The More Economic Approach to EU Antitrust Law

Anne C Witt

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1

Triggers and Catalysts

I. Introduction

The more economic approach to EU antitrust law did not appear out of the blue. A number of factors contributed to its advent. In the mid-1990s, the European Union had realised its key aim of creating a single market to a great extent, which allowed the institutions to turn their attention to new tasks and objectives. Around the same times, the European Commission's antitrust policy came under increasing criticism from academics and practitioners for its lack of economic analysis. The 1990s and early 2000s saw the Commission clash repeatedly with the US antitrust authorities over cases with international dimensions, in which it was accused of being guided by the wrong values and applying outdated economic theories. In particular, the emotionally charged dispute over the Commission's decision to prohibit the merger between the two US companies General Electric and Honeywell triggered an extensive debate about the role of economics in antitrust analyses both at the academic level and within the European Commission's Directorate General for Competition Policy (DG Competition). The Court of Justice of the European Union is likely to have fuelled the Commission's review process further when, in an unprecedented move, it annulled three merger decisions in 2001 because of manifest errors of assessment. Another important factor was the appointment of an economist to the position of Commissioner for Competition in 1999. His professional background and personal convictions no doubt played a major part in driving forward the reform and shaping the Commission's more economic approach to EU antitrust law. Finally, the Commission's review process is likely to have been influenced by the exchange of ideas between antitrust authorities in the International Competition Network and other international forums of cooperation.

II. The Completion of the Internal Market

The creation of a common market between the six original Member States had been the cornerstone of the European project that dominated much of the Union's early activities. In order to understand the importance accorded to this aim, one must bear in mind that market integration not only served the purpose of creating economic welfare. In the 1950s, it was considered a key tool for preventing further military conflict in Europe. The European Communities were created in response to World Wars I and II, which ravaged the European continent in quick succession. Attempts at international peace-building following World War I had not been successful. 20 years after the Treaty of Versailles officially ended the state of war between Germany and the allied powers, World War II began, only to surpass the previous conflict in human loss, destruction and suffering. In 1946, the League of Nations, which had proved ineffective in preventing World War II, was therefore dissolved. The United Nations took its place as the key international body to promote international cooperation and peace. Given how powerless the League of Nations had been against the rise of war, however, there were serious doubts as to whether this successor organisation would be any more successful.

Against this background, the French Foreign Minister Robert Schuman proposed a novel and highly experimental method of securing a sustainable peace in Europe. Instead of focusing on the promotion and respect of certain ideological values in the image of the United Nations and the Council of Europe, the Schuman Declaration of May 1950[1] outlined a much more pragmatic plan. It was based on the key premise that in order to achieve a lasting peace in Europe it was necessary to eliminate the age-old opposition between France and Germany. This was not to be achieved through unilateral supervision of Germany, but through practical cooperation. The hope was that such cooperation, which was to start in small, well-defined areas, would result in mutual trust and could then be expanded to other spheres.

Today's European Union is the outcome of this plan. In 1951, France, Germany, Italy and the three Benelux countries agreed to create a common market for coal and steel. With this aim, they created a European Coal and Steel Community (ECSC) with independent institutions that would not only ensure the application of the Treaty's provisions but also had the power to make rules and take decisions with regard to this common market that were binding on the signatory States.[2] This system allowed the Member States and the independent Community institutions to monitor the trade of coal and steel within the Community's territory. The reasons for starting cooperation and trust-building in this specific area were obvious. Coal and steel were indispensable to the production of arms and military machinery, so that placing the trade in coal and steel under common supervision would have allowed the participating States to detect if one of them were rearming.

In 1957, the same six States agreed to create two further areas of cooperation. The Treaty establishing the European Atomic Energy Community (Euratom)

[1] Declaration of 9 May 1950 by Robert Schuman, available at: www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf.

[2] Treaty establishing the European Coal and Steel Community (1951).

related to the other area relevant to modern warfare, ie nuclear energy. The Treaty establishing the European Economic Community, the legal predecessor of today's Union, was not concerned with detecting and preventing rearmament, but pursued another method of conflict prevention: economic integration. In the ultimate aim of establishing an 'ever-closer union amongst the peoples of Europe' and the 'elimination of barriers which divide Europe',[3] the same six States decided to begin this process by abolishing the economic barriers that divided Europe. The key purpose of the European Economic Community was to create a common market between its members, within which goods, services, capital and the people engaged in economic activities could move around freely irrespective of national borders. The hypothesis was that national economies would become so intertwined that engaging in military conflict with one another would have disastrous economic consequences for the individual Member States. This was deemed a powerful deterrent not only for the Member States' governments but also for their citizens, who were dependent on good relations with neighbouring States either because they were engaged in trade with them or because they benefited from this trade as consumers. In addition to this effect, the signatory States also assumed that free trade would create economic prosperity and improve the 'living and working conditions of their peoples'.[4]

The key legal tools for creating the common market were the free movement rules that were aimed at abolishing state-imposed barriers to the free movement of goods, workers, the self-employed, services and capital.[5] As a complement to these rules, the signatory States also included 'rules on competition' that were addressed to undertakings. The main reason for including these competition rules was that they were deemed necessary to ensure that private parties did not replace the state-imposed barriers with private barriers to trade.

The creation of the three Communities was a remarkable victory of reason over emotion. France, Germany, Belgium and The Netherlands had geographically been at the centre of both world wars and many other previous European military conflicts. France and Germany in particular had repeatedly clashed over border territories and in the 1950s, there was a deeply embedded distrust between the citizens of these States stemming from centuries of conflict and suffering.

While the aim of peace-building may no longer be what most people nowadays associate with the internal market goal, it must have been prominent in the minds of the first generations of Community officials, who had experienced the traumas of World Wars I and II first-hand. This experience, and the desire to prevent another conflict between the original Member States, undoubtedly explains the importance, urgency and almost mythical status accorded to the common market goal in the early days of the Communities. Not surprisingly, therefore, the

[3] Treaty Establishing the European Economic Community (1957) Preamble, points 1 and 2.
[4] ibid, Preamble, point 3.
[5] Now TFEU, Arts 28–37, 45–48, 49–55, 56–62 and 63–66.

creation of the common market was the focus of the institutions' policy during the first 35 years of the Union's existence,[6] including its antitrust policy. While the process faltered in the 1970s and early 1980s when the oil crises, recession and empty chair crisis almost paralysed the Union's political institutions, it was revived in the mid-1980s, when the Commission published a White Paper outlining a plan for completing the common market by 1992 under the guidance of its new president Jacques Delors. The functional rather than institutional approach of Delors' plan appealed to most Member States, prompting them to convene an intergovernmental conference, which resulted in the adoption of the Single European Act in 1986.[7] This Treaty amended the Treaty of Rome in apparently modest ways.[8] At its heart lay the proposal and goal to complete the common market, redubbed 'single market', by 31 December 1992. Between 1986 and 1992, the European Union adopted nearly 280 pieces of legislation to achieve this aim.[9] The single market was formally considered in place on 1 January 1993.

While the aim of protecting the single market, renamed 'internal market' by the Treaty of Lisbon, remains a valid and important objective of the Union, it lost some of its immediate urgency after 1 January 1993. This is also reflected in the growing number of objectives not related to the internal market in the Union Treaties after 1993. Consequently, the institutions, including the Commission, were able to turn their attention to other projects and causes, more in line with that of a modern nation state than an experimental supranational organisation focused on eliminating barriers to trade.

III. Academic Criticism

In the late 1980s and early 1990s, EU antitrust law came under attack from a number of academics. Barry Hawk famously published a particularly critical analysis of the treatment of vertical restraints under EU antitrust law, which he deemed too legalistic and lacking in economic analysis.[10] The European Commission explicitly engaged with his views in a Green Paper on Vertical Restraints from 1997, which opened a public consultation on ways of modernising the

[6] JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; DJ Gerber, *Law and Competition in Twentieth Century Europe* (Oxford, Clarendon Press, 2001) 346 ff; R Wesseling, *The Modernisation of EC Antitrust Law* (Oxford, Hart Publishing, 2002) 22 ff.

[7] Single European Act [1987] OJ L169/1.

[8] GA Bermann, 'The Single European Act: A New Constitution for the Community' (1989) 27 *Columbia Journal of Transnational Law* 529, 536; JW de Zwaan, 'The Single European Act: Conclusion of a Unique Document' (1986) 23 *Common Market Law Review* 747.

[9] European Commission, 20 Years of the European Single Market (Luxembourg, Publications Office of the European Union, 2012).

[10] BE Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973. See also BE Hawk, 'The American (Anti-trust) Revolution: Lessons for the EEC?' (1988) 9 *European Competition Law Review* 53.

Commission's approach to assessing vertical restraints.[11] Hawk was by no means the only person to criticise the lack of economic analysis in the Commission's antitrust policy. A number of other eminent academics, practitioners and even Commission officials expressed similar views.[12] Most of these critiques drew on a comparison of EU antitrust law with US antitrust law, which had been guided by the objectives and tools of economic theory since the late 1970s, and the Commission's approach usually came off very much worse in these comparisons.

IV. Transatlantic Conflict

What a number of academics had detected in the 1980s already became more or less public knowledge in the late 1990s: EU and US antitrust law did not follow the same substantive principles. This became painfully obvious when the US and EU antitrust authorities investigated a number of cases with international dimensions and reached opposite findings. All of a sudden, these discrepancies were no longer merely of academic interest. They had very real implications.

A. The Boeing/McDonnell Douglas Crisis (1997)

In 1997, both the US Federal Trade Commission (FTC) and the European Commission investigated the proposed merger between Boeing and McDonnell Douglas. Both of these businesses were US companies operating in the aerospace industry. At the time of the proposed transaction, Boeing had a market share of 64 per cent in the market for new large commercial aircraft and McDonnell Douglas had a market share of 6 per cent. The only other significant competitor, the European Airbus consortium, had a market share of around 30 per cent.[13] After the transaction, McDonnell Douglas was to become a wholly owned

[11] European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 of 22 January 1997, fn 4.

