



# Court upholds Commission's ban on GE/Honeywell merger

## Summary

The European Court of First Instance (CFI) has dismissed the separate appeals that GE and Honeywell lodged against the European Commission's 2001 decision to prohibit their proposed merger. This briefing looks at why, and the impact of the judgments on future practice.

In one of the longest running court cases of recent years, the European Court of First Instance (CFI) has dismissed the separate appeals lodged by GE and Honeywell against the European Commission's 2001 decision to prohibit the proposed GE/Honeywell merger.

The judgment in the GE case contains a number of findings regarding the Commission's assessment of mergers, in particular relating to dominance, conglomerate and vertical effects, and the Commission's duty to assess the deterrent effect of article 82 of the EC Treaty on future post merger commercial activity.

## Dominance

The CFI found that GE held a dominant position in the market for engines for large commercial aircraft for the following key reasons:

- GE's increasing market share (more than 50 per cent when combined with that of its joint venture CFMI) was in itself evidence of the existence of a dominant position. The CFI found that 'even on a bidding market...the fact of a manufacturer maintaining, or even increasing, its market share over a number of years in succession is an indication of market strength';
- GE was able to use its vertically related leasing and finance businesses 'to win contracts which it probably would not have won without them'; and
- GE's market power was not sufficiently constrained by customers or competitors.

## Conglomerate and vertical effects

However, the CFI did not consider the Commission correct in asserting that following the merger, the merged GE/Honeywell entity would be able to leverage that dominance to create dominance in Honeywell's avionics markets.

Specifically, the Commission had claimed that in the future, the merged GE/Honeywell could use its power in the engine market to 'bundle' avionics products to the detriment of competition in aerospace product markets. The CFI held that although the Commission was entitled to investigate whether the merged GE/Honeywell entity would use its ability to bundle engines and avionics products to distort competition post merger, on the facts of the case, the evidence was not convincing enough to establish clearly that GE would behave in that manner in the future.

In particular, as economic theory did not establish clearly that the merged entity had an economic incentive to bundle, 'the onus was on the Commission to put forward...other evidence suggesting that the merged entity would make the strategic decision to sacrifice profits in the short term with a view to reaping larger profits in the future. By way of example, internal documents showing that [GE's] board of directors had that objective on the launch of their bid to acquire Honeywell could...have constituted such evidence.'

The CFI found that there was no such evidence and that, accordingly, the Commission was wrong to prohibit the merger on these grounds.

The CFI came to a similar conclusion for vertical effects. The fact that GE could, post merger, refuse to supply its engine competitors with Honeywell engine starters needed to be investigated more thoroughly by the Commission. In particular, because such conduct could amount to an abuse of a dominant position contrary to article 82, the Commission should have investigated the likelihood of GE adopting such conduct, given article 82's deterrent effect. The Commission had not carried out such an analysis and had therefore made a manifest error of assessment.

## Horizontal effects

The CFI upheld the Commission's argument that the merger would have created a monopoly on the worldwide market for jet engines for large regional aircraft. It also found that the Commission was right to reject the commitment proposed by the parties to resolve the Commission's concerns on the grounds that the remedy would not be viable. Similarly, the CFI upheld the Commission's findings concerning the creation of dominant positions on the market for engines for corporate jet aircraft and on the market for small marine gas turbines. It is on the basis of the Commission's findings concerning horizontal effects in these three markets that the CFI refrained from annulling the contested decision.

## EU/US differences

The CFI also gave reasons why merger regulators in different jurisdictions may come to different conclusions. The US authorities had approved the GE/Honeywell merger with only minor remedies required. The CFI found that the US decision was not relevant. 'The fact that the competent authorities of [a] non-member state determine an issue in a particular way for the purposes of their own proceedings does not suffice per se to undermine a different determination by [the Commission]' because the 'matters and arguments ... and the applicable legal rules [in non-member states]... are not necessarily the same [as those in the EU]'.  
Honeywell's appeal was dismissed in its entirety on technical grounds.

## How important are the GE/Honeywell judgments?

Fairly. The Commission will have taken comfort from the fact that its decision (which was described as 'off the wall' by members of the US administration at the time) was upheld. Merging parties can take comfort from the fact that the CFI has made it abundantly clear that the Commission will find it very difficult to successfully prohibit deals on the basis of conglomerate effects unless there is compelling evidence (such as internal documents) of the merging parties' intention to behave strategically to significantly impede competition post merger. In practice, however, the GE judgment adds little to the CFI's *Tetra/Sidel* ruling other than to underline the importance of taking care when drafting internal documentation. The judgment is likely to encourage the Commission to request such documents more frequently in the future.

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