
Summary of ABA and Canadian Bar Association Brown Bag Lunch Program on International Merger Enforcement: The GE-Honeywell Decision and the Future of EU Merger Analysis [\[Top\]](#)

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On February 8, 2006, the ABA Mergers & Acquisitions and International Committees, together with the Canadian Bar Association International Competition and Trade Law Committee, hosted a Brown Bag discussion of the recent EU Court of First Instance (CFI) judgment in the GE-Honeywell case.

The Panel was moderated by Ken Glazer of the Coca-Cola Co. Speakers included Carles Esteva-Mosso¹, Francisco Enrique González-Díaz² and Marleen Van Kerckhove.³ Esteva-

Mosso presented the European Commission's (EC or Commission) view of the CFI judgment; González-Díaz discussed the court's review of the EC's application of the horizontal "dominance" test to the merger. Van Kerckhove discussed the CFI's review of the EC's application of conglomerate effects theory to the merger. These presentations were followed by a panel discussion.

Background to GE-Honeywell

GE and Honeywell announced their intention to merge in October 2000. The transaction gave rise to possible antitrust issues including:

- Horizontal issues in several overlap markets such as large regional and corporate jet engines;
- Vertical issues resulting from GE's ability to foreclose competing jet engine vendors from access to Honeywell's engine starters post-merger;
- Conglomerate issues resulting from GE's ability to bundle Honeywell's avionic and non-avionic products with its own jet engines post-merger; and

* The author wishes to thank Carles Esteva-Mosso, Marleen Van Kerckhove, John Parisi and Kristina Martin for reviewing this note.

**Any views expressed in this article are those of the author personally, and are not reflective of the official views or positions of the Federal Trade Commission.

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- General issues resulting from the perceived market power afforded GE through its financing arm—GECAS.

The transaction was reportable to both the U.S. Department of Justice (DOJ) and the EC. By May 2001, the DOJ had completed its review of the transaction and cleared it subject to limited commitments. Also in May 2001, the EC issued a Statement of Objections, signaling its intention to block the transaction. These diverging merger review outcomes triggered a heated debate between the EC and the DOJ specifically, and within the wider antitrust community generally, as to the application of conglomerate and vertical theories to the merger. In July 2001 the EC nonetheless adopted a decision blocking the merger.⁴ Even though this decision effectively marked the end of the road for the transaction, GE took the unusual step of appealing the Commission's decision to the EU Court of First Instance (CFI). In December 2005, the CFI handed down its judgment upholding the Commission's blocking decision overall, while nullifying it in part.⁵ Broadly speaking, the CFI upheld those parts of the Commission's decision blocking the transaction on horizontal grounds and nullified those parts of the decision blocking the transaction on vertical and conglomerate grounds.

Carles Esteva-Mosso

Esteva-Mosso presented the EC's view of the CFI judgment. The EC welcomed the CFI judgment for two principal reasons: firstly, because the Commission's decision was up-

⁴ GE/Honeywell, Case No. COMP/M.2220, Comm. Decision of 3 July 2001.

⁵ Case T-210/01, General Electric Company v. Commission, Judgment of the Court of First Instance, 14 December 2005.

held, and secondly, because the CFI judgment provided "clear guidance" on how the EC should assess conglomerate effects. Although the court did not agree with the EC's analysis across the board, it agreed that the Commission was right to block the merger due to horizontal effects arising in three different worldwide markets, and that the remedies submitted by GE to resolve the Commission's concerns were insufficient. The fact that two of the three theories of harm put forward by the Commission were struck down by the court could not vitiate the whole decision.

