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Abstract

Discussion in this Essay is designed to explore recently introduced efficiency considerations and to compare developing law in the United States and the European Union. The following sections discuss why incorporation of efficiency factors has been controversial, explore efficiency analysis in connection with mergers under U.S. law, explore comparable developments in EU law, and, finally, offer a comparison of developments in the two jurisdictions.

ESSAY

EFFICIENCY CONSIDERATION AND MERGER ENFORCEMENT: COMPARISON OF U.S. AND EU APPROACHES

*Robert Pitofsky**

INTRODUCTION

The question of introducing efficiency considerations into merger review has been lively and controversial for many years. Of course, most mergers are between companies that are too small or too remote in competitive effects to endanger competition. A relative few—less than five percent in both the United States and the European Union—approach monopoly or dominant firm dimensions, or threaten the welfare of consumers by allowing combined firms to raise prices or reduce output without effective response from others, and, as a result, are carefully examined.[1] Both dangers to competition are now acknowledged in U.S.[2] and EU[3] law. The question addressed here is whether some few mergers, close to the line of legality, can be justified by considerations of efficiency.

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1. *See, e.g.*, Richard G. Parker & David A. Balto, *The Evolving Approach to Merger Remedies*, 2000 ANTITRUST REP. 2 (2000); *Mergers and Corporate Consolidation in the New Economy: Hearing Before the S. Comm. on the Jud.*, 105th Cong. (1998) (statement of Robert Pitofsky, Chairman, Fed. Trade Comm'n), *available at* http://www.ftc.gov/os/1998/06/merger98.tes.htm. Examination of European merger statistics reveals a ratio of enforcement actions to horizontal mergers similar to that at the FTC. *See* Eur. Comm'n, Directorate-General for Competition, European Merger Control—Council Regulation 139/2004—Statistics, Sept. 21 1990-Feb. 28 2007, http://ec.europa.eu/comm/competition/mergers/statistics.pdf (last visited May 17, 2007) (compiling historical data reflecting level of scrutiny given proposed mergers over time in question).

2. DEP'T OF J. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2-3 (rev. 1997) [hereinafter HORIZONTAL MERGER GUIDELINES], *available at* http://www.usdoj.gov/atr/hmerger/11251.pdf.

3. Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings ("EC Horizontal Merger Guidelines"), O.J. C 31/5 (2004) (guidelines to appraise concentrations within the scope of the Merger Regulation, Article 2 of Council Regulation (EC) No. 139/2004, O.J. L 24/1 (2004)).

Both the United States and the European Union appear to have accepted, in recent years, that mergers can contribute to efficiency (for example by introducing cost savings, economies of scale, or facilitating innovation), and these efficiencies may occur in markets where they are likely to be passed on to consumers to an extent that the efficiencies outweigh any likely anticompetitive effect. Both jurisdictions have been slow to reach this conclusion and formally to introduce efficiency considerations into merger analysis. Even today, there are critics who doubt that the acknowledgement of relevance of efficiencies is more than an empty commitment, and who believe efficiency is not a practical factor in merger review.[4]

Discussion in this Essay is designed to explore recently introduced efficiency considerations and to compare developing law in the United States and the European Union. The following sections discuss why incorporation of efficiency factors has been controversial, explore efficiency analysis in connection with mergers under U.S. law, explore comparable developments in EU law, and, finally, offer a comparison of developments in the two jurisdictions.

I. *PROS AND CONS OF INTRODUCING EFFICIENCY CONSIDERATIONS INTO MERGER ANALYSIS*

It has been widely accepted for some years in U.S. scholarship that there is a strong case for introducing efficiency consideration into merger review,[5] and yet both the United States and the European Union have been slow to accept formally the relevance of efficiency considerations. There are several reasons why the issue is controversial. First, efficiency issues are not expressly recognized in statutes covering merger review in either jurisdiction, though consideration of such issues is not expressly foreclosed either.[6] Second, opponents of taking efficiency con-

4. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW 133-34 (2d ed. 2001); Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 SUP. CT. ECON. REV. 189, 231 (2005).

5. *See, e.g.*, IV-A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 970b, at 25-27 (2d ed. 2006); Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 383 (1980); Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 208-209 (1992).

