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# AN INTERNATIONAL ANTITRUST DILEMMA: AN ANALYSIS OF THE INTERACTION OF ANTITRUST LAWS IN THE UNITED STATES AND THE EUROPEAN UNION

SANDRA FERSON YOUNG\*

*"The successful competitor, having been urged to compete, must not be turned upon when he wins."*<sup>1</sup>

## I. INTRODUCTION

Businesses exist to make money. The current legal system of subjecting international companies to multiple and conflicting antitrust regulations imposes unnecessary costs that can obstruct and prevent mergers.<sup>2</sup> This multi-jurisdictional approval requirement may impose transaction costs, such as legal fees and several different sets of concessions, which make a marginally possible merger no longer attractive.<sup>3</sup> In addition, a pre-existing

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1. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

2. See Jaret Seiberg, *Global Antitrust Enforcement?*, NAT'L L.J., Nov. 6, 2000, at B1 (noting that when America Online purchased Time Warner, Inc., there were sixty different pre-merger notifications given that required the companies to consider more than ninety countries' antitrust laws). See also Neal R. Stoll & Shepard Goldfein, *A Tale of Two Regulators*, N.Y. L.J., July 17, 2001, at 3 (stating that when General Electric Co. agreed to acquire Honeywell International, Inc., the companies filed over 100 notifications with national and regional competition authorities).

3. See generally Kathleen Luz, Note, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System*, 32 GEO. WASH. J. INT'L L. & ECON. 155, 155 (1999) (providing a thorough description of the Boeing-McDonnell Douglas merger and the negotiations leading to its approval). The Boeing-McDonnell Douglas merger is another example of large companies needing merger approval from several jurisdictions. *Id.* at 155. The U.S. had approved the merger but the European Commission initially decided to reject it and impose fines on the companies if they continued. *Id.* After Boeing made several concessions, the

company facing antitrust issues in one jurisdiction will have to defend in another jurisdiction if both jurisdictions are investigating the same issue.<sup>4</sup> Defending on both sides of the Atlantic creates inefficiencies, in both time and money, that cannot be justified. The legal system needs to address this business problem faced by many global companies.

This comment compares the United States' (U.S.) and the European Union's (E.U.)<sup>5</sup> systems of antitrust regulation using the failed General Electric (G.E.)-Honeywell merger as an example. Part I-A presents an overview of the G.E.-Honeywell merger. Part I-B examines U.S. antitrust laws and regulations. Part I-C explores E.U. competition law.<sup>6</sup> Part II delves into how the U.S. and E.U. laws interact. Part II-A surveys U.S. decisions on extraterritorial application of antitrust law. Part II-B reviews E.U. decisions on the same issue. Part II-C explains the agreements that the U.S. and E.U. have entered into concerning antitrust law. Finally, Part III proposes the creation of a single global forum where all companies operating on an international basis can present and resolve their antitrust issues, thereby correcting the many inefficiencies of the present multi-jurisdictional approval system.

#### A. A Case Study: The General Electric-Honeywell Merger

The G.E.-Honeywell case is a recent illustration of the problems international companies face because they are subject to the multiple and conflicting antitrust laws of many nations. On October 23, 2000, G.E.'s Chief Executive Officer, Jack Welch,<sup>7</sup>

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European Commission finally approved the merger. *Id.*

4. See Laura E. Keegan, Comment, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft Corp. Window*, 2 J. INT'L LEGAL STUD. 149, 167-68 (1996) (providing a detailed analysis of Microsoft antitrust cases in both the U.S. and the E.U.). Microsoft is one such company that has had to contend with multiple regulatory agencies examining the company's antitrust activities. *Id.* at 168. The U.S. Department of Justice was investigating anti-competitive practices while the European Commission was also investigating a complaint. *Id.*

5. Basically, two major treaties account for the creation of the E.U.; the 1957 Treaty of Rome and the Single European Act of 1986. Carolita L. Oliveros, *International Distribution Issues: Overview of Relevant International Trade Laws*, COURSE NUMBER SD62 (A.L.I.-A.B.A. Course of Study Materials, 1999). The Treaty of Rome was renamed the Treaty Establishing the European Community [hereinafter "E.E.C. Treaty"] in 1993. *Id.* The Single European Act of 1986 became effective in July of 1987 and is a set of amendments to the Treaty of Rome. *Id.*

6. The E.U. refers to their antitrust law as competition law. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923, 938 (1996).

7. Jack Welch was the chief executive officer (CEO) of G.E. at the time the acquisition was announced. *The Honey Monster*, THE LAW, July 23, 2001, at 24. He had obtained celebrity status as a CEO and had even been referred to

announced his company's acquisition of Honeywell International.<sup>8</sup> Honeywell International was formed when Honeywell, Inc. merged with Allied Signal.<sup>9</sup> The all-stock deal was valued at approximately \$45 billion.<sup>10</sup> Just days before the G.E.-Honeywell merger was announced, Honeywell had considered merging with United Technologies in a deal valued at \$40.3 billion.<sup>11</sup> However, once G.E. entered into negotiations with Honeywell, United Technologies withdrew their offer because they did not want to be part of a bidding war.<sup>12</sup> Analysts believed G.E. and Honeywell were a good fit, both for their product mix and corporate cultures.<sup>13</sup> At the time the acquisition was announced, Jack Welch did not foresee any problems obtaining regulatory approval.<sup>14</sup> In addition to getting approval from the Department of Justice in the U.S., the merger was subject to review and approval by the European

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as "iconic." *Id.* As part of the deal with Honeywell, Jack Welch agreed to delay his planned April 2001 retirement and remain as CEO until the end of 2001. Claudia H. Deutsch, *Within G.E.'s Vocabulary, The Honeywell Deal Scans*, N.Y. TIMES, Oct. 24, 2000, at C4. Jack Welch is a "great leader" and has a "legacy as corporate America's most-admired manager". Andrew R. Sorkin, *Failure to Acquire Honeywell is Sour Finish for G.E. Chief*, N.Y. TIMES, July 3, 2001, at A1. Jack Welch was the youngest CEO ever at G.E. when in 1981 he became CEO at age forty-four. *Id.* He focused on areas where the company could be number one or two in the market and for those areas that could not, he would either fix them, sell them, or close them. *Id.*

8. Andrew R. Sorkin & Claudia H. Deutsch, *General Electric Buying Honeywell in \$45 Billion Deal*, N.Y. TIMES, Oct. 23, 2000, at A1. Honeywell was to become a wholly owned subsidiary of G.E., with G.E. having sole control of Honeywell. Commission Decision of 03/07/2001 Declaring a Concentration to be Incompatible with the Common Market and the EEA Agreement. Case No COMP/M.2220 - General Electric/Honeywell para. 5 (official publication forthcoming) (on file with author).

9. Sorkin & Deutsch, *supra* note 8, at A1.

10. *Id.* All references to dollars refers to U.S. dollars.

