Federal Trade Commission

The Challenge of Non-Horizontal Merger Enforcement

J. THOMAS ROSCH[1]
COMMISSIONER, FEDERAL TRADE COMMISSION

at the
Fordham Competition Law Institute's
34th Annual Conference on International Antitrust Law & Policy
New York City
September 27-28, 2007

I. INTRODUCTION

In prior remarks, I have suggested that there are substantial differences in the treatment of single firm conduct in the United States and in Europe, and I have explored some of the factors that may be driving those differences.[2] The burden and expense of private antitrust litigation in the United States – the opportunity for treble damages, the class action device and the extensive rights to discovery – is one possible explanation. For example, the United States

---

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Kyle Andeer, for his invaluable assistance in preparing this paper.

[2] See J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "The Three Cs: Convergence, Comity, and Coordination", at the St. Gallen International Law Forum (May 10-11, 2007), available at http://www.ftc.gov/speeches/rosch/070510stgallen.pdf; J. Thomas Rosch, "Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence" Remarks at the Bates White Fourth Annual Antitrust Conference Washington, D.C. (June 25, 2007) available at http://www.ftc.gov/speeches/rosch/070625pendulum.pdf; J.Thomas Rosch, Commissioner, Fed. Trade Comm'n, "I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?", at the International Bar Association's Antitrust Section Conference (Sept. 6, 2007), available at http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf.

Supreme Court twice voiced concerns this past term about the high costs of antitrust litigation when these features are part of the enforcement regime.[3] The European legal system does not allow for the same private enforcement of its competition laws – at least not yet.[4]

A second possible explanation is a deepening distrust of lay juries to reach the "right" answer in antitrust cases. The concern about the risk of false positives, compounded by the risk of treble damages, was reflected in the Supreme Court's *Credit Suisse* decision.[5] The European competition law enforcement and judicial systems, in contrast, do not (yet) include lay juries. Rather, competition cases are first decided at the Commission by lawyers and economists well versed in competition law and economics.

A third possible explanation lies in the economics underlying the two regimes. United States antitrust policy and economics is heavily influenced by Chicago School economics. Chicago School economics posits that competitors (including dominant firms) are likely to engage in rational and efficiency-enhancing conduct rather than conduct whose purpose and effect is simply to eliminate rivals, and, if they do not, markets are likely to correct themselves.[6]

---

[3] Bell Atlantic Corp. v. William Twombly et. al., 127 S.Ct. 1955 (2007); Credit Suisse Securities LLC v. Billing, 127 S.Ct. 2383 (2007).

[4] It should be noted, however, that third parties can appeal a decision by the Commission to allow a merger. See IMPALA v. Comm'n, T-464/04, 2006 ECR II-02289 (CFI) (reversing the Commission's approval of Sony's joint venture with BMG).

[5] Credit Suisse, 127 S.Ct. at 2395 (2007) ("Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar factual circumstances differently.").

[6] See supra note 2, Rosch "I say Monopoly, You say Dominance" at 7.

For example, then Professor (now Judge) Posner has suggested through rhetorical questions that it is unlikely that a firm will engage in tying for predatory purposes because, as a matter of economics, it can only extract one profit from sales of the combination of the tying and tied product.[7] Thus, Chicago School economics tends to discount the significance of conduct alleged to exclude or cripple rivals and to assume instead that the conduct is likely to be efficiency-enhancing in purpose and effect.[8] Chicago School thinking has gained significant traction in the Supreme Court's non-merger antitrust jurisprudence – as reflected in decisions such as *Sylvania*, *Matsushita*, *Brooke Group*, *Trinko*, *Weyerhaeuser*, and most recently in *Leegin*.[9]

On the other hand, at the same time Chicago School influence grew in shaping both American antitrust jurisprudence and policy in the 1980s, economists and lawyers alike began to question some of the fundamental assumptions underpinning the Chicago School's teachings. Scholars such as Doug Bernheim, Janusz Ordover, Steve Salop and others (dubbed "post-Chicago School" scholars) have presented scenarios in which leveraging monopoly power can not only be a profitable strategy for the monopolist but also one with significant anticompetitive effects. For example, raising rivals cost theorists, like Professor Salop, argue that concerted refusals to deal, tying, and exclusive dealing may be more readily explained not as devices for

---

[7] See Richard Posner, The Chicago School of Antitrust Analysis, 127 U. PA. L.REV. 925 (1979).