The CFI judgment provided "clear guidance" on how the EC should assess conglomerate effects going forward and this was to be welcomed. The court did not rule out future application of conglomerate effects but rather spelled out the burden of proof placed on the Commission when blocking a merger based on a conglomerate theory. In this respect, the judgment put "meat on the bones" of the Tetra Laval judgment.⁶

On the vertical issues raised by the merger, Esteva-Mosso took the view that there was a "clear case" of foreclosure since Honeywell had a de facto monopoly in jet engine starters and GE held a dominant position in the downstream market for jet engines. The court found this part of the Commission's vertical theory to be "very persuasive." However, the court went

⁶ Case C-12/03 P, Commission v. Tetra Laval, [2005] ECR I-987. This case also dealt with both conglomerate and vertical theories in a merger context. In its judgment, the European Court of Justice (ECJ), which is the highest court in the EU system, held that the Commission must present convincing evidence that a merged entity: (1) will be capable of engaging in post-merger behavior likely to give rise to vertical or conglomerate effects; (2) has concrete economic incentives for so doing; and (3) can be expected so to do, thereby impeding competition.

on to hold that the Commission had erred in not taking into account the deterrent effect of Article 82 on future conduct (e.g., exclusive dealing, bundling, etc.) by the merged entity likely to result in such foreclosure. For this reason, the Commission's decision to block the merger on vertical grounds could not stand. According to Esteva-Mosso, this conclusion may contradict the ECJ's ruling in Tetra Laval in which that court held that EU merger review law does not impose an obligation on the Commission to take into account the deterrent effect of Article 82. In addition, Article 82 is unlikely to deter in cases where it is difficult to detect an abuse. In the GE-Honeywell case, some of the possible means of foreclosure, such as delays in the supply of starters or progressive degradation of the product, would have been difficult to detect.

Glazer asked Esteva-Mosso whether the GE-Honeywell case had a detrimental effect on EC/US antitrust cooperation. Esteva-Mosso stressed that GE-Honeywell was an "exceptional" case, one that could not be considered reflective of the generally high level of cooperation between the US and EC. He noted that the case was a driver behind the October 2002 Best Practices initiative concerning cooperation in merger investigations between the EC and US agencies. These Best Practices apply to simultaneous merger review by the EC and the US and cover issues including confidentiality waivers, inter-agency staff information exchanges, and coordination of remedies.⁷

Francisco Enrique González-Díaz

González-Díaz discussed the CFI's review of the EC's application of the horizontal "dominance" test to the merger. He first noted, however, that with the introduction of the revised substantive test in May 2004, the dominance test has become less relevant in merger analysis. Under the new substantive test, the Commission's review looks to whether the transaction would "significantly impede effective competition." This test places new emphasis on future effects analysis, in addition to static structural analysis. González-Díaz found the judgment to be "very interesting" in helping to understand how future courts will likely assess the new test.

González-Díaz thought it noteworthy that in reaching its conclusions regarding dominance, the CFI went into great detail in some markets (such as large regional jet engines) and less detail in others (such as small marine gas turbines). This may, of course, have been a function of the emphasis placed on some markets by GE itself in presenting its arguments and evidence to the court.

González-Díaz also discussed the court's findings on the relevance of market shares in bidding markets. GE argued before the court that, due to their volatility, market shares in bidding markets could not be considered a proxy for market power. The Commission had paid attention to this argument in its review but dismissed it because several plus factors served to reinforce GE's market shares. These plus factors included GE's financial strength overall and, in particular, the financial strength of its leasing arm, GECAS, the largest aircraft leasing company in the world. Although the court agreed with the Commission on this issue, González-Díaz thought it likely that in future cases market shares would not be enough to

⁷ The Best Practices are available at: www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

establish dominance in bidding markets absent such plus factors.

Marleen Van Kerckhove

Van Kerckhove discussed the CFI's review of the EC's application of conglomerate effects theory to the merger. In her assessment, the CFI judgment confirmed that there are specific problems of proof when applying a conglomerate theory of harm to a merger. This is not only because conglomerate transactions do not generally give rise to anticompetitive effects, but also because, unlike structural analysis, their assessment typically involves a prospective analysis stretching well into the future. In addition, the specific conduct of the merged entity will determine to a great extent what effects the concentration has; yet, the chain of causation between the conduct and the effects may be uncertain and difficult to establish. These difficulties make the quality of the evidence produced by the Commission in support of conglomerate theories all the more important.

