-European mobile service to corporate customers". The EC Commission argued that Vodafone would secure a first mover advantage which other operators could not replicate, and that it would thereby become the dominant (maybe even the only) seamless pan-European mobile platform, thus raising the spectre of an "essential facility". The EC Commission concluded that:

> "The merged entity would be the only mobile operator able to capture future growth through new customers, because new customers would be attracted by the services offered by Vodafone AirTouch/Mannesmann on its own network. Given their inability to replicate the new entity's network, competitors will have at best, i.e. if they are allowed access to Vodafone's network at all, significant costs and performance/quality disadvantages given its dependency on Vodafone AirTouch/Mannesmann for instance on roaming agreements in order to offer "equivalent" pan-European mobile services. This situation is likely to entrench the merged entity into a dominant position on the emerging pan-European market for international mobile customers for the foreseeable future because customers of other operators would generally prefer the merged entity to other mobile operators given its unrivalled possibility to provide advanced seamless services across Europe." [96]

There are a number of unsupported leaps in the EC Commission's reasoning. First, Vodafone did not have a dominant position in most national mobile markets after the required divestiture of Orange. Indeed in most national markets other mobile operators were larger, and sometimes dominant with market shares in excess of 40%. Second, the EC Commission defined the relevant geographical markets as national, so there was no relevant pan-European market. Third, the service which was alleged to be the relevant product market did not at the time of the merger exist. As a result the merged entity did not create or enhance a dominant position in any existing geographical market, nor did it have a dominant position in any established relevant product market. Rather, what troubled the EC Commission was the merged entity's possible first mover advantage and possible introduction of an innovative product over a European geographical footprint.

The EC Commission's subsequent decision in Vodafone AirTouch Mannesmann/Vivendi/Canal+[97] is even more difficult to reconcile with standard competitive analysis. This was a 50-50 joint venture to develop a branded horizontal multi-access Internet portal (Vizzavi) across Europe which would provide customers with a seamless range of web-based interactive services. Vodafone was to supply the mobile service in 10 EU Member States; Vivendi the content. There were no increased concentration, no horizontal market concerns, and no finding that Vodafone was dominant in any relevant market. The EC Commission's concern was

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[96] Vodafone AirTouch/Mannesmann, para 45.

[97] Case No. COMP/JV.48 Vodafone/Vivendi/Canal+ (2000).

that Vodafone's size combined with Vivendi's content could lead "to the creation or strengthening of a dominant position in an emerging Pan-European market for WAP-based mobile Internet access" [98] by leveraging its large customer base in national markets for mobile telephony into the markets for mobile Internet access. Similar arguments were used to justify concerns over the market for horizontal portals, although the Commission conceded that "the Parties individually do not at present enjoy significant market share on the horizontal portals market". However, it argued Vodafone and Vivendi/Canal+ may be able to extend their position of dominance in pay TV and "market power" (but not dominance) in mobiles into national markets for horizontal portals. Moreover, the Commission found that the joint venture might lead to or strengthen a "dominant position" in the "WAP-roaming based pan-European portal market using ubiquitous pan-European mobile telecommunications services" (para 80); a market that did not yet exist, and as it turned out was a failure.

What is remarkable about these decisions is the way the EC Commission has treated innovation as a competition problem and the willingness to defined markets and dominance in emerging markets, and not as one would expect on the leveraging of dominance. The decisions also further expand the dominance concept – creating a notion of future (or futuristic) dominance; that a merged entity which does not have a dominant position in an existing market, can nonetheless be found prospectively dominant in a market which the merger is predicted to create but which is at the time of the merger non-existent.

PROCEDURAL ISSUES

In Airtours, and its subsequent annulments, the most scathing and damning criticism was reserved for the failure of the EC Commission to undertake properly analysis and satisfy the evidentiary standards required in law. The CFI found that evidence supporting the EC Commission's decision was absent and misconstrued, its assessments of the likely impact of the proposed merger based on implausible speculations, and in Schneider that the EC Commission had breached natural justice by failing to give the parties to the merger the opportunity to respond to new allegations.

Role of Economics

The core criticism made by the CFI concerned the soundness of the EC Commission's analysis, and absence of economic evidence. It had simply failed to establish either a convincing justification for its decisions, either through economic analysis or economic evidence. The absence of credible economic analysis in the decisions is paradoxical given the elite nature of the Merger Task Force, its pioneering use of economics, and the fact that the EC Competition Commissioner (Mario Monti) is an economist, albeit not an industrial economist. In contrast, the

[98] Vodafone AirTouch/Mannesmann, para. 68.

economics and factual analysis undertaken by the US authorities, both in its scope and depth is considerable. The FTC alone has 50 economists and its chief economist is an academic economist of the highest standing. Indeed the ascendancy of economics in the US has been such that Judge Posner in the second edition of his treatise Antitrust Law dropped the subtitle "An Economic Perspective" because, he argued, it is now settled that US antitrust is based on an economic approach.[99]

The judicial onslaught against the EC Commission has yielded positive reforms. There has been general agreement both from the EC Commission and the EC antitrust bar, that EC merger control needs to draw on better economics, and that economic analysis should be central. As a result, the EC Commission will appoint a Chief Economist based on the US model of an academic economist, seconded for a maximum of three years responsible for economists spread across the competition directorates divisions directly under the Director General (currently Philip Lowe). It has, as discussed above, published draft EC Horizontal Merger Guidelines for the first time to provide greater clarity to and consistency in its decisions.