11. Andrew R. Sorkin & Claudia H. Deutsch, *Offer from G.E. Breaks Up \$40 Billion Deal for Honeywell*, N.Y. TIMES, Oct. 21, 2000, at C1. *See also* Sorkin & Deutsch, *supra* note 8, at A1 (reporting that Jack Welch put this deal together after the Honeywell board had already began a meeting about the United Technologies offer). Jack Welch interrupted that meeting at 11:00 a.m. Friday, and by Sunday afternoon the deal between G.E. and Honeywell had been signed. *Id.*

12. Sorkin & Deutsch, *supra* note 11, at C1.

13. *Id.* Both companies produce plastics, chemicals, power generation systems, and regional aircraft engines. *Id.* G.E. manufactures wide-bodied jets and other commercial aircraft, whereas Honeywell focuses on avionics and business jet engines. *Id.* Furthermore, Lawrence Bossidy, a former G.E. employee, had run Allied Signal and instituted programs also used by G.E., such as Six Sigma, after Allied Signal and Honeywell merged. *Id.*

14. *See* Michael Elliott et al., *How Jack Fell Down; Inside the Collapse of the G.E.-Honeywell Deal - And What it Portends for Future Mergers*, TIME, July 16, 2001, at 40 (quoting Jack Welch as saying, "[t]his is the cleanest deal you'll ever see."). While both G.E. and Honeywell are diversified conglomerates, their product lines shared few overlaps. *Id.*

Commission (E.C. or the Commission).<sup>15</sup> The merger was approved by the U.S. Department of Justice on May 2, 2001, after the companies agreed to divest Honeywell's helicopter engine business and authorize a third-party service provider to maintain, repair, and overhaul certain Honeywell model aircraft.<sup>16</sup>

It did not take long for problems to arise on the European front.<sup>17</sup> By February 2001, the E.C. decided to conduct an extended investigation into the merger.<sup>18</sup> The E.C. expressed concerns about bundling,<sup>19</sup> but said it was not concerned about

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15. See *id.* (stating that the E.C. has to approve all mergers in which the participating firms have combined revenues of \$4.2 billion, with at least \$212 million generated from Europe; since G.E. alone employed 85,000 people in Europe with its year 2000 revenues from Europe totaling \$25 billion, E.C. approval was required). Flaherty & Lally-Green, *supra* note 6, at 934 (describing the institutional framework of the E.U.). The institutions that make up the E.U. are: (1) a Council of Ministers; (2) a Commission; (3) a Parliament; and (4) the Court of Justice. *Id.* The Council of Ministers is the legislative arm, consisting of a president and ministers from each Member State. *Id.* at 935. The Commission's responsibilities include making policy recommendations to the Council of Ministers and ensuring compliance with the E.E.C. Treaty and Council policies by the member states. *Id.* The commissioners, while appointed by their own country to the commission, are not to act with bias toward any particular country, but must act with E.U. common interests in mind. *Id.* The European Parliament recommends legislation to the Council. *Id.* Finally, the Court of Justice, with a role similar to that of the U.S. Supreme Court, is made up of one judge from each member state. *Id.* The Justices are similarly required to act independently from their country's interest and focus instead on E.U. interests. *Id.* at 935-36. The E.C. did not receive notification of the G.E.-Honeywell deal until February 5, 2001. Commission Decision, *supra* note 8, para. 1.

16. Press Release, Department of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001) (on file with author). The reason for these divestitures was to protect the U.S. military from higher prices for helicopters, as well as to protect commercial business aircraft users from increased prices repairs and maintenance of their aircraft. *Id.*

17. Andrew R. Sorkin, *U.S. Businesses Turn to Europe to Bar Mergers*, N.Y. TIMES, June 19, 2001, at A1 (acknowledging that acquiring approval in Europe is a very different process than gaining approval in the U.S.). The E.C.'s antitrust branch can block deals without going to court and a company's only recourse is an appeal to the European Court of Justice (E.C.J.) in Luxembourg. *Id.* Some consider the E.C.J. to be "an ally of the commission." *Id.*

18. Paul Meller & Claudia H. Deutsch, *Europe Sets Examination of G.E. Deal*, N.Y. TIMES, Feb. 28, 2001, at W1. The inquiry was extended because some competitors expressed concerns about the proposed deal. *Id.*

19. See Paul Meller, *Europe Plans Full Inquiry on G.E.-Honeywell Deal*, N.Y. TIMES, May 9, 2001, at W1 (defining bundling as a company tying together its products into a package, thus making it more difficult for the purchasers to compare prices on the individual products). There are four elements to tie-in agreements that violate antitrust law:

- (1) two distinct and separate products, the sale of one of which (the tied product) is tied to the sale of the other (the tying product);
- (2) a refusal by the seller to sell the tying product separate from the tied product;
- (3)

portfolio effects.<sup>20</sup> Additionally, the E.C. had received letters from potential G.E.-Honeywell competitors expressing concern.<sup>21</sup> To ameliorate these concerns, Jack Welch agreed that G.E. would not bundle its aircraft engines and avionics packages in situations where the competition could not do the same.<sup>22</sup>

Rivals played a significant role in G.E.'s hearing before the E.C.<sup>23</sup> Competitors were permitted to voice their concerns during a hearing held in May 2001, thereby giving their opinions significant weight.<sup>24</sup> However, only one potential customer, Lufthansa Airlines of Germany, exercised its right to attend the hearing.<sup>25</sup> Another example of the competitors significant influence was after G.E. commenced its negotiations with the E.C., the E.C. conducted a market test by sending a summary of concessions made to G.E.'s rivals eliciting comments.<sup>26</sup>

The E.C. expressed several concerns regarding the G.E.-Honeywell merger. For example, the E.C. was concerned that G.E. Capital Aviation Services (GECAS),<sup>27</sup> a lessor of aircrafts that

the seller's possession of sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and (4) a not insubstantial amount of interstate commerce in the tied product affected by the tying arrangement.

Jan F. Rydstrom, Annotation, *What Constitutes "Sufficient Economic Power" to Make Tying Arrangement Unlawful Restraint of Trade Violative of § 1 of Sherman Act (15 USCS § 1) – Supreme Court Cases*, 51 L. ED. 2D 826, 830 (1978).

20. See Meller, *supra* note 19, at W1 (opining that portfolio effects refer to extending the range of products of the merged company).

21. *Id.* The letters were informal responses from aircraft builders, component makers, airlines, leasing companies and maintenance contractors. *Id.*

22. *G.E. Chief Says He Is Surprised by Scrutiny of a Deal*, N.Y. TIMES, May 18, 2001, at C4.

23. Paul Meller, *G.E. Defends Deal to European Panel*, N.Y. TIMES, May 30, 2001, at W1. For the E.C., competitors' opinions are given substantial time and great weight in the merger approval process. Stoll & Goldfein, *supra* note 2, at 3. U.S. regulators tend to heed more to customers' opinions. *Id.*

24. Meller, *supra* note 23, at W1.

25. *Id.* One attorney suggested that the airlines might refrain from expressing their concerns about the merger because of the possibility of injuring a relationship with a major supplier after approval of the deal. *Id.*

26. Paul Meller & Andrew R. Sorkin, *G.E. Chief Courts Europeans on Acquisitions of Honeywell*, N.Y. TIMES, June 14, 2001, at C1.

27. See Elliott et al., *supra* note 14, at 40 (noting that, according to Jack Welch, GECAS had only an eight percent market share in the new-plane market). Typically, thirty to thirty-five percent of the market share is required before weight is given to vertical considerations. Stoll & Goldfein, *supra* note 2, at 3. The E.C. stated that while GECAS purchased less than ten percent of the aircraft, it exerted great influence over the engine market. Commission Decision, *supra* note 8, at para. 125. Of particular concern was GECAS' ability to influence smaller airlines' future purchases. *Id.* After the smaller airline's initial use of G.E. equipment, fleet commonality considerations may require the airlines to continue using G.E. equipment. *Id.*

bought only G.E. engines, would buy only Honeywell avionics systems after G.E. acquired Honeywell.<sup>28</sup> As the deadline for submitting concessions approached,<sup>29</sup> Jack Welch offered to divest G.E. of \$3 billion in annual revenues, operate GECAS as a semi-independent company so that parts could be bought from rivals based on merit, and separate GECAS' accounting from G.E. Capital.<sup>30</sup>

By mid-June 2001, approval looked bleak after the E.C. said these final concessions would not be sufficient.<sup>31</sup> Political pressure began to mount when U.S. President George W. Bush expressed his concern about the merger's potential failure.<sup>32</sup> A G.E. memoranda at that time directed employees not to focus on the integration effort, but rather on current business needs.<sup>33</sup>

In the meantime, the stock prices of both companies had fallen, making the deal worth \$42 billion, \$3 billion less than when Mr. Welch initially announced the deal.<sup>34</sup> For the next couple of weeks the E.C. worked on a draft decision rejecting the deal.<sup>35</sup> The member-nations endorsed the decision; however, Greece was not represented and three E.U. countries did not support the decision.<sup>36</sup> G.E. continued its lobbying efforts and stood by its

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Commonality also greatly affects larger airlines' decisions on future purchases because of concerns of maintenance costs, training the engineers, etc. *Id.* at para. 153. Furthermore, GECAS is the single largest purchaser of new aircraft. *Id.* para. 128. No individual airline places more than 5% of the aircraft orders annually. *Id.* at para. 226. The E.C. was concerned about G.E.'s ability to not only sell engines, but also solely provide maintenance and financing. *Id.* at para. 167.