[12] eg N Kyriazis and L Gyselen, 'Article 86 EEC: the Monopoly Power Measurement Issue Revisited' (1986) 11 *European Law Review* 134; AS Pathak, 'Articles 85 and 86 and Anti-competitive Exclusion in EEC Competition Law: Part 1' (1989) 10 *European Competition Law Review* 74 and 'Articles 85 and 86 and Anti-competitive Exclusion in EEC Competition Law: Part 2' (1989) 10 *European Competition Law Review* 256; V Korah, 'The Judgment in Delimitis: A Milestone towards a Realistic Assessment of the Effects of an Agreement—or a Damp Squib?' (1992) 14 *European Intellectual Property Review* 167 and 'The Paucity of Economic Analysis in the EEC Decisions on Competition: Tetra Pak II' (1993) 46 *Current Legal Problems* 148; D Ridyard, 'Economic Analysis of Single Firm and Oligopolistic Dominance under the European Merger Regulation' (1994) 15 *European Competition Law Review* 255; R van den Bergh, 'Modern Industrial Organisation versus Old-Fashioned European Competition Law' (1996) 17 *European Competition Law Review* 75.

[13] *Boeing/McDonnell Douglas* (Case IV/M.877) [1997] OJ L336/16, recital 9.

subsidiary of Boeing. It was undisputed that the merger would have repercussions on European markets.

The FTC cleared the transaction unconditionally by majority vote, despite the fact that the merger would reduce the number of players in the market from three to two. Its reasoning was that McDonnell Douglas, whose market shares had been steadily decreasing over the previous 10 years, no longer constituted a meaningful competitive force in the commercial aircraft market.[14] The European Commission, on the other hand, made clear that it intended to block the merger under the EU Merger Regulation unless the parties submitted commitments that would alleviate its concerns.[15] It took the view that Boeing already had a dominant position in the market for large commercial aircraft, which would be further strengthened if Boeing were to acquire McDonnell Douglas.[16] The merger would reduce the number of competitors from three to two in the market for large commercial aircraft, and increase Boeing's market share from 65 to 70 per cent. Further, Boeing would acquire McDonnell Douglas' existing customer base, fleet in service, skilled work force, as well as considerable financial and other resources. It would be the only manufacturer able to offer a full family of aircraft and to commit itself to new aircraft models, which would strengthen its ability to induce airlines into long-term exclusivity agreements, thus denying its competitors access to customers.[17] The Commission was also concerned about the effects of Boeing acquiring McDonnell Douglas' space and defence business, which would increase Boeing's intellectual property portfolio. Further, McDonnell Douglas' R&D activities in this area received significant financial contributions from the US government. The Commission considered it likely that Boeing could use some of these monies to cross-subsidise its activities in the commercial aircraft sector, allowing it to offer aircraft at lower prices than its one remaining competitor, Airbus.[18]

The case was highly politicised, both in the United States and in Europe. The US government reportedly exerted considerable pressure on the European Commission and warned it of a damaging political conflict should the Commission

[14] FTC Press Release, 1 July 1997, 'FTC Allows Merger of the Boeing Company and McDonnell Douglas Corporation'; 'Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney Concerning The Boeing Co./McDonnell Douglas Corp.', FTC File No 971-0051 (1 July 1997). 1 Commissioner dissented and wrote a separate statement in which she disagreed with her colleagues' assessment of McDonnell Douglas's competitive significance, arguing that the evidence showed that McDonnell Douglas had added an element of competition and had continued to win some business: 'Statement of Commissioner Mary L. Azcuenaga Concerning The Boeing Co.', FTC File No 971-0051 (1 July 1997). Both statements are available at: www.sec.gov/Archives/edgar/data/63917/0000063917-97-000017.txt.

[15] P Chalmers, 'EU Threatens Being/McDonnell Douglas Deal' *Reuters News* (4 July 1997); 'Brussels v Boeing' *The Economist* (17 July 1997).

[16] *Boeing/McDonnell Douglas* (n 13) recitals 21–71.

[17] The Commission estimated that such exclusivity deals would foreclose around 40% of the world market; ibid, recital 71.

[18] *Boeing/McDonnell Douglas* (n 13) recitals 72–112.

oppose the merger.[19] The Commission, on its part, was digging in its heels. In late-night talks, just days before the final decision, neither side seemed prepared to cede grounds, and the parties walked away without finding a solution to what threatened to turn into a major conflict between the two jurisdictions.[20]

Public opinion in the United States was fiercely critical of the Commission's decision. There was a fair deal of resentment that the European Commission should assume the right to assess and block a merger between two US companies.[21] From the point of view of US antitrust lawyers, however, the extra-territorial scope of the EU Merger Regulation[22] was not the true bone of contention. US courts have long interpreted the US antitrust provisions as also applying to business conduct taking place in another jurisdiction, at least if they were 'intended to affect imports and did affect them'.[23] The US Department of Justice and the FTC have issued enforcement guidelines for international operations that explain in more detail under what conditions they intend to apply the US antitrust rules to foreign businesses,[24] and the FTC has repeatedly assessed mergers between non-US companies under section 7 of the Clayton Act.[25]

While the Commission's scrutiny of the proposed acquisition of McDonnell Douglas by Boeing could therefore not really come as a shock to US antitrust experts, the Commission's reasons for opposing this particular merger were met with great scepticism. Primarily, the Commission was accused of being guided

[19] B Coleman, 'Clinton Hints U.S. May Retaliate if EU Tries to Block Boeing-McDonnell Deal' *Wall Street Journal* (New York, 18 July 1997) A2.

[20] A Torres, 'EU Issues Tough Warning over Boeing-McDonnell Merger' *Reuters News* (15 July 1997); B Coleman, 'EU Still Threatening To Vote Down Boeing-McDonnell Douglas Deal' *Dow Jones Business News* (21 July 1997); J Wolf, 'Boeing-McDonnell Merger Plan Is Closer to Rejection in Europe' *Wall Street Journal* (New York, 16 July 1997) B4.

[21] eg EL Andrews, 'Boeing, Threatened, Sees Trade War' *New York Times* (21 May 1997).

[22] The General Court established in *Gencor* that the application of the Merger Regulation is justified under public international law when it is foreseeable that a proposed concentration between undertakings established outside the Union will have an immediate and substantial effect within the Union (Case T-102/96 *Gencor Ltd v Commission* ECLI:EU:T:1999:65, para 90).

[23] The extra-territorial scope of s 2 of the Sherman Act was first recognised in *US v Aluminium Co. of America*, 148 F.2d 416, 444 (2d Cir 1945). For s 1 of the Sherman Act, see *Hartford Fire Ins. Co v California*, 509 U.S. 764 (1993). (This is a much-simplified summary of a very complex legal question. For an in-depth account, see F Wagner-von Papp, 'Competition Law and Extraterritoriality' in A Ezrachi, *Research Handbook on International Competition Law* (Cheltenham, Edward Elgar, 2012) 21–59).

[24] US Department of Justice and US Federal Trade Commission, 'Antitrust enforcement guidelines for international operations' (April 1995), available at: www.justice.gov/atr/public/guidelines/internat.htm.

[25] Only a few weeks before approving the Boeing/McDonnell Douglas merger, eg, the FTC filed a complaint against a German company, Mahle GmbH, and its Brazilian competitor, Metal Leve SA, for failing to notify the US antitrust authorities of their intention to merge under the Hart-Scott-Rodino Act. Mahle and Metal Leve agreed to pay a (then record) $5.6 million civil penalty to resolve the charges (*United States of America (filed at the request of the FTC) v Mahle GmbH, Mahle, Inc, Mabeg eV, Metal Leve, SA, and Metal Leve, Inc*). Mahle also undertook to divest certain parts of its US business, which was made binding by a FTC consent order of 6 June 1997 (FTC File No 961-0085, Docket Number: C-3746).

by protectionist motives rather than concerns for competition.[26] Unlike in the subsequent *GE/Honeywell* case, only few analysts engaged with the substance and theoretical underpinnings of the Commission's analysis in *Boeing/McDonnell Douglas* in detail. Those who did, however, reached the conclusion that *Boeing/McDonnell Douglas*, far from being a case of national protectionism, was dealt with in good faith on both sides of the Atlantic and that the different positions were expressions of different philosophies as to the purpose of merger control and different economic assumptions about markets.[27]

The 'dirty trade war' predicted by journalists[28] was eventually averted after Boeing offered a number of last-minute structural and behavioural commitments that the Commission deemed capable of addressing its concerns.[29] Despite some sabre-rattling on both sides, the conflict thus eventually blew over. However, people were quick to recall the incident when the European Commission and the FTC clashed over the ill-fated *GE/Honeywell* merger in 2001. That crisis ended less happily.

B. GE and Honeywell Run Afoul of Nineteenth-Century Thinking (2001)

In 2001, both the US and the EU antitrust authorities investigated another proposed merger between two US companies in the aerospace industry, General Electric Company (GE) and Honeywell International Inc (Honeywell). Both GE and Honeywell were diversified manufacturing and services companies. Amongst others, GE was active in the markets for aircraft engines, household appliances, lighting, power generation, industrial controls, medical imaging equipment, engineering plastics, broadcasting, financial services and transportation systems. Honeywell's activities included aerospace products and services, automotive products, electronic materials, speciality chemicals, performance polymers, transportation and power systems as well as home, building and industrial controls.[30] GE and Honeywell's turnovers were such that the proposed acquisition had a 'Community dimension' within the meaning of Regulation 4064/89 (the original Merger

[26] HW Jenkins, 'Business World: What's a Little Antitrust between Friends?' *Wall Street Journal* (New York, 28 January 1997); Editorial, 'Distrustful', *The Economist* (London, 26 July 1997) 60. For a particularly scathing review of the European position, see Editorial, 'A "'Dangerous" Merger?' *Wall Street Journal* (New York, 21 July 1997).

[27] EM Fox, 'Antitrust Regulation Across National Borders: The United States of Boeing Versus the European Union of Airbus' 1998 16 *Brookings Review* 30; EJ Stock, 'Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss' 1999 (20) *University of Pennsylvania Journal of International Economic Law* 825.

[28] Editorial, 'Brussels v Boeing' *The Economist* (17 July 1997).

[29] *Boeing/McDonnell Douglas* (n 13) recitals 114–19.

[30] US Department of Justice, Press Release (2 May 2001), and Commission Decision of 3 July 2001 in *General Electric/Honeywell* (Case COMP/M.2220) OJ [2004] L48/1, recitals 3 and 4.

Regulation),[31] which meant that, although both companies were established in the United States, the transaction also fell within the scope of EU merger law.