[8] Id.; see also ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, New York: Basic Books, 1978; Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1, 31 (1984).

[9] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574 (1986); Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Weyerhaeuser v. Ross Simmons, 127 S.Ct.1069 (2007); Leegin Creative Leather Prods. v. PSKS, Inc.,127 S.Ct. 2705 (2007).

destroying a rival altogether but rather for making the rivals' production or distribution more costly, thereby impairing the competitive process and injuring consumers.[10] Thus, post-Chicago School economics in general is more concerned about conduct that hobbles rivals as competitors and tends to eschew presumptions that conduct is efficiency-enhancing. Post-Chicago School thinking appears to be reflected in a number of recent European judicial decisions, including *France Telecom*, *British Airways*, *General Electric*, and *Tetra Laval*.[11]

Barry Hawk asked that I comment on the Commission's draft guidelines on non-horizontal mergers today, and in doing so I would like to use this opportunity to voice my thoughts about whether there are differences between American and European competition policy and jurisprudence relating to non-horizontal merger policy, and if so, why that might be so.

European and American *horizontal* merger enforcement is largely in lock-step – there is real convergence in the principles governing the assessment of mergers between competitors. The same cannot be said for vertical and conglomerate mergers – which are commonly collectively referred to as non-horizontal mergers. The Commission's draft guidelines reflect not only a willingness but a determination to challenge non-horizontal mergers which threaten to lessen competition in upstream and downstream markets. That may not seem significant if one

---

[10] Thomas Krattenmaker & Steve Salop, Antitrust Analysis of Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 YALE LAW JOURNAL 209 (1986); Michael H. Riordan & Steve Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 ANTITRUST L.J. 513 (1995); Janusz Ordover, Garth Saloner & Steven Salop, Equilibrium Vertical Foreclosure, 80 AM. ECON. REV. 127 (1990).

[11] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (CFI), aff'd Case Commission v. Tetra Laval BV, C-12/03P, 2005 ECR I 987 (CJ); General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI); British Airways plc v. Commission, T-219/99, 2003 ECR II 5917 (CFI); France Télécom SA v. Commission of the European Communities, T-340/03, 2007 ECR _(CFI).

focuses only on the case law in the United States. There is support for non-horizontal merger challenges if one reads the decisions of the Supreme Court and the lower courts in the United States. For example, the Supreme Court has condemned vertical mergers which threaten to lessen competition in upstream or downstream markets.[12] Likewise, the Court has also held that a conglomerate merger might conceivably be illegal.[13] Government challenges to non-horizontal mergers – particularly vertical mergers – were fairly routine at one time.[14]

There is no question that time has passed. The reality is that in the past three-plus decades there have been very few challenges to non-horizontal mergers in the United States.[15] The federal antitrust law enforcement agencies have not litigated to conclusion a single merger

---

[12] United States v. Brown Shoe Co., 370 U.S. 294, 323-24 (1962) ("The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition."); Ford Motor Co. v. United States, 405 U.S. 562, 570 (1972).

[13] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[14] United States Steel Corp. v. FTC, 426 F.2d 592 (6th Cir. 1970); Mississippi River Corp. v. FTC, 454 F.2d 1083 (8th Cir. 1972); Gulf & Western Indus. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973); Ash Grove Cement Co. v. FTC, 577 F.2d 1368 (9th Cir. 1978).

[15] Since the issuance of the 1984 Merger Guidelines, the agencies have challenged approximately 23 matters based at least in part on non-horizontal theories. The agencies worked out a settlement in twenty of those matters and the other three transactions were abandoned. See, e.g., Statement of the Federal Trade Commission, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002) (parties abandoned the transaction); In the Matter of Dominion Resources, Inc. and Consolidated Natural Gas Company, FTC Docket No. C-3901 (consent agreement November 1999), available at http://www.ftc.gov/opa/1999/11/dominion.htm; In the Matter of America Online, Inc. and TimeWarner Inc., FTC Docket No. C-3989 (consent agreement Dec. 2000), available at http://www.ftc.gov/opa/2000/12/aol.shtm; Cadence Design Sys. Inc., 124 F.T.C. 131 (1997); Time Warner Inc., 123 F.T.C. 171 (1997); Silicon Graphics, Inc., 120 F.T.C. 928 (1995); Eli Lilly & Co., 120 F.T.C. 423 (1995); United States v. MCI Communs., Inc., 1993-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994); United States v. Tele-Communs., Inc., 1994-2 Trade Cas. (CCH) ¶ 71,496 (D.D.C. 1994).