28. Paul Meller, *In Europe, Aircraft Unit Hampers G.E. Deal*, N.Y. TIMES, June 8, 2001, at W1.

29. See Meller & Sorkin, *supra* note 26, at C1 (acknowledging that the "deadline" was not solid and negotiations were expected to continue beyond its expiration date).

30. *Id.*

31. Paul Meller & Andrew R. Sorkin, *G.E. Purchase of Honeywell Now Appears Near Collapse*, N.Y. TIMES, June 15, 2001, at C1.

32. Paul Meller & Claudia H. Deutsch, *Europe Opens Door for G.E., Just Slightly*, N.Y. TIMES, June 16, 2001, at C1. President Bush expressed concern about its potential failure at a news conference. *Id.* Jack Welch also spoke with the White House chief of staff, Andrew Card, in hopes that Washington could help the deal get through the process. Laurence Zuckerman & Andrew R. Sorkin, *G.E. Calls Its \$45 Billion Bid for Honeywell All but Dead*, N.Y. TIMES, June 17, 2001, at A31. It is also interesting to note the interplay between G.E. and Honeywell during this process. G.E. could not withdraw its offer unless Honeywell gave explicit permission, which Honeywell had not given. *Id.* Furthermore, G.E. was legally obligated under the merger agreement to use its "best efforts" in pursuing approval of the deal. Andrew R. Sorkin, *G.E.-Honeywell Deal: If at First. . .*, N.Y. TIMES, June 27, 2001, at C1.

33. Meller & Deutsch, *supra* note 32, at C1.

34. *Id.*

35. Sorkin, *supra* note 32, at C1.

36. *Id.* There are fifteen member states in the European Union. PAOLO MENGIOZZI, EUROPEAN COMMUNITY LAW FROM THE TREATY OF ROME TO THE

proposal.<sup>37</sup> G.E. and the E.C. were still negotiating in late June, 2001, with G.E. offering to sell as much as a 19.9 percent<sup>38</sup> stake in GECAS to a non-competitor through preferred shares.<sup>39</sup> G.E. wanted to maintain some control over the shares by restricting their transfer or sale to instances where G.E. granted permission.<sup>40</sup> Finally, G.E. issued a statement that they were finished negotiating.<sup>41</sup> The E.C. Commissioner, Mario Monti,<sup>42</sup> indicated that they were still open to negotiations that would involve “a structural commitment to modify the commercial behaviour of GECAS.”<sup>43</sup> Mr. Monti expressed regret that this route had not been fully pursued and said the merger review would continue unless it was withdrawn.<sup>44</sup> More comments supporting the merger were made from the U.S. political arena.<sup>45</sup> Mr. Monti’s response was that politics were irrelevant to the E.C.’s decision and that he did not understand the political criticism because at the time a final decision had not been rendered.<sup>46</sup>

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TREATY OF AMSTERDAM 2-4 (Patrick Del Duca trans., Kluwer Law International 2d ed. 1999). The member states are: France, Germany, Belgium, Italy, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, and Sweden. *Id.*

37. Paul Meller, *Another Step in Killing Deal for Honeywell*, N.Y. TIMES, June 26, 2001, at C1.

38. See Andrew R. Sorkin & Paul Meller, *G.E. Is Said to Float Plan to Save Deal*, N.Y. TIMES, June 28, 2001, at C1 (stating that the E.C. had originally wanted the twenty percent stake to be sold to the public or a competitor).

39. Paul Meller & Andrew R. Sorkin, *Europe Indicates to G.E. New Offer Is Unacceptable*, N.Y. TIMES, June 29, 2001, at C2. The new offer also involved G.E. having to divest itself of less revenue. *Id.* In the E.C., such a proposal would require market testing (getting opinions from competitors). *Id.* The E.C. considered this unacceptable because of time constraints. *Id.*

40. *Id.* If G.E. were allowed to sell less than twenty percent, then it could still consolidate GECAS’ earnings on its books and not separate them from their own. *Id.* The owner of these Class B shares would not have a financial interest but would have voting rights. Commission Decision, *supra* note 8, at para. 551. The owner of the preferred shares would be allowed to elect a director independent from G.E. *Id.* at para. 535. This arrangement was unsatisfactory to the E.C. because G.E. would still ultimately control GECAS through their ability to select the investor, limit the transferability of the stock and would not affect G.E.’s behavior. *Id.* at para. 552.

41. Press Release, European Commission, Statement on General Electric/Honeywell Merger, IP/01/842 (Jun. 14, 2001) (on file with author).

42. Mr. Monti is a Yale-educated, Italian economist in charge of the E.C.’s competition agency. Sorkin, *supra* note 17, at A1.

43. Press release, European Commission, Statement on General Electric/Honeywell Merger, IP/01/842 (Jun. 14, 2001) (on file with author).

44. *Id.*

45. Sorkin & Meller, *supra* note 38, at C1. The U.S. Treasury Secretary, Paul O’Neill, attacked the Commission’s proposed ruling, stating that it would be “off the wall” for them to prohibit the merger after the U.S. approved it. *Id.*

46. Press Release, European Commission, Commissioner Monti Dismisses Criticism of G.E./Honeywell Merger Review and Rejects Politicization of the Case, IP/01/855, (June 18, 2001) (on file with author). Mr. Monti stated, “I deplore attempts to misinform the public and to trigger political intervention.

Interplay continued between G.E. and Honeywell. Honeywell offered to accept \$1.8 billion less than the agreed purchase price if G.E. would make the divestitures required by the E.C. regulators.<sup>47</sup> Mr. Welch rejected Honeywell's proposal stating that the divestitures the E.C. required would no longer make the deal profitable for G.E.'s shareholders.<sup>48</sup>

In early July 2001, the E.C. decided to block the deal.<sup>49</sup> This marked the first time a deal involving two American companies had been blocked solely by the E.C.<sup>50</sup> It was also only the fifteenth

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This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics, not politics." *Id.* Mr. Monti further said that "[t]he nationality of the companies and political considerations have played and will play no role in the examination of mergers, in this case as in all others." *Id.*

47. Andrew R. Sorkin, *G.E. Reportedly Weighing an End to Honeywell Bid*, N.Y. TIMES, July 2, 2001, at A13. Honeywell distributed this letter to the press, a move that to many, signaled desperation. Sorkin, *supra* note 7, at A1. G.E. responded to Honeywell by sending its own letter through the press rejecting their proposal and signed the letter, "Best, Jack." *Id.* G.E. also tried to persuade Honeywell to let it withdraw its application from the E.C. so that no vote could occur that might establish that G.E. was dominant in aviation equipment, possibly making future mergers more complicated. *Id.* However, Honeywell was reluctant to allow G.E. to withdraw its bid because in doing so Honeywell would not be able to sue G.E. for breach of the merger contract requiring G.E. to extend "best efforts" to finish the deal. *Id.*

48. *Id.*

49. Sorkin, *supra* note 7, at A1. The Commission found that G.E. already had a dominant position in the large commercial jet engine market and in the large regional aircraft market. Press Release, European Commission, The Commission Prohibits GE's Acquisition of Honeywell, IP/01/939 (July 3, 2001) (on file with author). This was based on G.E.'s strong market position in aircraft leasing and financial strength. *Id.* The Commission also found that Honeywell is the leader in supplying avionics, non-avionics products, engines for corporate jets, and engine starters. *Id.* G.E. and Honeywell are the only companies manufacturing engines for large regional jets; large regional jets accounted for thirty-three percent of the European fleet in 1998. Commission Decision, *supra* note 8, at paras. 20-23. The Commission believed that the merger would have resulted in "the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets." Press Release, European Commission, The Commission Prohibits GE's Acquisition of Honeywell, IP/01/939 (July 3, 2001) (on file with author). The E.C. also stated that possible bundling of G.E. and Honeywell products was another reason for objecting to the merger. Commission Decision, *supra* note 8, at para. 360. The Commission stated that the proposed merger would have eliminated competition and have had an adverse effect on product quality, service, and prices. Press Release, European Commission, The Commission Prohibits GE's Acquisition of Honeywell, IP/01/939 (July 3, 2001) (on file with author).

