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Aerospace And Antitrust: How The European Union Supports Its Interests To The Detriment Of United States' Companies

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**AEROSPACE AND ANTITRUST: HOW THE EUROPEAN UNION
SUPPORTS ITS INTERESTS TO THE DETRIMENT OF UNITED STATES’
COMPANIES**

*Jason Thompson**

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SYNOPSIS

The purpose of this Article is to examine the European Union’s exercise of jurisdiction over mergers that take place between companies located outside of the European Union. It looks at the possibility that the European Union’s approval or disapproval of such mergers depends not only on the possible anticompetitive effects of the merger and, by implication, the negative effects to the consumers within the European Union, but also the protection of the national champion of the European Union, the aerospace industry. In addition, the European Union helps the aerospace industry within the European Union by granting subsidies that violate European Union competition laws, United States antitrust laws, and treaties that the European Union has entered into with other nations.

INTRODUCTION

In order to determine whether the European Union (“E.U.”) is favoring European undertakings,¹ it is first essential to have an

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understanding of the merger guidelines of the E.U.² The E.U. promulgated the “Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.”³ The chief question to be answered by E.U. officials when evaluating a possible merger⁴ of two businesses, or undertakings, is whether the merger would significantly impede competition, or particularly, whether the merger would strengthen a dominant position in the common market.⁵ It is important to note that the language of the E.U. regulation discusses the effect of the merger on the “common market” and makes no reference to the location of the companies attempting to complete the merger.⁶

The most common reason to deny a merger between undertakings is that the merger would be harmful to competition by strengthening the dominant position of a single firm.⁷ The E.U. Competition Commission (“Competition Commission”) assesses the competitive effects of the merger by considering the competitive conditions that will result after the merger compared with the conditions without the merger.⁸ The Competition Commission states that it uses two means in reviewing a potential merger:⁹ the current market shares in

¹ Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of concentrations Between Undertakings, 2004 O.J. (C 31/03) 5, 5, available at http://europa.E.U.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf [hereinafter Guidelines]. “Undertakings” is the term that the European Union uses to refer to businesses. Throughout this Article, business and undertakings may be use interchangeably.

² Cf. <http://www.ftc.gov/bc/docs/horizmer.htm> (outlining the United States’ horizontal merger guidelines as a means of comparison).

³ Guidelines, *supra* note 1.

⁴ See generally EUROPA, EUROJARGON, at http://europa.E.U.int/scadplus/glossary/merger_en.htm (last visited Apr. 10, 2006). In addition to using the term mergers the European Union also refers to mergers as “concentrations.”

⁵ Guidelines, *supra* note 1, at 5.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.*

its competitive analysis,¹⁰ and the Herfindahl-Hirschman Index¹¹ in its determination of concentration levels.¹² The E.U. views a market share of over fifty percent or more as evidence of the existence of a dominant position on the part of a particular undertaking.¹³ The Competition Commission has also determined that some undertakings with less than forty percent of the market share hold a dominant position.¹⁴

The real issue and the purpose of this Article is to focus on the E.U. and its exercise of jurisdiction in extraterritorial mergers. No one denies or argues with the E.U.'s authority and jurisdiction to control the mergers of undertakings located within the territorial bounds of the E.U..¹⁵ The issues exist when the principals to the merger are located outside of the territory of the E.U..

The E.U. takes the position that mergers are within the jurisdiction of the E.U. even if the principals are not located within the territorial bounds of the E.U.. The Competition Commission relies on the Merger Regulation¹⁶ to find jurisdiction for the review of mergers

¹⁰ *Id.*

¹¹ *Id.*

¹² See HERBERT HOVENKAMP, FEDERAL ANTIRUST POLICY THE LAW OF COMPETITION AND ITS PRACTICE § 12.4a2, at 2 (2d ed.1999). The Herfindahl-Hirschman Index ("HHI") is used by the enforcement agencies within the United States to measure market concentration. The HHI is determined by computing the sum of the squares of the market share of the companies in a particular market. A market with an HHI in excess of 1800 is considered to be highly concentrated. For example, in a market containing 3 firms with one firm holding thirty-four percent and the other two each holding thirty-three percent of the market share the HHI would be 3,334. By comparison, a market with 20 firms, each holding five percent of the market share, would have an HHI of 500.

¹³ Guidelines, *supra* note 1, at 7.

¹⁴ *Id.*

¹⁵ This is subject to the limitations mandating that the member states of the E.U. have exclusive jurisdiction, which is beyond the scope of this Article.

¹⁶ Council Regulation 139/04 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), art. 1, 2004 O.J. (L 24) 1, 1, available at http://europa.E.U.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf [hereinafter EC Merger Regulation].

between companies that are foreign to the E.U..¹⁷ The Merger Regulation applies to all mergers that have a community dimension, explained below.¹⁸ The Merger Regulation does not specify where the merger must occur or where the location of the undertakings must be in order for the E.U. to have jurisdiction over the merger, thus leaving a gray area in the jurisdiction.¹⁹ The Competition Commission therefore takes the position that if a proposed merger meets the definition of a concentration that will have an impact on the E.U., then the Competition Commission gives no regard to the location of the parties.²⁰

According to the Competition Commission, the only relevant factor is whether the activities of the companies have a community dimension in that the merger will affect the E.U..²¹ This broad definition of community dimension gives the E.U. jurisdiction no matter where the companies are located and whether the companies have a presence within the boundaries of the E.U..²² This, of course, raises the question of how the E.U. can review mergers that occur outside of the boundaries of the E.U. between companies that are located in and do all of their manufacturing in another country, such as the U.S., and not violate treaties.

Business is becoming more and more global, and companies are seeing more of an opportunity to increase profits through the implementation of selling to other countries. Some companies choose to locate in another country through the presence of a wholly owned subsidiary. Other companies choose to remain in the home country and to simply export goods into another state or country. The U.S. and the E.U. have entered into an agreement²³ whereby the two entities agree on

¹⁷ David J. Feeney, *The European Commission's Extraterritorial Jurisdiction Over Corporate Mergers*, 19 GA. ST. U. L. REV. 425, 430 (2002).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 431.