Standard of Proof

The CFI found that the EC Commission had adopted unacceptably low evidentiary standards. It principle flaw was the willingness to establish an adverse outcome of a merger simply by reference to its theoretical possibility, and which was selectively and inadequately supported by facts. The common theme running through the CFI's three merger annulments, was that the EC Commission committed a manifest error, and thus failed to satisfy the requisite legal standard of proof.

The difficulty is that while the CFI has stated what is unacceptable, it has provide clear guidance on the requisite legal standard. Obviously it is considerably higher than has hitherto been the case; and all agree that it will have to be based on sound economic analysis and evidence. But short of substituting the CFI's assessment of economics and the facts for the EC Commission's each time, there is little guidance in the judgments, and a danger that further litigation will be needed to clarify the contours of the evidentiary standards that the EC Commission must satisfy.

One commentator has suggested, reading between the lines of Airtours, that the Court ruling requires that the EC Commission satisfy the following requirements.[100] Merger analysis is difficult and inherently speculative as it must assess the likely impact of the proposed merger. Nonetheless the EC Commission must demonstrate a high level of certainty, a "preuve solide", before acting against a merger. This must be based on a detailed assessment of the evidence and existing market realities.

[99] R. A. Posner, ANTITRUST LAW (2nd Edn., 2001).

[100] A. Burnside, *Preuve Solide: The CFI Raises the Bar*, IN COMPETITION 1 (Sept. 2002).

Having done this task correctly, it will be allowed discretion to assess the future which must be based on sound economics and on the assumption that business will not willingly infringe antitrust law.

One area where the CFI has overshot the mark is on the interaction between merger and antitrust rules. In Tetra Laval, the CFI held that the existence of antitrust law, and commitments given by the parties that they would not engage in anticompetitive actions, should have a persuasive effect on the EC Commission's reasoning. Indeed, it made the bolder claim that the EC Commission should have only taken into account conduct "which would, at least probably not been illegal". To quote:

> "In this regard, it must be stated that, although the [EC Merger] Regulation provides for the prohibition of a merger creating or strengthening a dominant position which has significant anti-competitive effects, these conditions do not require it to be demonstrated that the merged entity will, as a result of the merger, engage in abusive, and consequently unlawful, conduct. Although it cannot therefore be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers. Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets (Recital 359), the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue." [101]

The difficulty with the CFI's position is that taken literally, it vitiates the need for merger control. If the proposition is the EC Commission must assume that the merged entity will not act in contravention of antitrust (or regulatory) rules, then this would result in the clearance of anticompetitive mergers. It will always be open to the parties to argue that while the merger increases market power, this is adequately dealt with ex post by antitrust rules and remedies. The problem here is that merger law is an ex ante system of control designed to ensure competitive market structures and avoid the need for behavioural antitrust rules. The EC Commission has made clear that behavourial commitments are not generally suitable for this purpose, and

[101] Tetra Laval v Commission, para 159.

that its first preference is for structural remedies.[102] At the time of writing, the EC Commission had announced that it would appeal this part of the CFI's decision in Tetra Laval.

The Organisation of Enforcement

The EC Commission is an administrative body which acts as prosecutor, judge and jury with few procedural safeguards for the parties. The US system differs in that while administrative bodies play a major role, it is the Courts which ultimately enforce the law. This independent scrutiny acts as a powerful constraint on the exercise of the agencies' powers, and puts considerable pressure on them to "do their homework" to avoid litigation and reversals of their decisions.

The EC Commission has been criticised for its reluctance for proposing an independent review process of its merger decision, which many feel will perpetuate the existing procedural flaws and offer no guarantee of independence. However, with the increased judicial "activisim" of the European Courts together with their ability to undertake "merits reviews", this criticism is now much weaker. Further, the EC Commission is a relatively open body, where the parties have access to the file, negotiations can take place during Phase I, and importantly the EC Commission gives reasons for its decisions. This compares favourably with the US position where decisions provide terse descriptions of the reasons for a decision, the file is not open and the parties cannot negotiate with the antitrust authorities.

CONCLUDING REMARKS

EC merger law is at a critical point in its history. While the ECMR has even these difficult times been hailed as a major achievement in the development of merger control in Europe, it nonetheless has developed doctrinal and administrative flaws which require, and are recognised as requiring, remedial action. The present reforms have been spurred by the adverse assessments of the modus operandi and decisionmaking of the EC Commission rather than any fundamental dispute over antitrust principles or doctrine apart from the clarification of the requirements of collective dominance. This is in sharp contrast to the issue which appear to have divided the EC Commission and US authorities and commentators over the GE/Honeywell decision. The CFI's acceptance of "portfolio effects" and leveraging, and the EC Commission's refusal to adopt SLC, show that on antitrust doctrine it is business as usual. Whether the proposed patching up of dominance under the new Merger Regulation will be effective is an open question and made more problematic as some Member States move to a SLC standard under their national laws.

[102] COMMISSION NOTICE OM REMEDIES ACCEPTABLE UNDER COUNCIL REGULATION (EEC) NO 4064/89 UNDER COMMISSION REGULATION (EC) NO 447/98, OJ C68, 2.3.2001, para 8.