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Tony Reeves* Ninette Dodoo†

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Abstract

This Article considers, in light of the judgment in Tetra Laval ECJ, what standard the Commission's decisions in the field of merger control must satisfy if they are to withstand judicial scrutiny, and whether the Commission's concerns that the standard has been raised are justified. We also consider how the Courts' review of Commission decisions has evolved, what the standard of such judicial review now is, and what margin of appreciation is left to the Commission. Along the way, some observations are made as to how the position could be clarified further so as to ensure a satisfactory competition law regime that inspires confidence and promotes legal certainty.

STANDARDS OF PROOF AND STANDARDS OF JUDICIAL REVIEW IN EUROPEAN COMMISSION MERGER LAW

*Tony Reeves & Ninette Dodoo**

INTRODUCTION

The standard to which the European Commission (the "Commission") must prove its case before finding an undertaking to be in breach of the competition provisions of the Treaty Establishing the European Community ("EC Treaty"),[1] or before prohibiting a merger under the European Commission Merger Regulation ("EC Merger Regulation"),[2] has been the subject of intense debate and scrutiny among academics, practitioners, the Judiciary, and the Commission in recent years. The recent proliferation of appeals and annulments of Commission decisions, particularly in the field of merger control, has intensified the debate and highlighted the need for clarity regarding both the standard the Commission must meet in order to prohibit a merger, and the standard of review applied by the Courts in relation to the Commission's decisions.[3] The February 2005 European Court of Justice ("ECJ") judgment in *Commission v. Tetra Laval* ("*Tetra Laval ECJ*")[4] has further contributed to the debate on both the standard of proof required of the Commission and

* Tony Reeves is a Partner at Clifford Chance LLP (Brussels). Ninette Dodoo is a Senior Associate at Clifford Chance LLP (Brussels). The authors would like to thank Dimos Dakanalis and Anna Morfey for their comments and assistance in the preparation of this Article. The Article reflects the personal views of the authors and is not to be attributed to Clifford Chance LLP or its clients.

1. *See* Consolidated Version of the Treaty Establishing the European Community, O.J. C 325/33 (2002) [hereinafter EC Treaty].

2. *See generally* Council Regulation No. 139/2004, arts. 14-15, O.J. L 24/1, at 15 (2004) (on the control of concentrations between undertakings) [hereinafter EC Merger Regulation].

3. *See, e.g.*, Airtours PLC v. Commission, Case T-342/99, [2002] E.C.R. II-2585, 2634, ¶ 120, [2002] 5 C.M.L.R. 317, 348; *see also* Schneider Electric SA v. Commission, Case T-310/01, [2002] E.C.R. II-4071, 4142, ¶¶ 236-38, [2003] 4 C.M.L.R. 17, 810; Lagarderè SCA & Canal+ v. Commission, Case T-251/00, [2002] E.C.R. II-4825, 4878, ¶ 158, [2003] C.M.L.R. 20, 1000.

4. *See* Commission v. Tetra Laval, Case C-12/03 P, [2005] E.C.R. I-987, ¶¶ 75-78, [2005] 4 C.M.L.R. 8, 649-50 [hereinafter *Tetra Laval ECJ*] *aff'g* Tetra Laval v. Commission, Case T-05/02, [2002] E.C.R. II-4381, [2002] 5 C.M.L.R 28 [hereinafter *Tetra Laval CFI*].

the intensity of review permissible by the Court of First Instance ("CFI," and together with the ECJ, the "Courts").

Since 2002, regarded by many to have been the Commission's *annus horribilis*, the Commission has complained openly that the cumulative effect of recent CFI and ECJ judgments has been to raise the standard of proof to such a degree that it would now be very difficult, if not impossible, for the Commission to prove that certain types of mergers are anticompetitive.[5] These concerns were clearly articulated in the Commission's appeal of the CFI's decision in *Tetra Laval v. Commission* (*Tetra Laval CFI*),[6] where the Commission accused the CFI of "purporting to apply a standard of review based on manifest error of assessment while, in reality, applying a different standard"[7] and stated that "the Court of First Instance, whilst referring to 'manifest error of assessment' in the judgment, has in fact significantly raised the level of standard of proof required from the Commission to prohibit a conglomerate merger and has thereby gone beyond the review of legality."[8]

It is important to place the Commission's seeming frustration at what it views as excessive judicial control in the context of the European Community's ("EC") institutional balance in the field of merger control. Under the EC administrative system of merger control, the Commission not only enjoys wide investigative powers, akin to those of a public prosecutor, it also is the sole arbiter, in the first instance, of whether a merger is anticompetitive or not, and has the power to enforce its decisions[9] by

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5. *See* Mario Siragusa, Lecture at the U.K. Competition Commmission's Biannual Series: Judicial Review of Competition Decisions Under EC Law (Sept. 21, 2004), *available at* http://www.competition-commission.org.uk/our_role/cc_lectures/judicial_control_210904_siragusa.pdf.

6. *Tetra Laval CFI*, Case T-05/02, [2002] E.C.R. II-4381, [2002] 5 C.M.L.R 28.

7. *Appeal brought on 13 January 2003 by the Commission of the European Communities against the judgment delivered on 25 October 2002 by the First Chamber of the Court of First Instance of the European Communities in case T-5/02 between Tetra Laval BV and the Commission of the European Communities*, O.J. C 70/3, at 4, ¶ 1 (2003) [hereinafter Tetra Laval Appeal].