²¹ Ariel Ezrachi, *Limitations on the Extraterritorial Reach of the European Merger Regulation*, 22 EUR. COMPETITION L. REV. 137, 138 (2001).

²² *Id.*

²³ Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the

the enforcement of competition laws through comity.²⁴ If this is the case, one must then wonder: how can the two entities clash regarding mergers?

Although the agreement is intended to create a cooperative relationship between the US and the E.U. in order to avoid a clash of laws, the agreement specifically excludes the area of review of mergers.²⁵ Because of this exclusion in the agreement, the US and the E.U.²⁶ can review the exact same merger and reach a different determination as to whether the proposed merger will have a negative effect on competition.

In 2002, the Economic and Social Committee ("Committee") of the E.U. released an opinion regarding competition rules relative to mergers.²⁷ The Committee stated that since the time the merger regulation came into effect, approximately 2,000 proposed concentrations have been notified to the Competition Commission.²⁸ Of the 2,000 notifications of mergers, the Competition Commission blocked eighteen and approximately 150 received clearance after concessions from the companies planning to merge.²⁹ Although the Committee stated that the ultimate goal of competition law is to protect consumer

Enforcement of Competition Laws, 1998 O.J. (L 173) 28, 28 [hereinafter Agreement on Comity Principles].

²⁴ *Id.*, art. III, at 29. Comity is the balancing of the local law against the interest of a foreign state's laws in determining whether jurisdiction is proper. *See, e.g.*, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, (9th Cir. 1976). *But see, e.g.*, Jaafar A. Riazi, *Finding Subject Matter Jurisdiction Over Antitrust Claims of Extraterritorial Origin: Whether the Seventh Circuit's Approach Properly Balances Policies of International Comity and Deterrence*, 54 DEPAUL L. REV. 1277 (2005).

²⁵ Agreement on Comity Principles, *supra* note 23, art. II, at 29; Feeney, *supra* note 17, at 429-30.

²⁶ *See generally* Andre Fiebig, *Modernization of European Competition Law as a Form of Convergence*, 19 TEMP. INT'L & COMP. L. J. 63 (2005).

²⁷ Opinion of the Economic and Social Committee on the 'Green Paper on the Review of Council Regulation (EEC) No. 4064/89,' 2002 O.J. (C 241/25) 130, 130 [hereinafter 2002 Opinion].

²⁸ *Id.* at 131.

²⁹ *Id.*

interests,³⁰ the Committee also articulated that, “merger control should be considered within the context of the global economy, in order to take account of the steadily rising international competitive pressure on European companies.”³¹ The Committee also noted that protection of European companies is needed to facilitate growth of companies of the E.U., and that policies must evolve to allow European companies to be competitive on a global level.³²

I. THE PURPOSE OF THE EUROPEAN UNION

The E.U. is a group of countries located within Europe that joined together in 1957 in an effort to provide a single market.³³ In addition to the stated humanitarian goals of the E.U. is the goal of being a viable economic competitor on the world stage.³⁴ Although not so stated, one of the primary purposes of the E.U. is to allow countries that are a part of the E.U. to compete with the U.S.. The gross national product of the U.S. is approximately \$12 trillion,³⁵ whereas the gross national product of the E.U. is approximately \$8 trillion.³⁶ Although no one country within the E.U. has the necessary power to compete with the U.S. economically, the E.U., as a group, does have that power.

II. THE NATIONAL CHAMPION THEORY

The theory of a national champion is that a country will have a particular company that will compete with companies from another

³⁰ *Id.* at 132.

³¹ *Id.* at 131.

³² *Id.* at 135.

³³ EUROPA, THE E.U. AT A GLANCE—THE HISTORY OF THE EUROPEAN UNION, at http://europa.E.U..int/abc/history/index_en.htm (last visited Mar. 24, 2006).

³⁴ *Id.*

³⁵ WORLD BANK, TOTAL GNI 2004, ATLAS METHOD 4 (Jul. 15, 2005), <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNI.pdf>.

³⁶ *Id.*

country.³⁷ The national champion will generally fall to a large multinational corporation that competes on a global level in a certain area of manufactured goods. The theory of a national champion is twofold. First, the national champion may receive preferential treatment from the local government in the application of antitrust laws.³⁸ Second, the country or governing body in the case of governmental organizations will act in a manner that is detrimental to competing companies from other countries in favor of the national champion.³⁹ This favoritism causes concern because acting in such a manner can not only be anticompetitive in that it is not necessarily in the best interest of consumers to support the national champion, but also because it can result in a political disaster as a result of the perceived harm caused to another sovereign.

This favoritism is most commonly seen in the context of mergers. Sovereigns have a vested interest in protecting their national champion as well as in exerting political pressure.⁴⁰ The argument can (and will herein) be made that Airbus is the National Champion of the E.U.. Beyond Airbus, the E.U.'s preference seems to extend to the

³⁷ See generally Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173 (2005) (discussing national regulation in cross-border transactions).

³⁸ Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 356 (2004).

³⁹ See generally <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNI.pdf>, *supra* note 35.

⁴⁰ See generally EUR. COMM'N, STAR 21—STRATEGIC AEROSPACE REVIEW FOR THE 21ST CENTURY 4 (2002), available at http://europa.E.U.int/comm/enterprise/aerospace/report_star21_screen.pdf [hereinafter STAR 21 REPORT] (setting out the Aerospace Advisory Group's analysis and recommendations for creating a coherent market and policy framework). The European Advisory Group on Aerospace produced the STAR 21 report. The Group was made up of seven aerospace industry chairmen, five European Commissioners, the E.U. High Representative for the Common Foreign and Security Policy and two Members of the European Parliament. Also among the members of the group were two co-chairmen of EADS, the chairman of BAE Systems and the chairman of Rolls-Royce.

aeronautical industry itself, making the industry as a whole the national champion, instead of just Airbus.

