[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.

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[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.

[7] See Richard Posner, The Chicago School of Antitrust Analysis, 127 U. P

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

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[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

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[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

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[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).

[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]

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)

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[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).

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.

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[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 sim7g[(2) when ts 0 gsuia6“

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[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,

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[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).

[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/doc

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

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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

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).

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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

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

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[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

[60] Id. at ¶ 73.