8. *Id.* at 4, ¶ 1.

9. *See* Christopher Bellamy, Address at the Org. for Econ. Co-operation and Dev. [OECD] Roundtable on Judicial Enforcement of Competition Law (Nov. 27, 1997), *reprinted in* OECD, JUDICIAL ENFORCEMENT OF COMPETITION LAW 105, OECD Doc. OCDO/GD(97)200, *available at* http://www.oecd.org/dataoecd/34/41/1919985.pdf (stating that, in this sense, the CFI is not, strictly speaking, "a court of first instance"—the Commission is).

imposing fines,[10] other conditions, or ultimately, by prohibiting the merger from taking place.[11] On the one hand, the multitude of duties which the Commission is called to fulfill[12] and the clear intention of the EC legislature to identify the Commission as the main driving force behind the shaping and application of competition law,[13] make it imperative that the Commission should enjoy a certain degree of discretion in the discharge of its duties. On the other hand, it is precisely this multiplicity of roles that necessitates the existence of an effective system of judicial review. It is clear that the debate about the standard of proof (and the standard of review) is part of a larger debate on due process and the balance between maintaining, on the one hand, a fast and effective system of merger control and, on the other hand, rigorous examination of Commission decisions by EC courts.[14]

This Article considers, in light of the judgment in *Tetra Laval ECJ*, what standard the Commission's decisions in the field of merger control must satisfy if they are to withstand judicial scrutiny, and whether the Commission's concerns that the standard has been raised are justified. We also consider how the Courts' review of Commission decisions has evolved, what the standard of such judicial review now is, and what margin of appreciation is

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10. *See generally* EC Merger Regulation, *supra* note 2, arts. 14-15, O.J. L 24/1, at 15-16 (2004) (authorizing the Commission to impose fines and periodic penalty payments on undertakings engaging in anticompetitive mergers).

11. *See id.* art. 8, O.J. L 24/1, at 11 (2004).

12. Contrast these duties with the United States, where the Federal Trade Commission and the Department of Justice act as prosecutors only. *See, e.g.*, Fed. Trade Comm'n, Guide to the Federal Trade Commission, http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm#action (last visited Jan.24, 2006) (explaining how the division of enforcement acts to protect consumers); U.S. Dep't of Justice, Mission Statement and Statutory Authority, http://www.usdoj.gov/02organizations/index.html (last visited Jan. 24, 2006) (discussing the role of Attorney General as prosecutor). It is then for U.S. courts to decide whether a merger is anticompetitive or not, based on a full review of the facts before them.

13. *See* Europa, Mission of Competition Directorate General, http://europa.eu.int/comm/dgs/competition/mission (last visited Jan. 24, 2006) (explaining that the role of the Competition Directorate General is to enforce the competition rules of the European Community).

14. *See, e.g.*, H.C.H. Hofmann, *Good Governance in European Merger Control: Due Process and Checks and Balances Under Review*, 24 EUR. COMPETITION L. REV. 120, 120-22 (2003); John Swift Q.C., U.K. Competition Commission Autumn Lecture: Judicial Control of Competition Decisions in the U.K. and EU (Sept. 21, 2004), *available at* http://www.competition-commission.org.uk/our_role/cc_lectures/judicial_control_210904_swift.pdf.

left to the Commission. Along the way, some observations are made as to how the position could be clarified further so as to ensure a satisfactory competition law regime that inspires confidence and promotes legal certainty.

I. *THE DISTINCTION BETWEEN STANDARD OF PROOF AND STANDARD OF REVIEW*

As a preliminary issue, it is important to distinguish between standard of proof and standard of review. By standard of proof we refer to the standard incumbent upon the Commission—as the administrative body deciding cases at first instance—in concluding that conduct infringes the EC Treaty's competition provisions (i.e., Articles 81 or 82) or in prohibiting a merger under the EC Merger Regulation.[15] The standard of review, on the other hand, refers to the intensity with which the Court will review a Commission decision that is brought before it on appeal.[16] In competition cases, this involves an appeal to the Court of First Instance ("CFI"), and subsequently an appeal, on points of law only, to the European Court of Justice ("ECJ").[17] While theoretically the concepts of standard of proof and standard of review are distinct—the former pertaining to the Commission and the latter to the Courts—in practice they draw heavily upon each other. At the end of the day, what is required for a Commission decision to stand in court depends on both the quantity and quality of evidence adduced by the Commission in support of its case (i.e., whether the standard of proof has been met), and on the level of scrutiny exercised by the Courts (i.e., the standard of review applied). It can be said that the more rigorous the standard of review, the more likely it is that the standard of proof will be high as well. In other words, if a court is prepared to scrutinize and question, at an exacting level, all of the Commission's factual findings, as well as its legal and economic analysis, then it follows that the level of sophistication and accuracy which the Commission must reach in its investigation needs

15. *See* EC Merger Regulation, supra note 2, art. 8, O.J. L 24/1, at 11 (2004).

16. *See, e.g., Airtours*, Case T-342/99, [2002] E.C.R. II-2585, 2638, ¶ 133, [2002] 5 C.M.L.R. 7, 350 (holding that the Commission did not produce enough evidence to reach its conclusion).