The E.U. has a stated policy to lean towards companies that are a part of the E.U. in the aeronautical industry. The E.U. Competition Commission has stated that the E.U. has a position leaning towards E.U. undertakings in the aerospace industry.⁴¹ The Competition Commission responded to the STAR 21 Report in 2003.⁴² In this report, the E.U. Competition Commission communicated with the Council, the European Parliament, The European Economic and Social Committee, and the Committee of the Regions.⁴³

The Competition Commission began by stating that the aerospace industry within the E.U. plays a central role in the overall quality of life within the E.U., including, without limitation, transportation, communication, observation, security and defense.⁴⁴ The Competition Commission also highlighted that a “globally competitive aerospace industry is central to the achievement of Europe’s economic and political objectives.”⁴⁵ According to the Competition Commission, Europe needed to build an environment in which the aerospace industry would be encouraged to retain and improve its competitiveness in order to contribute to the E.U.’s ultimate goals.⁴⁶ As a result, the Competition Commission formed the Aerospace Advisory Group to consider and review the political and regulatory framework for the aerospace industry in Europe and to make proposals for improvement of the same.⁴⁷ The stated position of the Competition Commission was that the aerospace

⁴¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—A Coherent Framework for Aerospace—A Response to the STAR 21 Report, COM(03)600 final.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at pt. I.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

industry within Europe should receive supportive policies⁴⁸ to improve its global competitiveness.⁴⁹

As stated earlier, the national champion of the E.U. is the aerospace industry. The major player in the aerospace industry within Europe is Airbus, a maker of commercial airplanes that competes chiefly with Boeing of the U.S.. Airbus is made up of stock ownership of two other companies.⁵⁰ The European Aeronautic and Space Company ("EADS") is the majority owner of Airbus, owning eighty percent of the stock of Airbus. The other owner of Airbus is British Aerospace and Marconi Electronic Systems ("BAES"), which owns the remaining twenty percent of Airbus. Airbus is now the largest producer of commercial planes in the world, overtaking Boeing in output.⁵¹

As Airbus is owned by two other companies, it is important to note who those companies are. EADS is a giant multinational company with sales that exceeded \$43 billion in 2004.⁵² EADS possesses several subsidiaries, including Airbus S.A.S., Airbus North America Holdings, Inc., and EADS North America, Inc.⁵³ Of course, it is not uncommon in

⁴⁸ As a means to support the aerospace industry within Europe, the E.U. has challenged one merger of American companies engaged in the aerospace industry (Boeing/McDonnell Douglas) and blocked another (General Electric/Honeywell).

⁴⁹ See STAR 21 REPORT, *supra* note 40.

⁵⁰ See Commission Decision of 18 October 2000 declaring a concentration to be compatible with the common market (Case No. COMP/M.2061 – AIRBUS) According to Council Regulation (EEC) 4064/89, para. 1, 2000 O.J. (C 57). The Commission determined that a concentration whereby European Aeronautic Defense and Space Company acquired control of Airbus and BAES also joined in the concentration. A merger between Aerospatial Matra of France, DASA of Germany, and Macroni Electronic Systems created EADS, whereas a merger of British Aerospace and Macroni Electronic Systems created BAES. The E.U. Competition Commission approved both the BAES and EADS mergers, and the concentration made for a combination of the interests of EADS and BAE in Airbus. Nonetheless, the Commission found that the concentration did not result in any anticompetitive concerns. See *infra*, para. 7.

⁵¹ *European Aeronautic Defense and Space Company EADS N.V.*, HOOVER'S IN-DEPTH COMPANY RECORDS, available at 2005 WLNR 14063172.

⁵² *Id.*

⁵³ *Id.*

the business world for ownership of a multibillion dollar multinational company to fall to other corporations. EADS' principals, however, are what make the company unusual. EADS formed in 2001 as a result of the joining of several companies,⁵⁴ namely, Daimler Chrysler Aerospace of Germany, Aerospatiale Matra of France, and Construcciones Aeronauticas, SA of Spain.⁵⁵ Within the ownership of EADS, Daimler Chrysler of Germany owns approximately thirty percent, and the French Government, France-based Lagardere, BNP Paribas and AXA together own another thirty percent.⁵⁶ Also, SEPI, owned by Spain, owns five and a half percent of EADS.⁵⁷

The current environment within the E.U. is perfect for the aerospace industry to be the national champion. This favorable environment stems from a combination of the E.U.'s intent to present a viable competitor on the world market and the E.U. Competition Commission's statement that it is essential for the E.U. to have a strong presence in the aerospace industry. The ownership of aerospace companies by companies from different countries within the E.U. and, in some instances, by actual nations such as France and Spain, also contributes to the aerospace industry's prominence as the national champion.

III. EFFECTS OF NATIONAL CHAMPIONS

In order to see the repercussions of the national champion preference or a perceived national champion preference, one need look no further than the European Union's dealings with the proposed merger of two American companies, Boeing and McDonnell Douglas. In the Boeing McDonnell Douglas merger, the U.S. and the E.U. both accused the other of playing to a national champion.⁵⁸ The E.U.'s reaction to the Boeing merger is illustrative of the possible negative reactions to a

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. INT'L L. J. 1, 47 (2005).

national champion. When informed of the E.U.'s intention to block the merger, the U.S. House of Representatives passed a resolution by 416-2 that warned the E.U. against getting involved and interfering in a U.S. business transaction.⁵⁹ This caused the E.U. to acquiesce to the merger. However, the true effect of the E.U.'s preference for their national champion manifested itself in the proposed merger of General Electric ("G.E.") and Honeywell, both of which are American companies. The merger at least arguably failed because of the E.U.'s preference for a national champion.