According to the CFI, it was not enough for the Commission to show that GE would have the ability to transfer certain practices from jet engines to Honeywell's avionics and non-avionics products. The Commission should also have shown that the merged entity likely would engage in such conduct and that such conduct would create, in the relatively near future, dominance on one or more (non-) avionics markets. The Commission did not meet this standard of review because it did not take into account the fact that the GE and Honeywell markets did not share the same dynamics. Instead, the Commission relied on general presumptions. For example, the Commission overlooked certain practical problems for GE in engaging in bundling engines and (non-)avionics: specifically, such bundling only works if the customer selecting the engine and the customer selecting the (non-)avionics is the same entity. In addition,

engines are also generally selected at an earlier stage in the design process. The Commission also failed to produce economic evidence demonstrating that any costs to GE of bundling products could, in fact, be offset against extra revenues, or that the merged entity would have an incentive to engage in mixed bundling (absent clear evidence that the "Cournot effect" supported the Commission's conclusions). Finally, the Commission ignored the deterrent effect that future Article 82 enforcement could have on abusive bundling conduct. For all these reasons, the Commission was unable to meet its burden of proof in establishing a conglomerate effect post merger.

Panel Discussion

Glazer asked the panel whether future mergers were likely to be challenged on conglomerate effects grounds in light of the CFI ruling in GE-Honeywell. Esteva-Mosso repeated his earlier point that such merger challenges were rare prior to the CFI's decision and would remain so. To illustrate, he referred to two recent Commission merger decisions in which the Commission examined possible conglomerate effects raised by complainants but nonetheless cleared the transaction in Phase I.⁸

Van Kerckhove agreed that while complainants would likely continue to raise conglomerate effects it would be increasingly difficult, given the standard of proof required for the Commission to block mergers using a conglomerate theory post GE-Honeywell.

González-Díaz predicted that conglomerate effects would be raised in future cases but would best be applied to markets where there was documentary evidence of past conduct by

⁸ GE/Amersham, Case No. COMP/M.3304, and Procter & Gamble/Gillette, Case No. COMP/M.3732.

the acquirer supporting the theory. González-Díaz further noted that the Commission should also in future cases be burdened with producing an economic model in support of its conglomerate theory. Unlike the model adopted in GE-Honeywell, this model should not be theoretical but rather should take into account real-life industry and company specific variables. This would require data from the parties themselves, not interveners, as was the case in GE-Honeywell. Absent such evidence, the Commission would be less likely to argue conglomerate effects in the future.

González-Díaz went on to consider whether future EU courts would apply the same (*i.e.*, more stringent) evidentiary standards to vertical effects as the GE-Honeywell court had done to conglomerate effects. He saw no theoretical reason why this should not be the case. Indeed, economists argue that the same rigor should be applied to transactions alleging either theory. Neither did he see any legal reason why vertical theories should be treated differently.

Esteva-Mosso explained that the reason why the GE-Honeywell court had not applied as stringent a standard to vertical effects could be because the underlying facts supporting the vertical theory in the case were particularly strong. He predicted that, in general, the evidentiary standards laid down in GE-Honeywell will prompt the Commission to look to internal company documents as a means of assessing likely future conduct in more cases than in the past; as it notably did in the recent EDP/ENI/GDP case.⁹ The Commission in future cases also will likely use more economic

evidence to demonstrate the incentives of merging parties to engage in specific conduct post-merger.

⁹ EDP/ENI/GDP, Case No. COMP/M.3440, Comm. Decision of 9 Dec. 2004, *aff'd*, EDP v. Commission, Case T-87/05, Judgment of the Court of First Instance, 21 Sept. 2005.