50. Sorkin, *supra* note 7, at A1. After the G.E.-Honeywell merger was prohibited by the E.C., Mr. Monti commented on the close cooperation that took place between the E.C. and the U.S. Department of Justice and said, "I am determined to strengthen our bilateral cooperation in the future to try and reduce this risk further." Press Release, European Commission, The

time since 1990 that the E.C. had blocked any transaction.<sup>51</sup>

After the rejection, both companies filed a still-pending appeal with the European Court of Justice (E.C.J.).<sup>52</sup> The appeal is restricted to procedural issues.<sup>53</sup> It is only the seventh time that companies have appealed an E.C. decision to reject a merger.<sup>54</sup> Companies typically do not appeal E.C. decisions because the appeals process can take years.<sup>55</sup> Each of the other six companies that filed appeals lost their appeals.<sup>56</sup> G.E. and Honeywell do not want the decision reversed so that the merger can proceed; rather, G.E. wants the decision overturned because it fears a precedent that they are in a dominant position will make approval for future acquisitions more difficult to obtain.<sup>57</sup>

The G.E.-Honeywell merger is an extreme example of what can happen during the merger approval process. Before this comment evaluates the interaction between U.S. and E.U. antitrust law, it first briefly examines the laws governing each regulatory body.

### B. U.S. Antitrust Laws

U.S. antitrust laws are premised on the notion that competition is in itself valuable.<sup>58</sup> U.S. antitrust statutes include

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Commission Prohibits GE's Acquisition of Honeywell, IP/01/939 (July 3, 2001) (on file with author).

51. Stoll & Goldfein, *supra* note 2, at 1. The year 1990 is significant as the year that the E.C. became a "one-stop shop for mergers and acquisitions requiring regulatory approval[.]" Press Release, European Commission, The Commission Prohibits GE's Acquisition of Honeywell, IP/01/939 (July 3, 2001) (on file with author). The E.C. indicated that they had to prohibit the merger because G.E. "was unable to propose undertakings that would have removed all competition concerns" and that the merger "would create or strengthen dominant positions on several markets and that the remedies proposed by GE were insufficient to resolve the competition concerns. . . ." *Id.* It appears that European Competition Commissioner Mario Monti believes the companies are at fault. *Id.* Mr. Monti is quoted as saying, "I regret that the companies were not able to agree on a solution that would have met the Commission's competition concerns." *Id.*

52. *G.E. and Honeywell Appeal Europe's Rejection of Deal*, N.Y. TIMES, Sept. 13, 2001, at C8.

53. *Id.*

54. Andrew Ross Sorkin & Paul Meller, *G.E. Said to Be Planning Appeal of Honeywell Decision*, N.Y. TIMES, Aug. 1, 2001, at C4.

55. *See id.* (stating that after a company submits its appeal, regulators from the fifteen member-nations submit their opinions, which are then reviewed and compiled into a final submission by the Commission to the court).

56. *Id.* In the only two instances since 1990 that the E.C.J. overturned a decision of the Commission, each occurred when a merger was approved but the competitors appealed. *Id.*

57. *Id.*

58. Georg Terhorst, *The Reformation of the E.C. Competition Policy on Vertical Restraints*, 21 J. INT'L L. BUS. 343, 352 (2000).

the Sherman Act,<sup>59</sup> the Clayton Act,<sup>60</sup> and the Federal Trade Commission Act.<sup>61</sup> The Department of Justice (D.O.J.) and the Federal Trade Commission (F.T.C.), as well as each state through its attorney general, has authority to review mergers.<sup>62</sup> The D.O.J. enforces both the Sherman Act and the Clayton Act, while the F.T.C. enforces only the Clayton Act.<sup>63</sup> The D.O.J. cannot block a merger.<sup>64</sup> When the D.O.J. doubts the legality of a merger, it refers the matter to a federal district court for review.<sup>65</sup> The F.T.C. has the authority to block a merger through an administrative law judge.<sup>66</sup> If the F.T.C. blocks a merger, the affected companies can

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59. The pertinent parts of the Sherman Act include:

§ 1. Trusts, etc., in Restraint of Trade Illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

§ 2 Monopolizing Trade a Felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]

15 U.S.C. §§ 1-2 (2000). While the statute purports to prohibit all restraints of trade, the U.S. Supreme Court has limited the reach of the Sherman Act to only prohibiting unreasonable restraints of trade. *See* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citing *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898)). The courts employ a “rule of reason” analysis requiring the fact finder to determine if there is an unreasonable restraint on competition. *Id.* When applying the “rule of reason” analysis, several factors must be evaluated including: “specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature and effect.” *Id.* Criminal or civil penalties may be assessed for violations of the Sherman Act. *Joint FTC/DOJ International Antitrust Guidelines*, FTC TODAY, Apr. 1995, at 1. Criminal prosecutions are “limited to traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid rigging or other cartel activities that would also be violations of the law in many countries.” *Id.*

60. 15 U.S.C. § 18 (2000).

61. 15 U.S.C. § 45 (2000).

62. Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT’L ECON. L. 825, 826 (1999). However, because most states do not have the resources necessary for such antitrust regulation and enforcement, the federal government is primarily responsible for merger approval in the United States. *Id.* at 827.

63. *Id.* Recently there has been some discussion on changing the way mergers are evaluated by the F.T.C. and D.O.J. *See* John R. Wilke & Nicholas Kulish, *Agencies Plan Merger-Oversight Changes*, WALL ST. J., Jan. 17, 2002, at A8 (reporting that the D.O.J. and F.T.C. are contemplating changes in the way mergers are divided between them, stating that the D.O.J. would exclusively handle the merger approval process for software, games, and telecommunications and that only the F.T.C. would regulate the mergers in the health care, energy and electricity industries).

64. Stock, *supra* note 62, at 827.

65. *Id.* at 828.

66. *Id.*

first appeal to the full commission, followed by further review by a federal appellate court.<sup>67</sup>

The F.T.C. and the D.O.J. have jointly issued Horizontal Merger Guidelines for companies to use when contemplating mergers or acquisitions.<sup>68</sup> The factors the agencies consider include:

[w]hether the merger would significantly increase concentration and result in a concentrated market, . . . whether the merger . . . raises concern about potential adverse competitive effects[,] . . . whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern[,] . . . any efficiency gains that reasonably cannot be achieved by the parties through other means[, and] . . . whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market.<sup>69</sup>

Many international companies have to contend not only with U.S. antitrust laws, but also with the laws of the E.U.

### C. European Union Competitive Law

Both the E.U. and the individual member states have authority to approve mergers,<sup>70</sup> but ultimately only one authority can challenge the merger.<sup>71</sup> The European Commission has the authority to review the merger when its effects extend to more

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67. *Id.*

68. See Oliveros, *supra* note 5 (stating that horizontal agreements are formed between companies on the same level of the production and distribution processes; vertical agreements are formed between companies on different levels of the production and distribution processes); 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992).

69. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992). The agencies undertake a separate analysis when determining whether to bring an antitrust claim against a foreign defendant. *Joint FTC/DOJ International Antitrust Guidelines*, FTC TODAY, Apr. 1995, at 28. These factors may include:

(1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

*Id.* at 28-29.

70. Stock, *supra* note 62, at 827.

71. *Id.*

than one nation and when there is a "Community Dimension."<sup>72</sup> The European Court of Justice has exclusive jurisdiction to review Commission decisions.<sup>73</sup> The Commission must be notified within one week of either, the conclusion of the agreement, the public announcement of the bid, or the acquisition of the controlling interest, whichever comes first.<sup>74</sup> After the Commission receives notification, it will publish a "Fact of the Notification" that includes the parties' names, the nature of the transaction and the involved economic sectors.<sup>75</sup> The Commission then has four weeks to decide how to proceed.<sup>76</sup> The Commission evaluates whether the proposed transaction will create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market, or in a substantial part of it.<sup>77</sup> If a dominant position is not created or strengthened, the transaction will be declared compatible with the common market and allowed to proceed.<sup>78</sup> If a dominant position is created or strengthened, the transaction will be declared incompatible with the common market and disallowed.<sup>79</sup>

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72. *Id.*; Council Regulation 4064/89, on the Control of Concentrations between Undertakings, 1989 O.J. (L 395) 1 (stating that a community dimension exists when each company meets a certain dollar amount of sales worldwide, or where the company has a certain percentage of sales within one Member state). The threshold amounts were last updated in 1997. Council Regulation 1310/97 of 30 June 1997 Amending Regulation (EEC) No 4064/89, on the Control of Concentrations Between Undertakings, 1997 O.J. (L 180) 1. The new amounts are:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2,500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU (European Currency Units) 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 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.

*Id.* G.E. and Honeywell met this requirement; each has sales in excess of 2,500 million ECU. Commission Decision, *supra* note 8, para. 7. However, neither had two-thirds of their sales from one Member State. *Id.*

73. Council Regulation 4064/89, 1989 O.J. (L 395) 1.

74. *Id.* The E.C. can also start a competition investigation after receiving a complaint from a third party, or one based on its own review. Hans van Houtte, *Introduction to Council Regulation No. 17/62 and Commission Regulation No. 27/62*, Introduction and Bibliography written Nov. 1989, 2 B.D.I.E.L. 179.

75. Council Regulation 4064/89, 1989 O.J. (L 395) 1.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

The primary purpose behind E.U. competition law is economic integration and the creation of a common market.<sup>80</sup> The secondary purpose is to avoid a “weakening of competition [that] would be contrary to the goals of the common market.”<sup>81</sup> Articles 81 and 82 of the Treaty of Rome pertain to competition law in the E.U. and apply to the entire European Community.<sup>82</sup> Any agreement violating Articles 81 and 82 is considered void.<sup>83</sup> Article 81 prohibits agreements that have anticompetitive effects in the E.U.; Article 82 allows the Commission to take action against individual firms that violate Article 81.<sup>84</sup>

Sometimes after receiving notice of the agreement, the Commission will determine that Articles 81 and 82 do not apply and will send a letter alerting the parties that the file was closed and no further action will be taken.<sup>85</sup> In other instances, the Commission will grant negative clearance.<sup>86</sup> If the Commission decides to investigate further, the Commission will send the companies a statement of objections.<sup>87</sup> This extended investigation may only last three months before the Commission’s decision must be announced.<sup>88</sup> Before the Commission makes a final decision, it must consult an Advisory Committee consisting of representatives from each Member State.<sup>89</sup> The Advisory Committee will vote and

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80. Terhorst, *supra* note 58, at 352.

81. *Id.* at 353 (quoting Case 6/72, *Europemballage Corp. v. Commission*, 1973 E.C.R. 215, 244). The E.C. has stated that merger regulations are “not about protecting competitors but about ensuring that markets remain sufficiently competitive in the long run so that consumers benefit from sufficient choice, innovation and competitive prices.” Press Release, *The Commission Prohibits GE’s Acquisition of Honeywell*, IP/01/939 (July 3, 2001) (on file with author).

82. Terhorst, *supra* note 58, at 378 n.22 (noting that the Treaty of Rome was amended by the Amsterdam Treaty, effective May 1, 1999). In the Amsterdam Treaty, articles 85 and 86 were renumbered as Articles 81 and 82. *Id.* The text was not altered when they were renumbered. *Id.* See also TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (L 340) 3 (1997) [hereinafter EC TREATY; EC TREATY art. 82].

83. EC TREATY, *supra* note 82, art. 81.

84. Oliveros, *supra* note 5, at 728.

85. *Id.* at 730. Commission might also request that the agreement be modified. *Id.*

86. *Id.* A negative clearance is defined as a decision of the Commission to publish a fact summary regarding its findings. *Id.* Third parties also have the opportunity to submit their opinions. *Id.* The parties are essentially asking the E.C. to confirm that the notified action is not in violation of the antitrust laws. Houtte, *supra* note 74. The E.C. could also grant an exemption if it believes that the agreement will benefit consumers. *Id.*

87. Oliveros, *supra* note 5, at 731. This statement of objections will contain the factual findings of the E.C., any evidence of an infringement of Articles 85 or 86, and an explanation why an exemption will not be granted. Houtte, *supra* note 74. The parties under investigation then are given an opportunity to respond either in writing or at a hearing. *Id.*

88. Council Regulation 4064/89, 1989 O.J. (L 395) 1.

89. *Id.* at art. 19.

then deliver its opinion to the Commission, which is obligated to take "the utmost account of the [Advisory Committee's] opinion."<sup>90</sup> If the Commission finds that Articles 81 or 82 are violated, the Commission can order that the agreement be terminated.<sup>91</sup> The Commission can assess a large fine on companies that violate E.U. competition law.<sup>92</sup> The Commission must closely scrutinize mergers because the remedies available to it after a merger is approved are much more limited than that of the U.S. agencies.<sup>93</sup>

The European Court of Justice is the final resort for companies in antitrust cases. Part of the E.C.J.'s responsibilities include construing the competition provisions of the E.E.C. Treaty. In *Commercial Solvents v. Commission*,<sup>94</sup> the court examined an alleged dominant position.<sup>95</sup> Commercial Solvents Corporation (CSC), a U.S. corporation, owned fifty-one percent of Istituto Chemioterapico Italiano (ICI), an Italian company.<sup>96</sup> CSC produced a chemical that it allowed ICI to sell to another company, Laboratorio Chimico Farmaceutico Giorgio Zoja (Zoja), that processed the chemical into a final product.<sup>97</sup> CSC decided to discontinue the resale of the chemical so that ICI could process the

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90. *Id.*

91. Oliveros, *supra* note 5, at § C8.

92. *Id.* The fine will be assessed regardless of whether the companies violated the law negligently or intentionally. *Id.* The fine can range from any amount between 1,000 and 1,000,000 euros, or ten percent of the offending companies' previous year sales. *Id.* Volkswagen AG was recently fined 102 million euros for its violation of Article 85(1). Commission Decision Relating to a Proceeding under Article 85 of the EC Treaty, Case No. IV/35.733 Volkswagen, 1998 O.J. (L124) 60. Volkswagen AG and two of its subsidiaries, Audi AG and Autogerma S.p.A., had entered into agreements that did not allow for cars to be sold in Italy to residents of other member states, making it difficult for vehicles sold in Italy to be re-exported to Germany or Austria. *Id.* at § 18. The E.C. imposed a fine of fifty million euros on Volkswagen for the violation of Article 85, imposed an additional thirty-five million ECU fine to account for the long duration of the violations (in this case over ten years), and imposed an additional seventeen million ECU fine for the aggravating circumstances, specifically, that Volkswagen had not terminated the behavior after notification by the Commission of the infraction but misled the E.C. to believe that the problem had been corrected. *Id.* at §§ 215-19.