IV. PROPOSED MERGER OF GENERAL ELECTRIC AND HONEYWELL

The G.E. merger with Honeywell is perhaps the case that drew the lines of extraterritorial jurisdiction over mergers.⁶⁰ The G.E./Honeywell merger was set to be a major joining of two American companies, with the deal worth an estimated \$45 billion.⁶¹ However, the merger did not happen because the European Commission's Directorate General for Competition Policy at the time, Mario Monti, made the decision that, "the merger would create or strengthen dominant positions, leading to unfair competition."⁶² The block of the G.E./Honeywell merger was only the second time that Commissioner Monti blocked a merger between two American companies.⁶³

The major effect of the blocking of this particular merger is that it marked the first time that the E.U. prevented the merger of two American companies after the merger already received clearance by the U.S. Department of Justice and the Federal Trade Commission.⁶⁴ The

⁵⁹ *Id.* at 48.

⁶⁰ *See* *Hartford Fire Insurance Co. v. California*, 509 US 764, (1993) (discussing how the United States exercised jurisdiction over an antitrust case in which actions of a company in United Kingdom allegedly affected the United States economy).

⁶¹ Yeo Jin Chun, *The G.E.-Honeywell Merger Debacle: The Enforcement of Antitrust/Competition Laws Across the Atlantic Pond*, 15 N.Y. INT'L L. REV. 61, 61 (2002).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 62.

E.U. Competition Commission concluded that the “proposed merger would lead to the creation, or strengthening, of a dominant position in the markets for large commercial jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbines, causing competition in the common market to be significantly impeded.”⁶⁵

The position of the E.U. on the G.E./Honeywell merger resulted in a rift between the U.S. and the E.U..⁶⁶ The decision caused President George W. Bush to speak out publicly against the blocking of the G.E./Honeywell merger. In his response, Bush echoed the sentiments of American companies by stating that he wanted U.S. companies to be treated fairly by the authorities of the E.U..⁶⁷ The E.U. nevertheless blocked the G.E./Honeywell merger, even though G.E. offered concessions in an effort to bring the merger to fruition.⁶⁸

As stated above, the E.U.’s decision to get involved in a merger of two American companies was met with hostility on the part of the U.S..⁶⁹ The U.S. not only objected to the jurisdictional concerns based on the fact that the companies only sold goods in Europe and were not located within the E.U., but also to the fact that the E.U.’s decision to block the merger in the face of approval by the U.S. was motivated by economic self-interest, rather than solid economic and antitrust analysis and principles.⁷⁰ Mario Monti responded to Bush’s push for the merger by stating that the decision regarding the proposed merger was a matter of law and economics and did not involve politics.⁷¹

The review of the G.E./Honeywell merger by the E.U. Competition Commission began on February 5, 2001, when the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT’L L. & COM. 263, 274 (2002).

⁶⁹ *Id.*

⁷⁰ *Id.* at 276.

⁷¹ *Id.*

Competition Commission received notification of the proposed merger.⁷² The Competition Commission acknowledged that both of the companies involved in the proposed merger were American companies.⁷³ In order to obtain jurisdiction over the proposed merger, the Competition Commission viewed the “community dimension” of the proposed merger.⁷⁴

The Competition Commission determined that jurisdiction was proper to review the merger for several reasons. First, the two undertakings possessed worldwide sales in excess of five billion Euros, and second, within the E.U., the two companies had combined sales in excess of 250 million Euros.⁷⁵ Furthermore, as required by the laws of the E.U., the companies did not receive more than two-thirds of their aggregate Community-wide turnover within one member state or country.⁷⁶ Based on this determination, the Competition Commission found that the merger had a community dimension and thus, jurisdiction was proper to review and ultimately block the proposed merger of the two American companies.⁷⁷

In reviewing a potential merger, the approval or disapproval often hinges on how the Competition Commission defines the relevant market of the two companies wishing to merge. It is interesting to note that although G.E. engages in a myriad of industries, the Competition Commission chose to define the relevant market as the aerospace and power systems industries.⁷⁸ The Competition Commission determined that the only overlap between the two companies was in the market for large regional jet aircraft engines.⁷⁹ The fact the Competition Commission chose to limit the merger’s market to aerospace, rather than consider the different industries and markets which the merger may

⁷² Commission Decision of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement, 2004 (L 48) 1, 8 [hereinafter Decision on General Electric/Honeywell Merger].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 11.

affect, lends further credence to the theory that the aerospace industry is the national champion of the E.U..

In order to review a potential merger in the aerospace market generally, and within the jet engine market specifically, the Competition Commission considers the geographic market to be a worldwide market.⁸⁰ The Competition Commission's stance is that the transportation cost of jet engines is negligible and therefore, the relevant market is the entire world, regardless of the physical location of the manufacturer.⁸¹ In reviewing G.E.'s position within the aerospace industry, the Competition Commission focused on the three largest makers of jet engines in the world:⁸² G.E., Rolls Royce, and Pratt & Whitney.⁸³ Of those three makers, the second largest is Rolls Royce, which is located in the United Kingdom.⁸⁴

In reviewing the proposed merger of G.E. and Honeywell, the Competition Commission focused more on the competitors in the relevant markets than on the actual competition. The Merger Regulations of the E.U. Competition Commission state that the mergers should be blocked if the merger will harm *competition* or increase a dominant position, which is generally defined as a market share of greater than fifty percent.⁸⁵ However, the protection of competitors is in direct opposition to the intent of antitrust laws within the U.S. as well as within the E.U..⁸⁶ Not only did the Competition Commission consider

⁸⁰ *Id.* at 13.

⁸¹ *Id.*

⁸² *Id.* at 15.

⁸³ See *Rolls-Royce*, in HOOVERS IN-DEPTH COMPANY RECORDS, available at http://www.hoovers.com/rolls-royce/--ID__41834--/free-co-factsheet.xhtml.

⁸⁴ *Id.*

⁸⁵ See Guidelines, *supra* note 1. (emphasis added).