Like in the case of *Boeing/McDonnell Douglas*, the US antitrust authorities reached the conclusion that the proposed acquisition, as modified by the parties, did not raise significant competitive concerns,[32] and again, the European Commission took the opposite view. This time, however, the European Commission prohibited the acquisition, only a few weeks after it had been cleared by its US counterparts.[33] The two agencies had cooperated closely during the fact-finding stages of the investigation. They had conducted several joint witness interviews[34] and the factual basis for the US Department of Justice's and European Commission's competitive analyses was therefore not appreciably different. The two antitrust authorities reached different conclusions because they carried out different analyses.

i. The US Investigation

The US Department of Justice had originally had competition concerns for certain markets on which both GE and Honeywell were active, as well as for certain related after-sales service markets. GE and Honeywell were the two premier manufacturers of US military helicopter engines. The US Department of Justice had feared that GE's acquisition of its competitor would substantially lessen competition in this market and result in higher prices, lower quality and reduced innovation in the production of the next generation of advanced military helicopter engines for the US military. It also predicted that the acquisition was likely to result in a substantial lessening of competition in the market for the maintenance, repair and overhaul of Honeywell aircraft engines and auxiliary power units, resulting in higher prices and lower quality for commercial business aircraft users. To resolve these concerns, GE agreed to divest Honeywell's helicopter business after the acquisition and to license a new competitor to service certain Honeywell engines. The Department considered these undertakings sufficient to mitigate its concerns in substance.

ii. The EU Investigation

In line with Article 2(3) of Regulation 4064/89, the Commission assessed whether the acquisition would result in the creation or strengthening of a dominant position and found that this was likely to be the case. It held that the transaction would

[31] Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ [1989] L 395/1, Art 1(2).

[32] US Department of Justice, Press Release (n 30).

[33] *General Electric/Honeywell* (Case COMP/M.2220) OJ [2004] L48/1.

[34] Remarks of Deborah Platt Majoras, then Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, before the Antitrust Law Section State Bar of Georgia, 29 November 2001.

strengthen an already dominant position in markets in which both entities were competitors because it would reduce the number of competitors in these markets and eliminate the undertaking that had exercised the only significant competitive constraint on GE's business practices. This part of the Commission's analysis was, in theory at least, not radically different from that carried out by its US counterpart, even though they drew different conclusions from the facts. The Commission's analysis looked at most of the factors relevant in a market power analysis under section 7 of the US Clayton Act, such as market shares, potential competition, barriers to entry and countervailing buyer power.

Had the Commission limited its assessment to this part of its analysis, the reaction of US antitrust experts may not have been quite so vehement. However, it also based its prohibition on a further argument. In the second part of its competitive assessment, it established that the merger would moreover result in anticompetitive effects on vertically related and adjacent markets. It held that the acquisition would create or strengthen dominant positions on these markets because the combination of GE and Honeywell's activities would allow the merged entity to exclude other businesses from these markets. According to the Commission, there were two mechanisms by which the merged entity could be expected to 'leverage' its existing dominance to create new dominant positions in other markets. First, it took the view that GE's considerable financial power would allow it to cross-subsidise Honeywell's former activities in vertically related markets. This would give it such an advantage in these markets that it would be able to exclude its competitors therein and thus create a new dominant position. Second, the Commission predicted that the combined portfolio of the two companies' diversified activities would allow the merged entity to offer its customers bundles of products and services that were so attractive that competitors would be forced out of the market because they would be unable to match these.[35]

iii. The Controversy

There seems to have been the unspoken expectation that the Commission would eventually follow the example of the US Department of Justice and clear the acquisition. When the Commission eventually prohibited the acquisition, the reaction of US government officials, antitrust experts but also journalists and the wider business community alternated between indignation and disbelief. There were, on the one hand, accusations of obstructionism and protectionism.[36] The European Commission was said to have an official policy of favouring national champions[37]

[35] *General Electric/Honeywell* (n 33) recitals 342–444.

[36] See eg Editorial, 'Europe to GE: Go Home' *Wall Street Journal* (15 June 2001) A14: 'In the Honeywell case, novel antitrust theories have been dreamed up simply because it would be unthinkable to let a large U.S. company go about its business unmolested'.

[37] HR Varian, 'Economic Scene: In Europe, GE and Honeywell Ran Afoul of 19th Century Thinking' *New York Times* (28 June 2001) C2.

or at least of having caved in to powerful interests in this instance.[38] More fundamentally, however, the Commission was accused of adhering to 19th century thinking[39] and dangerously outdated economic theories.[40] The Commission's leveraging or portfolio arguments in particular incited more or less open derision.[41]

It can of course not be excluded that industrial policy considerations tacitly played a role—on either side of the Atlantic—even though they did not find expression in the authorities' final decisions and official statements. Notwithstanding this possibility, it is unlikely to have been the only reason why the two jurisdictions reached different conclusions. A comparison of the two authorities' assessments shows that they assessed very different types of effects. In line with the substantive test of Regulation 4064/89,[42] the Commission examined whether the merger would have had the effect of creating or strengthening a 'dominant position', ie a

> position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[43]

By contrast, the US antitrust authorities had assessed whether the merger would result in the creation of market power, which would result in higher prices, lower quality and reduced innovation for consumers.

If one discards the accusations of protectionism and bias against US companies, the key criticism of US antitrust experts was that the Commission had not made its findings dependent on the merger's effects on consumers, but had instead based its conclusions on the concern that competitors could be forced to leave the market as a consequence of the merged entity's combined abilities. Their overarching conclusion was that EU competition law protected competitors while US antitrust law protected competition.[44] Indeed, the merger's effects on end prices

[38] G Becker, 'Economic View Point: What US Courts Could Teach Europe's Trust Busters' *Business Week* (6 August 2001) 20.

[39] Varian, 'Economic Scene' (n 37) C2.

[40] GL Priest and F Romani, 'Antique Antitrust: The GE/Honeywell Precedent' *The Wall Street Journal* (21 June 2001) 6.

[41] See Varian (n 37) C2; Priest, 'The GE/Honeywell Precedent and Franco Romani' (n 40) A18.

[42] Art 2(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ [1989] L 395/1 reads as follows: 'A concentration which creates or strengthens 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 shall be declared incompatible with the common market'. Regulation 4064/89 was superseded by the current EU Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1) with effect from 1 May 2004.

[43] Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22, para 65.

[44] W Kolasky, 'Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels' (2002) 10 *George Mason Law Review* 533; CA James, 'Statement on the EU's Decision Regarding the GE/Honeywell Acquisition' (3 July 2001) available at: www.justice.gov/archive/atr/public/

were not part of the European Commission's analysis. The head of the European Commission's former Merger Task Force, responsible for assessing the transaction and drafting the decision, defended the Commission's approach against the onslaught of criticism by arguing that it was simplistic to believe that competitors should never be the focus of antitrust law as there could be no competition without competitors, and described the US position as 'Darwinian'.[45]

GE subsequently lost its action for annulment before the General Court.[46] It was a bittersweet victory for the Commission, as the Court severely criticised the decision's standard of proof. It found in particular that the Commission had failed to establish to the required legal standard that the merged entity was actually likely to engage in bundling or cross-subsidisation.[47] Importantly, however, it did not disapprove of the controversial theory underlying these assessments.[48] The Court ultimately dismissed the action in its entirety because it saw no manifest errors of assessment in the first part of Commission's analysis, relating to the markets on which both parties were competitors, which it deemed sufficient to justify a prohibition of the transaction.[49]

C. Microsoft (2004)

In 2004, only three years after *GE/Honeywell*, the next crisis loomed on the horizon when both the US and the EU authorities investigated the US software giant Microsoft for a number of business practices considered questionable in both jurisdictions. Despite shared concerns, the investigations again resulted in different outcomes. The first business practice considered problematic by both the US and EU antitrust authorities was Microsoft's strategy of integrating diverse types of software into its 'Windows' operating system. This led to accusations of anticompetitive tying in both the United States and Europe. The second practice concerned Microsoft's refusal to reveal interoperability information to other

press_releases/2001/8510.htm; Becker, 'What US Courts Could Teach Europe's Trust Busters' (n 38) 20; DS Evans, 'The New Trustbusters, Brussels and Washington May Part Ways' (2002) 81 *Foreign Affairs* 14.

[45] G Drauz, 'Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers under EC Competition Law' in B Hawk (ed), *International Antitrust Law and Policy 2001, Annual Proceedings of the Fordham Corporate Law Institute* (New York, Juris Publishing, 2002).

[46] Case T-210/01 *General Electric Company v Commission* ECLI:EU:T:2005:456.

[47] ibid, paras 311 and 340.

[48] This was in line with the ruling in *Tetra Laval* 2 years earlier. Although in that case, too, the Court found that the evidence adduced by the Commission had not met the high standard of proof required for predicting uncertain future effects, which ultimately led to the annulment of the Commission decision, it did not object to the Commission's leveraging theory: Case T-5/02 *Tetra Laval BV v Commission* ECLI:EU:T:2002:264, upheld on appeal in C-12/03P *Commission v Tetra Laval BV* ECLI:EU:C:2005:87.

[49] *GE v Commission* (n 46) paras 474–620.

software developers, which the latter required to produce software capable of operating efficiently in Windows.

i. The US Investigation

In the United States, the process was long, complex and involved several actors. The following is a much-simplified account.[50] The FTC began its antitrust investigation into Microsoft's business practices in the early 1990s, but decided to close the case in 1993 after several internal deadlocks. The US Department of Justice subsequently initiated its own investigation, and brought its first lawsuit against Microsoft under section 2 of the Sherman Act in 1994 for unlawfully maintaining a monopoly in the operating system market by means of anticompetitive terms in its licensing and software developer agreements. Microsoft chose to enter into a consent decree, in which it agreed to eliminate certain contractual restrictions on PC manufacturers and thus avoided a trial on the merits.[51]

In 1998, the Department of Justice brought a second lawsuit under sections 1 and 2 of the Sherman Act against Microsoft for various types of exclusionary conduct, ie exclusive dealing arrangements, unlawfully tying its web-browser 'Internet explorer' to its operating system 'Windows', maintaining a monopoly through predatory practices and attempts to monopolise the web-browser market.[52] A number of States also brought claims accusing Microsoft of violating various State antitrust laws. These cases were joined with the Department of Justice's action. After several months of fruitless settlement negotiations, the DC District Court issued its conclusions of law. It agreed with the Department of Justice in all but one count. It found that Microsoft had violated section 1 by tying its web browser to its operating system. It further found that Microsoft had a monopoly within the meaning of section 2 of the Sherman Act in the market for Intel-compatible PC operating systems, based on its market share of 95 per cent and the high barriers to entry characterising the market. It further held that Microsoft had unlawfully maintained this monopoly by anticompetitive exclusionary practices that significantly restricted the ability of other firms to compete on the merits of what they offered customers, in particular by integrating the web browser into the operating system, by contractually requiring key players in the market to give preference to Microsoft products and through its efforts to

[50] Amongst the many detailed accounts of the US Microsoft litigation under s 2 of the Sherman Act, see eg RJR Peritz, 'The Microsoft Chronicles' in L Rubini (ed), *Microsoft on Trial* (Cheltenham, Edward Elgar, 2010) 205–57, or AD Melamed and DL Rubinfed, '*U.S. v. Microsoft*: Lessons Learned and Issues Raised' in EM Fox and DA Crane (eds), *Antitrust Stories* (New York, Foundation Press, 2007) 287–310; AI Gavil and H First, *The Microsoft Antitrust Cases* (Cambridge, MA, MIT Press, 2014).