17. EC Treaty, *supra* note 1, art. 225, O.J. C 325/33, at 124 (2002) (stating that "decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only").

to be such as to ensure that its decisions will withstand the Courts' scrutiny. It is interesting to note how the Commission itself recognizes this interplay between the standard of review and the standard of proof in its appeal of the *Tetra Laval CFI* decision.[18] Its claim was in fact that "the standard of proof required by the Court of First Instance . . . exceeds the standard of review of the legality of Community acts."[19] In other words, in the Commission's view, the CFI has raised the standard of proof incumbent on the Commission, by raising its own standard of review.

II. *STANDARD OF PROOF*

A. *General Principles*

It is often repeated in the case law that the Commission must prove its case to the "requisite legal standard."[20] While this term can be seen in virtually every judgment reviewing Commission decisions, it is inherently imprecise. In practice, the "requisite legal standard" will depend on the case under consideration and the evidence available. What the Commission's decisions must ultimately do is to achieve a standard capable of withstanding scrutiny in the Courts, and whether this threshold has been met will inevitably vary from case to case depending on its complexity, the nature of arguments advanced and the theory of harm in issue—to name but a few factors. In addition, the fact that the EC system is based on principles common to the Member States complicates the issue insofar as the Member States have widely diverging standards applied in their own legal systems.[21]

In the common law tradition, applicable in the United Kingdom, the two most common standards of proof or reasoning, which can act as useful comparative analytical tools also in the context of EC merger control are: (i) proof "beyond reasonable doubt," applicable to criminal cases; and (ii) proof "on the balance of probabilities" or on the "preponderance of the evi-

18. *See* Tetra Laval Appeal, *supra* note 7, O.J. C 70/3, at 4, ¶ 1.

19. *Id.*

20. Schneider Electric SA v. Commission, Case T-310/01, [2002] E.C.R. II-4071, 4182, ¶ 402, [2003] 4 C.M.L.R. 17, 832.

21. This divergence may partly be behind the EC courts particular choice of vague wording. Given the nature of the EC judicial system, there may be advantages in avoiding coloring the standard of proof according to the colors of any Member State flag.

dence," applicable to civil cases.[22] Following *Napp Pharmaceutical Holdings Ltd. and Subsidiaries v. Director Genneral of Fair Trading*,[23] there has been some discussion in the United Kingdom ("U.K.") as to whether the standard applied in U.K. competition law cases is civil or criminal. The U.K.'s Competition Appeals Tribunal ("CAT") has recently confirmed that the appropriate standard is the civil standard, and that cases, therefore, need only be proved on the balance of probabilities.[24] However, this does not mean that the U.K. applies a "bare balance of probabilities" standard in competition cases. In *JJB Sports v. Office of Fair Trading*, the CAT affirmed the following point made in *Napp*, namely that the seriousness of the allegation must also impact upon the application of this standard:

> [F]ormally speaking, the standard of proof in proceedings under the [Competition] Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the [Office of Fair Trading] to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.[25]

The U.K. therefore has a standard of proof in competition cases

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22. There is a third standard—"manifest error or unreasonableness"—applicable to judicial review of administrative decisions (what in the United Kingdom is known as "Wednesbury unreasonableness," named after the synonymous case). This, however, is a standard of review rather than a standard of proof. *See* Bo Vesterdorf, *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, EUR. COMPETITION J., Mar. 2005, 6-7; *see also* David Bailey, *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, 40 COMMON MKT. L. REV. 845, 851-55 (2003) (discussing the difference between various standards of proof). The standard of "manifest error or unreasonableness" would require an administrative body to have taken a decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." Council of Civil Serv. Unions and Others v. Minister for the Civil Serv., [1985] A.C. 374, 410 (H.L.).

23. Napp Pharm. Holdings Ltd. v. Dir. Gen. of Fair Trading, Case No. 1001/1/1/01, [2002] C.A.T. 1, [2002] E.C.C. 13 (U.K. Competition Comm. App. Trib.), *available at* http://www.catribunal.org.uk/documents/JdgNapp150102.pdf.

24. *See* JJB Sports PLC v. Office of Fair Trading, Case 1021/1/1/03, [2004] CAT 17, [2004] All E.R. (D) 17 (U.K. Competition App. Trib.), *available at* http://www.catribunal.org.uk/documents/Jdg1021Umbro011004.pdf.

25. *Id.* (quoting *Napp*).

which is formally that of "balance of probabilities" (i.e., the civil law standard), although in reality this appears to be a heightened standard which probably falls somewhere between the civil standard and the criminal standard of "beyond reasonable doubt." This is a pragmatic approach insofar as it recognizes the inherently administrative nature of competition law, while at the same time allowing for a certain degree of flexibility, depending on the underlying facts of each case. In practical terms, the CAT's approach is to reiterate that the standard of proof is the civil one for all competition cases, but that its application will differ from case to case, in accordance with the well-established principle of English law that unlikely and/or particularly serious events require more convincing proof.[26]

This principle has also been reiterated in a merger context. The CAT applies the ordinary principles of judicial review in merger cases. However, the Court of Appeal has recently confirmed in *Office of Fair Trading v. IBA Health Limited* that the intensity with which the principles will be applied must vary in accordance with the nature of the issues involved.[27] In its preference for flexibility over legalism the principle stated in *IBA Health* is similar to that mentioned above in *Napp* and also to the approach of the Court in *Tetra Laval ECJ*.[28] In fact, in the recent *Unichem Ltd. v. Office of Fair Trading*[29] case, the CAT expressly mentions that the approach of the Court of Appeal in *IBA Health* is close to that of the Court in *Tetra Laval ECJ*.[30]

The realization that in its application the "balance of probabilities" standard can be stretched from requiring a bare balance of probabilities (i.e., a fifty-one percent likelihood of something occurring) to something resembling certainty, depending on the underlying facts, exposes to some extent the inherent artificiality of the civil/criminal divide and, at the same time, serves as a very useful tool for understanding and predict-

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26. *See, e.g.*, Sec'y of State for Home Dep't v. Rehman, [2001] 3 W.L.R. 877; *Napp*, [2002] C.A.T. 1, [2002] E.C.C. 13, ¶ 107, B v. Chief Constable of Somerset and Avon, [2003] A.C. 787; Re H [1996] A.C. 563, 586.