6. *See generally* Clayton Act § 7, 38 Stat. 730, 731, *codified at* 15 U.S.C. § 18 (1996); Federal Trade Commission Act § 5, 38 Stat. 717, 719 (1914), *codified at* 15 U.S.C. § 45 (2006); Sherman Act § 1, 26 Stat. 209 (1890), *codified at* 15 U.S.C. § 1 (2004); Council

siderations into account have emphasized that efficiencies are difficult to quantify, especially since they rely entirely on a prediction of the beneficial results of a not yet consummated merger, and are thus even harder to trade off against anticompetitive effects.[7] Advocates argue that the problem can be handled by placing the burden of proof of the existence of efficiencies squarely on the people advocating the merger, and requiring that any claimed efficiencies be clear and substantial.[8] Third, skeptics point out that if there are efficiencies of scope or scale, or of innovation, those can be achieved by internal expansion of a single firm, or by less restrictive alternatives like joint ventures or licensing arrangements.[9] Advocates for efficiency consideration concede the point, and therefore insist that any claimed efficiencies be "merger specific"—i.e., as a practical matter, the efficiency cannot be achieved other than through the proposed merger.[10] Finally, many have pointed out that if the merger leads to monopoly or near monopoly, any short-term benefits to consumers will be outweighed in the long term by the ability of the combined firm to extract monopoly rents.[11] Both jurisdictions have responded to this legitimate concern by specifying that efficiency considerations will not justify mergers to monopoly or near monopoly.[12]

Regulation No. 139/2004, O.J. L 24/1 (2004) [hereinafter EC Merger Regulation] (on the control of concentrations between undertakings).

7. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 124-29 (1993 ed.); POSNER, *supra* note 4, at 133-34; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1585-86 (1983); Miguel de la Mano, For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control 1 (Enterprise Paper No. 11, 2002), http://ec.europa.eu/enterprise/library/enterprise-papers/pdf/enterprise_paper_11_2002.pdf (last visited May 17, 2007).

8. *See, e.g.*, United States v. Rockford Mem'l Corp., 717 F. Supp. 1251, 1289 (N.D. Ill. 1989); VI AREEDA & HOVENKAMP, *supra* note 5, ¶ 974a, at 66-67; Coate, *supra* note 4 at 234-35.

9. *See, e.g.*, *Rockford Mem'l Corp.*, 717 F. Supp. at 1289; VI AREEDA & HOVENKAMP, *supra* note 5, ¶ 973b, at 53-61; Pitofsky, *supra* note 5, at 242.

10. *See, e.g.*, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004); *Rockford Mem'l Corp.*, 717 F. Supp. at 1289; VI AREEDA & HOVENKAMP, *supra* note 5, ¶ 973a, at 52-53; Coate, *supra* note 4, at 196-97; de la Mano, *supra* note 7, at 1.

11. *See, e.g.*, Coate, *supra* note 4, at 197-98; de la Mano, *supra* note 7, at 11; Robert Pitofsky, *Merger Analysis in the '90s: The Guidelines and Beyond—Overview*, 61 ANTITRUST L.J. 147 (1992-1993).

12. *See* 15 U.S.C. 18 (1996); EC Merger Regulation, para. (29), O.J. L 24/1, at 4 (2004).

II. *EFFICIENCY CONSIDERATIONS IN U.S. MERGER ENFORCEMENT*

The treatment of efficiencies in the United States began with a notable misstep. In 1962, in *Brown Shoe Co. v. United States*,[13] the U.S. Supreme Court, in the first merger case it considered after the Clayton Act was thoroughly revised in 1950 to augment governmental power to challenge mergers,[14] concluded that efficiencies realized in mergers could weigh against the legality of a merger:

> [Another] significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers.[15]

The Court went on to state that it was important to protect "viable, small, locally-owned businesses" and attributed its decision to allow consumers to pay higher prices than otherwise would be necessary to an intention on the part of Congress to maintain "fragmented industries and markets."[16]

The misstep was fortunately short-lived. In *FTC v. Proctor & Gamble, Co.*,[17] the Supreme Court did not repeat the assertion that efficiencies might turn out to be anticompetitive, but went so far as to comment:

> [P]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.[18]

For several decades, the Supreme Court's position remained that efficiencies, at best, are neutral with respect to the merits of a merger. Although the Supreme Court undertook no