⁸⁶ See THOMAS E. SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 2 (4th ed. 1999) ("The purpose of antitrust law is to promote the goal of enhancing economic efficiency without consideration of the sociopolitical imbalance that such a goal may create between the large concentrated business and the small struggling competitor. Antitrust laws are intended to protect competition, not competitors.")

the branch of G.E. that is involved with the production of jet engines, but it also looked at the company as a whole.⁸⁷

The Competition Commission stated that G.E. has an unmatched balance sheet that gives it an advantage over other companies,⁸⁸ especially over other manufacturers of jet engines.⁸⁹ In the Competition Commission's view, these deep pockets allow G.E. to take more risk in product development, and that a failure in the development of a new product will not doom the company.⁹⁰ The Competition Commission noted that within the industry of jet engine manufacturing, much time would pass between the building of a new product and the eventual recoupment of that money along with eventual profits.⁹¹ The Competition Commission further stated that G.E.'s financial strength gives them an advantage over Pratt & Whitney and Rolls Royce.⁹²

In evaluating the merger, the Competition Commission noted that Rolls Royce does not possess the ability to replicate the market strength of G.E..⁹³ Further, the Competition Commission held that although Rolls Royce is a "very capable supplier in the technical sense," it cannot be considered a credible bidder for all engines across all markets.⁹⁴ Interestingly, the expansive view of the Rolls Royce markets stood in contrast to the narrow parameters of the Honeywell and G.E. markets, which the Competition Commission found overlapped only in one specific type of jet engine.

It seems the Competition Commission stepped outside logical parameters of the evaluation of the proposed merger in order to protect

⁸⁷ Decision on General Electric/Honeywell Merger, *supra* note 72, at 25. It is interesting to note that in determining that G.E. has a superior position in the aerospace industry, the Commission considered the company as a whole, but in viewing the merger with Honeywell, the Commission seemed to disregard the fact that G.E. was involved in other industries besides the manufacturing of jet engines.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 37.

⁹⁴ *Id.*

the E.U. aerospace industry. Rolls Royce was determined to be at a competitive disadvantage against G.E..⁹⁵ According to the Competition Commission, Rolls Royce would not be able to provide meaningful competition with G.E. without taking significant risks that “could jeopardize the very future of its aircraft engine activities.”⁹⁶ Taking into account a company’s potential financial troubles stemming from competition with another company is the very essence of protecting a competitor, rather than competition.

In reviewing the proposed merger, the Competition Commission also evaluated the position of Honeywell within the Community. The Competition Commission stated that Honeywell was the largest worldwide supplier of all aerospace equipment other than engines.⁹⁷ The Competition Commission noted that the competitors of Honeywell did not possess the broad range of products that Honeywell did.⁹⁸ In considering Honeywell, the Competition Commission considered that the merger would result in Honeywell having financial resources that competitors of Honeywell did not have.⁹⁹ The Competition Commission stated that Honeywell had an important market position in a number of engine accessories and controls that are essential to jet engines.¹⁰⁰ In the Competition Commission’s view, the merger of G.E. and Honeywell would have created a vertically integrated relationship based on G.E.’s position in the market.¹⁰¹

In reviewing the proposed merger of G.E. and Honeywell, the Competition Commission also expressed concerns for the UK-based Rolls Royce and concluded that G.E. and Rolls Royce’s other competitor, Pratt & Whitney, was likely to lose some of its market share in the jet engine market.¹⁰² The Competition Commission considered the possibility of the competitors gaining sales lost by Pratt & Whitney and

⁹⁵ *Id.* at 40.

⁹⁶ *Id.*

⁹⁷ *Id.* at 42. According to the Commission, the only market in which G.E. and Honeywell overlapped was in a specific type of engine.

⁹⁸ *Id.* at 48.

⁹⁹ *Id.* at 54.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.* at 65.

stated that if G.E. were allowed to merge with Honeywell, Rolls Royce would have less of a chance of gaining those sales because potential purchasers would be more apt to choose the engines produced by G.E..¹⁰³

Based on the above-mentioned reasons, the Competition Commission issued the following conclusion regarding the proposed merger of G.E. and Honeywell:

[I]t should be concluded that the proposed merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded.¹⁰⁴

It is clear from the Competition Commission's analysis that in reviewing the proposed merger of G.E. and Honeywell, the Competition Commission was more concerned with competitors than competition. The Competition Commission focused heavily on the other undertakings' ability to compete with G.E.. It is also prudent to note that Rolls Royce was one of the competitors the Competition Commission considered in reviewing the potential merger¹⁰⁵

V. BOEING MERGER WITH McDONNELL DOUGLAS

Another merger within the aerospace industry that involved the national champion of the E.U. and companies from the U.S. was the merger of Boeing and McDonnell Douglas. The Competition Commission received notification of the proposed merger on February 18, 1997.¹⁰⁶ After reviewing the proposed merger, the Competition

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 84.

¹⁰⁵ The Commission agreed with most of the positions asserted by the STAR 21 Committee, of which the CEO of Rolls Royce was a part.

¹⁰⁶ Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No.

Commission decided to suspend the merger while it reviewed the possible concentration.¹⁰⁷ After much publicity and review, however, the Competition Commission finally approved the merger.¹⁰⁸

The Competition Commission determined that the merger fell within the scope of the Merger Regulation and had serious doubts about the concentration's compatibility with the common market.¹⁰⁹ Both Boeing and McDonnell Douglas, the two merging companies, were American corporations that were publicly traded and engaged in the business of manufacturing commercial jet airplanes.¹¹⁰ The Competition Commission determined that the merger had a community dimension; therefore, jurisdiction to review the merger was proper.¹¹¹ By letter, the Competition Commission informed the U.S. Federal Trade Commission of its concerns regarding the proposed merger and Chairman Pitofski of the Federal Trade Commission responded by indicating that the E.U.'s concerns would be taken into account during the Federal Trade Commission's review process.¹¹²

After its review, the Federal Trade Commission unanimously approved the merger. On July 13, 1997, the U.S. Department of Defense and U.S. Department of Justice informed the E.U. Competition Commission of concerns that the decision to block the merger could harm the U.S. national defense interests and that steps to preserve McDonnell Douglas as a stand-alone manufacturer of new aircraft would likely be unsuccessful.¹¹³ Moreover, in the U.S.' view, blocking the merger would

IV/M.877 – Boeing/McDonnell Douglas), 1997 O.J. (L 336) 16, 16 [hereinafter Decision on Boeing/McDonnell Merger].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 17. The Commission used the same standard asserted in the G.E./Honeywell merger, specifically, that the aerospace industry had a world-wide effect. See Decision on General Electric/Honeywell Merger, *supra* note 72, at 13. Through this standard, Competition Commission jurisdiction was proper to review the proposed mergers, even if the companies were not located within the territory of the E.U.