27. *See, e.g.*, Office of Fair Trading v. IBA Health Ltd., [2003] C.A.T. 27, *available at* http://www.catribunal.org.uk/documents/JdgIBA031203.pdf.

28. *See infra* notes 40, 44 and accompanying text.

29. Unichem Ltd. v. Office of Fair Trading, Case 1049/4/1/05, [2005] CAT 8, [2005] 2 All E.R. 440 (U.K. Competition App. Trib.), *available at* http://www.catribunal.org.uk/documents/Jdg1049Uni01042005.pdf.

30. *Id.* ¶ 169.

ing not so much what the standard of proof is, but rather how it will be applied, regardless of whether the nature of the competition proceeding in question is criminal or civil.

B. *Standard of Proof in Merger Cases*

It is clear under EC law that merger cases are administrative proceedings, and that the decision taken by the Commission as to whether to clear or prohibit them is also administrative. The decision is undertaken in the context of the Commission acting as regulator; fines are generally not imposed,[31] and a company's conduct is not declared illegal as it is in competition cases. However, "administrative" does not mean "inconsequential," nor does it mean "trivial," and it is arguable that the nature of the proceedings alone should not influence the debate on what the appropriate standard of proof is.[32] This is not only because the consequences of a Commission decision can be particularly serious for the undertakings concerned, but also because of the

31. *Cf.* EC Merger Regulation, *supra* note 10, art. 14, O.J. L. 24/1, at 15 (2004). Fines of up to one percent of aggregate turnover may be imposed under Article 14 for example where an undertaking, intentionally or negligently, supplies incorrect or misleading information in the course of the investigation, or fails to supply information in response to a request made by decision under Article 11(3). Heavier fines, of up to ten percent of aggregate turnover, may be imposed for failing to notify a concentration without authorization, or for implementing a concentration while the investigation is ongoing or contrary to a decision prohibiting the concentration. A fine may also be imposed for failing to comply with conditions or obligations set out in a Commission decision pursuant to EC Articles 6(1)(b), 7(3), or 8(2).

32. The standard of proof under Articles 81 and 82 of the EC Treaty is not examined in any detail in this Article. It has been argued, based on the nature of Article 81 and 82 proceedings, that the standard of proof is in fact higher than the one under the EC Merger Regulation. It is submitted that this view is not supported, however, by the fact that the Courts have used similar wording to describe the standard of proof under both Articles 81 and 82 and the EC Merger Regulation. *See, e.g.*, Compagnie Royale Asturiene des Mines SA and Rheinzink v. Commission, Case 29/83, [1984] ECR 1679 [1985] 1 C.M.L.R. 688; Ahlstrom Osakeyhtio v. Commission, Case C-89/85, [1993] ECR I-1307, [1993] 4 C.M.L.R. 407; Hercules v. Commission, Case T-7/89, [1991] ECR II-1171, [1992] 4 C.M.L.R. 84. All these cases use language similar to that found in the merger cases referred to *supra* note 2. This consistency in wording supports the view that there is in fact one standard of proof in competition law, the application of which depends on and varies in intensity in accordance with the underlying facts. In this sense, if one wishes to draw a distinction between Articles 81 and 82 on the one hand, and the EC Merger Regulation on the other, the appropriate distinguishing factor is not the nature of the proceedings (i.e., civil or criminal), but rather the temporal nature of the assessment of each proceeding. This theme will be further explored in the discussion of the ex-ante nature of merger control. *See infra* Part II.B.2.

Commission's exclusive handling of the proceedings—as prosecutor, judge and jury, all at the same time.

In the following Sections we will consider some of the most interesting issues and factors that influence the application and determine the intensity of the standard of proof. In the light of the *Tetra Laval ECJ* judgment, we will examine in turn whether there is a presumption of legality in EC merger control[33] which could shift the focus from the standard of proof in borderline cases, the importance of the ex-ante nature of review in merger cases and, finally, whether different kinds of merger should require different standards of proof.