challenge on a vertical theory since 1979.[16] And to the best of my recollection, neither agency has challenged a merger on a conglomerate theory (or even pursued a consent decree under such a theory) since 1966. The last official word of the agencies on merger enforcement policy – the 1992 merger guidelines – did not mention vertical or conglomerate mergers at all.[17] Indeed, one has to look back to the guidelines issued by the Department of Justice in 1984 for the last mention of non-horizontal mergers.[18]

In searching for reasons for the difference in attitude about non-horizontal merger law enforcement let me use a crude regression analysis. First, the difference does *not* seem to be due to concerns about the costs of litigation that has influenced the American consideration of single firm conduct. Today merger cases of any stripe are rare. The Hart-Scott Rodino Act has led to a significant reduction in number of government merger cases in the American courts. Private and state merger enforcement is even rarer – largely because the incentives (i.e., the payoffs) are largely lacking. To be sure, the Supreme Court has held that private parties can seek injunctive relief, including divestiture, against mergers.[19] Moreover, the Court has held that the strict standing requirements that ordinarily apply in treble damage cases do not apply in actions for injunctive relief.[20] And accordingly, lower courts have held that even indirect purchasers who

---

16 Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979).

17 U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 4 (1992; as amended 1997) reprinted in 4 Trade Reg Rep. (CCH) ¶ 13,104.

18 Dep't of Justice, Non-Horizontal Merger Guidelines, § 4.0, 49 Fed. Reg. 26,823 (June 29, 1984), available at http://www.usdoj.gov/atr/public/guidelines/2614.htm.

19 California v. American Stores Co., 495 U.S. 271 (1990).

20 Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).

would be barred from bringing treble damage cases, can seek injunctive relief and divestiture.[21]

That said, however, if injunctive relief is sought *before* the merger occurs, the pre-trial process will be truncated. The burdens of discovery, and the *in terrorem* threat of treble damages, will not exist. If the private challenge is made *after* the transaction is closed, there are of course prospects of discovery and of treble damages for the interim period between consummation of the transaction and trial. However, those treble damages are not likely to be nearly as substantial as they would be if the potential liability period were protracted. And a private litigant who seeks post-transaction divestiture runs the risk that it will face a successful laches defense.[22] In fact, one court has suggested that such relief to private parties is available *only* prior to the closing of the transaction.[23] Net, net, then the differences between the American and European non-horizontal merger enforcement policies do not appear to be explained by American concerns about the costs imposed by our private antitrust regime.[24]

Nor does the Supreme Court's concern about lay juries seem to explain the difference. To begin with, private challenges to mergers that occur prior to consummation of the transaction are tried to judges, not juries in the United States. Moreover, even when the challenge occurs after the transaction closes in a treble damage action, there is a substantial question as to whether

---

[21] Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone Inc., 140 F.3d 1228 (9th Cir. 1998).

[22] American Stores, 495 U.S. 271.

[23] FTC v. Mylan, 62 F.Supp. 2d 25, 41-42 (D.D.C. 1992).

[24] I do not mean to suggest that private challenges to mergers in the United States are costless. To the contrary, as I have elsewhere remarked, those challenges can have significant nuisance value, and that can result in settlements that arguably should not occur. See supra note 2, Rosch "The Three Cs: Convergence, Comity, and Coordination" at 11. However, those costs are generally not comparable to the burden and expense of treble damage litigation based on the Sherman Act with which the Supreme Court has been concerned.

a jury trial is available in the U.S. The Supreme Court held in the *Markman* case that there is a right to jury trial in the United States only insofar as there was such a right in England, when the right was enshrined in our Constitution.[25] It is arguable that there was no right in England to a jury trial in a merger case at that time, regardless of the nature of the relief sought.[26] Even apart from *Markman*, at least one circuit court in the United States has held that juries are not appropriate in complex civil cases, and merger cases (especially non-horizontal merger cases) are arguably of that ilk.[27] In any event, for the reasons I have described, the error costs of a jury not "getting it right" in a post-transaction challenge to a non-horizontal merger are substantially less than what they would be in other antitrust jury trials.