13. 370 U.S. 294 (1962).
14. Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (1950).
15. *Brown Shoe*, 370 U.S. at 344.
16. *Id.*
17. 387 U.S. 568 (1967).
18. *Id.* at 580.

additional merger reviews raising substantive issues, the situation in the United States became increasingly unstable because lower courts, aware of the Supreme Court's hostility to claims of efficiency as a mitigating factor, nevertheless examined efficiency questions in merger cases.[19] Throughout the period prior to the mid-1990s, the government's Merger Guidelines acknowledged that efficiencies might lead the government, as a matter of prosecutorial discretion, not to challenge a merger, but the various formulations with respect to prosecutorial discretion were always framed in language that indicated strong skepticism that efficiencies would ever change the result of an otherwise illegal combination.[20]

The posture of efficiency considerations in the United States changed in 1997 when the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") amended their Horizontal Merger Guidelines to acknowledge that efficiency considerations not only could influence prosecutorial discretion, but could justify otherwise illegal mergers facing challenge in

19. *See, e.g.*, FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11 Cir. 1991) (acknowledging that claims of efficiency can rebut the government's prima facie case, but finding insufficient evidence in the record); United States v. United Tote Inc., 768 F. Supp. 1064, 1084-85 (D. Del. 1991) (holding efficiency claims not sufficient to overcome evidence of anticompetitive effects, particularly because "there are no guarantees that these savings would be passed on to the consuming public").

20. For example, the 1982 Merger Guidelines state,

> Except in extraordinary cases, the Department will not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged. Plausible efficiencies are far easier to allege than prove. Moreover, even if the existence of efficiencies were clear, their magnitudes would be extremely difficult to determine.

DEP'T OF J. & FED. TRADE COMM'N, MERGER GUIDELINES 29 (1982), *availalable at* http://www.usdoj.gov/atr/hmerger/11248.pdf. The 1984 Merger Guidelines state,

> Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department.
>
> Some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. If the parties to the merger establish by clear and convincing evidence that a merger will achieve such efficiencies, the Department will consider these efficiencies in deciding whether to challenge the merger.

DEP'T OF J. & FED. TRADE COMM'N, MERGER GUIDELINES 23 (1984), *available at* http://www.usdoj.gov/atr/hmerger/11249.pdf. The 1992 Horizontal Merger Guidelines use almost identical language. *See* DEP'T OF J. & FED. TRADE COMM'N, MERGER GUIDELINES 28 (1992), *available at* http://www.usdoj.gov/atr/hmerger/11250.pdf.

court.[21] The Guidelines struck the principal theme, at the outset of the efficiency section, by noting that efficiencies generated by merger can enhance the merged firm's ability and incentive to compete, and later, that cognizable efficiencies may be "sufficient to reverse the merger's potential to harm consumers in the relevant market."[22] The new acknowledgement of the role of efficiencies in merger enforcement was designed to be narrow (too narrow in the view of many in the U.S. academic community and at the Bar), and included the following qualifications:

> (1) The alleged efficiencies must be verifiable (i.e., not vague or speculative);
> (2) The efficiencies must be timely, likely and sufficient to overcome anticompetitive effects;
> (3) The efficiencies must be merger-specific (i.e., "unlikely to be accomplished in the absence of the proposed merger");
> (4) The efficiencies must not grow out of an anticompetitive reduction in output or service (for example, if the reduction in costs results from closing one of two competing outlets, that is hardly an efficiency likely to benefit consumers); and
> (5) "Efficiencies [will] almost never justify a merger to monopoly or near-monopoly."[23]

In the final paragraph, the Guidelines address the differences in types of efficiency, noting that efficiencies resulting from production shifts that reduce cost of production are most "likely to be susceptible to verification, merger specific and to be substantial"; that efficiencies relating to research and development can be substantial but are "generally less susceptible to verification"; and that efficiencies relating to procurement, management or capital costs are the least likely to make a difference because they are often not merger specific or substantial.[24] While the U.S. Guidelines never make the point expressly, the whole tone of the section strongly indicates that the burden of proof is squarely on the party asserting the efficiency claim.