1. Is There a Presumption of Legality of Mergers?

Given the uncertainty inherent in the concept of "a requisite legal standard," any presumptions as to the legality (or illegality) of mergers could serve as a useful starting point in any attempt to articulate what the requisite standard actually is. More importantly, a presumption can serve as a decision making tool, to enable both the Commission and the Courts to resolve the so-called "difficult" or "grey-area" cases. In this sense, it is interesting to note that a clear presumption of legality would render part of the debate on standard of proof redundant and resolve some of the relevant issues. In genuinely borderline cases, the Commission (or the Courts) would have clear guidance as to how to proceed, in the form of a presumption of legality. Unfortunately, as with the standard of proof, the issue of a presumption of legality of mergers in general is not addressed expressly anywhere in the EC Merger Regulation. The only reference to a category of mergers which "by reason of the limited market share of the undertakings concerned" should be deemed to be compatible with the common market is to be found in Recital 32 of the EC Merger Regulation, which states that a market share of twenty-five percent or below in the common market or a substantial part thereof is an indication that the merger does not impede competition.[34] Due to the fact, to some extent, that the EC Merger Regulation is silent on the matter, various arguments have been put forward, on both sides,

33. This Article will also examine the desirability of a presumption of legality in EC merger control.

34. *See* EC Merger Regulation, *supra* note 2, at Recital 32, O.J. L. 24/1, at 5 (2004).

based on interpretations of relevant EC Merger Regulation provisions, the general objectives of competition and EC law in general and opposing economic theories. In the words of Article 2(2) of the EC Merger Regulation:

> A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.[35]

Some commentators have suggested that there cannot exist any such presumption of legality[36] based on the fact that Article 2(3) mirrors exactly the wording of Article 2(2), requiring a concentration that would *not* significantly impede effective competition to be declared compatible with the common market.[37] In other words, the symmetry of language points towards neutrality rather than a presumption of legality (or illegality, for that matter). Both provisions are meant to lay down a positive obligation on the Commission to find a merger to be compatible or incompatible, rather than allowing it to assume that if it cannot be shown to be one then it must be the other.

It is respectfully submitted that, while this is a plausible interpretation of Article 2, it can lead to very undesirable situations, which would undermine the credibility of the merger control regime. The symmetric language of Articles 2(2) and 2(3), interpreted strictly in the above manner, would not leave any room for doubt in the Commission's mind, and would not provide for a resolution of the cases falling within a "grey area," where it is uncertain whether the outcome will be pro- or anti-competitive. In a borderline case, where a merger is neither clearly anti-competitive nor pro-competitive, the Commission would face the impossible situation of finding a merger to be neither compatible nor incompatible.[38] This would give the paradoxical result that cases falling within such a grey area could not be resolved under the EC Merger Regulation.[39]

Furthermore, Article 10(6) of the EC Merger Regulation re-

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35. *See id.* art. 2(2), O.J. L. 24/1, at 7 (2004).

36. *See*, Bailey, *supra* note 22, at 878.

37. *See* EC Merger Regulation, *supra* note 2, art. 2(2)-(3), O.J. L. 24/1, at 7 (2004).

38. Or, depending on one's perspective, finding it to be both compatible and incompatible at the same time.

39. Attorney General Tizzano expressed himself in similar terms in his Opinion in

quires that where the Commission does not reach a decision as to the compatibility of a merger with the common market, within the timeframe laid down in the EC Merger Regulation, the merger shall be deemed compatible with the common market.[40] It has been argued that this provision is simply a penalty for inaction and an application of the equitable principle that a party who fails to act cannot benefit from its inaction. In other words, the argument is that Article 10(6) could not have been phrased in any other way, as it would have been manifestly unfair to the parties if the Commission were allowed to reach a decision outside the time limits that it has imposed on itself.[41] Article 10(6) certainly cannot be said to establish a presumption of legality on its own, as it relates to a particular procedural point (that of inactivity on the part of the Commission).[42] However, it provides a further indication of the intention behind the EC Merger Regulation that mergers shall be lawful unless deemed otherwise by the Commission within the timeframe set out therein.

Advocate General Tizzano interestingly expresses his arguments in favor of a presumption of legality in terms of the risks involved: "[I]t has been thought preferable to run the risk of authorising a transaction incompatible with the common market, rather than the risk of prohibiting one that is compatible, so unjustifiably restraining the parties' freedom of economic activity."[43]

As noted, the decision to prohibit a merger has serious consequences for the notifying parties, as it impacts upon the general right to own property, recognized in EC law. In the EC Treaty, Article 295 sets out the general principle that it "shall in no way prejudice the rules in Member States governing the system of property ownership."[44] In addition, Article 17(1) of the European Union ("EU") Charter of Fundamental Rights[45] also

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Tetra Laval ECJ delivered on May 25, 2004. Opinion of Advocate General Tizzano, *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 76.

40. *See* EC Merger Regulation, *supra* note 2, art. 10(6), O.J. L. 24/1, at 13 (2004).

41. *See, e.g.*, Vesterdorf, *supra* note 22, at 29-30.

42. *See* EC Merger Regulation, *supra* note 2, art. 10(6), O.J. L. 24/1, at 13 (2004).

43. Opinion of Advocate General Tizzano, *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 79.

44. *See* EC Treaty, *supra* note 1, art. 295, O.J. C 325/33, at 148 (2002).