There are several other possible explanations for the very cautious attitude toward antitrust challenges to non-horizontal mergers that prevails in the United States. One is that there is more skepticism in the United States than there is in Europe about prophylactic relief: arguably, American agencies and courts would rather wait and see whether rivals in upstream or downstream markets are truly hobbled as competitors after the merger and, if so, whether there are efficiencies that offset that seeming adverse impact on competition; if competition is foreclosed or crippled and there are no efficiencies, the post-transaction conduct can always be challenged under the Sherman Act (or perhaps the Robinson Patman Act). Justice Stevens, dissenting in the *Monfort* case, suggested that the majority's rejection of allegations that the

---

[25] Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

[26] Id.

[27] See In re Japanese Electronic Products Antitrust Litigation, 635 F.2d 1069 (3d Cir. 1980); see also Joseph A Miron, Note, The Constitutionality of a Complexity Exception to the Seventh Amendment, 72 CHI.-KENT L. REV. 865 (1998).

merger in that case would result in predatory pricing was driven by this argument.[28]

However, I frankly doubt that this accounts for the differences. For one thing, our Section 7 of the Clayton Act, which is the primary U.S. merger antitrust law, is explicitly prophylactic in its application; it creates liability for any merger or acquisition that "may" substantially lessen competition or tend to create a monopoly.[29] Prior to issuance of the Merger Regulation in 1989 the European Commission lacked explicit authority to challenge mergers at all (though the Commission did challenge them under Articles 85 and 86 despite the recognized shortcomings of those tools). Even under the Merger Regulation (amended in 2004), it is arguable that the Commission's burden of proof when challenging a merger prospectively goes beyond proof of the probability of anti-competitive effects because the Regulation requires the Commission to prove that the transaction "would significantly impede effective competition…"[30] Thus, it would seem the United States agencies and courts would be more rather than less, bold in engaging in prophylactic merger law enforcement that their European counterparts.

More fundamentally, non-horizontal mergers are generally alleged to threaten to facilitate conduct that will cripple upstream or downstream rivals – refusals to deal, predatory pricing, tying, bundling, loyalty discounts, etc.[31] Chicago School economists are skeptical whether that type of conduct should be treated as a Sherman Act violation at all. So, insofar as U.S. agencies

---

[28] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 122-23 (1986).

[29] 15 U.S.C. § 18

[30] Council Regulation (EC) No. 139/2004 of Han. 20, 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24).

[31] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (Tetra Laval I) (CFI), aff'd Case Commission v. Tetra Laval BV, C-12/03P, 2005 ECR I 987 (Tetra Laval II) (CJ); General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI).

and courts are indeed influenced by Chicago School economists, it seems doubtful that they are signaling that the Sherman Act, rather than Section 7 of the Clayton Act, is the proper statute to look to in order to address concerns respecting non-horizontal mergers.

Finally, the suggestion has been made that the differences in attitudes about antitrust (competition) law enforcement are rooted in cultural and historical differences – particularly, the prevalence of historically dominant firms and "national champions" in Europe.[32] Frankly, I am not trained sufficiently in European history or anthropology to evaluate this thesis. I therefore leave it to others to explore this possibility. But I will say that this explanation would seem to apply with equal force to horizontal and non-horizontal mergers, and, as I said, law enforcement attitudes about, and challenges to, horizontal mergers have been largely congruent on both sides of the Atlantic.

That leaves one variable unaccounted for: the economic thinking underlying non-horizontal merger policy in the United States, on the one hand, versus the economic thinking underlying that policy in Europe, on the other hand.

Let me begin by considering the United States. First, as I say, the last official policy statements issued by the agencies respecting non-horizontal mergers were issued in 1984. Those guidelines were authored under the leadership of Professor (then Assistant Attorney General) William Baxter; General Baxter was (among other things) a very strong supporter of Chicago School economics, and Chicago School economic thinking is clearly reflected in the 1984 guidelines. Specifically, the guidelines embrace two limited theories of liability for non-horizontal mergers (apart from liability based on the elimination of potential competitors or on

[32] See John Vickers, Competition Law and Economics: A Mid-Atlantic Viewpoint, 3 EUROPEAN COMPETITION LAW JOURNAL 1 (2007).

the evasion of rate regulation). First, the guidelines posit that non-horizontal mergers may facilitate collusion in either the upstream or downstream market.[33] That theory is consistent with Chicago School economics since collusion is one of the few kinds of conduct that is considered to be inefficient and hence, pernicious.[34]