¹¹² Decision on Boeing/McDonnell Merger, *supra* note 106, at 17.

¹¹³ *Id.* at 17-18.

result in a loss of jobs in the U.S. and a divestiture of McDonnell Douglas to a third party. The third party would then be motivated to raise prices for spare parts for the McDonnell Douglas planes in service, thereby having an anticompetitive effect.¹¹⁴ After reviewing the position of Boeing in the relevant market, the Competition Commission determined that Boeing possessed a dominant position as a result of the barriers to entry¹¹⁵ and Boeing's sales.¹¹⁶ In the end, however, the Competition Commission determined that the merger would not impede the common market and approved the concentration.¹¹⁷

VI. PROCTER & GAMBLE MERGER WITH GILLETTE

Recently the E.U. Competition Commission approved the merger of two other American companies, neither of which had any dealings in the aerospace industry. On July 15, 2005, the Competition Commission decided not to oppose the concentration of Procter & Gamble and Gillette.¹¹⁸ Procter & Gamble is the number one maker of

¹¹⁴ *Id.* at 18.

¹¹⁵ *Id.* at 24. During the Boeing McDonnell Douglas merger evaluation, Boeing admitted that the barrier to entry in the market of manufacturing jet planes was extremely high, with the cost of developing a new wide-body jet exceeding \$10 billion.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 39. See also Jeffrey A. Miller, *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 MD. J. INT'L L. & TRADE 359, 359 (1998). The European Union Competition Commission approved the Boeing and McDonnell Douglas merger despite a determination that the merger was anti-competitive in the commercial aircraft sector. The Commission also decided to compel Boeing into making concessions instead of blocking the merger altogether. The Commission backtracked from the earlier position that the merger was anti-competitive largely because of President Clinton's statements that a decision against the proposed merger could lead the United States to either bring the matter to the World Trade Organization or to potentially pursue its own options. See *infra* p. 359.

¹¹⁸ Non-Opposition to a Notified Concentration (Case COMP/M.3732 – Procter & Gamble/Gillette), 2005 O.J. (C 239) 12.

household products in the world,¹¹⁹ with 300 brands of products available in more than 160 countries.¹²⁰ Procter & Gamble is ranked number twenty-six on the Fortune 500, and between 2004 and 2005, the company had world-wide sales of \$56 billion.¹²¹ Correspondingly, Gillette is the world's number one maker of shaving supplies.¹²² Gillette is ranked number 215 on the Fortune 500,¹²³ and in the fiscal year of 2004, Gillette had sales just over \$10 billion.¹²⁴

During its review of the proposed merger of Procter & Gamble and Gillette, the Competition Commission noted previous Commission decisions in issuing its decision.¹²⁵ The Competition Commission also considered that conglomerate effects might come about if two companies with large market shares in numerous, non-overlapping products decided to merge.¹²⁶ This comparison could indeed include the blocked merger of G.E. and Honeywell. Both Procter & Gamble and Gillette own a considerable number of "must stock brands," specifically, brands with a strong appeal that most retailers will stock on their shelves.¹²⁷ After the merger, the companies would own 21 brands with sales of more than \$1 billion per year for each brand.¹²⁸ Despite this, the Competition Commission decided not to oppose the merger and found it to be compatible with the common market.¹²⁹

¹¹⁹ *Proctor and Gamble Company*, in HOOVERS IN-DEPTH COMPANY RECORDS, available at 2005 WLNR 17297003.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Global Gillette*, in HOOVERS IN-DEPTH COMPANY RECORDS, available at 2005 WLNR 15269186.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Commission Decision of 15 July 2005 Declaring a Concentration to be Compatible With the Common Market (Case No IV/M.3732 – Procter & Gamble/Gillette) according to Council Regulation 4064/89, ¶ 110, available at <http://europa.E.U.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32005M3732:EN:HTML> [hereinafter Decision on Procter & Gamble/Gillette Merger].

¹²⁶ *Id.*

¹²⁷ *Id.* para. 111.

¹²⁸ *Id.*

¹²⁹ *Id.* para. 158.

It is interesting to note that as with the denied merger of G.E. and Honeywell, the approved merger of Procter & Gamble and Gillette involved a merger of two gigantic companies with huge sales that were leaders in their particular industries. Procter & Gamble is a world leader in home products, whereas Gillette is the world leader in the market of shaving products. It appears as though the only difference between the two mergers is the products of the companies. The blocked merger of G.E. and Honeywell was between companies in the aerospace industry, which the E.U. indicated through word and deed that it would protect. The Procter & Gamble and Gillette merger, on the other hand, fit a similar mold but received E.U. approval, as it is of two companies in a different industry.

VII. SUBSIDIES

Along with acting in a manner that is harmful to the competitors of an E.U. undertaking located outside of Europe, the E.U. can also govern in a manner that is beneficial to the maker within the E.U..¹³⁰ The E.U. is on record as stating that a viable aerospace industry is necessary to the E.U. economy and meeting the goals of the E.U..¹³¹ In an attempt to facilitate the leading E.U. company within the aerospace industry and its global success, the E.U. has given funds to Airbus in an attempt to help the company compete and excel on a global level.¹³²

¹³⁰ See Commission Decision of 25 June 1999 Declaring a Concentration to be Compatible With the Common Market (Case No IV/M.1438 – British Aerospace/GEC Marconi) according to Council Regulation (EEC) No 4064/89, 1999 O.J. (C 241) 8; Commission Decision of 20 December 2002 Declaring a Concentration to be Compatible With the Common Market (Case No IV/M.2924 – EADS/Astrium) According to Council Regulation 4064/89, 2003 O.J. (C 117) 6; Commission Decision of 26 May 2003 Declaring a Concentration to be Compatible With the Common Market (Case No IV/M.3156 – EADS/Astrium (II)) according to Council Regulation 4064/89, 2004 O.J. (C 066) 5.

¹³¹ See EUROPA, AEROSPACE, at http://europa.E.U..int/comm/enterprise/aerospace/index_en.htm (last visited Apr. 1, 2006).

¹³² Press Release, Office of the United States Trade Representative, United States Takes Next Step in Airbus WTO Litigation (May 30, 2005), *available at* http://www.ustr.gov/document_library/press_releases/2005/may/united_states_t

Currently, Airbus owns a fifty percent share of the market of large commercial airplanes world-wide and owns a sixty percent share of the global order book for aircraft.¹³³

Over its thirty-five year history,¹³⁴ the E.U. financed at least partially, if not totally, every major aircraft model Airbus produced.¹³⁵ Airbus recently received a commitment from the E.U. for \$3.7 billion for the launch of its Airbus A380.¹³⁶ In all, Airbus will receive approximately \$6.5 billion in subsidies for the Airbus A380.¹³⁷ Airbus is also the maker of the Airbus A350,¹³⁸ which is designed to compete directly with the Boeing 787.¹³⁹ As a part of the merger between Boeing and McDonnell Douglas, and in order to receive E.U. approval, Boeing was required to license to Airbus any government funded patent.¹⁴⁰ Airbus has no such requirement, therefore placing Boeing at a competitive disadvantage.¹⁴¹

In addition to placing Boeing at a competitive disadvantage in its competition with Airbus, the subsidies also violate the competition laws of the E.U..¹⁴² The Competition laws of the E.U. mandate that “any aid

akes_next_step_in_airbus_wto_litigation.html [hereinafter USTR Press Release].

¹³³ *Id.*

¹³⁴ *Id.* (explaining that the most recent incarnation of Airbus actually came about in 2001, before Airbus was a conglomerate. The reference to the thirty-five year history of Airbus makes reference to both versions of the company).

¹³⁵ See USTR Press Release, *supra* note 132.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See AIRBUS AIRCRAFT FAMILIES, INTRODUCTION TO THE ALL-NEW A350, at <http://www.airbus.com/en/aircraftfamilies/a350/index.html> (last visited April 1, 2006).

¹³⁹ See USTR Press Release, *supra* note 132.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² In addition to violating the Competition Laws of the European Union, the case can certainly be made that the subsidies paid by the countries of the E.U. to Airbus violate the antitrust laws of the United States as well. Even though Airbus is not an American company, the courts of the United States have jurisdiction over the company. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993). It appears that both the United States government and

granted by a Member State or through State resources *in any form whatsoever* which distorts or threatens to distort competition by favouring [sic] certain undertakings or the productions of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.”¹⁴³ The E.U. competition law provides that certain subsidies are compatible with the common market; however none of these exceptions apply to the subsidies of Airbus.¹⁴⁴ The E.U. competition law also provides that in certain circumstances, the giving of state aid may be compatible with the common market.¹⁴⁵ The E.U.

Boeing could bring an action against Airbus based on Airbus's actions relative to subsidies. The Sherman Act outlaws all contract combinations or conspiracies in restraint of trade. Sherman Act § 1, 15 U.S.C. § 1 (2004). It is not necessary for the two parties that are in contract or combination to be competitors. The position could also be taken that Airbus's actions violate Sherman Act § 2, which states that it is illegal for a company to monopolize or attempt to monopolize. Sherman Act § 2, 15 U.S.C. § 2 (2004). Given the fact that Airbus has Boeing as its only other competitor in the commercial aircraft manufacturing market, and that there are tremendous barriers for new companies to enter the market, Airbus might have the proper market power to be considered a monopoly. Even if Airbus is not a monopoly, the company's attempt to seek funds from the E.U. when it is already the largest company in the world in the relevant industry could certainly be deemed an attempt by Airbus to monopolize.

¹⁴³ Consolidated Version of the Treaty Establishing the European Community, art. 87, 2002 O.J. (C 325) 1, 67, *available at* http://europa.E.U.int/eur-lex/en/treaties/dat/EC_consol.pdf.(emphasis added).

¹⁴⁴ *Id.* Exceptions that are compatible with the common market include:

- (a) aid having a social character;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany to compensate for the economic disadvantages caused by the division of Germany.

See infra p. 330.

¹⁴⁵ *Id.* . The EC Treaty states the following may be considered compatible with the common market:

- (a) aid to promote the economic development of areas where

Competition Commission could probably make the argument that the subsidies to Airbus fall within the exception permitting state aid in some cases. However, even though the subsidies to Airbus may not directly violate the provisions of Article 87 of the EC Treaty,¹⁴⁶ the subsidies to Airbus are in opposition to the stated Competition Commission position on state aid.¹⁴⁷

Even though the E.U. gives subsidies to Airbus, the Competition Commission recognizes that subsidies are anti-competitive.¹⁴⁸ The Competition Commission stated that, “giving certain firms of products favoured [sic] treatment to the detriment of other firms of products, state aid seriously disrupts normal competitive forces.”¹⁴⁹ The Competition Commission went on to state that because of subsidies, “the entire market will suffer from state aid, and the general competitiveness of the

the standard of living is abnormally low or where there is serious underemployment; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

See infra p. 67.