45. *See* Charter of Fundamental Rights of the European Union, art. 17(1), O.J. C 364/1, at 12 (2000) [hereinafter Charter of Fundamental Rights]. The Charter does

sets out that:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.[46]

The general principles of freedom of property ownership set out above clearly suggest a presumption in favor of the freedom to own and acquire property. Finally, in accordance with the principle of proportionality, Recital 6 to the EC Merger Regulation supports such an interpretation. It states that the EC Merger Regulation "does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition."[47]

This Recital further supports the presumption that mergers notified under the EC Merger Regulation must be presumed lawful unless the Article 2(2) criteria are met. It underlines the principle of "an open market economy with free competition," and states that the EC Merger Regulation will not go beyond what is necessary to achieve this, (i.e., presumably to block anti-competitive mergers, but to allow all others, which will account for the vast majority), including mergers falling within the grey area.[48]

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not have an official status under the EC Treaty. However, it has significant persuasive force, and it is arguable that a legitimate expectation exists that the Charter will be observed by the Commission in merger proceedings. In this context, for example, the Charter is expressly mentioned in the preamble of the Commission decision on the terms of reference of hearing officers in competition cases. *See* Commission Decision No. 2001/462/EC, ECSC, pmbl. ¶ 2, O.J. L 162/21 (2001). In this context, it should be noted that the right to property is not absolute and in fact, may be in conflict in some cases with other objectives of the EC Treaty, such as the objective of undistorted competition under Article 3(1)(g), or the establishment of the common market. EC Treaty, *supra* note 1, art. 3(1)(g), O.J. C 325/33, at 40 (2002) (stating that the EC shall include "a system ensuring that competition in the internal market is not distorted"). Thus, no one can argue that the protection of the right to property is a conclusive reason on its own in favor of a presumption of legality. It is merely advocated that a presumption of legality of mergers is compatible with this fundamental right.

46. Charter of Fundamental Rights, supra note 45, art. 17(1) O.J. C 364/1, at 12 (2000).

47. *See* EC Merger Regulation, *supra* note 2, Recital 6, O.J. L. 24/1, at 1 (2004).

48. *See id.*

On a theoretical level, it has been fiercely contested whether it is preferable for the Commission to allow an anti-competitive merger (a "Type 2 error") or to prohibit a pro-competitive merger (a "Type 1 error").[49] It has been argued that a Type 1 error is the lesser evil in that it only harms the interests of the parties rather than consumers or the whole of the economy.[50] There exist strong arguments, however, against a preference for Type 1 errors. First, it disregards the fact that a pro-competitive merger may benefit consumers in a number of ways,[51] thus resulting in direct harm not only to the parties, but to consumers as well. At the same time, it is easy to exaggerate the possible harm to consumers and the competitive environment if one forgets that the Type 1/Type 2 error debate only arises in difficult, grey-area cases where by definition the merger in question is not clearly anti-competitive (hence the need to discuss errors). By the same token, this view undermines the fact that the effects of a prohibition may be devastating on the parties, which in turn could have repercussions in the long run for the industry in question. Furthermore, as discussed above, it has been recognized in the EC Treaty that encroachment of property rights can only occur in exceptional circumstances.

Most importantly, opting for a Type 1 error is an irreversible decision. Conversely, a Type 2 error provides some scope for rectification by way of EC Treaty Article 82, regarding the abuse of a dominant position.[52] If a merger proves to be anticompetitive, the Commission has the opportunity to address any issues that have arisen under Article 82, thus mitigating the consequences of its previous error.[53]

Utilizing many of the arguments mentioned above, Advocate General Tizzano has been very forward in his support for a

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49. *See* Alberto Pera & Vito Auricchio, *Consumer Welfare, Standard of Proof and the Objectives of Competition Policy*, EUR. COMPETITION J., Mar. 2005, at 162-163 (discussing Type 1 and Type 2 errors).

50. *See, e.g., id.* at 168.

51. A pro-competitive merger may, for example, create significant efficiencies in the fields of distribution, research and development, and pricing.

52. *See* EC Treaty, *supra* note 1, art. 82, O.J. C 325/33, at 65 (2002) (stating how an anti-competitive merger, such as one created by a Type 2 error, would be struck down by EC law).

53. *See* Opinion of Advocate General Tizzano, *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 81 (stating that anti-competitive mergers can be dealt with *ex post* by Article 86, and by extension, Articles 81 and 82 of the EC Treaty).

presumption of legality in merger cases. In his opinion, in cases "of doubtful or difficult classification . . . the most correct solution is quite certainly to authorise the notified transactions."[54]

Unfortunately, the ECJ has not seized the historic opportunity presented to it to clarify this matter beyond doubt. Although both the Commission and the Attorney General refer to the subject,[55] the ECJ chose not to mention the issue in its judgment and refrained from unequivocally stating that a presumption of legality exists in Commission merger control, thus leaving open the question of how to best deal with a case where the Commission is uncertain whether the merger under review is in fact compatible or incompatible with the Common Market. It is submitted that, for the reasons outlined above, a presumption of legality would be an appropriate tool for dealing with such cases.

2. Ex Ante Nature of Review

It has been argued that the standard of proof is higher under EC Treaty Articles 81 and 82 than it is under the EC Merger Regulation.[56] One of the reasons is the ex-post nature of Article 81 or 82 investigations and the availability of evidence.[57]

Commission investigations into possible infringements of Article 81 and 82 are a long process, involving a large amount of fact-finding via on-site inspections, requests for information, market surveys and questionnaires, interviews, the eventual issuance of a Statement of Objections and an Oral Hearing, prior to the issuance of a decision. The process typically takes years. Evidence must be adduced in support of the case the Commission is bringing, which is based in the main part on facts discovered during the administrative procedure. To the extent that economic theories or models are relied upon, they seek to underline the conduct for which some evidence already exists. There

54. *Id.* ¶¶ 76-77.