Second, the 1984 guidelines posit that a non-horizontal merger may foreclose competition by creating objectionable barriers to entry in the markets in which the acquired and acquiring firm compete.[35] However, the creation of such entry barriers is recognized as a viable threat only in very limited circumstances – namely, 1) when entry into both markets is necessary in order to compete in one of them, *and* 2) when the non-horizontal merger makes simultaneous entry substantially more difficult.[36] There is no mention in the guidelines of the opportunities and incentives that may exist, post-transaction, for the acquiring firm to engage in conduct that may cripple rivals in upstream or downstream markets – conduct such as refusals to deal, predatory pricing, or various forms of leveraging, such as tying, bundling, loyalty rebates, and exclusive dealing. To the contrary, the guidelines suggest that non-horizontal mergers are almost always efficiency-enhancing.[37]

This view of foreclosure and this expansive view of efficiencies seem to have been embraced by the agencies since 1984, regardless of the party in power, at the agencies. As I say,

---

[33] Dep't of Justice, Non-Horizontal Merger Guidelines, at § 4.22, 49 Fed. Reg. 26,823 (June 29, 1984), available at http://www.usdoj.gov/atr/public/guidelines/2614.htm.

[34] See supra note 2, Rosch, "I say Monopoly, You say Dominance" at 6.

[35] Dep't of Justice, Non-Horizontal Merger Guidelines, at § 4.25, 49 Fed. Reg. 26,823 (June 29, 1984), available at http://www.usdoj.gov/atr/public/guidelines/2614.htm.

[36] Id. at §§ 4.211 - 4.212.

[37] Id. at §§ 4.0 and 4.24.

there have been no litigated challenges to non-horizontal mergers since then.[38] There have been a number of consent decrees – approximately twenty by my count – where non-horizontal effects, to varying degrees, have played a role in the analysis.[39] However, in all of these cases, with one possible exception, the descriptions of liability are consistent with the theories of liability embraced by the 1984 Non-Horizontal Guidelines.[40] The decree resolving the Commission's concerns with Time Warner's acquisition of Turner is the only matter that arguably embraces a theory of effects outside of the 1984 guidelines.[41] Significantly, moreover,

---

[38] The closest the United States came to litigating non-horizontal issues since the issuance of the 1984 guidelines was the proposed acquisition of Northrop Grumman by Lockheed. In 1998, the Department of Justice filed a complaint seeking to enjoin that transaction and that matter proceeded through four months of discovery before the parties abandoned the transaction. The government alleged significant horizontal and vertical competitive effects in a number of different markets. See United States v. Lockheed Corp., et. al. 1:98-cv-00731 (D.D.C. 1998).

[39] See supra note 15.

[40] Commentators have pointed to recent settlements as evidence that the government has embraced theories of effects beyond those found in the 1984 guidelines. Yet the publicly available documents in those cases do not appear to support that conclusion. See United States v. Monsanto 1:07-cv-00992 (D.D.C. 2007) (While not explicitly labeled as such, one of the two theories of competitive effects described in the public documents could be described as vertical. However, the vertical theory described in those documents, and the negotiated remedy, are consistent with § 4.21 of the 1984 guidelines) available at http://www.usdoj.gov/atr/cases/monsanto.htm; In the Matter of Valero, et. al. FTC Docket No. C-4141 (2005) (The publicly available documents explicitly describe a theory of vertical effects stemming from the combination of Valero's refinery and Kaneb's ethanol storage terminals in Northern California. Kaneb's assets were the only terminals in Northern California with the ability to store ethanol, an essential input in the production of CARB gasoline. The concern appeared to be that Valero's control of those assets would raise entry barriers in the downstream market for CARB gasoline and force competitors in that market to enter the terminal market. That theory of effects is consistent with § 4.21 of the 1984 guidelines); United States v. Premdor, 1:01-cv-01696 (D.D.C. 2001) (The publicly available documents explicitly focus on § 4.22 of the 1984 Merger Guidelines "Facilitating Collusion Through Vertical Merger." The concern was that Premdor's acquisition of Masonite would improve its ability to coordinate with its vertically integrated competitor.).