There is no recorded instance in the United States where an otherwise illegal merger was found by a court not to violate the antitrust laws because of the presence of efficiencies. On the other hand, there is increasing evidence that efficiency claims, as

21. HORIZONTAL MERGER GUIDELINES, *supra* note 2, at 30-31.
22. *Id.*
23. *Id.*
24. *Id.* at 32.

spelled out in the Guidelines, have had the effect of persuading enforcement authorities not to challenge proposed mergers. In the recently published *Commentary on the Horizontal Merger Guidelines*,[25] jointly published by the FTC and the Department of Justice in 2006, the U.S. enforcement agencies issued a report designed to explain how they interpret the Horizontal Merger Guidelines and to make enforcement decisions more transparent. Part of the process involved publication of brief explanations of why each agency decided to challenge, or declined to challenge, reported transactions. In the section of the commentary on efficiencies, the agencies noted five proposed mergers that were not challenged, where efficiency claims led to that decision, or were significant factors along with other considerations.[26]

III. *EFFICIENCY CONSIDERATIONS IN EU MERGER ENFORCEMENT*

Like the United States, EU law does not expressly allow or expressly prohibit efficiency considerations to be taken into account in merger enforcement. Article 2(1)(b) of the European Community Merger Regulation ("ECMR") does allow "technical and economic progress provided it is to the consumers' advantage" to be taken into account, which would appear to open the door to efficiency claims.[27] On the other hand, the next phrase in the ECMR provides that any such technical progress should "not form an obstacle to competition", which arguably closes the same door.[28] Because of such obscure language, and confusion about the way the Commission addressed efficiencies in the *Aerospatiale/DeHavilland*[29] and *GE/Honeywell*[30] cases, in 2001 the Commission acknowledged the presence of confusion and formally invited discussion of the role, if any, of efficiency consider-

25. DEP'T OF J. & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006) [hereinafter 2006 MERGER COMMENTARY], *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

26. *See id.* at 50, 53, 55, 58 (Nucor-Birmingham Steel, Genzyme-Novazyme, Toppan-DuPont, Verizon-MCI, SBC-AT&T).

27. EC Merger Regulation, art. 2(1)(b), O.J. L 24/1, at 7 (2004).

28. *Id.*

29. Commission Decision No. 91/619/EEC, O.J. L 334/42 (1991) (Aerospatiale-Alenia/de Havilland).

30. Commission Decision No. 2004/134/EC, O.J. L 48/1 (2001) (General Electric/Honeywell).

ations. The majority of responders advocated that efficiency considerations should be taken into account since they might contribute to overall economic efficiency and the welfare of consumers.[31]

In 2004, the Commission added a detailed description of efficiency considerations to its Horizontal Merger Guidelines.[32] The main themes of the EU Efficiency Guidelines are strikingly similar to those of the United States, but in the process of spelling out the Guidelines, some minor but interesting differences emerge. The overarching theme, touched upon in the introduction to Section VII of the Guidelines, relating to efficiencies, is that efficiencies can be generated by a merger that may enhance the ability or incentive of the merged entity to act pro-competitively for the benefit of consumers, and thereby counteract any adverse competitive effects. Efficiencies in the context of innovation and research are no less relevant than efficiencies leading to reduction of costs.[33]

The EU discussion of efficiencies is divided into three categories: (1) benefit to consumers, (2) merger specificity, and (3) verifiability.[34] While the United States does not break out discussion in separate categories, the essential direction of the EU Guidelines is similar to that of the United States.

A. *Benefit to Consumers*

Among the factors that are quite similar to the U.S. approach, the EU Guidelines emphasize that the efficiencies must be substantial and timely—not simply result from restrictions in output—and are unlikely to justify any mergers that lead to or approach monopoly.[35] While the EU Guidelines, like the DOJ-FTC Guidelines, do not explicitly reject a total welfare standard in judging efficiencies (i.e., incorporate as efficiencies benefits to producers as well as consumers), it is fairly clear on the face of the EU Guidelines that a consumer welfare standard is intended.

One difference is the emphasis in the European Union on

31. Commission of the European Communities, *Green Paper on the Review of Council Regulation* (EEC) No 4064/89, arts. 170-72, COM (2001) 745 (Dec. 2001).

32. *See* EC Horizontal Merger Guidelines, paras. 76-88, O.J. C 31/5, at 13-14 (2004).

33. *See id.* para. 81, O.J. C 31/5, at 13 (2004).

34. *See id.* paras. 76-88, O.J. C 31/5, at 13-14 (2004).