55. *Tetra Laval ECJ*, Case C-12/03 P, [2005] E.C.R. I-917, ¶ 29 (describing the Commission's argument that the symmetrical language of Article 2 of EC Merger Regulation "reflects the intention of the [EC] legislature to protect equally the private interests of the parties to the concentration and the public interest in maintaining effective competition and in consumer protection").

56. *See, e.g.*, Philip Lowe, Address at The Fordham Annual Conference on International Antitrust Law & Policy, *The Substantive Standard for Merger Control and the Treatment of Efficiencies [sic] in Merger Analysis: An EU Perspective* (2002), *available at* http://europa.eu.int/comm/competition/speeches/text/sp2002_039_en.pdf at 3, 8-9

57. *See id.* at 8-9.

is therefore less room for speculation than, for example, in a merger investigation that is by its very nature forward-looking.[58] Does this mean that mergers, which are investigated ex ante and which therefore necessarily entail projections as to future market shares, behavior on the market, etc. should require more or less evidence as a basis for a prohibition decision?

On the one hand, the forward-looking nature of the review suggests that the standard of proof required to block a merger should be met with less evidence. The evidence that will be available to the Commission in making its assessment will largely depend on economic theory and modeling as to the likely evolution of the market: no two economists will agree precisely on the likely outcome, and in several cases opinions may diverge widely. Consequently, if the Commission is required to prove its case to an exigent standard of proof, it will never be able to prohibit a merger, even if there is a general consensus that it will be anti-competitive.

On the other hand, however, there are dangers in accepting less evidence in such cases simply to take account of the difficulties involved in assessing mergers ex ante. Indeed, *Tetra Laval ECJ* acknowledged the forward-looking nature of assessing mergers, but concluded that a more (not less) careful review is necessary:

> A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events—for which often many items of evidence are available which make it possible to understand the causes—or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.
>
> Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to ef-

58. It is interesting to note however, that past conduct may be very difficult to prove in some cases. The classic example is that of a cartel, where the parties know full well the consequences of their actions and make conscious efforts to avoid documenting their practices. In such cases, a high standard of proof would make it very difficult for the Commission to prosecute a cartel. *See* Aalborg Portland A/S Others v Comm'n, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, [2004] E.C.R. I-123, ¶¶ 55-57.

> fective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.[59]

While future projections may be difficult to make, companies should not be penalized for the difficulties the Commission has with assessing them. Nor should the strict time limits be used as a reason for lowering the threshold for prohibition for companies falling within the EC Merger Regulation's jurisdiction. The Commission had the opportunity to adjust the time limits within which it must review a notified merger when it revised the EC Merger Regulation last year, but it did little substantively to change these limits. As a result, a decision must still be reached within twenty-five to thirty-five days (Phase 1) or approximately five to six months (Phase 2). The Commission should not now be allowed to invoke this tight timeframe in favor of lowering the standard of proof incumbent upon it.

The conclusion that prospective analysis necessitates a higher standard of proof flows inexorably from the principle discussed above—that predictions as to possible future effects require more convincing proof. Suppositions, absent any cogent and convincing evidence, will not suffice.

3. Different Standards for Different Kinds of Mergers?

A further point to be considered is whether the evidence required to prohibit a merger can or should vary according to whether the merger under consideration is horizontal, vertical or conglomerate. Both the language used by the Courts and the principles discussed above indicate that the approach to standard of proof in competition law is a unified one and can be distilled to the following simple proposition: Has the Commission brought enough convincing and coherent evidence—whether factual or economic, given the facts of the specific case, to prove that the merger under review is incompatible (or compatible) with the common market?[60] It is interesting in this sense to group mergers according to their "type," because it allows us to focus on the underlying characteristics which most

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59. *Tetra Laval ECJ*, Case C-12/03 P, [2005] E.C.R. I-917, ¶ 42-43 (paragraph numbers omitted).

60. Or, has the infringement of Articles 81 or 82 of the EC Merger Regulation that the Commission alleges in fact occurred?

mergers of a given type will have, and it is these underlying characteristics that dictate the level of proof required of the Commission.[61]

Certain horizontal mergers are in many ways arguably more straightforward in their effects than are vertical or conglomerate mergers since, provided the market is correctly defined, it is possible to ascertain the undertakings' market shares post-merger. Although market shares are not the only relevant criteria in assessing horizontal mergers, they, nevertheless, provide a first proxy of the post-merger market situation. Arguably, the assessment is often less prone to speculative theories of harm because the presumed anticompetitive effects in the market are immediate: the market structure will change with the elimination of a competitor.[62]

Where horizontal cases also involve certain expected behavior by the undertakings (in particular, collective dominance cases), the Commission's analysis is based in part upon the current conditions of the market but also, in large part, on predictions as to the parties' (and other market players') future behavior. This renders the analysis inherently more speculative. In such instances, the CFI has emphasized that the more remote the likelihood of the conduct is, the greater the evidence the Commission must adduce in order to support its theory. In other words, theories of harm based on the parties' alleged future behavior require more convincing evidence for the merger to be prohibited, and this is the decisive factor in shaping the standard of proof, rather than the fact that the merger in question is a horizontal one. Thus, in *Kali & Salz*,[63] the ECJ held that the Commission's decision was not supported by a "sufficiently cogent and consistent body of evidence" and, therefore,

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61. *See* Bailey, *supra* note 22 at 853 (noting that even if the same standard of proof is applied, it is easier to prove things that are inherently more likely to happen than those that are not); *see also* Sec'y of State for Home Dept. v. Rehman, [2002] 3 W.L.R. 877, 895 (Eng.) (stating, for example, that it would require more convincing evidence to conclude that it was more likely than not that the sighting of an animal in a park was a lion, than it would to satisfy the same standard of probability that the animal was a dog).