[41] See Time Warner Inc., 123 F.T.C. 171 (1997).

in their written submission to the OECD with respect to vertical mergers, the United States federal antitrust enforcement agencies urged explicit endorsement of a presumption that non-horizontal mergers are efficiency-enhancing.[42]

In contrast, the European Commission's draft non-horizontal merger guidelines draw heavily from a study of economic theory – particularly post-Chicago economic theory – commissioned by DG Comp in 2004.[43] Reflecting post-Chicago School economics, the guidelines expressly posit liability where, post-transaction, the acquiring firm will have the ability and incentive to cripple rivals in upstream and downstream markets by raising their costs and engaging in exclusive dealing, predatory pricing or leveraging. The approach in the draft guidelines should come as no surprise to those who have followed the continuing debate over Article 82. The draft non-horizontal merger guidelines appear to share a common theoretical foundation with DG Comp's Article 82 discussion paper. Indeed, one could interpret the draft guidelines as an effort to halt Article 82 abuses in their incipiency.

More specifically, both the Article 82 discussion paper and the draft guidelines on the assessment of non-horizontal mergers focus on the likelihood that the conduct (i.e., the transaction in the case of non-horizontal mergers) will foreclose rivals from competing effectively to the disadvantage of consumers.[44] For example, the draft non-horizontal guidelines

---

42 United States submission to the Organization for Economic Cooperation & Development "Roundtable on Vertical Mergers" (Feb. 15, 2007), available at http://www.ftc.gov/bc/international/docs/07RoundtableonVerticalMergers.pdf.

43 Jeffrey Church, Impact of Vertical and Conglomerate Mergers (2004), available at http://ec.europa.eu/comm/competition/mergers/others/merger_impact.pdf?bcsi_scan_129F6A3CDB83467E=0&bcsi_scan_filename=merger_impact.pdf

44 DG Competition, Draft Commission Notice: Guidelines on the assessment of non-horizontal mergers, (2007) at ¶ 28 ("A vertical merger may significantly impede effective

focus on whether a vertical merger will give the acquiring firm the ability and the incentive to engage in conduct that will disadvantage its rivals – whether that is complete foreclosure or a strategy designed to increase its rivals' costs. Yet foreclosure alone is not enough. The guidelines then ask whether competition – and consumers – will be harmed by the foreclosure.

Furthermore, like the Article 82 discussion paper, the draft guidelines place the burden on the parties to demonstrate that there are cognizable efficiencies to the conduct that outweigh any potential for harm, rather than presuming that they will exist.[45] And both papers make it clear that the parties must demonstrate that the efficiencies will benefit consumers. These positions contrast with the official position of the U.S. agencies as reflected in its recent comments to the OECD.[46] European officials seem unpersuaded by these arguments advanced by the United States and other commentators representing business interests, suggesting instead that the parties are in the best position to make an assessment of efficiencies – in other words these officials appear to prefer facts rather than theoretical presumptions.[47] To be sure, the draft

competition through noncoordinated effects mainly when it gives rise to foreclosure. Foreclosure may discourage entry or expansion of rivals or encourage their exit.") available at http://ec.europa.eu/comm/competition/mergers/legislation/draft_nonhorizontal_mergers.pdf; Id. at ¶ 92 ("The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices); DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (2005) at ¶ 56 ("The central concern of Article 82 with regard to exclusionary abuses is thus foreclosure that hinders competition and thereby harms consumers.") available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf

[45] Id. Guidelines on the Assessment of non-horizontal mergers at ¶¶ 50-56, Article 82 Discussion Paper at ¶¶ 84 -92.

[46] See supra note 42, "Roundtable on Vertical Mergers."

[47] See Phillip Lowe, Remarks on Unilateral Conduct, at Tr. 22:10-22:22 (Sept.2006) available at ("The reactions to [the Article 82 Discussion Paper] show definite support for

guidelines provide that such mergers are more likely than horizontal mergers to be efficient.[48] However, efficiencies remain a defense (and the burden of proof is on the parties) just as is the case of a horizontal merger.

Finally, it is no accident that the draft non-horizontal merger guidelines and the Article 82 Discussion Paper both focus on exclusionary conduct of the sort which post-Chicago School scholars have said may occur and which they have said may injure consumers when it does occur. In fact, the decisions of the Court of First Instance in *Tetra Laval*[49] and *General Electric*[50] appear to dictate that result. More specifically, the Commission's challenge in *Tetra Laval* was based in part on the theory that the acquisition of Sidel would enable Tetra to leverage its dominance in the carton market in order to obtain a dominant position in the PET equipment market by engaging in tying or bundling and by offering incentives amounting to predatory pricing and loyalty rebates.[51] The Court of First Instance agreed with the Commission that it

---

efficiencies playing a role in the analysis, and in that respect, there is an ongoing debate, which I hope will end very quickly, on who should have the burden of proof. All I can say is that the approach of expecting an agency to analyze potential efficiencies is one which is bound to fail because the agency has less information than the companies who are arguing for the efficiencies, and the approach that the -- well, that some say the defendants should be balancing efficiencies against distorted effects is equally realistic, because it is the agency who has the major role in analyzing what the likely distorted effects are.")