35. *See id.* para. 79, O.J. C 31/5, at 13 (2004).

cost efficiencies that lead to reductions in variable or marginal costs. The EU Guidelines describe variable costs as more likely to result in lower prices to consumers.[36] The U.S. Guidelines more or less ducked the issue, although they do refer at several points to "marginal" cost reductions.[37] Since in the long term all fixed costs become marginal costs, the position advocated in the economic community that marginal cost savings are more valuable than fixed cost savings, and more likely to be passed on to consumers, is of questionable validity. It is difficult to believe that a major reduction in the cost of fixed assets as a result of a merger would not be likely to reduce costs to consumers—certainly in the long run—just as would a major reduction in the cost of ingredients.[38]

B. *Merger Specificity*

Like the United States, the EU Guidelines emphasize that the efficiencies must be "merger-specific"—*i.e.*, could not be achieved to a similar extent by less anticompetitive alternatives.[39] In both jurisdictions, the burden of proof to demonstrate there exists no less anticompetitive alternative, is placed squarely on the party claiming the efficiency.[40]

C. *Verifiability*

At least on the surface, the EU Guidelines regarding verification may be more stringent than in the United States. Efficiencies, where reasonably possible, must be "quantified."[41] Also, the Guidelines emphasize that because the relevant information is in the hands of the parties advocating the merger, they have the burden of proof to show the extent to which the efficiencies would outweigh any adverse consumer effects.[42]

36. *See id.* para. 80, O.J. C 31/5, at 13 (2004).

37. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 2, § 4.

38. *See* 2006 MERGER COMMENTARY, *supra* note 25, at 57-58. In the Commentaries on the U.S. guidelines, discussed earlier, the U.S. enforcement agencies report they do consider reductions in fixed costs, though it is clear that they are given less weight than reductions in variable costs. *See id.* at 59.

39. *See* EC Horizontal Merger Guidelines, para. 85, O.J. C 31/5, at 14 (2004).

40. *See id.*; *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 2, § 4.

41. *See* EC Horizontal Merger Guidelines, para. 86, O.J. C 31/5, at 14 (2004).

42. *See id.* para. 87, O.J. C 31/5, at 14 (2004).

IV. *DIFFERENCES BETWEEN THE UNITED STATES AND THE EUROPEAN UNION*

There are a few modest differences between the U.S. and EU approaches. First, unlike the United States, the European Union requires that efficiencies and the resulting benefits to consumers should be "quantified."[43] Since efficiencies are a prediction before the merger actually goes through, too much emphasis on quantification may undermine the validity of the efficiency claim. Second, the EU describes the type of internal documents that would support an efficiency claim; particularly, internal documents used by management to decide on the merger and historical examples of efficiencies and consumer benefit.[44] The U.S. Guidelines do not spell out such details, although perhaps it is self-evident that is the kind of data that would be most useful. Third, the U.S. Guidelines explain that certain types of efficiency are most persuasive: Efficiencies resulting from shifting production enabling firms to reduce costs are more likely to be susceptible to verification; efficiencies relating to procurement, management, or capital costs are least likely to be merger-specific or substantial.[45] The EU Guidelines do not expressly address the subject, although some comments indirectly suggest the European Union would be more hospitable to claims of efficiency leading to innovations than the United States.[46]

Finally, the U.S. Guidelines address the question of whether efficiencies in one market can outweigh adverse competitive affects in a separate and distinct market.[47] The EU Guidelines never take up the question. Since the U.S. Guidelines are exceptionally obscure on the point,[48] Europe may be demonstrating the better part of wisdom in simply ducking the question.

There are small differences between the Guidelines in the

43. *See id.* para. 86, O.J. C 31/5, at 14 (2004).

44. *See id.* para. 88, O.J. C 31/5, at 14 (2004).

45. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 2, § 4.

46. *See, e.g.*, EC Horizontal Merger Guidelines, para. 81, O.J. C 31/5, at 13 (2004).

47. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 2, § 4.