93. See Seiberg, *supra* note 2, at B1 (reporting that Mr. Monti stated that having the power to break up companies in violation of antitrust laws would allow the E.C. to be less strict in reviewing mergers because then it would be able to restrain deals that become anticompetitive). By way of comparison, the U.S. agencies have the ability to break up companies in violation of antitrust law and can require companies to sell entire operating units. *Id.* Furthermore, the U.S. takes a shorter-term view regarding the anticompetitive effects of a merger than does the E.U. Stoll & Goldfein, *supra* note 2, at 3.

94. Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v. Comm'n, 1974 E.C.R. 223.

95. *Id.*

96. *Id.* at § 37

97. *Id.* at § 1

final product itself.<sup>98</sup> Zoja notified the E.U. which, in turn, instituted the court action.<sup>99</sup> CSC argued that they were not in a dominant position because there were other possible sources of the chemical.<sup>100</sup> The E.C.J. affirmed the Commission's finding that CSC was in a dominant position because the other sources referred to by CSC were experimental and were significantly smaller.<sup>101</sup> The court also held that CSC abused its dominant position under Article 86 when it decided to discontinue supplying Zoja with the chemical and began manufacturing the final product itself.<sup>102</sup> In summary, the regulators in the E.U. evaluate mergers using criteria different than those employed by the U.S. regulators.<sup>103</sup> However, understanding each individual country's laws is less significant than understanding the interaction between the different countries laws through their extraterritorial applications.

## II. INTERACTION BETWEEN U.S. AND EUROPEAN UNION ANTITRUST LAWS

Part II-A examines U.S. case law concerning the extraterritorial application of antitrust laws from both a historical and current perspective. Part II-B then examines E.U. decisions on the same topic. Part II-C concludes the section by discussing agreements reached between the U.S. and E.U. on the application of antitrust/competition laws.

### A. U.S. Decisions on Extraterritorial Application of Antitrust Laws

#### 1. A Historical Survey of U.S. Decisions

An early United States Supreme Court case discussing the applicability of U.S. laws on activities that transpired outside of the U.S. is *American Banana Co. v. United Fruit Co.*,<sup>104</sup> authored by Justice Holmes. The plaintiff filed suit against the defendant for antitrust violations that occurred in Costa Rica and Panama.<sup>105</sup>

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. The E.C. looks at the effect the merger will have on the overall market and will reject mergers where a dominant position is created or strengthened. Stoll & Goldfein *supra* note 2, at 3. In contrast, the U.S. concentrates on any possible harm the merger will have on consumers. *Id.* at 5. Using the G.E.-Honeywell merger as an example, the E.C. was able to use GECAS, a unit relatively unrelated to the merger, to block the merger because of perceived effects on competition. *Id.* at 3. The F.T.C. and D.O.J. generally cannot block a merger unless the competitive effects are directly related to the merging parties' assets. *Id.* at 8.

104. 213 U.S. 347 (1909).

105. *Id.* at 353-55.

Both the plaintiff and defendant were U.S. corporations.<sup>106</sup> Justice Holmes affirmed the dismissal of the complaint, holding that conspiring in the U.S. to do acts in another country that would be illegal in the U.S., but that are legal in that other country, was not a valid cause of action.<sup>107</sup> He reasoned that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>108</sup>

Several years later, the United States Circuit Court of Appeals for the Second Circuit decided another significant case, *United States v. Aluminum Co. of America* (Alcoa), involving the application of U.S. laws to acts that took place outside of the U.S.<sup>109</sup> Alcoa allegedly entered into agreements in violation of U.S. antitrust laws.<sup>110</sup> In an opinion written by Judge Learned Hand, the court explained that the agreements were illegal, even if made outside of the U.S., if “they were intended to affect imports and that did affect them.”<sup>111</sup> The court also discussed the required burdens of proof. After the government proved the companies intended to affect imports, the burden of proof then shifted to the defendant to prove that imports were not affected.<sup>112</sup> Ultimately, the court determined there was a violation of the law and issued an injunction.<sup>113</sup>

The Ninth Circuit used a different test when it examined a claim that U.S. and Honduran companies had conspired in violation of U.S. antitrust laws.<sup>114</sup> The court employed a three-prong test to determine if it should allow the claim to proceed. The test required: (1) some effect on American foreign commerce;

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106. *Id.* at 354.

107. *Id.* at 359. Justice Holmes stated that the plaintiff's case rested on “several rather startling propositions.” *Id.* at 355. He continued, “In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.” *Id.*

108. *Id.* at 356. The court stated that applying the U.S. law to actions that had taken place outside the U.S. would be “unjust,” and an “interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.” *Id.*

109. 148 F.2d at 416. The case was originally to be heard before the U.S. Supreme Court but the court did not have the required quorum of six to hear the case, so therefore the Court referred it to the Court of Appeals. *Id.* at 421.

110. *Id.*

111. *Id.* at 444. Conversely, the court stated that agreements made outside of the U.S. were not illegal if there was no intent to affect imports but nonetheless there was an affect on imports or exports. *Id.* Furthermore, the court rationalized that an agreement that was intended to have an affect on imports or exports but did not affect them was not illegal. *Id.*

112. *Id.*

113. *Id.* at 448.

114. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976).

(2) that the effect be substantial enough to warrant an American court's exercise of jurisdiction; and (3) the balancing of the strength of the American interest, as opposed to the strength of another country's interest, in asserting jurisdiction.<sup>115</sup>

## 2. *Hartford and Its Progeny*

The most recent U.S. Supreme Court case addressing the issue of extraterritorial application of U.S. antitrust laws is *Hartford Fire Insurance Co. v. California*.<sup>116</sup> In *Hartford*, the plaintiffs alleged that the defendant insurers and reinsurers violated the Sherman Act.<sup>117</sup> The defendants filed motions to dismiss or alternatively, for summary judgment.<sup>118</sup> The district court granted the motion to dismiss, but the Court of Appeals reversed.<sup>119</sup> Some of the defendant reinsurers were London companies.<sup>120</sup> These London reinsurers argued that while the U.S. court may have jurisdiction over the case, it should refuse to exercise that jurisdiction because of the interest of another country, in this case, Great Britain.<sup>121</sup> The U.S. Supreme Court relied on the well-established principle that the Sherman Act applies when foreign corporations produce a "substantial effect" in the U.S., stating that international comity would not prevent the exercise of jurisdiction in this case.<sup>122</sup> The "effects doctrine" allows a U.S. court to have general jurisdiction "over foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."<sup>123</sup> The Court then engaged in a conflict of law analysis, holding that there would only be a conflict when it was not possible to follow both U.S. and British laws

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115. *Id.* at 614. The court also provided factors to determine whether the third prong of the test was satisfied. These factors included:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Id.* at 614.

116. 509 U.S. 764 (1993).

117. *Id.* at 778.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Hartford*, 509 U.S. at 795.

122. *Id.* at 796-97.

123. *See id.* at 796. Oliveros, *supra* note 5 (noting that imports for sale in the U.S. will meet this "intent test," as will mergers and acquisitions under the Clayton Act).

simultaneously.<sup>124</sup> Finding no conflict of law, the Court allowed the exercise of jurisdiction over the foreign defendants in this case.<sup>125</sup>

The next major federal case addressing the extraterritorial application of antitrust law was *United States v. Nippon Paper Industries, Co.*<sup>126</sup> *Nippon* involved the extraterritorial application of U.S. antitrust laws in a criminal context. In *Nippon*, a Japanese defendant was criminally charged under section 1 of the Sherman Act with conspiring, in Japan, to fix the prices of Nippon's fax paper sold in the United States.<sup>127</sup> The trial court granted the defendant's motion to dismiss because the alleged conspiracy took place entirely in Japan.<sup>128</sup> However, the Court of Appeals for the First Circuit reversed and reinstated the indictment.<sup>129</sup> The appellate court relied on *Hartford*, and rejected the defendant's argument that comity would warrant dismissal of the case.<sup>130</sup> The appellate court reiterated that under *Hartford*, comity only applied when the laws of the other country required the defendant to act in violation of U.S. law or when it was not possible to comply simultaneously with the laws of both countries.<sup>131</sup> Furthermore, the court found the defendant's alleged conduct illegal in both the U.S. and Japan, but the U.S. was the more appropriate forum to prosecute because only American consumers felt the effects of the alleged actions.<sup>132</sup>

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124. *Hartford*, 509 U.S. at 799. Several commentators have stated that *Hartford* was wrongly decided. See, e.g., Roger P. Alford, Postscript, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 220 (1993) (stating that *Hartford* is a sharp divergence from previous cases, providing little guidance on how to handle cases where there is a conflict between two countries' laws, and showing a lack of respect for "the fundamental sovereignty interests of another country that may have concurrent jurisdiction"); Joseph P. Griffin, *Sovereignty Revisited: Regulation of Competition in the Canada/U.S. Context Extraterritorial Reach of U.S. Antitrust Law - A U.S. Perspective*, 22 CAN.-U.S. L.J. 315, 321 (1998) (asserting that *Hartford* was based on faulty reasoning and a misunderstanding of the Restatement of Foreign Relations Law). *But cf.* Varun Gupta, Note, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287, 2288 (1996) (asserting that *Hartford* was decided correctly but that the reasoning was wrong and agreeing that principles of international comity are no longer appropriate).

125. *Hartford*, 509 U.S. at 799.

126. 109 F.3d 1 (1st Cir. 1997).

127. *Id.* at 2.

128. *Id.* at 3.

129. *Id.* at 9.

130. *Id.* at 8.

131. *Nippon Paper Indus. Co.*, 109 F.3d at 8.

132. *Id.*

*B. E.U. Case Law Addressing the Extraterritorial Application of Competition Laws*

The European Court of Justice (E.C.J.) has had several opportunities to consider the application of E.U. competition laws to activities occurring outside the E.U. In *Ahlstrom Osakeyhtio v. Commission*,<sup>133</sup> the E.C.J. examined whether its laws should apply to U.S., Canadian, Swedish, and Finnish producers of wood pulp who allegedly conspired to fix prices of wood pulp in the E.U.<sup>134</sup> The E.C.J. held that its laws applied because the agreement was implemented in the E.U.<sup>135</sup> The place of negotiation and execution of agreement was deemed irrelevant.<sup>136</sup> The E.C.J. also noted that Article 85 applied to all agreements affecting trade in the Member States, and that the wood pulp producers competed for orders in the European Community.<sup>137</sup> Such competition rendered the participants subject to E.U. regulation.<sup>138</sup> In a conflict analysis similar to that found in *Hartford and Nippon*, the E.C.J. observed that the companies were not subject to conflicting laws of their home countries and, thus, the E.U. laws would be enforced.<sup>139</sup> Moreover, the Court summarily rejected the defendants' comity argument and refused to allow the Commission's jurisdiction to be questioned.<sup>140</sup>

In *Commercial Solvents*, the E.C.J. again had the opportunity to examine the effect needed on the member states in order for the anticompetitive behavior to be reviewable by the Commission.<sup>141</sup> CSC and ICI argued that since Zoja sold ninety percent of its finished product outside of the E.U., the Commission did not have jurisdiction to examine CSC's actions.<sup>142</sup> Nonetheless, the E.C.J. held that whether Zoja exported its products or sold them in the E.U. was immaterial because sales outside the E.U. would have an effect on the competitive structure within the E.U.<sup>143</sup> Additionally, the E.C.J. found that Zoja did sell its product in two member states.<sup>144</sup> This case illustrates the very broad interpretation of the "effects" needed in order for the E.C. to have jurisdiction over an antitrust issue.

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133. Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Ahlstrom Osakeyhtio v. Comm'n*, 1988 E.C.R. 5193 (commonly referred to as the "Woodpulp" case).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Ahlstrom Osakeyhtio*, 1988 E.C.R. 5193.

140. *Id.*

141. *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp.*, 1974 E.C.R. 223.

142. *Id.*

143. *Id.*

144. *Id.*

The case commonly referred to as *Dyestuff* considered the issue of a parent company located outside of the E.U., and its subsidiary located inside the E.U., engaging in alleged price-fixing with other companies.<sup>145</sup> In *Dyestuff*, ten individual companies allegedly engaged in a concerted effort to raise prices by the same percentage within a short period of time.<sup>146</sup> The court said that the companies' price-fixing activities had an effect on the E.U. market and, therefore, the companies were subject to fines.<sup>147</sup> The E.C.J. also ruled that because of the parent company's control over the subsidiary, it was appropriate to fine the parent company for the subsidiary's actions.<sup>148</sup> In an effort to reduce some of this extraterritorial application of each country's antitrust law, the U.S. and the E.U. have entered into bilateral agreements.

### *C. Agreements Between the U.S. and E.U. Regarding Antitrust Law*

In 1991, the U.S. and the E.U. entered into an agreement concerning the application of antitrust laws.<sup>149</sup> The Acting Attorney General and the Chairman of the F.T.C. signed on behalf of the U.S. and the Vice President of the E.C. signed on behalf of the E.U.<sup>150</sup> Article I of the 1991 Agreement stated that its purpose was "to promote cooperation and coordination and lessen the possibility or impact of difference between the Parties in the application of their competition laws."<sup>151</sup> In Article II, the parties agreed to notify each other when one party's antitrust activities could affect the interests of the other party, and specified events that could trigger the notification requirement.<sup>152</sup> Article III obligated the parties to hold regular meetings in order to facilitate an exchange of information regarding their antitrust activities.<sup>153</sup> Article IV obligated each party to cooperate and coordinate with the other's antitrust enforcement activities on specified occasions.<sup>154</sup> Article V formalized positive comity,<sup>155</sup> whereas,

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145. Case 48/69, *Imperial Chem. Indus., Ltd. v. Comm'n*, 1972 E.C.R. 619 [hereinafter the "Dyestuffs" case].

146. *Id.*

147. *Id.*

148. *Id.*

149. Agreement on the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.U., 30 I.L.M. 1487 [hereinafter the "Agreement"].

150. *Id.*

151. *Id.* at 1492.

152. *Id.* at 1493.

153. *Id.* at 1496.

154. Agreement on the Application of their Competition Laws, Sept. 23, 1991, U.S.-E.U., 30 I.L.M. 1487.

155. *Id.* at 1497-98. Positive comity allows regulators in one country to ask the regulators in the other country to investigate possible antitrust violations in the notified country on behalf of the requesting country. *Id.* at 1498. The U.S. and the E.U. entered into a subsequent agreement in 1998 that defined and expanded the positive comity principles described in the 1991 Agreement.

Article IV formalized negative comity and set forth specific factors for consideration.<sup>156</sup>

In 1994, France, Spain, and the Netherlands brought suit before the E.C.J. seeking an annulment of the 1991 Agreement on the grounds that the Commission did not have authority to enter into the Agreement and that the Agreement had to be approved by the Council of Ministers.<sup>157</sup> The E.C.J. agreed and annulled the Agreement.<sup>158</sup> After this decision, the European Council approved the Agreement and re-entered it into force on April 10, 1995 with the effective date retroactively set to the original date of the 1991 Agreement.<sup>159</sup> An understanding of the suits brought by France, Spain, and the Netherlands, and the agreements by the Commission can help bring some predictability to the merger process until a different process has been adopted.

### III. PROPOSAL

There are several different options to consider regarding the improvement of international antitrust enforcement. The first and simplest option is to do nothing. Business will continue as always, with several jurisdictions requiring independent merger approval. This option does not solve the problem of obtaining merger approval from several different regulators because businesses will still be required to comply with multiple antitrust regulations. A second option would be for the U.S. to continue entering into bilateral agreements to cooperate with other countries in antitrust regulation.<sup>160</sup> Although this may be a viable short-term goal, it

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Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, Apr. 6, 1998, U.S.-E.U., 1998 O.J. (L 173) 1.

156. Agreement on the Application of their Competition Laws, U.S.-E.U., Sept. 23, 1991, 30 I.L.M. 1487. Negative comity is "to refrain from enforcing competition laws where such enforcement would unduly interfere with the legitimate sovereign interests of the other signatory." Charles F. Rule, *Introductory Note to Agreement on the Application of their Competition Laws*, Sept. 23, 1991, U.S.-E.U., 30 I.L.M. 1487.

157. Case C-327/91, *French Republic v. Comm'n*, 1994 E.C.R. I-3641.

158. *Id.*

159. Decision of the Council and the Commission of 10 April 1995 Concerning the Conclusion of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, 1995 O.J. (L 131).

160. The United States has already entered into some bilateral agreements including treaties with Canada and Australia. Agreement Regarding the Application of their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., 35 I.L.M. 309; Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 21 I.L.M. 702. See Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 647-48 (2001) (stating that the U.S. also has agreements with several other countries including Germany, Brazil, Israel, Japan, and Mexico).

does not meet the needs of businesses because cooperation is generally optional under the agreements and the companies would then have to research and analyze several different agreements to determine how to proceed. A third option is to establish a global forum dispute resolution.<sup>161</sup> This alternative has already been achieved on a much smaller scale in the E.U. Several European countries have combined their rules and regulations. In fact, the E.U. favors the World Trade Organization (W.T.O.) having an expanded role in competition matters.<sup>162</sup>

Mr. A. Douglas Melamed, Joel Klein's<sup>163</sup> replacement as the D.O.J. lead antitrust prosecutor, has also considered developing a Global Competition Initiative (G.C.I.).<sup>164</sup> Mr. Melamed proposed having the G.C.I. become part of a larger world agency, such as the World Bank.<sup>165</sup> The D.O.J. does not want antitrust enforcement left to the W.T.O. because it fears that the committee may not be as committed to the enforcement of antitrust laws as the U.S. is.<sup>166</sup> However, the United States Trade Representative (U.S.T.R.) office has suggested that the W.T.O. have a large role in international antitrust matters.<sup>167</sup> The U.S.T.R. advocates this measure as part of resolving trade disputes in general.<sup>168</sup> These observations also show the power struggle between the D.O.J. and the U.S.T.R. If antitrust regulation were given to the W.T.O., then the U.S.T.R. would suddenly have more power than the D.O.J. in antitrust matters.<sup>169</sup>

A yet unexplored option is to bypass the W.T.O. or World

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161. *Contra* Griffin, *supra* note 124, at 322-23 (stating that the U.S. would not likely agree to any diminution of sovereignty because of the fear that any new antitrust organization would not have strong antitrust laws since half of the countries in the W.T.O. do not have antitrust rules, so negotiating with those countries would yield a "lowest common denominator").

162. Spencer W. Waller, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: Contribution: National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1123 (1996).

163. Mr. Klein had discounted the global forum initiative and instead opted for positive comity. *E.U./U.S.: Top U.S. Trust-Buster Against WTO Delving in Competition*, EUROPEAN REPORT, Oct. 31, 1998 at 2355. Mr. Klein also said that the W.T.O. would be an unsuitable forum as many W.T.O. member nations did not have antitrust/competition codes. *Id.*

164. Seiberg, *supra* note 2, at B1. Mr. Melamed also mentioned that on cases where multiples countries have jurisdiction that the D.O.J. would consider deferring to foreign antitrust regulators on some cases. *Id.* This deference has never before been considered but would be possible if a G.C.I. built trust and cooperation among antitrust regulators. *Id.*

165. *Id.* Mr. Melamed said he preferred the World Bank as opposed to the W.T.O. because he believed the W.T.O. to be too inflexible for the rapidly-changing business world. *Id.*

166. Waller, *supra* note 162, at 1123.

167. *Id.* at 1122.

168. *Id.*

169. *Id.*

Bank as global forums, and create a new global governing body to enforce international competition laws.<sup>170</sup> This new forum could then be modeled to avoid the drawbacks associated with the existing forums.

Initially, this new global forum would not include every country, but only those countries that account for a substantial amount of international trade. The countries that are not initially invited to join this global forum could petition for inclusion if their trade circumstances change. The reduced number of countries involved would make it easier for agreements to be reached regarding what the laws should be and how they should be implemented.

By far the most difficult obstacle to overcome is deciding what laws should be adopted and how they should be enforced in each country. This drawback would have to be overcome by cooperation among the countries involved based on the recognition of the importance of this new global forum. Furthermore, each country would have to take an oath to affirmatively enforce the antitrust laws in their country, and obligate themselves to use the global forum as their sole means of international antitrust regulation. If a country were to join the forum and still permit their individual antitrust regulators to enforce that country's laws, it would create another layer of approval, rather than simplifying the procedure.

Another challenge the proposed forum may encounter would be its organization and structure. One manner of resolution is that each country represented be allowed to have one vote on important matters. This one-vote per country requirement would allow voting parity among all countries so that a country with a large population would not be able to dominate smaller countries, which could happen if the number of votes allocated to each country was based on population. Another alternative is to have the votes weighted based on the percentage of trade for which each country accounts. This would alleviate any concerns that a country may have about giving up too much power. The countries should be able to have a fixed number of representatives in attendance for the presentation of information, allowing several experts to voice their opinions before a final vote. A simple majority of votes would be needed before any individual antitrust

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170. *But cf.* Luz, *supra* note 3, at 155; Brian Peck, Comments, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute Over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1210 (1998) (proposing that the W.T.O. be the forum used for a global antitrust organization); Thomas P. O'Toole, Comment, "The Long Arm of the Law" - *European Merger Regulation and Its Application to the Merger of Boeing and McDonnell Douglas*, 11 TRANSNAT'L LAW. 203 (1998) (advocating that the W.T.O. be the forum chosen for dispute resolution).

actions would take place. To amend the governing laws or make other substantial changes to the forum, a super-majority of the votes should be required.

The issue of confidentiality of the information submitted by the companies to the global forum is certain to be at the forefront of the debate. The new forum would have to ensure that the documents submitted be kept in the utmost confidence. The forum would have to keep the documents sealed in order to protect the documents from being used by the companies' competitors, opponents in litigation, or the general public.

These ideas and comments by antitrust regulators are definitely a step in the right direction because they recognize the problems that businesses face in today's global markets. More needs to be done to make this proposal a reality.<sup>171</sup> The new forum suggested by the regulators would make it simpler and less costly for businesses to consummate mergers of an international scale. A good initial step would be for the antitrust regulators to convene meetings to discuss their involvement in this new proposed global forum.

#### IV. CONCLUSION

In summary, the failed G.E.-Honeywell merger is an example of the effects that conflicting international antitrust regulations can have on important mergers. The merger was approved in the U.S.; however, the E.C. rejected the merger even though G.E. made several concessions during their lengthy negotiations.<sup>172</sup> The E.C. rejected the merger because of a possible strengthening of a dominant position in the market.<sup>173</sup> The U.S. and E.U. antitrust regulators used different methods in evaluating the merger.<sup>174</sup> The Sherman Act and the Clayton Act govern U.S. antitrust law.<sup>175</sup> Articles 81 and 82 of the Treaty of Rome govern E.U. competition law.<sup>176</sup> Additional problems arise when the U.S. and E.U. courts try to apply their laws extraterritorially. Therefore, the creation of an independent global forum used to resolve all international antitrust issues would be a logical and pragmatic solution to the current paradigm.

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171. One lawyer suggested that the U.S. should start deferring to decisions made by other countries as a sign of commitment to the G.C.I. Seiberg, *supra* note 2, at B1.

172. *See supra* Part I.A. (these concessions included not bundling products, divesting GE revenues and operating GECAS as a semi-independent entity).

173. *Id.*

174. *Id.*

175. *See supra* notes 59-61 and accompanying text (discussing United States antitrust statutes).

176. *See supra* notes 81-84 and accompanying text (discussing Articles 81 and 82 of the Treaty of Rome).