[48] See supra note 44, Guidelines on the Assessment of non-horizontal mergers at ¶¶ 13-14.

[49] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (Tetra Laval I) (CFI).

[50] General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI).

[51] Case No. COMP/M.2416 - Tetra Laval/Sidel C (2001) at ¶ 364 ("Leveraging [this position] [...] in a number of ways [...] Tetra/Sidel would have the ability to tie carton packaging equipment and consumables with PET packaging equipment and, possibly, preforms (in particular barrier-enhanced preforms). Tetra/Sidel would also have the ability to use pressure or incentives (such as predatory pricing or price wars and loyalty rebates) so that its carton customers buy PET equipment and, possibly, preforms from ... Tetra/Sidel and not from its

could challenge a non-horizontal merger like Tetra's acquisition of Sidel, and that Tetra could engage in such conduct post-transaction.[52] However, it faulted the Commission for failing to assess whether Tetra would have had the incentive to engage in such conduct or that it could escape detection and punishment if it did so because the conduct would arguably be illegal under Article 82.[53] It held that the Commission's failure to make such an assessment was reversible error.

The Court of Justice affirmed the rejection of the Commission's challenge, albeit on different grounds. The Court agreed that the Commission could challenge a non-horizontal merger (like the one at issue) where there was sufficiently powerful evidence that the transaction would likely result in the kind of conduct alleged by the Commission.[54] The Court also agreed

competitors or converters.").

[52] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (Tetra Laval I) (CFI) at ¶ ¶ 192-199 ("¶ 199 Consequently, the Commission did not commit a manifest error of assessment in finding that it would be possible for the merged entity to engage in leveraging practices.").

[53] Id. at ¶ 159 ("Although it cannot . . . be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers. Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets, the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.").

[54] Commission v. Tetra Laval BV, C-12/03P, 2005 ECR I 987 (CJ) at ¶ 44 ("The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to

that the Commission was obliged to show that Tetra had the incentives to engage in such conduct.[55] However, the Court disagreed with the Court of First Instance that the Commission was required to do a detailed analysis of the alleged conduct's legality under Article 82 or other applicable Commission or Member States' competition laws.[56] Nevertheless, the Court found that the Commission failed to adequately assess the impact of the commitments Tetra made to the Commission on Tetra's incentives to engage in the conduct alleged.[57]

Following the Court of Justice decision in *Tetra Laval*, the Court of First Instance considered the Commission's prohibition of General Electric's attempted acquisition of Honeywell. The Court of First Instance upheld the Commission's decision based on the

---

give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.").

[55] Id. at ¶ 74 ("[T]he Court of First Instance was right to hold that the likelihood of its adoption must be examined comprehensively, that is to say, taking account . . . both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.").

[56] Id. at C-12/03 P, Commission v. Tetra Laval (Tetra Laval II), [2005] ¶¶ 75-78 (¶75 "[i]t would run counter to the Regulation's purpose of prevention to require the Commission, as was held in the last sentence in paragraph 159 of the [CFI opinion], to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue").

[57] Id. at ¶ 89 ("[A]lthough the Court of First Instance erred in law by rejecting the Commission's conclusions as to the adoption by the merged entity of conduct likely to result in leveraging, it was nevertheless right to hold . . . that the Commission ought to have taken account of the commitments submitted by Tetra with regard to that entity's future conduct. Accordingly, whilst the ground of appeal is well founded in part, it cannot call into question the judgment under appeal in so far as it annulled the contested decision since that annulment was based, inter alia, on the Commission's refusal to take account of those commitments.").

horizontal effects of the transaction; however it rejected the Commission's findings on vertical and conglomerate effects. First, the Commission was concerned that General Electric's dominance in the large commercial jet engine market would be enhanced by Honeywell's position as the only independent manufacturer of engine starters for those engines. Specifically, the Commission was concerned that the combined entity would refuse to sell Honeywell's engine starters – an essential component for aircraft engines – to rival engine manufacturers like Rolls Royce and /or that the transaction would enable General Electric to raise rivals' costs by selling the starters to them at exorbitant prices.[58] Second, the Commission was also concerned that General Electric's acquisition of Honeywell would allow the combined entity to become dominant in avionics and non-avionic markets by bundling or tying those products to the sale of GE's large commercial jet engines.