[51] *United States v Microsoft Corp*, 56 F.3d 1448 (DC Cir 1995). The Department of Justice subsequently filed a civil contempt action against Microsoft, alleging that Microsoft had violated one of the consent decree's clauses. The DC Circuit Court dismissed the action as unfounded (*United States v Microsoft Corp*, 147 F.3d 935 (DC Cir 1998)).

[52] *United States v Microsoft Corp*, 84 F. Supp. 2d 9 (D.D.C. 1999) (Findings of Fact).

contain and subvert competing technology.[53] The District Court also held that Microsoft's anticompetitive efforts to maintain its monopoly power in the market for Intel-compatible PC operating systems amounted to an unlawful attempt to monopolise a second market, ie the market for Internet browsers.[54] The final judgment ordered Microsoft to submit a plan of divestiture that would split the company into an operating systems business and an applications business, and also ordered a number of behavioural remedies.[55]

On appeal, the DC Circuit Court affirmed in part, reversed in part, and remanded in part the District Court's judgment.[56] It agreed with the District Court that Microsoft had monopoly power in the market for PC operating systems and that Microsoft had unlawfully maintained this power by engaging in various forms of exclusionary conduct, harming the competitive process and thereby consumers.[57] However, it reversed the District Court's finding of section 2 liability for attempted monopolisation of the second market on the grounds that the Department of Justice had failed to 'flesh out' the claim.[58] Regarding the allegation of tying, it found that the District Court had applied the wrong test by assessing the practice under a *per se* rule instead of a rule of reason and remanded the case for assessment under the latter.[59] Most significantly for Microsoft, perhaps, the Circuit Court also vacated the remedial order in its entirety as it rested on findings that it did not uphold. It vacated in full the final judgment embodying the remedial order and remanded the case to the District Court for reassignment to a different trial judge for further proceedings consistent with the Circuit Court's opinion.[60]

Shortly thereafter, the Department of Justice, recently re-staffed with appointments by the new Bush administration,[61] announced that it would not pursue its original aim of breaking up Microsoft and also decided to abandon the claim that Microsoft had engaged in illegal tying.[62] With regard to the other allegations it reached a settlement with Microsoft.[63] The District Court approved the parties' agreement in substance, but amended a number of provisions that would have prevented it from enforcing the decree. According to the settlement, Microsoft was required to share certain interoperability information with third party manufacturers of middleware software, and was prohibited from retaliating against users of competing software. Microsoft was not prohibited from integrating any

[53] *United States v Microsoft Corp,* 87 F. Supp. 2d 30 (D.D.C. 2000) (Conclusions of Law) 34–44.
[54] ibid, 45–46.
[55] *United States v Microsoft Corp*, 97 F. Supp. 2d 59, 64–65 (DDC 2000) (Final Judgment).
[56] *United States v Microsoft Corp*, 253 F.3d 34 (DC Cir 2001).
[57] ibid 58, 59–79.
[58] ibid 84.
[59] ibid 84–96.
[60] ibid 119.
[61] Peritz, 'The Microsoft Chronicles' (n 50) 219.
[62] US Department of Justice, Press Release, 'Justice Department Informs Microsoft of Plans for Further Proceedings in the District Court' (6 September 2001).
[63] *US v Microsoft Corp*, Civil Action No 98-1232, 12 November 2002.

of its software programs into Windows.[64] Most of the plaintiff States joined the settlement. Others chose to litigate to judgment. The judgment entered by the District Court closely paralleled the consent decree negotiated by the Department of Justice and Microsoft.[65] In addition to the enforcement attempts by the federal and State antitrust authorities, there were a number of private law suits brought primarily by other software developers, all of which were eventually settled.[66]

ii. The EU Investigation

The European Commission began investigating Microsoft under the EU antitrust rules in February 2000 while the US Department of Justice was litigating its second case against Microsoft in the DC District Court. Four months after the District Court issued its conclusions in law finding Microsoft guilty of infringing both sections 1 and 2 of the Sherman Act, the European Commission formally opened proceedings against Microsoft by sending it its first Statement of Objections.[67]

While the European Commission's investigation also centred on Microsoft's near monopoly power on the market for Intel-compatible PC operating systems and its attempts to maintain and extend this power into neighbouring markets, the Commission focused on different business practices from those investigated by the US antitrust authorities. The US Department of Justice had accused Microsoft of tying its browser to its operating system. The European Commission, by contrast, investigated Microsoft for tying its media player to its operating system. The European Commission further objected to Microsoft's refusal to supply designers of 'work group server operating systems'[68] with interoperability information for its operating systems software so as to allow them to develop interoperable software. The US Department of Justice had been concerned about Microsoft's refusal to share such information with producers of middleware software.

In May 2004, almost four years after sending out its initial Statement of Objections, the Commission issued an infringement decision according to which Microsoft had infringed Article 102 on both counts.[69] According to the Commission's assessment, Microsoft's practice of exclusively selling its PC operating system 'Windows' with a pre-installed 'Windows Media Player' amounted to an

[64] At the plaintiffs' request, the District Court agreed to extend parts of the Final Judgments for 2 years. The remaining provisions of the Final Judgments expired as originally ordered on 12 November 2007 (*United States v Microsoft Corp*, Civil Action No 98-1232 (CKK) (DDC 7 September 2006)).

[65] Affirmed on appeal in *Commonwealth of Massachusetts v Microsoft Corp*, 373 F.3d 1199 (DC Cir 2004).

[66] For a more detailed account, see Peritz (n 50) 221–22.

[67] European Commission, Press Release IP/00/906, 3 August 2000, 'Commission Opens Proceedings against Microsoft's Alleged Discriminatory Licensing and Refusal to Supply Software Information'.

[68] Work group server services are the basic services that are used by office workers in their day-to-day work, namely sharing files stored on servers, sharing printers and having their rights as network users administered centrally by their organisation's information technology department. Work group server operating systems, in turn, are operating systems designed and marketed to deliver these services collectively to relatively small numbers of PCs linked together in small to medium-sized networks.

[69] *Microsoft* (Case COMP/C-3/37.392) OJ [2007] L32/23.

abuse of a dominant position by means of tying. In line with the findings of the US courts, it found that Microsoft was dominant in the market for PC operating system because of its market share of over 95 per cent and the market's high barriers to entry. According to the Commission, Microsoft's conduct formally amounted to tying as Microsoft was selling two separate products as a bundle and did not give consumers a choice to purchase the tied product separately, which was sufficient to make this practice anticompetitive according to the case law. In view of Microsoft's highly specific defences, however, the Commission additionally chose to assess the practice as to its actual effects as it considered it possible that this specific instance of tying did not in fact have any negative effects on competition, or that any potential anticompetitive effects could be outweighed by efficiencies. The Commission found that the practice did have anticompetitive effects: Microsoft's ubiquity on the market for PC operating systems and the network effects characterising this market gave Microsoft a competitive advantage unrelated to the merits of the products as it offered software developers the ability to reach almost all PC users worldwide by relying on the Windows monopoly. Software developers were hence induced to rely primarily on Windows technology to reach consumers. Consequently, consumers would also prefer to use Microsoft's media player over competing media players, since a wider array of complementary software would be available for this product. The Commission therefore concluded that Microsoft's practice of tying its media player to Windows risked (1) excluding competitors from the media player market by placing them at a competitive disadvantage; (2) stifling innovation in the media player market; and (3) causing a spill-over effect on competition in complementary software markets with further detrimental effects on innovation. It did not find any of the efficiency defences offered by Microsoft sufficient to outweigh these anticompetitive effects.[70]

With regard to Microsoft's refusal to supply interoperability information to designers of 'work group server operating systems', the Commission established that in view of its market shares and the high market entry barriers Microsoft was dominant in both the market for PC operating systems and in the market for work group server operating systems. It then assessed whether Microsoft had 'abused' these positions by refusing to supply competing manufacturers of work group server operating systems with the interoperability information they needed to make their products compatible with Windows. It held that while undertakings were generally free to choose their contractual partners, a refusal to supply on the part of a dominant undertaking could be considered abusive, because dominant undertakings had a special responsibility not to distort competition. Under exceptional circumstances this could even apply to refusals to license intellectual property rights. On the basis of a lengthy analysis of the facts, the Commission reached the conclusion that there were several factors that justified qualifying

[70] ibid, recitals 793–993.

Microsoft's refusal to supply interoperability information as 'exceptional' and therefore abusive within the meaning of Article 102: (1) Microsoft had held a quasi-monopoly position in the PC operating systems market for many years; (2) it had progressively diminished the level of disclosures; (3) interoperability with Windows was necessary for a work group server operating system vendor in order to stay in the market; (4) Microsoft's market share had increased swiftly in the market for work group server operating systems to a position of extraordinary strength as a result of the interoperability advantage; (5) data showed that there was a risk that competition would be completely eliminated in the market for work group server operating systems and (6) Microsoft's refusal to supply stifled innovation in the market for work group server operating systems and diminished consumer choice by locking them into a homogeneous Microsoft solution. It did not find that Microsoft's practice was objectively justified.[71]

Microsoft argued, amongst others, that the Commission had not established to the required standard that consumers were harmed as a consequence of its conduct. The Commission took the view that it had demonstrated consumer harm, and that, in any event, actual consumer harm was irrelevant under Article 102. According to longstanding case law Article 102 prohibited not only conduct that could prejudice consumers directly but also conduct that harmed them indirectly by impairing an effective competitive structure.[72]

The Commission fined Microsoft a (then) record €497,196,304 for the two infringements. It further imposed a number of behavioural remedies, ordering Microsoft to make available a version of Windows without Windows Media Player within 90 days,[73] and to make available interoperability information to any undertaking having an interest in developing work group server operating system products on reasonable and non-discriminatory terms.[74] Microsoft brought an action for annulment against the Commission decision. In 2007, the General Court upheld the decision in its entirety.[75] The Commission subsequently fined Microsoft a further €899 million for failure to comply with the remedies imposed in the infringement decision.[76]

Incidentally, Microsoft's troubles with EU antitrust law did not end there. In 2008, the Commission turned its attention to Microsoft's practice of tying its web browser to its operating system—the very strategy that the US Department of Justice had tried to put an end to in 1998.[77] Microsoft offered commitments to

[71] ibid, recitals 546–791.

