Legal Backgrounder

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U.S. AND EUROPEAN MERGER POLICIES MOVE TOWARDS CONVERGENCE

by

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The collapse of the proposed merger between General Electric and Honeywell last year prompted plenty of discussion about the differences between the European Union (EU) and the United States systems when it comes to competition analysis. Some of this discourse was perhaps overstated — particularly where it sought to create the impression that European antitrust authorities were intentionally discriminating against American businesses — as well as overly pessimistic. But for the most part it has positively focused attention on the need for greater antitrust convergence.

Notwithstanding the GE/Honeywell deal, there is already an enormous amount of cooperation between American and European competition authorities (A note on terms: in the United States the term "antitrust" is used to refer to all matters relating to monopoly, mergers and restraints of trade, whereas in Europe and elsewhere "competition" is the catch all phrase, while antitrust refers only to restrictive trade agreements.) The U.S. has entered into numerous bilateral cooperation agreements with the EU, and the Organization for Economic Cooperation and Development ("OECD") has been issuing recommendations for antitrust cooperation ever since the 1960s.

But cooperation alone is insufficient, as the GE/Honeywell case makes clear. Officials on both sides of the Atlantic have explained that there was, in fact, extensive cooperation in that case. And this underscores GE/Honeywell's significance. If there was so much cooperation, with both American and European officials "analyzing identical product and geographic markets and having access to the same facts,"Assistant Attorney General Charles A. James, Address before the OECD Global Forum on Competition (Oct. 17, 2001) (available at usdoj.gov), how could they come to such contradictory conclusions?

The answer is that although there is much similarity between the merger control regulations in Europe and the United States, important substantive and procedural differences also exist, as well as perhaps some conflicting underlying assumptions. These differences cannot and should not be brushed under the rug.

This LEGAL BACKGROUNDER will focus primarily on merger control, which is simultaneously the area of antitrust where cooperation is the most developed and the area where convergence is most essential, since "[v]irtually any large transaction involving international business is likely to be subject to review in both the U.S. and under the European Merger Regulation." Assistant Attorney General Charles A. James,

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Address before the Canadian Bar Association (Sep. 21, 2001) (available at usdoj.gov). It will examine some of the key differences between the two jurisdictions, explore the reasons for some of those differences, and review recent efforts to bridge the gaps. It will also discuss measures being taken on a more global scope which may eventually lead to greater cooperation and convergence among the rapidly increasing number of nations that have adopted some form of competition law.

The Differences. Officials in the EU and the U.S. have stressed the similarities between the two regimes. In general, however, European officials have to a greater degree sought to downplay the differences, while American officials have emphasized the significance of the divisions.

The major substantive difference between the two jurisdictions is that the European Union's merger regulation prohibits mergers that may "create or strengthen a dominant position," whereas United States law forbids mergers that may "substantially lessen competition." In practical terms, this tends to manifest itself in a greater American emphasis on protecting the competitive process without impeding efficiencies, and a greater European emphasis on protecting competitors. The dichotomy becomes more acute in the context of conglomerate mergers like GE/Honeywell than in more traditional vertical and horizontal combinations, where the consensus is greater. For the EU, efficiencies from a merger make it harder for competitors, which constitutes a "harm" even though consumers benefit.[1]

It is this disagreement that many believe drove the European Commission's decision to disapprove the GE/Honeywell merger. As Assistant Attorney General James has noted, the Commission "focused on how the merger would affect competitors . . . . It is essential that we not minimize the significance of this difference." Address before the Canadian Bar Association (Sep. 21, 2001). James argues that the purpose of antitrust "is not to protect business from the working of the market; it is to protect the public from failure of the market." Address before the OECD Global Forum on Competition (Oct. 17, 2001).

American antitrust officials contend that competition is not the goal; rather it is a means to achieving greater efficiency, which, according to Deputy Assistant Attorney General William Kolasky, should be the "ultimate goal." Address before George Mason University Symposium (Nov. 9, 2001) (available at usdoj.gov). They criticize the EU's "portfolio effects" or "range effects" analysis, which they insist will block pro-competitive mergers and cause others to never be attempted — to the detriment of consumers. Although it has various meanings, "range effects" is the theory that merged entities will engage in "mixed bundling" by packaging their respective products and selling them at discounted prices. *Id*. The U.S. Justice Department argues that ". . . 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.'" *Range Effects: The United States Perspective*, DOJ Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers (submitted Nov. 12, 2001). Assistant Attorney General James considers the "portfolio effects" analysis "antithetical to the goals of antitrust enforcement." Address before the OECD Global Forum on Competition (Oct. 17, 2001).

By contrast, European authorities believe that they take a more long-term perspective than their American counterparts. In the words of competition Commissioner Mario Monti, efficiencies must involve "... long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, and which cannot be achieved by less restrictive means and which reasonably will be passed on to the consumer on a permanent basis . . . ." Address before General Counsel Roundtable American Bar Association (Nov. 14, 2001). He says that there should be no

[1]European governments have, in many instances, refused to permit discounting because, even though discounting benefits consumers, it harms competitors.

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presumption that conglomerate mergers "generally and automatically" generate such efficiencies. *Id.*

In other words, while EU officials bristle at the assertion that they care little about efficiency, it seems safe to say that they view claims of efficiency with a healthy degree of skepticism.

This divergence on efficiency is attributable to more than simply different statutory language. Institutional and procedural differences are at work as well. Deputy Assistant Attorney General Kolasky has suggested that part of the explanation may lie in the fact that the United States has a larger professional staff (including economists) integrated into the process and also possesses greater investigatory tools. Address before George Mason University Symposium (Nov. 9, 2001).

Many also point to the different roles played by the courts in the two jurisdictions. The EU Commission possesses what is essentially final decision-making authority to block a proposed merger, whereas the Justice Department or Federal Trade Commission would need to bring a case before a court. (Consequently, American officials tend to view the judiciary's role in Europe as insufficient.)

Moving Toward Convergence. As this paper has demonstrated above, key differences exist between U.S. and EU merger law. There appears to be a strong recognition on both sides of the ocean, however, that greater convergence is essential. Nearly everyone recognizes that a situation where significant differences exist between jurisdictions is untenable. For one thing, if EU and U.S. competition agencies are reaching completely contrary results on cases, that can only serve to undermine confidence in the antitrust laws and weaken ongoing efforts to export antitrust ideas (and the free market economy principles they support) to other parts of the world. Second, it will also impose enormous transactional costs to the detriment of the global economy. As Deputy Assistant Attorney General Kolasky explained:

> "[T]here are serious externalities associated with one jurisdiction blocking a merger on the basis of theories that other jurisdictions believe risk sacrificing important efficiencies to prevent speculative future harm to competition" *Id.*

Thus, substantial steps toward greater convergence are already underway. Competition Commissioner Monti says there is "a silent process of convergence in competition law" that has intensified in recent years. Address before General Counsel Roundtable American Bar Association (Nov. 14, 2001).

The European Commission has taken steps to move closer to the U.S. in terms of investigative tools, including the ability to compel production of documents. Likewise, it has begun to embrace the "failing firm" defense that exists in the U.S., which allows a merger to proceed when the acquired company would otherwise go out of business. *Id.*

On December 11, 2001, the Commission released a "Green Paper," which suggested a willingness to consider accepting the U.S. "substantial lessening of competition" test. (The Green Paper can be found at www.europa.eu.int.). Adoption of this test, according to Commissioner Monti, ". . . could prevent rifts between leading antitrust officials . . . in the U.S. and EU." *EC Review of Current Rules Would Allow Companies More Time to Remove Obstacles*, ANTITRUST & TRADE REG. DAILY (BNA), Dec. 12, 2001. The Green Paper also indicated a willingness to adopt so-called "stop the clock" procedures, which in certain circumstances would give parties the right to request a short and finite extension of time, during which "identified competition concerns" and proposed remedies could be more fully explored. Green Paper at 46-50. The Commission has been considering comments submitted in response to the Green Paper, and is expected to propose amendments to EU merger regulations later this year. For their part, U.S. authorities have initiated efforts to enable the merger approval process to move forward in a more predictable and

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timely manner. Unlike in the U.S., the EU merger approval process adheres to strict deadlines.

These steps represent significant progress toward convergence, but they should not disguise the fact that some of the differences between the EU and U.S. run deeper than variations in procedure or even statutory language. Indeed, the statutory language is actually quite similar. The EU's dominant position test embraces the American substantial lessenings of competition framework, and the American test defines "substantial lessening of competition" as "creating or enhancing market power." Deputy Assistant Attorney General William J. Kolasky Address before George Mason University Symposium (Nov. 9, 2001).

It may well be that there are more intrinsic disagreements, which will be harder to resolve. Deputy Assistant Attorney General Kolasky has speculated that the two jurisdictions ". . . may have a fundamentally different view about the comparative ability of markets versus government regulators to get it right," and he notes that European authorities may also ". . . simply be uncomfortable with our emphasis on efficiency and our unwillingness to cut competitors any slack." *Id.*

Global Convergence. Efforts at convergence extend beyond the bilateral relationship between the U.S. and the EU. As more countries have moved to embrace free market economies and deregulation, a massive growth has occurred in the number of competition laws and agencies. More than sixty jurisdictions now have some form of a merger control regime, with more on the way. Convergence has become a global concern.

With that goal in mind, the International Competition Networks ("ICN") has been set up to ". . . provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement." DOJ press release, Oct. 25, 2001 (available at usdoj.gov). Aside from working toward convergence in industrial countries (focusing initially on the multi-jurisdictional merger control process), ICN will work to instill a "competition culture" in developing counties, many of which have only recently transitioned into free market economies. ICN has received strong backing from the United States. U.S. Antitrust Chief James has made ICN a "personal priority" and noted that it will be "all antitrust, all the time." Address before the Canadian Bar Association (Sep. 21, 2001) (available at usdoj.gov).

Conclusion. The GE/Honeywell case left little doubt that there are real differences between the way U.S. antitrust officials look at mergers and the way EU competition officials do so. But ultimately, these diverging views may turn out to have been a blessing in disguise. They have led to a bilateral consensus that although perfect convergence will never be achieved, divergent outcomes need to be avoided as much as possible. In that regard, it has underscored the imperative of creating greater harmony between the EU and the U.S.

The momentum for antitrust convergence is building, but much more needs to be done.

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