The Court of First Instance rejected the concern that the transaction would allow the combined entity to raise its rivals' costs on the ground that engine starters were a relatively inexpensive input and even a substantial increase in price would have a de minimus impact on the price of large commercial jet engines.[59] However, the Court did not reject the refusal to deal claim as a matter of theory or fact. Instead, it once again criticized the Commission for failing to

---

[58] Case Comp/M.2220, General Electric/Honeywell, ¶ 420 (July 3, 2001).

[59] General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI) at ¶ 307 ("A possible 50% increase in the price of engine starters, without any apparent commercial justification, would represent only a 0.1% increase in the price of a jet engine and would therefore have virtually no effect on the jet-engine market. Moreover, if a price increase for engine starters were applied in a non-discriminatory way, it would be liable adversely to affect some of the merged entity's customers, and accordingly would have harmful commercial effects for it. Such an increase could, in particular, affect its relations with airlines, which are customers for engine starters both indirectly as purchasers of aircraft and directly on the aftermarket for services and which are also likely to be customers of the merged entity for both engines and avionics and non-avionics products.").

consider General Electric's incentive to engage in that conduct in light of that fact that the conduct might be an abuse of dominance under Article 82 law.

Likewise, the CFI did not reject the Commission's bundling claims as a matter of theory – suggesting that in the right circumstances such a theory would support a challenge to a merger. Rather it criticized the Commission's application of that theory given the facts of the case. The court also criticized Commission's assessment of General Electric's incentives to engage in bundling and tying post-acquisition for failing to take into account the potential applicability of Article 82. The CFI interpreted the Court of Justice decision in *Tetra Laval* as holding "that the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct. That appraisal does not, however, require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them, given that an assessment intended to establish whether an infringement is likely and to ascertain that it will be penalised in several legal orders would be too speculative."[60]

Thus, the Court of First Instance has concluded that the Commission must weigh the potential applicability of Article 82 or other competition laws in assessing the incentives of the parties to engage in conduct such as tying, bundling, refusals to deal, loyalty rebates and other potentially anticompetitive practices post mergers – even after the Court of Justice's decision in *Tetra Laval*. However, *General Electric* apparently teaches that the Commission can discharge

---

[60] Id. at ¶ 73.

its responsibilities in this respect with a simple summary finding.[61] The draft non-horizontal merger guidelines show that the Commission has heard that message.[62]

Dr. Lars-Hendrick Röller, the former Chief Competition Economist at DG Comp has said that Europe has taken substantial steps toward convergence, but that greater convergence should not be confused with complete convergence.[63] As he has observed, the "final answer by economists in a given case may still be different . . . economists can disagree – both in theory and on empirical analysis and findings." This observation is apt in the case of antitrust law enforcement policy respecting both single firm conduct and non-horizontal mergers. And, that, I suggest, is the fundamental reason for the differing attitudes with respect to non-horizontal mergers that exist on the European and the United States sides of the Atlantic.

---

[61] Id. at ¶ 74 ("Thus, where the Commission, without undertaking a specific and detailed investigation into the matter, can identify the unlawful nature of the conduct in question, in the light of Article 82 EC or of other provisions of Community law which it is competent to enforce, it is its responsibility to make a finding to that effect and take account of it in its assessment of the likelihood that the merged entity will engage in such conduct.").

[62] See supra note 44, Assessment of non-horizontal mergers at ¶¶ 44, 70, 108 ("when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful *inter alia* because of competition rules or sector-specific rules at the EU or national levels. This appraisal, however, does not require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them. Moreover, the illegality of a conduct may be likely to provide significant disincentives for the merged entity to engage in such conduct only in certain circumstances. In particular, the Commission will consider, on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law, (ii) the likelihood that this illegal conduct could be detected, and (iii) the penalties which could be imposed.").

[63] Lars-Hendrik Röller, Chief Economist DG Comp, European Commission, "Antitrust Economics – Catalyst for Convergence?" (Sept. 20, 2005) at 9 available at http://ec.europa.eu/comm/competition/speeches/text/sp2005_017_en.pdf.