[72] ibid, recitals 702–08, citing Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36, para 125.

[73] ibid, Art 6.

[74] ibid, Art 5.

[75] Case T-201/04 *Microsoft Corp v Commission* ECLI:EU:T:2007:289.

[76] *Microsoft* (n 69).

[77] European Commission, Memorandum MEMO/09/15 of 17 January 2009, 'Antitrust: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows'.

address the Commission's concerns, which the Commission considered satisfactory and made legally binding by means of a decision.[78] However, Microsoft failed to fulfil these commitments to the satisfaction of the Commission,[79] which fined Microsoft another €561 million for non-compliance in March 2013.[80]

iii. The Controversy

Like in the case of the failed *GE/Honeywell* merger five years earlier, the Commission's decision in *Microsoft* met with great disapproval in the United States. US Senators are reported to have been 'particularly incensed' at the Commission's demand that Microsoft give its rivals access to the computer code underlying Windows, which they considered an infringement of a US company's intellectual property.[81] Again, there was talk of a transatlantic trade war.[82] All in all, however, the political reaction to the European Commission's decision in *Microsoft* was more muted than in the case of *GE/Honeywell*. The Assistant Attorney General for the Antitrust Division of the US Department of Justice resigned himself to expressing the view that EU competition law favoured 'gentlemanly' over 'Darwinian' competition.[83] This relatively mild reaction may be explained by the fact that there had been serious doubt about Microsoft's conduct in the United States as well. Not only had the Department of Justice brought proceedings against Microsoft, joined by no fewer than 20 States, but the DC District Court had found Microsoft guilty of breaching both sections 1 and 2 of the Sherman Act and had taken the radical step of attempting to break Microsoft into two separate companies. The Court of Appeals, while partially reversing this judgment, had upheld the finding of a section 2 infringement for maintaining a monopoly by anticompetitive means, including tying, and had remanded the case for a separate assessment of Microsoft's tying under the correct section 1 test, making clear that it did not find Microsoft's technological integration welfare-enhancing or that it should be absolved of tying liability.[84] In the end, the new federal administration preferred to settle with Microsoft. The settlement, which was partially extended for another two years,

[78] This possibility had not existed during the first Microsoft investigation. Commitments decisions are a relatively new tool in EU antitrust law, which were introduced by Council Regulation (EC) 1/2003 (the so-called Modernisation Regulation) with effect from 1 May 2004.

[79] European Commission, Press Release IP/13/196, 6 March 2013, 'Antitrust: Commission Fines Microsoft for Non-compliance with Browser Choice Commitments.

[80] *Microsoft (Tying)* (Case AT.39530).

[81] R Wray, 'Microsoft Ruling is 'First Shot in Trade War'' *Guardian* (London, 26 May 2004) 17.

[82] ibid; J Burgess, 'Europeans Come down Hard on Microsoft' *Washington Post* (Washington, DC, 25 March 2004).

[83] Address by R Hewett Pate, 'Antitrust in a Transatlantic Context—From the Cicada's Perspective' (Brussels, 7 June 2004) available at: www.usdoj.gov/atr/public/speeches/203973.htm. Commissioner Monti, appearing to take offence at this characterisation, replied that he did not oppose the Darwinian concept of competition as long as it was 'Darwinian competition on the merits' (M Monti, 'Comments to the Speech of Hew Pate at the Conference "Antitrust in a Transatlantic Context"' (Brussels, 7 June 2004) www.ec.europa.eu/comm/competition/speeches).

[84] *United States v Microsoft Corp* (n 56).

imposed restrictions on Microsoft that addressed at least a few of the Department of Justice's initial concerns. Moreover, several States refused to join the federal government's settlement and litigated the case to the end in the attempt to obtain more stringent remedies. Even in the United States, there were voices that argued that Microsoft had got away with anticompetitive conduct.[85]

At the academic level, by contrast, the European Commission's decision met with clearer criticism. US commentators, as well as many EU academics, found that the Commission's analysis in Microsoft suffered from similar shortcomings as its assessments in *Boeing/McDonnell-Douglas* and *GE/Honeywell*. The Commission's assessment was generally found to lack solid economic foundations.[86] Also, the Commission was once more criticised for assessing the effects on competitors rather than on consumer welfare.[87]

D. Conclusion

Parallel investigations of the same conduct by the US and EU antitrust regimes continue to happen. In so far, the above cases are not unique. In 2013, for example, both the US Federal Trade Commission and the European Commission independently investigated claims under their respective antitrust rules that the US technology company Google had been giving preference to its own services in its research results (this time, Microsoft was the complainant). Google eventually settled the case with both authorities.[88]

At first sight, US and EU antitrust law contain very similar rules: a prohibition of anticompetitive agreements, a prohibition of anticompetitive conduct on the part of economically powerful undertakings and a prohibition of anticompetitive mergers. In both antitrust systems, these prohibitions are worded broadly and in somewhat antiquated language, that requires substantial interpretation by the antitrust authorities and courts. However, *GE/Honeywell*, at the very latest, made obvious that the US and EU antitrust authorities and courts in fact did not interpret their antitrust rules identically. They assessed different types of effects

[85] See eg S Houck, 'The EC Decision Against Microsoft: Windows on the World, Glass Houses, or Through the Looking Glass?' *The Antitrust Source* (September 2004) 1, 10.

[86] See eg R Pardolesi and A Renda, 'The European Commission's Case Against Microsoft: Kill Bill?' (2004) 27 *World Competition* 513; D Ridyard, 'Compulsory Access under EC Competition Law—a New Doctrine of "Convenient Facilities" and the Case for Price Regulation' (2004) 25 *European Competition Law Review* 669; DS Evans and AJ Padilla, 'Tying under Article 82 EC and the Microsoft Decision: a Comment on Dolmans and Graf' (2004) 27 *World Competition* 503; J-Y Art and G McCurdy, 'The European Commission's Media Player Remedy in its Microsoft Decision: Compulsory Code Removal despite the Absence of Tying or Foreclosure' (2004) 25 *European Competition Law Review* 694.

[87] eg D Ridyard, 'Tying and Bundling—Cause for Complaint?' (2005) 26 *European Competition Law Review* 316.

[88] US FTC, 'Statement of the Federal Trade Commission Regarding Google's Search Practices', *In the Matter of Google Inc,* FTC File Number 111-0163 (Washington, DC, 3 January 2013).

and relied on different theories of harm. US antitrust experts found the European Commission's analyses to be strangely out of sync with contemporary economic theory. Yet more fundamentally, antitrust experts began to wonder whether the two antitrust regimes might not even pursue the same aim. From the point of view of US antitrust lawyers, it seemed that EU antitrust law aimed to protect businesses from the anticompetitive conduct of their competitors, whereas the objective of US antitrust law was to protect consumers from anticompetitive conduct.

This recognition contributed to a major transatlantic debate about the appropriate objective of antitrust law, key concepts of antitrust law as well as the role of economics in antitrust assessments. The debate took place both at the academic and political level, and involved a fair deal of exchange between the two.[89]

[89] Amongst many, see eg M Monti, 'Antitrust in the US and Europe: A History of Convergence' (General Counsel Roundtable American Bar Association, Washington, DC, 14 November 2001); G Drauz, 'Unbundling GE/Honeywell' (n 45); A Schaub, 'Continued Focus on Reform: Recent Developments in EC Competition Policy' in Hawk (ed), *International Antitrust Law and Policy 2001, Annual Proceedings of the Fordham Corporate Law Institute* (n 45) 31; D Ridyard, 'Exclusionary Pricing and Price Discrimination Abuses under Article 82—An Economic Analysis' (2002) 23 *European Competition Law Review* 286; W Kolasky, 'Conglomerate Mergers and Range Effects' (n 44); D Ridyard and S Bishop, 'EC Vertical Restraints Guidelines: Effects-Based or Per Se Policy?' (2002) 23 *European Competition Law Review* 35; O Odudu, 'A New Economic Approach to Article 81(1)?' (2002) 27 *European Law Review* 100; E Fox, 'US and European Merger Policy—Fault Lines and Bridges—Mergers that Create Incentives for Exclusionary Practices' (2002) 10 *George Mason Law Review* 471; J Temple Lang and R O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC' (2002) 26 *Fordham International Law Journal* 83; J Vickers, 'How to Reform the EC Merger Test?' in G Drauz and M Reynolds (eds), *EC Merger Control—A Major Reform in Progress* (Oxford, Oxford University Press, 2003); AJ Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part 1' (2003) 11 *European Competition Law Review* 604 and 'Part 2' (2003) 11 *European Competition Law Review* 657; SB Völker, 'Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control' (2004) 25 *European Competition Law Review* 395; V Verouden, C Bengtsson and S Albaek, 'The Draft EU Notice on Horizontal Mergers: A Further Step toward Convergence?' (2004) 49 *Antitrust Bulletin* 243; C Veljanovski, 'EC Merger Policy After GE/Honeywell and Airtours' (2004) 49 *Antitrust Bulletin* 153; B Sher, 'The Last of the Steam-Powered Trains: Modernising Article 82' (2004) 25 *European Competition Law Review* 243; P Lowe, 'DG Competition's Review of the Policy on the Abuse of Dominance' in Hawk (n 45) 163; DS Evans and AJ Padilla, 'Tying under Article 2 EC and the Microsoft Decision' (2004) 27 *World Competition* 503; L-H Röller, 'Der ökonomische Ansatz in der europäischen Wettbewerbspolitik' in Monopolkommission, *Zukunftsperspektiven der Wettbewerbspolitik* (Baden-Baden, Nomos, 2005); R Hewett Pate, "Antitrust in a Transatlantic Context" (n 83); M Monti, 'Comments to the Speech of Hew Pate at the Conference' (n 83); K-U Kühn, "Antitrust in a Transatlantic Context" R Stillman and C Caffarra, 'Economic Theories of Bundling and their Policy Implications in Abuse Cases: an Assessment in Light of the Microsoft Case' (2005) 1 *European Competition Journal* 85; JS Venit, 'Article 82: The Last Frontier—Fighting Fire With Fire?' (2005) 28 *Fordham International Law Journal* 1157; D Waelbroeck, 'Michelin II: A *Per Se* Rule Against Rebates by Dominant Companies?' (2005) 1 *Journal of Competition Law and Economics* 149; G Niels and H Jenkins, 'Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down' (2005) 26 *European Competition Law* Review 605; L-H Röller, 'Antitrust Economics—Catalyst for Convergence?' George Mason Law Review Symposium (Washington, DC, 20 September 2005); A Christiansen and W Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "*Per Se* Rules v Rule of Reason"' (2006) 2 *Journal of Competition Law & Economics* 215; Bundeskartellamt/Competition Law Forum, 'Debate on Reform of Article 82: A Dialectic on Competing Approaches' (2006) 2 *European Competition Journal* 211; R Nazzini, 'The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 EC Cases' (2006)

It contributed greatly to the substantive modernisation process that transformed EU antitrust law in the first decade of the twenty-first century.

V. DG Competition's *annus horribilis*

A further chain of events that influenced and drove forward the Commission's substantive reform took place in 2002. Within a period of only three months, the General Court struck down three separate Commission decisions in the field of EU merger control because of serious errors of assessment.[90] This unprecedented situation led to important organisational changes within DG Competition but also to some soul-searching on the quality of its competitive assessments.

A. The Scope of Judicial Review

It is unusual for the Court of Justice to second-guess the Commission's assessments in the area of antitrust law. According to longstanding practice, the Court exercises judicial self-restraint when it comes to reviewing assessments of an economic nature and limits itself to verifying whether the relevant procedural rules have been complied with, whether the decision's statement of reasons is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers.[91] This is particularly so in the field of merger control where the Commission is required to make a prospective assessment of likely future effects. The Court takes the view that Article 2 of the Merger Regulation confers upon the Commission a discretionary margin, which the Union judicature must take into account when reviewing assessments of an economic nature.[92] Notwithstanding this principle, the General Court found that

31 *European Law Review* 518; A Schmidt, 'Wie ökonomisch ist der "more economic approach"? Einige Anmerkungen aus ordnungsökonomischer Sicht' (2006) *Freiburger Diskussionspapiere* 06/10; J Vickers, 'Market Power in Competition Cases' (2006) 2 *European Competition Journal* 3; S Voigt and A Schmidt, 'Der "more economic approach" in der Mißbrauchsaufsicht' (2006) 56 *Wirtschaft und Wettbewerb* 1097; G Monti, 'The Concept of Dominance in Article 82' (2006) 3 *European Competition Journal* 31; P Lowe, 'Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy?' 13th International Conference on Competition (Munich, 27 March 2007); M Dreher and M Adam, 'Abuse of Dominance under Reform—Sound Economics and Established Case Law' (2007) 28 *European Competition Law Review* 278; ILO Schmidt, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic vs. Static Efficiency' (2007) 28 *European Competition Law Review* 408.

[90] Case T-342/99 *Airtours plc v Commission* ECLI:EU:T:2002:146; Case T-310/01 *Schneider Electric SA v Commission* ECLI:EU:T:2002:254; Case T-5/02 *Tetra Laval BV v Commission* ECLI:EU:T:2002:264.

[91] See eg Case 42/84 *Remia BV and others v Commission* ECLI:EU:C:1985:327, para 34.

[92] Joined Cases C-68/94 and C-30/95 *France and Others v Commission* ('Kali & Salz') ECLI:EU:C:1998:148, paras 223 and 224.

the Commission had committed assessment errors of such gravity in the cases of *Airtours, Schneider Electric* and *Tetra Laval* that they exceeded the permissible margin of discretion.

B. Airtours

In the case of *Airtours*, the Commission had prohibited a merger between two UK tour operators, Airtours and First Choice, on the grounds that it would create a collective dominant position in the UK market for short-haul foreign package holidays as a result of which competition would be significantly impeded on this market.[93] A position of collective dominance is one held by the parties to the concentration together with one or more undertakings not party thereto. According to the Court, it refers to a situation in which effective competition would be significantly impeded by the members of the collective dominant position, in particular because of factors giving rise to a connection between them as a result of which they would be able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and ultimately consumers.[94] In the case of *Airtours*, the General Court further clarified that a collective dominant position could only exist under three conditions: (1) the market had to be sufficiently transparent for each member to know how the other members were behaving in order to monitor whether they were adopting the common policy; (2) the situation of tacit coordination had be sustainable over time, ie there had to be an incentive not to depart from the common policy, which was only the case if there was a sufficient deterrent not to depart from the common course of conduct; and (3) the Commission had to establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.[95]

The General Court found that the Commission had failed to prove any of these conditions to the required legal standard in this case and that its decision was 'vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created'.[96] It found, for instance, that the Commission had been wrong to infer that there was already a tendency to collective dominance prior to the merger from factors such as the market participants' cautious capacity planning or from the fact that the same institutional investors were found to some extent in the three major market players.[97] It also criticised the Commission for not having taken into account that the main

[93] *Airtours/First Choice* (Case IV/M.1524) OJ [2000] L93/1.
[94] Case T-102/96 *Gencor v Commission* ECLI:EU:T:1999:65, paras 125 and 163.
[95] *Airtours plc v Commission* (n 90) para 61.
[96] ibid, para 294.
[97] Ibid, paras 91, 92.

tour operators' market shares had been volatile in the past and that such volatility was counter-indicative of coordination.[98] It further held that the Commission had failed to prove key factors on which it based its assumption that the market was conducive to oligopolistic coordination, that the Commission had frequently misinterpreted the available data,[99] and that it had ignored economic theory by not considering demand volatility a factor likely to destabilise any attempt at collusion by the remaining market players post-merger.[100] It also found that the Commission had underestimated the likely reaction of smaller competitors, potential competitors and consumers as factors capable of destabilising the alleged dominant oligopoly.[101] In particular, it had failed to take into account the lack of barriers to entry.[102] Finally, the Court rebuked the Commission for having ignored 'economic logic' by not taking into consideration that every business was motivated by profit maximisation in its attempts to predict the likely impact of the merger on the remaining market participants' conduct.[103] The Court found the Commission's assessment so flawed that it annulled the decision in its entirety. This was a damning criticism of the Commission's evidentiary standards and economic know-how.

C. Schneider Electric

In *Schneider Electric*, the General Court was asked to review a Commission decision prohibiting a merger in the electrical distribution sector.[104] Schneider Electric, a company incorporated under French law, was the parent of a group engaged in the manufacture and sale of products in the electrical distribution sector. It proposed to acquire all publicly held shares in Legrand, another French company, specialising in the manufacture and sale of electrical equipment for low-voltage installations. The Commission prohibited the acquisition on the basis that it would create new dominant positions in nine markets and would strengthen pre-existing dominant positions in another five markets.[105]

On review, the Court found that, like the in the case of *Airtours*, the Commission had committed serious errors in its assessment of the merger's likely impact that by far exceeded the permissible margin of discretion. Amongst others, it held

[98] ibid, paras 112, 120. The Commission had excluded growth by acquisition when it assessed the evolution of the key actors' market share, and thus reached the conclusion that the market participants' market shares had been stable. The Court did not find this convincing.

[99] ibid, paras 133, 172–80.

[100] ibid, para 147.

[101] ibid, paras 208–61.

[102] ibid, para 269.

[103] ibid, paras 290–93.

[104] *Schneider Electric v Commission* (n 90), reviewing Commission Decision of 10 October 2001 in *Schneider/Legrand* (Case COMP/M.2283) OJ [2004] L101/1.

[105] *Schneider/Legrand* (n 104) recitals 782 and 783.

that the Commission had overestimated the merged entity's power by presuming the existence of 'transnational effects' capable of increasing the concentration's impact on the relevant national markets, but had failed to prove the likelihood of such effects on the basis of cogent evidence.[106] It also found that, having defined the separate product markets as being national in dimension, the Commission had failed to carry out a detailed country-by-country analysis and had instead repeatedly relied on general European-wide considerations[107] or on characteristics of other national markets.[108] It further found that the Commission had failed to prove its contention that the merged entity would become an unavoidable trading partner for wholesalers and that these had no countervailing buyer power. It took the view that the data contained in the decision was at odds with the Commission's findings and criticised the Commission for imputing specific future market conduct on the part of the merged entity without providing any evidence in support of this critical assumption.[109] Also, when calculating the competing companies' market shares for the purpose of assessing their strength, the Commission had been wrong not to take into consideration the proportion of sales that these competitors made to vertically integrated groups.[110]

In unusually stern language, the Court concluded that it considered these 'errors, omissions and inconsistencies' in the Commission's analysis to be 'of undoubted gravity', and that they were such as to 'deprive of probative value the economic assessment of the impact of the concentration.'[111] To add insult to injury, the Court also found that the Commission had infringed Schneider's rights of defence by basing a key objection to the merger on a concern that was not formulated in the Statement of Objections with sufficient precision to allow Schneider to identify it as such, submit practical comments and propose appropriate remedies.[112] Again, the General Court annulled the decision in its entirety.

D. Tetra Laval

The final blow came only three days after the judgment in *Schneider Electric* when the General Court struck down a third prohibition decision because of similar assessment errors.[113] The case concerned a proposed merger in the liquid food packaging industry. Tetra Laval SA, a French company wholly owned by the Dutch company Tetra Laval BV (Tetra), intended to acquire Sidel, a company incorporated under French law. Tetra comprised amongst others the Tetra Pak

[106] *Schneider Electric SA v Commission* (n 90) paras 152–91.
[107] ibid, para 193–97.
[108] ibid, paras 237, 238.
[109] ibid, paras 203–30.
[110] ibid, paras 292–296.
[111] ibid, paras 404, 411.
[112] ibid, paras 421–62.
[113] *Tetra Laval BV v Commission* (n 90).

company, which was active in the area of liquid food carton packaging and was the worldwide market leader for the production of carton packaging equipment and cartons. Tetra also had more limited activities in the plastic packaging sector, mainly as a converter[114] of high-density polyethylene (HDPE) bottles. Sidel designed and produced packaging equipment and systems, in particular stretch blow moulding (SBM) machines, which were used in the production of polyethylene terephthalate (PET) plastic bottles. It was the worldwide leader for the production and supply of such machines. It was also active in barrier technology, used to make PET compatible with products that are sensitive to gas and light, and the manufacture of filling machines for PET and HDPE bottles.[115]

The Commission prohibited the merger.[116] It held that pre-merger, Tetra already had a dominant position in the market for aseptic cartons and that it had a leading position in the market for non-aseptic cartons. Sidel had a leading, although not yet dominant, position in the market for PET packaging equipment. According to the Commission, the merger would turn the latter into a dominant position.[117] It would also further strengthen Tetra's already dominant position in the market for carton packaging systems, because it would create the only vertically integrated entity that was involved in the production of three separate packaging systems (carton, PET and HDPE). According to the Commission, the merged entity's dual position as supplier and competitor of converters would create a 'channel conflict' and be likely to incite it to raise competing converters' costs.[118] It further predicted that the merged entity would use its presence in several packaging markets to 'leverage' its dominant position in the carton sector, and turn its already leading position in PET packaging equipment into a dominant position. Tetra could achieve this by tying carton packaging equipment with PET packaging equipment, and using its knowledge of clients' needs from its carton side of the business to offer them timely and bespoke PET solutions, enabling them to switch from carton to PET with a single supplier.[119] The Commission found Tetra's commitments insufficient to address these concerns.

On review, the General Court found multiple issues with this analysis, which it deemed too serious to withstand review. Its comments on the Commission's analysis of the merger's horizontal and vertical effects were as brief as they were critical. It held that, if the commitments were taken into account, the potential negative horizontal and vertical effects identified by the Commission were merely minimal if not non-existent.[120] The Court went through the Commission's

[114] Converters manufacture and supply empty packaging to producers who then fill the packaging themselves.
[115] ibid, paras 9–13.
[116] *Tetra Laval/Sidel* (Case COMP/M.2416) OJ [2004] L43/13.
[117] ibid, recitals 263–90.
[118] ibid, recitals 291–324.
[119] ibid, 325–408.
[120] *Tetra Laval BV v Commission* (n 90) paras 132, 136–39.

assessment of the merger's likely conglomerate effects in more detail. It found that the Commission had committed 'manifest errors of assessment' in predicting that the merged entity could and would use its dominant position in the carton packaging market successfully as a 'lever' to achieve dominance in the neighbouring PET packaging equipment market by means of bundling or other exclusionary practices. First, the Commission had failed to take into account that such practices would be illegal pursuant to Article 102, which had to be considered a disincentive for the parties to engage in such behaviour. Also, Tetra had submitted behavioural commitments that left little room for such conduct.[121] While the Court did not exclude that it would in theory be possible for the merged entity to engage in leveraging practices, for example, by enticing existing carton customers to switch to PET or by offering attractive bundles of PET-related products, it held that the Commission had failed to adduce sufficiently convincing evidence to prove that this would allow the merged entity to achieve a dominant position in any of the PET-related markets.[122] It also dismissed the Commission's finding that the merger would reinforce Tetra's dominant position on the markets for aseptic carton packaging by eliminating the competitive constraint represented by Sidel as a potential competitor coming from the neighbouring PET markets on the grounds that the Commission had not adduced any evidence for the key assumption on which this prediction was based, namely that there would be considerable growth in PET use for sensitive products.[123] The Court concluded that the contested decision did not establish any of the alleged anticompetitive effects to the requisite legal standard and annulled it in its entirety.

This time the Commission appealed against the General Court's judgment to the Court of Justice, claiming that the former had exceeded its role by substituting its view for that of the Commission. The Court of Justice dismissed the appeal as unfounded. It confirmed that the Commission had a margin of discretion with regard to economic matters. This, however, did not mean that the Union Courts had to refrain from reviewing the Commission's interpretation of information of an economic nature. On the contrary: not only did the General Court have the duty to establish that the evidence relied on was factually accurate, reliable and consistent, but it also had to ascertain whether the evidence contained all the information necessary for assessing a complex situation and whether it was capable of substantiating the conclusions drawn from it.[124]

E. Consequences

The General Court's criticism of the Commission's assessments in these three merger decisions was unprecedented in its detail and outspokenness. It occurred

[121] ibid, paras 158–61.
[122] ibid, paras 226–307.
[123] ibid, paras 312–33.
[124] C-12/03P *Commission v Tetra Laval* ECLI:EU:C:2005:87.

only one year after the *GE/Honeywell* crisis incited equally vehement criticism of the Commission's competitive assessments from US antitrust experts and academics. One could easily jump to the conclusion that the General Court and the US antitrust community were making the same point when they criticised the quality of the Commission's assessments. However, that is not quite the case.

US antitrust experts primarily criticised that the Commission's analyses were not guided by the appropriate legal objective and did not focus on the correct type of harmful effect. In their view, a modern antitrust regime had to be guided by the objective of economic theory, ie the maximisation of economic welfare, be it in the form of general welfare or consumer welfare. Any antitrust test should therefore ask whether the conduct in question reduced economic welfare. This was not the approach taken by the Commission in *GE/Honeywell* or *Microsoft*. The Commission had instead assessed whether the merger would lead to the creation of a dominant position, and in particular whether this position would allow the merged entity to exclude competitors. Essentially, US antitrust experts thus took issue with the concept of competitive harm of EU antitrust law. In addition, they criticised the economic theories used by the European Commission to support their assumptions as being seriously outdated.

By contrast, the concept of competitive harm and the relevance of consumer harm were not the point of contention in the three judgments from 2001. The General Court did not criticise the Commission for looking at the wrong type of effect and asking the wrong questions. The General Court's main issue in 2002 was one of slapdash fact-finding and poor evidentiary standards. In its view, the Commission had 'merely' failed to support its key assumptions with sufficiently convincing evidence and had ignored fundamental economic reasoning in its conjecture.

Despite these differences, there is little doubt that both the *GE/Honeywell* crisis and the events of 2002 played an important role in encouraging the Commission to rethink key concepts and develop the more economic approach to EU antitrust law. Two weeks after the General Court handed down its judgment in *Tetra Laval*, the then Commissioner for Competition Policy, Mario Monti, stated that it had in fact long been his intention to submit a reform package on merger control to the Council. In so far, the General Court's judgments, however painful, had come at an opportune moment. Monti acknowledged that there were lessons to be drawn from the Court's criticism, and rather than allowing these setbacks to distort its view of the EU merger control policy, the Commission should turn them into an opportunity for even deeper reform than originally envisaged.[125] In fact, the Commission's reforms over the following years went far beyond addressing the Court's concerns in *Airtours, Schneider Electric* and *Tetra Laval,* which has led to a new and still ongoing conflict between the Court and the Commission.[126]

[125] M Monti, 'Merger Control in the European Union: A Radical Reform', Speech at the European Commission/IBA Conference on EU Merger Control (Brussels, 7 November 2002).

[126] This issue is discussed in Ch 10.

VI. The Great Reformer

There is little doubt that the professional background and beliefs of Mario Monti played a major role in introducing and shaping the Commission's more economic approach to EU antitrust law as we know it today. Since the earliest days of the European Economic Community, Commissioners for Competition Policy had traditionally been politicians with a background in law or political science. Hans von der Groeben (1958–67), the first Commissioner for Competition, was a lawyer and senior civil servant in the German post-war government. His successor Maan Sassen (1967–71), a Dutch politician, also held a law degree. Albert Borschette (1971–76) was a Luxembourgian diplomat and writer who had studied literature and politics. Raymond Vouel (1976–81) was a Luxembourgian politician and journalist, with a background in political economics. Frans Andriessen (1981–85) was a Dutch politician who had studied law. Peter Sutherland (1985–1989) and Leon Brittan (1989–93) were both barristers by profession. Karel van Miert (1993–99), a Dutch politician, had a degree in diplomatic sciences.

This tradition came to end when Mario Monti took over as Commissioner for Competition Policy in 1999. Monti was the first economist to be appointed Commissioner for Competition Policy. He held a degree in economics and business from Bocconi University in Italy and had pursued graduate studies at Yale University in the United States.[127] Prior to joining the European Commission he was a professor of economics. His research outputs include the Klein-Monti model, an econometric model aimed at describing the behaviour of banks operating under monopoly circumstances.[128] Monti was appointed European Commissioner for Internal Market, Financial Services and Financial Integration, Customs and Taxation in 1995, and became Commissioner responsible for Competition Policy in 1999.

Monti made clear from the beginning that he would make it a priority of his office to give EU competition law a radical overhaul and increase the emphasis on sound economics.[129] Throughout his term as Commissioner for Competition Policy, he continued to promote his aim of elevating EU antitrust law from its 'legalistic approach' to one 'based on sound economic principles' in line with current economic thinking.[130]

[127] www.ec.europa.eu/civil_service/docs/special_advisers/2015/monti_cv_en.pdf.

[128] M Monti, 'Deposit, Credit and Interest Rate Determination under Alternative Bank Objective Functions' in GP Szegö and K Shell (eds), Mathematical Methods in Investment and Finance (Amsterdam, North-Holland Publishing, 1972).

[129] M Monti, 'A Competition Policy for Today and Tomorrow' (2000) 23 *World Competition* 1.

[130] See eg M Monti, 'Antitrust in the US and Europe: A History of Convergence' (n 89); 'EU Competition Policy', Fordham Annual Conference on International Antitrust Law and Policy (New York, 31 October 2002); 'The New EU Policy on Technology Transfer Agreements', Speech at École des Mines (Paris, 16 January 2004); 'EU Competition Policy after May 2004', Speech at the Fordham Annual Conference on International Antitrust Law and Policy (New York, 24 October 2003), 'A Reformed Competition Policy: Achievements and Challenges for the Future', Speech at the Center for European

This is not to say that discussions about a substantive reform had not already started under the previous Commissioner or that the reform process came to an abrupt end when Monti left the Commission in 2004. The first public signs that the Commission was exploring the possibility of giving greater weight to economic theory in its antitrust policy in fact predate Monti's term. In 1996, the Commission published the aforementioned Green Paper on Vertical Restraints,[131] in which it outlined several ideas for modernising its approach to assessing vertical agreements under Article 101. This preparatory document proposed several policy options for a new approach to vertical restraints and signalled that it considered it useful to take into account the emerging consensus amongst economists on the effects of vertical agreements in this review.[132] Nonetheless, the Green Paper was still markedly cautious on the possible role and significance of economic theory in antitrust policy. Its opening paragraphs stressed that economic theory could not be the only factor in the design of its policy, as it was only one of many relevant policy sources. It also stressed that a full evaluation of every individual case according to economic principles would be too costly in terms of resource and would lead to legal uncertainty.[133]

This caution disappeared during Monti's office, and it is during his time as Commissioner that the Commission published the key documents introducing the more economic approach: the interpretative guidelines on Article 101,[134] the policy documents initiating the reform of EU merger law[135] and the interpretative horizontal merger guidelines accompanying the new Merger Regulation.[136] He also set in motion the ultimately very lengthy process of reforming the Commission's approach to Article 102 before the end of his term,[137] earning himself the epithet of 'Great Reformer'.[138]

Reform (Brussels, 28 October 2004). These speeches are available at: www.ec.europa.eu/competition/speeches. See also M Monti, 'The New Shape of European Competition Policy', Speech at the Inaugural Symposium of the Competition Policy Research Center (Tokyo, 20 November 2003).