48. *See id.* § 4 n.36. ("In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).").

two jurisdictions, but the similarities clearly outweigh the differences. In both jurisdictions, the efficiency defense is deliberately described in a way that makes it difficult to establish. As with the United States, there is no recorded instance in the EU where an otherwise illegal merger was found by a court as legal as a result of efficiencies. There are, however, in the United States, a substantial number of instances where efficiencies have led prosecutors not to challenge a merger.[49] In the European Union, there are several press releases in recent years suggesting that investigations were terminated because of likely efficiencies. For example, in *Korsnas/AD Cartonboard*, the press release states that "the transaction is likely to create synergies which would appear likely to be at least partly passed on to consumers."[50]

V. *HOLDING EFFICIENCIES AGAINST THE LEGALITY OF A MERGER*

As noted, for a brief period of time, efficiencies under U.S. law could be held against the legality of a merger.[51] Current law and current guidelines have firmly rejected that position.[52] In the European Union, several decisions appear to have held efficiencies against the legality of a merger, and no case law or guideline provision indicates that is an erroneous result. An example in the EU involves the 1991 Commission decision blocking the merger between Aerospatiale, a French manufacturer of aircraft and other space systems, and De Havilland, a Canadian company that manufactured turbo-prop aircraft.[53] The proposed merger was vulnerable on many conventional grounds, but was notable because the Commission decision found a violation, in part, due to the ability of the combined firm to furnish a complete range of products that would offer cost advantages to buyers, and would reduce the fixed costs of pilot and mechanic training and the cost of maintaining different in-house inventories.[54] While the Commission never squarely concluded that the

49. *See supra* note 26 and accompanying text.

50. Commission Press Release, IP/06/610 (May 12, 2006).

51. *See supra* notes 13-16 and accompanying text (discussing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)).

52. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 2, § 4.

53. Commission Decision No. 91/619/EEC, O.J. L 334/42 (1991) (Aerospatiale-Alenia/de Havilland).

54. *See id.* ¶ 32.

efficiencies counted against the legality of the merger, it did note that the merged group would enjoy benefits that would be out of the reach of competitors, and implied that that fact added to the reasons for blocking the transaction.[55]

More recently, controversy over using possible efficiencies to challenge mergers has emerged in the conglomerate merger area in connection with the concept of "portfolio" or "range" effects. The theory appears to be that a combination by merger of companies producing complimentary products gives the merged entity the opportunity to reduce price (by bundling or otherwise), or improve quality to the detriment of competitors, and in the long run, of consumers. Under the theory, mergers are less likely to be approved when the combined company produces products that are more attractive to buyers. For example, in *Boeing—McDonnell-Douglas*,[56] the Commission extracted conditions before it approved the merger, knowing that the combination would produce "commonality benefits" which, in turn, would lower costs to consumers.[57]

In 2001, the Commission took a far more controversial stance in blocking the merger of General Electric, the world's largest manufacturer of jet engines, and Honeywell, the world's largest manufacturer of aircraft control systems.[58] Again, the theory was that the combined company would have the opportunity to lower price and improve products through mixed bundling or technological tie-ins.[59]

Possibly these opinions, which appear equivalent to the early determination in the United States (in *Brown Shoe*) that efficiencies could be held against the legality of mergers, will not constitute a lasting approach. The opinion of the European Court of First Instance in *GE/Honeywell,* affirming on traditional grounds the decision to block the merger and finding portfolio or comparable theoretical effects not proven, may be a sign that

55. *See id.* ¶ 69 (suggesting competitors would not be able to withstand pricing pressure).

56. Commission Decision No. 97/816/EC, O.J. L 336/16 (1997) (Boeing/McDonnell Douglas).

57. *See id.* ¶¶ 41, 124.

58. Commission Decision No. 2004/134/EC, O.J. L 48/1 (2001) (General Electric/Honeywell).

59. *See id.* ¶¶ 162, 478-81, 483.

the European Union is changing direction on the role of efficiencies in merger analysis.[60]

60. *See* European Competition Commissioner Mario Monti, Speech at the Conference on Reform of European Merger Control: Review of the EC Merger Regulation—Roadmap for the Reform Project, (Jun. 4, 2002), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/252&format=HTML&aged=0&language=EN&guiLanguage=EN (stating that "there is no such thing as a so-called 'efficiency offense' in EU merger control law and practice."). Attorneys in Europe have challenged that view. *See* Robbert Snelders & Simon Genevaz, *Merger Efficiencies and Remedies*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: MERGER CONTROL 2007, at 9, 13 (Global Legal Group ed., 2007), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/958.pdf.