¹⁴⁶ This is especially true because the Competition Commission would be the entity to enforce the violation of Article 87 of the EC Treaty. Although Boeing could bring an action against Airbus, the likelihood of success is slim as the E.U. has a stated policy of protecting the aerospace industry and the governments of the E.U.’s member states are the ones giving the subsidies.

source
¹⁴⁷ EUROPA, EUROPEAN COMPETITION POLICY: A BRIEF OVERVIEW-STATE AID CONTROL, at http://europa.E.U.int/comm/competition/state_aid/overview/ (last visited Apr. 1, 2006).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

European economy is imperiled.”¹⁵⁰ Not only do the subsidies given to Airbus by the E.U. and the member states of the E.U. appear to be violating the E.U. competition policies, but they are also causing a rift between the E.U. and the U.S..¹⁵¹

As a result of the subsidies paid to Airbus, the U.S. sought review by the World Trade Organization and alleged that the E.U. violated agreements between the two.¹⁵² The U.S. alleged violations of both the General Agreement on Trade and Tariffs (“GATT”) and the Agreement on Subsidies and Countervailing Measures (“SCM”).¹⁵³

GATT states in relevant part that the signatories to the agreement seek to eliminate the adverse effects on trade in the area of civil aircraft as a result of governmental support in aircraft development, production and marketing.¹⁵⁴ Furthermore, GATT states that the signatories of the agreement will seek to avoid the adverse effects on trade in the area of civil aircraft that can result from governmental subsidies to the manufacturers of civil aircraft.¹⁵⁵

With regards to SCM, the agreement defines a subsidy as a financial contribution by a government or any public body of a signatory to the SCM in which the government practice involves a direct transfer of funds or potential of direct transfer of funds.¹⁵⁶ SCM also states that

¹⁵⁰ *Id.*

¹⁵¹ In response to the subsidies given to Airbus by the E.U. and some of the E.U.’s member states, the United States brought an action against the E.U. to the World Trade Organization. See WORLD TRADE ORGANIZATION, EUROPEAN COMMUNITIES—MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT, at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds326_e.htm (last visited Apr. 1, 2006).

¹⁵² See Press Release, U.S. Requests WTO Dispute Settlement Panel Over Airbus (May 30, 2005), available at <http://www.useu.be/Categories/AircraftSubsidies/May3005USAirbusWTO.html>.

¹⁵³ *Id.*

¹⁵⁴ General Agreement on Tariffs and Trade: Trade in Civil Aircraft, Apr. 12, 1979, art. 6, 31 U.S.T. 619 (1979), available at 1980 WL 309096.

¹⁵⁵ *Id.*

¹⁵⁶ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter SCM Agreement], available at 1994 WL 761483.

no signatory to the agreement should cause through subsidies adverse effects to the interests of another signatory, such as the injury to the domestic industry of another signatory.¹⁵⁷ Based on the fact that Airbus is now the largest airplane manufacturing company in the world supplanting Boeing,¹⁵⁸ it certainly appears as though the E.U. violated SCM by granting subsidies to Airbus.¹⁵⁹

CONCLUSION

The aerospace industry is vastly different from most other industries. Thus, to treat it as if it were the same as other industries is a folly. Governments the world over recognize that the aerospace industry is essential to the economy of the countries not only as it relates to the production and sales of the product, but also to allow for the citizens to be mobile. As the situation currently stands, governments¹⁶⁰ treat the aerospace industry as any other industry in some circumstances but not in others. Within the U.S., although the government is not giving direct subsidies to Boeing, it does continue to grant large government contracts that are certainly beneficial to Boeing's profitability.¹⁶¹ The E.U.

¹⁵⁷ *Id.*, art. 5, at 233.

¹⁵⁸ See Decision on Boeing/McDonnell Merger, *supra* note 106.

¹⁵⁹ SCM Agreement, art. 6, at 234. A subsidy shall be actionable if "it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product. 'Change in relative shares of the market' shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy." See *infra* at p. 234.

¹⁶⁰ This includes the United States Federal Trade Commission, the Department of Justice, the Trade Representative, and the Office of the President and the European Union Competition Commission and Parliament.

¹⁶¹ See Press Release, U.S. Dept. of Defense, Contracts (Oct. 31, 2005), available at <http://www.defenselink.mil/contracts/2005/ct20051031.html>. The U.S. Department of Defense awards contracts benefiting Boeing. For example, McDonnell Douglas Corp., a wholly-owned subsidiary of Boeing, in St. Louis, Missouri, is being awarded a \$38,299,002 firm fixed price contract to exercise

reviews a merger of companies within the aerospace industry just as if it were any two companies and then grants subsidies to Airbus in direct conflict with this state of thought. Sovereigns on both sides of the Atlantic are guilty of acting as if the aerospace industry is just another industry and then doggedly attempting to protect individual interests.

It should be recognized that the aerospace industry is the national champion of the E.U.. The E.U. has demonstrated this by granting subsidies to local companies and by attempting to hinder the progress of competitors from other countries, including the near block of the merger of Boeing and McDonnell Douglas and the block of the merger of General Electric and Honeywell. One should also recognize that the aerospace industry is extremely important to the U.S. as it relates to the overall economy and national defense.

The aerospace industry should not be painted with the broad brush of general competition law. Both the E.U. and the U.S. should agree as to whether subsidies to companies in the aerospace industry are permitted. The E.U. and the U.S. should also agree on whether prospective mergers are to be treated as other mergers and the degree of compliance required for relevant merger guidelines. Because these actions do not occur within a vacuum, the most prudent course of action would be to recognize that aerospace is different and should be treated as such to avoid further complications, threats, gamesmanship, and surprise results. Based on the tremendous barriers to entry within the aerospace industry,¹⁶² the possibility of new competitors within the aerospace industry is unlikely. Governments should understand that not all laws apply perfectly in all situations. As such, the respective governments should promulgate separate competition, or antitrust, laws for the industry to relieve confusion and to implement a system that makes sense for the industry.

Lot 2 option for the small diameter bomb increment I (fixed/stationary target) low rate initial production for munitions, carriages, and associated trainers and technical support. McDonnell Douglas Corp., a wholly owned subsidiary of Boeing in Long Beach, California, is being awarded a \$22,000,000 time and material contract modification. *See infra*.

¹⁶² *See* Decision on Boeing/McDonnell Merger *supra* note 106.