[131] European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' (n 11).

[132] ibid, para 10.

[133] ibid, paras 13, 86.

[134] Guidelines on Vertical Restraints of 13 October 2000, [2000] OJ C291/1; Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements of 6 January 2001, [2001] OJ C3/2; Guidelines on the Application of Article 81 of the Treaty to Technology Transfer Agreements [2004] OJ C101/2; and Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97.

[135] European Commission, 'Green Paper on the Review of Council Regulation (EEC) No 4064/89', COM(2001) 745/6 of 11 December 2001; European Commission, Proposal for a Council Regulation on the control of concentrations between undertakings [2003] OJ C20/4.

[136] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5.

[137] Monti, 'EU Competition Policy after May 2004' (n 130).

[138] M Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 EC and Cartel Policy' (2005) 1 *Competition Policy International* 55.

VII. Increased International Cooperation

One final factor that is likely to have contributed to shaping and facilitating the substantive reform of EU antitrust law is the increase in cooperation and exchange in best practices between antitrust authorities at the international level. Many attempts had been made in the twentieth century to establish binding international antitrust rules under the auspices of an international organisation.[139] None of these was successful, not least because of the US Congress and government's repeated opposition to a world antitrust system with centralised enforcement powers.[140]

In 2001, the *GE/Honeywell* dispute between the United States and European Union reignited the discussion on how to address the issue of diverging antitrust standards at the international level.[141] Although the concept of an enforceable international competition agreement under the auspices of the WTO remained, and continues to remain, popular at the academic level,[142] governments appeared to abandon such ambitions as unrealistic for the time being and decided to focus on a less invasive and more pragmatic form of international

[139] eg the ill-fated Havana Charter from 1948, proposed by John Maynard Keynes, had contained a chapter on restrictive practices, requiring its members to act against anticompetitive business conduct (Havana Charter for an International Trade Organization, Chapter V, United Nations Conference on Trade and Employment, held at Havana, Cuba from 21 November 1947 to 24 March 1948, Final Act and Related Documents (available at: www.wto.org/english/docs_e/legal_e/havana_e.pdf)) or the Draft International Antitrust Code from 1993 (reprinted in 'Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement 10 July 1993' (1993) 5 *World Trade and Arbitration Materials* 126), and the subsequent unsuccessful attempts by the WTO (eg Singapore WTO Ministerial Declaration (WT/MIN(96)/DEC) of 18 December 1996, para 20; Doha WTO Ministerial Declaration (WT/MIN(01)/DEC/1 20) of 14 November 2001, paras 23–25). For a detailed account, see P Marsden, *A Competition Policy for the WTO* (London, Cameron May, 2003).

[140] The Havana Charter was signed by 53 States, but ultimately abandoned owing to opposition in the US Congress (see eg K Kennedy, *Competition Law and the WTO: Limits of Multilateralism* (London, Sweet & Maxwell, 2001). For the US position on establishing a World Competition Order under the auspices of the WTO, see the speech of former US Assistant Attorney General Joel Klein, 'Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century' Fordham Corporate Law Institute, 24th Annual Conference on International Law and Policy (New York, 9 November 2000).

[141] See eg 'International Antitrust in the 21st Century: Cooperation and Convergence', Address by Charles A James, Assistant Attorney General, Antitrust Division, US Department of Justice, Speech before the OECD Global Forum on Competition (Paris, 17 October 2001); W Kerber, 'An International Multi-Level System of Competition Law: Federalism in Antitrust' in J Drexl (ed), *The Future of Transnational Antitrust—From Comparative to Common Competition Law* (Berne/The Hague, Staempfli Publishers/Kluwer Law International 2003) 269; A Geiger and W von Meibom, 'A World Competition Law as an Ultima Ratio' (2002) 23 *European Competition Law Review* 445.

[142] See eg DJ Gerber, 'Competition Law and the WTO: Rethinking the Relationship' (2007) 10 *Journal of International Economic Law* 707; M Taylor, *International Competition Law: A New Dimension for the WTO?* (Cambridge, Cambridge University Press 2006); J Drexl, 'International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda' (2004) 27 *World Competition* 419.

cooperation: harmonisation through informal dialogue and persuasion, rather than binding agreement.[143]

The Organisation for Economic Cooperation and Development (OECD) is one such forum for discussion. The OECD Competition Committee promotes regular exchanges of views and analysis of competition policy issues in roundtable discussion. The proceedings from these discussions, which include submissions from representatives of antitrust enforcement authorities and invited experts, are made publicly available.[144] The European Commission participates in these discussions alongside the national competition authorities of the European Union.[145] The OECD Competition Committee issues non-binding guidelines and best practices recommendations.[146] It is assisted by the Competition Division, which provides analytical support, promotes the Competition Committee's recommendations internationally and offers hands-on support to governments seeking to strengthen their competition frameworks. The OECD Global Forum on Competition further regularly brings together high-level competition officials from around the world to facilitate a policy dialogue between OECD countries and non-OECD economies.

The United Nations Conference on Trade and Development (UNCTAD) also has a Competition and Consumer Policies Programme, which provides a forum for intergovernmental deliberations, undertakes research to inform these deliberations and provides technical assistance to developing countries.[147] The European Commission is also involved in this programme.

The most recent, most specialised and probably most important addition to these forums is the International Competition Network (ICN). Launched in 2001 after the *GE/Honeywell* crisis on the initiative of the United States, the ICN was explicitly intended as an alternative to the WTO route. It was designed to provide competition authorities with a specialised, yet informal venue for maintaining regular contacts, addressing practical competition concerns and elaborating best practice on the procedural and substantive level.[148] Where members reach

[143] N Kroes, 'European Competition Policy in the Age of Internationalisation—Towards a Global Competition Order?', Speech at the FIW (Innsbruck, 7 February 2008); M Monti, 'Competition Policy in a Global Economy' (2004) 7 *International Finance* 495; O Budzinski, 'Towards an International Governance of Transborder Mergers?—Competition Networks and Institutions between Centralism and Decentralism' (2004) 36 *New York University Journal of International Law and Politics*; A Burnside and Y Botteman, 'Networking Amongst Competition Agencies' (2004) 10 *International Trade Law & Regulation* 1; A Burnside and H Crossley, 'Cooperation in Competition: a New Era?' (2005) 30 *European Law Review* 234.

[144] www.oecd.org/daf/competition/roundtables.htm.

[145] Supplementary Protocol No 1 to the Convention on the OECD.

[146] www.oecd.org/daf/competition/recommendations.htm.

[147] www.unctad.org/en/Pages/DITC/CompetitionLaw/ccpb-Mandate.aspx.

[148] See US Department of Justice's International Competition Policy Advisory Committee in *Final Report to the Attorney General and the Assistant Attorney General for Antitrust Enforcement* (February 2000) www.justice.gov/atr/international-competition-policy-advisory-committee-delivers-final-report-attorney-general-reno.

consensus on recommendations or best practices, the individual competition authorities decide whether and how to implement the recommendations. 104 competition agencies from 92 jurisdictions are members of the ICN, including those of the United States, the European Union and its Member States. It is also open to international organisations such as the OECD and the WTO, industry and consumer associations, antitrust practitioners and members of the academic community.

The ICN is based on the idea that regular contact and exchange will lead to converging views, which will de facto eventually result in common standards, without any need for overarching Treaty rules. The Network does not have the mandate to discuss the creation of binding international competition rules. It does not have a permanent seat either, but is of a virtual nature. It has no organs capable of deciding on behalf of its members and can therefore not be qualified as an international organisation within the meaning of public international law. It is in many ways a poster child of new governance: rules are replaced by best practices and recommendations, peer review replaces enforcement and instead of purely governmental actors, the ICN involves a multitude of stakeholders, including non-governmental organisations, private sector entities, civic society actors and individuals.

The ICN has been described as a success story that by far surpassed its creators' expectations.[149] Although there is little data on the degree of convergence that has resulted globally from the exchanges and discussions that have taken place within the ICN, it stands to reason that the discussions and search for best practices with other competition authorities will have influenced the Commission's substantive review at least to some degree. The ICN working groups have explored a number of issues highly relevant to the Commission's substantive reform process, including the aims of antitrust law,[150] the assessment of dominance,[151] substantive merger analysis[152] and the role of economists and economic evidence in competitive analyses.[153] In 2007, the then EU Commissioner for Competition, Neelie Kroes, in fact explicitly stated that the Commission had taken into account the ICN recommendations when reviewing its procedural merger rules, and that it considered the discussions of the ICN's unilateral conduct working group a key opportunity to gather useful input into its then still ongoing reform of Article 102.[154]

[149] E Fox, J Fingleton and S Mitchell, 'The Past and Future of International Antitrust: Gaps, Overlaps and the Institutional Challenge' in D Lewis (ed), *Building New Competition Law Regimes* (Cheltenham, Edward Elgar 2013) 163, 172.

[150] ICN Unilateral Conduct Working Group, Unilateral Conduct Workbook, Ch 1: The Objectives and Principles of Unilateral Conduct Laws.

[151] ibid, Ch 3: Assessment of Dominance.

[152] ICN Merger Working Group, Recommended Practices for Merger Analysis.

[153] ICN, Merger Working Group, 'The Role of Economists and Economic Evidence in Merger Analysis' Presented at the 12th Conference of the ICN (Warsaw, 24–26 April 2013) www.internationalcompetitionnetwork.org/uploads/library/doc903.pdf.

[154] N Kroes, 'The International Competition Network—Achievements and Goals', Speech at the International Competition Network (ICN) Annual Conference (Moscow, 30 May 2007).

VIII. Conclusion

In sum, a multitude of factors contributed to the advent of the European Commission's more economic approach to EU antitrust law. The Commission's antitrust policy had been subject to criticism from a number of different angles. Commentators and US antitrust experts were comparing it unfavourably with the 'more economic' US antitrust law. The Court had criticised the quality of the Commission's competitive assessments in *Airtours*, *Schneider Legrand* and *Tetra Laval* in scathing words. Crucially, the timing was also right for a review of the Commission's substantive antitrust policy. In the early 1990s, the internal market had been completed and the market integration aim had lost somewhat of its urgency. Before this background, and under the guidance of an economist with a vision, DG Competition embarked on the long process of introducing a more economic approach to EU antitrust law.