62. One can of course debate what the precise effects of a transaction will be and whether the change will be appreciable, however such discussion is beyond the scope of this Article.

63. France v. Commission, Joined Cases C-68/94 & 30/95, [1998] E.C.R. I-1375, [1998] 4 C.M.L.R. 829 [hereinafter *Kali & Salz*].

did not meet the standard required for a collective dominance theory to be upheld.[64]

Similarly, in *Airtours*, the CFI placed a high standard of proof on the Commission, requiring it to show that three cumulative conditions are fulfilled before prohibiting a merger based on collective dominance concerns.[65] First, each member of the dominant oligopoly must have the ability to know how the other members are behaving; there must be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving. Second, the situation of tacit coordination must be sustainable over time; that is to say, there must be an incentive not to depart from the common policy on the market (existence of a credible monitoring and retaliation mechanism). Third, the foreseeable reaction of current and future competitors, as well as of consumers, must not be such as to jeopardize the results expected from the common policy.

In this respect, the *Airtours* decision is an important signal to the Commission about the need for rigor in its decisions. It also shows that questions of standard of proof are not merely academic but have a profound effect on the outcome of litigation. It is certainly no coincidence that since *Airtours* the Commission has been reluctant to challenge any case based on a theory of collective dominance.[66]

The analysis of vertical or conglomerate mergers differs from many horizontal mergers in the key respect that there is no addition of market shares. For conglomerate mergers, the ECJ recently confirmed the standard set by the CFI in *Tetra Laval CFI*, stating that the standard of proof incumbent upon the Commission is the same as the standard for horizontal mergers, but that in the case of conglomerate mergers this standard will be more difficult to fulfill and will require a correspondingly

64. *Id.* ¶ 228.

65. *See Airtours*, Case T-342/99, [2002] E.C.R. II-2585, ¶ 62, [2002] 5 C.M.L.R. 317.

66. The Sony/BMG merger—the only merger since Airtours to go to Phase 2 on the basis of alleged collective dominance concerns—was eventually cleared without commitments. See Commission Decision No. 4064/89/EEC (2004) (Sony/BMG). Other cases, such as the recent *Pernod Ricard/Allied Domecq* decision, suggest that the Commission considers the *Airtours* criteria exceedingly difficult to fulfill, as the parties need only show that one of the criteria is not met in order for the Commission's entire collective dominance theory to come unstuck.

higher quality of evidence to show that the merger will have anti-competitive effects. It is submitted that this must also be true for vertical mergers insofar as the analytical framework is similar. In this respect it is interesting to compare the slight nuances in language that can be identified when comparing the CFI and the ECJ decisions. The CFI's approach is set out in the following paragraphs:

> the analysis of potentially anti-competitive conglomerate effects of a merger transaction raises a certain number of specific problems relating to the nature of such a transaction.[67]
>
> . . .
>
> . . . in a prospective analysis of the effects of a conglomerate-type merger transaction, if the Commission is able to conclude that a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded, it must prohibit it. . .[68]

In this connection, the CFI also found that the evidence the Commission must bring in conglomerate cases is comparable to that required for collective dominance:

> The Commission's analysis of a merger producing a conglomerate effect is conditioned by requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance (*Kali & Salz*, paragraph 222; and *Airtours*, paragraph 63). Thus the Commission's analysis of a merger transaction, which is expected to have an anti-competitive conglomerate effect, calls for a particularly close examination of the circumstances, which are relevant for an assessment of that effect on the conditions of competition in the reference market. As the Court has already held, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof (*Airtours*, paragraph 63). Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognized in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof of anti-

67. *Tetra Laval CFI*, Case T-05/02, [2002] E.C.R. II-4381, ¶ 147, [2002] 5 C.M.L.R 28, 1223.

68. *Id.* ¶ 153.

> competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects (*see*, by analogy, *Airtours*, paragraph 63).[69]
>
> . . .
>
> . . . In addition, since the anticipated dominant position would only emerge after a certain lapse of time, by 2005 according to the Commission, its analysis of the future position must, whilst allowing for a certain margin of discretion, be particularly plausible.[70]

The language used by the CFI in the passages cited above shows that to prohibit a conglomerate merger the Commission is required to show, first, that it undertook a very careful examination of the facts ("particularly close examination;" "precise examination"); second, that the conclusions it drew from this were based on "convincing evidence;" third, that the anti-competitive effects were likely to occur ("in all likelihood"); and fourth, that they would occur within the "relatively near future." While not setting a precise benchmark, this sets a very high standard for the Commission to meet. It is arguable whether the constant references to the particular facts of the case suggest that the preceding paragraphs are not a description of the standard of proof generally, but rather an explanation of how the standard would be applied if a case similar to *Tetra Laval CFI* was brought in the future.

The Commission appealed the CFI's judgment for this very reason, claiming that the CFI had "significantly raised the level of standard of proof required from the Commission to prohibit a conglomerate merger."[71] On appeal, however, the ECJ found that:

> . . . the Court of First Instance was right to find, in paragraph 155 of the judgment under appeal, in reliance on, in particular, the judgment in *Kali & