International Antitrust Law
European Court to Super Mario: Game Over

THE TRANSATLANTIC ANTITRUST DIVIDE AND THE CHANGING NATURE OF EUROPE'S COMPETITION LAW

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Europe's Competition Commissioner Mario Monti once ruled the EU antitrust world with an iron fist. But recent decisions by Europe's Court of First Instance have questioned "Super" Mario's power and exposed the core of a transatlantic antitrust divide.

FROM 1989 UNTIL 2001, the European Union (EU) body responsible for reviewing merger proposals, known as the Competition Commission (Commission),[1] operated with little or no challenges to its dominance and enjoyed over a decade of unparalleled authority deciding antitrust cases. In fact, the EU's Competition Commissioner, Mario Monti, has for years been referred to as "Super Mario" due to his vast power and influence over businesses operating in Europe. However, the Commission has recently suffered a number of defeats at the hands of the Court of First Instance (CFI),[2] and now faces widespread calls to reform its system of reviewing anti-competitive practices and merger applications. With recent decisions from the CFI challenging the Commission's reasoning in antitrust cases,[3] the landscape of the European antitrust world is changing, and fundamental questions about the nature of EU competition law are emerging.

Two recent antitrust cases that highlight this trend are *Schneider Electric SA v. Commission* and *Tetra Laval BV v. Commission*. In both cases, the CFI overturned the Commission's rulings, suggesting that the Commission's decisions are no longer beyond reproach, and that the traditional legal principles underlying antitrust review in the EU have evolved. The *Schneider* and *Tetra* decisions - and the policies they reflect - may also influence the outcome of two pending high-profile cases: General Electric's (GE) appeal following the unsuccessful Honeywell merger in 2001, and Microsoft's ongoing battle with the Commission over anti-competitive practices by the technology giant. As a result, attorneys on both sides of the Atlantic are keenly interested in how the CFI will rule on GE's appeal, whether Microsoft will follow in GE's footsteps and bring a case before the CFI, and what these decisions will mean for the future of transatlantic antitrust law.

Comparing the American and European Antitrust Systems

THE EUROPEAN AND AMERICAN antitrust systems are considered the two leading models of antitrust law in the world.[4] In theory, both U.S. and EU antitrust laws are designed to prevent unfair monopolies while preserving the free market, but in practice their systems are strikingly different. In the United States, there are two primary antitrust laws that govern activities in the marketplace, the Sherman Act and the Clayton Act.[5] Each of these laws is enforceable through the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).[6] The Sherman Act bans contracts or conspiracies in restraint of trade[7] and prohibits monopolization or attempted monopolization.[8] The Clayton Act generally prohibits price discrimination, mergers, and interlocking directorates, where the effect may be a substantial lessening of competition.[9] Most antitrust experts now agree that in addition to preserving efficiency and competition, promoting consumer welfare is now at the core of U.S. antitrust policy.[10]

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In contrast, the European system, which is governed by Articles 81 and 82 of the Treaty Establishing a European Community,[11] accounts for more policy considerations when dealing with antitrust and other economic matters. For example, the European system is designed "to promote throughout the Community a harmonious, balanced and sustainable development of

economic activities, a high level of employment and social protection, sustainable and non-inflationary growth, a high degree of protection and improvement of the quality of the environment, the raising of the standard of living, and quality of life, and economic and social cohesion and solidarity among Member States."[12] Thus, the primary difference between the two systems can be summed up as follows: In the United States, the main focus of antitrust law is protecting the consumer; in Europe, it is preserving competition.

This distinction is reflected in the systems' differing standards of review. In the United States, the DOJ and FTC use what is known as the Substantial Lessening of Competition Test. While this test may appear similar to the European approach, it also places a great deal of emphasis on whether or not a merger will benefit consumers.[13] For instance, if the ruling agency in the United States determines that there will not be a substantial lessening on competition within a sector, the merger will be approved. However, if the reviewing agency determines that competition will decrease, but consumers will still benefit, most often in the form of lower prices, the consumer benefit may offset the decrease in competition, and the proposed merger may still go forward even though it could result in a company gaining a dominant position in a particular market. On the other hand, the EU Dominance Test, viewed by many as a more stringent test, focuses "on whether the combined company will have an excessive market share" without considering whether the greater market share would benefit consumers.[14] In effect, the EU places less emphasis on protecting the consumer and more on market dominance.

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But things in the EU appear to be changing. Commissioner Monti recently conceded, for example, that while he intends to continue using the Dominance Test, he will "listen when merging suppliers argue that buyers still can negotiate favorable purchasing terms; carefully consider whether newcomers still can enter a market, even when that market is consolidating; and pay attention if merging companies say heightened efficiencies will enable them to offer lower prices."[15] This concession, and the CFI's continuing scrutiny over the Commission's approach to antitrust regulation, has set the stage for the core questions implicated in the *Schneider* and *Legrand* cases, and the pending GE and Microsoft matters: Do the recent reversals by the CFI signal a fundamental shift from the EU's historical focus on market competition to consumer protection? If so, what are the implications for the future of transatlantic antitrust law?

Changing Times: The CFI's Decisions in Schneider and Tetra

SCHNEIDER ELECTRIC SA V. COMMISSION

In October 2002, just four months after the Commission received its first reversal in twelve years (in a case involving travel companies First Choice and Airtours), the CFI dealt Commissioner Monti's antitrust team another embarrassing defeat by rejecting the Commission's veto of a $7.1 billion merger

between Schneider Electric and rival Legrand. The attempted merger between the two French electrical companies would have created the world's largest manufacturer of low-voltage electrical equipment. According to Simon Baxter, an antitrust lawyer with Clifford Chance commenting on the impact of the decision, "one annulment could be seen as an aberration, but with the similarities between the two rulings, this is a bit of a blow for the Commission."[16]

The Commission contended that the merger would impact all materials used for the control of electric circuits and have a negative impact on producers of distribution panels, cable supports, and power switches.[17] The CFI, in response, issued a verdict laced with thinly veiled attacks on the Commission's economic analysis used in the merger review process. The CFI criticized the Commission for both economic and procedural errors that prevented the merger between Schneider and Legrand. In its statement, the court said the Commission committed "obvious errors, omissions, and contradictions" in its reasoning.[18]

The CFI based its decision on two distinct factors. First, the CFI challenged the Commission's economic analysis in denying the merger because its analysis was "only in relation to French sectoral markets."[19] Since the mandate of the Commission is to block

mergers that would have an unfair impact on multiple countries throughout the EU, its contention that the rivalry between Schneider and Legrand was a "mainstay of competition in France"[20] omitted the potential for increased EU-wide competition and benefits to consumers through lower prices and higher-quality electrical goods. In addition, the CFI recognized that the Commission's decision did not adequately consider the relative strength of the two main competitors, Siemens and ABB, to a Schneider-Legrand conglomerate. As a result, the Commission overestimated the potential power of the combined electrical groups and the negative impact it would have on competition in Europe because any harm to competition would have been confined largely to France.

The second part of the CFI's rebuke concerned the Commission's procedural approach. The CFI considered "the procedure followed by the Commission when examining the proposal and [found] a procedural irregularity which constitutes an infringement of defense rights, having regard to the discrepancy between the statement of objections and the Commission's decision."[21] A "statement of objections" is the initial list of objections the Commission issues when a merger review is questioned. The goal of this list is to offer the company faced with review the opportunity to present a series of remedies that might appease the Commission's concerns. The Commission's initial statement of objections in this case focused on the "overlapping of Schneider-Legrand's activities in certain markets and the strengthening of Schneider in relation to wholesalers resulting therefrom."[22] However, in the Commission's final decision, which Schneider challenged, the Commission used the term "association, which refers to preponderant positions held in a single country by two undertakings in two distinct but completely sectoral markets."[23] This inconsistency between the Commission's statement of objections and its final decision thus precluded Schneider from attempting to remedy the problems and adequately preparing its defense.

Tetra Laval BV v. Commission

On October 25, 2002, just three days after the Schneider decision, the Commission received yet another reversal from the CFI. In *Tetra*, the CFI attacked the Commission's approach to leveraging, also known as bundling, which is the theory that a company may not force its way into one product market due to its dominance of another market.

In March 2001, the Swiss drink-carton packaging company Tetra Laval announced a public bid for all outstanding shares in the French plastic company Sidel,[24] the leading European manufacturer of PET packaging equipment (most often seen as finished, plastic soda bottles).[25] After a brief period of bidding among competing companies, Tetra acquired 95 percent of the shares and 96 percent of the voting rights in Sidel, making the company the clear majority shareholder. Tetra then informed the Commission of its merger plans in compliance with regulations that require a company to obtain authorization from the Commission before exercising majority-voting rights over another company.[26]

Eight months later, the Commission notified Tetra of its objections to the planned merger and ordered Tetra to divest itself from its shareholdings in the company. The Commission concluded that Tetra's dominance in the carton packaging industry and Sidel's position as a leading PET manufacturer "would provide the merged entity with the ability and incentive to leverage its dominant position in cartons to gain a dominant position in PET packaging equipment."[27] According to the Commission, the merger would "significantly reduce competition in liquid packaging to the detriment of innovation, choice, and competitive price."[28] Like it did in *Schneider*, the CFI disagreed with the Commission's conclusion that this merger would diminish choice and competitive pricing because, as one observer noted, "[y]ou can't put soda in a juice box; it would explode!"[29]

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The CFI accused the Commission of basing its ruling on assertions and estimates with no basis in fact, noting that "[t]he economic analysis of the immediate anti-competitive effects, of conglomerate effects, and of the foreseeable conduct of the companies in question is based on insufficient evidence and some errors

of assessment,"[30] and that "the Commission prohibited the transaction without proving that it would actually have an adverse effect on competition."[31] Moreover, the CFI found that the Commission exaggerated its contention that the merger would have "unfair horizontal (control of the PET equipment market) and vertical (risk of creation of a vertically-integrated structure) effects resulting from the merger."[32] Thus, for the CFI, the bottom line was that the Commission did not prove that the merger of a plastic bottling company with a drink carton company would hurt consumers, the Commission's leveraging theory was miscalculated, and the impact of a merger on consumers would not be adverse. To be sure, the CFI did not rule that leveraging would never be permitted; rather, in order for the CFI to uphold the leveraging theory, the Commission would have to illustrate both the presence of leveraging and a negative impact on consumers.[33]

The Impact of Recent Changes on Pending Cases

GE-Honeywell

The controversial decision of the Commission on July 3, 2001 to block the proposed merger between GE and Honeywell brought international interest and scrutiny to Europe's trustbusters. In addition to nearly resulting in a transatlantic trade war, the Commission's merger denial brought the different approaches of the U.S. and EU systems into the international business spotlight because it was the first time a merger was approved in the United States but blocked by the Europeans. One reason cited for the disagreement was "irreconcilable differences in the antitrust approaches of the two jurisdictions."[34] Although any serious talk of a trade war faded in the aftermath of the tragic attacks of September 11, the GE-Honeywell matter exposed the tension between the consumer-oriented approach of the U.S. and the competition-oriented approach of the EU to members of the business and legal communities.

Although a victory and successful merger would have increased GE's market capitalization and strengthened its position in Europe, it is far from clear that the result would be harmful to consumers or competition. Although few people in the U.S. question GE's dominance in areas from jet engines to power generation, financial services to plastics, and television to lighting, the European market has strong competition for most, if not all, of GE's products. Thus, when looking at the case from a U.S. perspective, the presence of European companies such as Siemens, Phillips, and, for now, Honeywell, suggests that a merger might actually result in increased competition designed to provide European consumers with higher-quality, lower-priced goods and services.

With the *GE* case now on appeal, the Commission faces the possibility that the CFI will rebuke Commissioner Monti's team again and overturn the decision to block the GE-Honeywell merger. In accord with the CFI's ruling in *Tetra*, the Commission has to prove both the presence of leveraging and a negative impact on consumers in order for its decision to remain intact. This theory remains at the heart of the U.S.-EU antitrust divide today, which is due in large part to U.S. antitrust experts' rejection of the leveraging theory. In addition, while the retirement of GE CEO Jack Welch and the changing economic landscape following the tragedy of September 11 have caused both companies to redirect their focus and move beyond the merger, GE remains an interested party "in hopes of preventing the leveraging theory from being used to shoot down future mergers."[35]

Microsoft

In October 2002, Judge Colleen Kollar-Kotelly of the federal district court in Washington upheld the Justice Department's settlement reached with Microsoft.[36] Although many predicted the settlement would end the global antitrust case against the company, the Competition Commission did not accept Judge Kollar-Kotelly's decision. In November 2003, the Commission concluded its own investigation into the company's control of the digital media market. The Commission largely agreed with Microsoft competitors, such as RealNetworks, that Microsoft is leveraging its dominance in the operating system market to expand its supremacy in the media-player market. Indeed, in December 2003, RealNetworks sued Microsoft in federal district court in San Jose, California, with parallel allegations that Microsoft is leveraging its dominance of operating systems to squeeze RealNetworks out of the media-player market. Given the diverging approaches to market regulation between U.S. and European antitrust enforcers, it is unclear what the impact of a negative decision for Microsoft in Europe would have on a case in the United States.

Although the Commission's reputation and legitimacy might be seriously damaged by a weak decision that gives Microsoft

grounds to appeal to the CFI, Commissioner Monti and his team are confident in their case against the tech giant. According to a Commission spokeswoman, "[o]ur case is quite different from a factual point of view to the case [brought by the DOJ] in the United States; we also have our own rules to uphold."[37] Indeed, with a parallel case now making its way through the U.S. court system, the Commission arguably finds itself in a stronger position to rule against Microsoft.

At the time of this writing, the Commission announced its decision to require Microsoft to pay a record $612 million fine and implement remedies designed to allow software competitors easier access to the company's operating system products. Microsoft executives promise a vigorous appeal, and any chance for a compromise appears all but lost. Moreover, Bo Vesterdorf, who heads the CFI, recently dealt Microsoft a blow when he indicated that any Commission decision forcing Microsoft to unbundle their Windows program should take effect immediately after a decision mandating the company to do so. This would prevent the company from obtaining a stay of the Commission's decision while Microsoft appeals – a process that could take years. But with the Commission risking another rebuke by the CFI if its analysis is inadequate, a compromise seemed to present substantial benefits to both sides. Now, however, the likely appeal to the CFI by Microsoft will almost certainly deepen the transatlantic antitrust divide.

Conclusion

LOOKING FORWARD, THE RULING IN *TETRA* on the leveraging theory is particularly important for both GE and Microsoft. In *Tetra*, the CFI ruled that "the Commission committed a manifest error of assessment in prohibiting the modified merger on the basis of evidence (relating to leveraging)."[42] At the time of the Commission's decision in the *GE* case, U.S. Assistant Attorney General Charles James said the Commission's reliance on the so-called "portfolio effects" theory (the concept that a decisive competitive advantage could lead to leveraging) was "antithetical to the goals of antitrust law enforcement."[43] Thus, the battle lines are now clearly established, and multinational companies and their attorneys in Brussels are watching the CFI and Commission closely to see what impact the *Schneider* and *Tetra* cases will have on the *GE* appeal and the recently decided *Microsoft* case.

Indeed, the changes in EU merger law have presented new challenges and opportunities for multinational companies and their lawyers. The Commission's twelve year, 18-0 record on appeals to the CFI has given way to a fundamental re-examination of Europe's antitrust system. Moreover, these changing tides have led to a gold rush of U.S. firms into Brussels. In 2003 alone, legal powerhouses such as Arnold & Porter, Gibson, Dunn & Crutcher, and Sidley, Austin, Brown & Wood all set up practices focusing on antitrust law, joining an ever-expanding field of international law firms with antitrust practices in Brussels.[44] However, in order to help clients navigate these changing tides, U.S. antitrust practices in Brussels will need to understand the key differences between the U.S. and EU systems, and whether the transatlantic antitrust divide is growing wider or whether a period of harmonization is possible.

With the eventual outcome of the *GE* appeal still in doubt, it is a safe bet that EU trustbusters are doing everything in their power to avoid earlier missteps that could lead to another embarrassing defeat at the hands of the CFI. At a minimum, the CFI reversals in *Schneider* and *Tetra* reveal a shift in the balance of power away from the Commission when it comes to antitrust issues. But the real measure of whether the EU's antitrust landscape is truly changing will come with the eventual resolution of the cases involving GE and Microsoft. If the CFI rebukes the Commission over its denial of the GE-Honeywell merger, attorneys on both sides of the Atlantic will have the strongest evidence to date that EU competition laws are shifting away from their historical reliance on the preservation of market competition.

As for Microsoft, it will likely follow GE into the European appeals court, and the Commission's next date with the tech giant will be in the CFI. Whatever the outcome of these high-profile cases, it is clear that American and European antitrust regulators must explore a more collaborative approach to enforcement that harmonizes the two systems and effectively protects *both* competition and consumer welfare. If not, the transatlantic antitrust divide will only grow larger. BLB

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1 The European Commission - the executive-bureaucratic arm of the EU - is divided into 24 directorates-general (DG), which are also known as Commissions. Each Commission is responsible for a particular area. In this paper, the Competition Commission (DG Competition) is referred to simply as the Commission.
2 The CFI was established in 1989 to reduce the caseload of the European Court of Justice. The CFI has original jurisdiction over competition law cases.
3 In the United States, the term "antitrust" is used to define most forms of competition policy. In Europe, "competition policy" encompasses four specific areas: antitrust & cartels; merger control; liberalization; and state aid control.
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5 Yeo Jin Chun, *The GE-Honeywell Merger Debacle: The Enforcement of Antitrust/Competition Laws Across the Atlantic Pond*, 15 N.Y. Int'l L. Rev. 61, 65 (2002).
6 *Id.*
7 15 U.S.C. § 1 (2000).
8 15 U.S.C. § 2 (2000).
9 15 U.S.C. §§ 12-27 (2000).
10 Chun, *supra* note 5, at 65.
11 EC Treaty art. 82; EC Treaty art. 2.
12 EC Treaty art. 2.
13 *EU Stands by Tough Test for Approval of Mergers*, The Wall St. J., Nov. 7, 2002, at http://www.wsj.com.
14 *Id.*
15 *Id.*
16 Paul Meller, *Court Deals New Setback to Europe's Antitrust Policy*, The NY Times, Oct. 23, 2002, at W1.
17 Court of First Instance Press Release No. 84/02, Oct. 22, 2002, *available at* http://www.europa.eu.int/cj [hereinafter *CFI Schneider Press Release*].
18 *Id.*
19 *Id.*
20 Emma Davis, *Schneider Electric Likely to Win Appeal vs. EU Over Legrand Buy*, AFX News Limited, Oct. 21, 2002, *available at* LEXIS, News Library, AFX File.
21 *CFI Schneider Press Release, supra* note 17.
22 *Id.*
23 *Id.*
24 *Tetra Laval BV v. Comm'n*, No. COMP/M, 2416, Jan. 30, 2002, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2416_84_en.pdf.
25 "PET" is polyethylene terephthalate, which is a recyclable plastic used in drink containers.
26 Article 7(3) of Council Regulation (EEC) No. 4064/89.
27 *International Antitrust*, 36 The Int'l Lawyer 2, 296 (2002).
28 Press Release No. IP/01/1516, *Commission Prohibits Acquisition of Sidel by Tetra Laval Group*, Oct. 30, 2002, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1516|0|RAPID&lg=E.
29 Brian Carney, *Monti Has Earned Himself a Watchdog*, The Wall St. J., Oct. 28, 2002, at http://www.wsj.com.
30 Court of First Instance Press Release No. 87/02, *Judgments of the Court of First Instance in the Case of T-5/02 and Case T-80/02*, Oct. 25, 2002, *available at* http://www.europa.eu.int/cj/en/cp/aff/cp0287en.html.
31 *Id.*
32 *Id.* at note 30.
33 Francesco Guerrera, *Europe's Battered Antitrust Chief Outlines His Package of Reforms: Mario Monti, Competition Commissioner, Dismisses Calls for His Resignation*, Fin. Times, Oct. 26, 2002, at 8.
34 Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 Fletcher F. World Aff. 59 (2002).
35 Paul Geitner, *EU Losing Streak in Court on Mergers Unlikely to Help GE, Microsoft Cases,* The Associated Press, Oct. 26, 2002, available at LEXIS, News Library, AP File.
36 Paul Meller, *Microsoft's Settlement Won't Clear Path in Europe,* The N.Y. Times, Nov. 5, 2002, at C5.
37 *Id.*
38 Brandon Mitchener, *Microsoft, EU Regulators Face More Pressure to Settle,* The Wall St. J., Nov. 24, 2003, at http://www.wsj.com.
39 Daniel Dombey, *Top Judge Steps Up Pressure on Microsoft*, Fin. Times, Dec. 19, 2003, at 34.
40 Microsoft Statement on Conclusion of European Commission Hearing at http://www.microsoft.com/presspass/press/2003/nov03/11-14eustatement.asp.
41 Jonathan Kim, *Prosecutors Still Unhappy with Microsoft*, The Wash. Post, Jan. 17, 2004 at E1.
42 *Tetra Laval, supra* note 24, at 3.
43 Charles A. James, Speech Before the OECD Global Forum on Competition, Oct. 17, 2001, *available at* http://www.usdoj.gov/atr/public/speeches/9330.htm.
44 Alexei Oreskovic, *Brussels Sprouts U.S. Law Firm Offices*, The Recorder, September 9, 2003, *available at* http://media.gibsondunn.com/fstore/documents/pubs/Recorder_Brusels_080803.pdf.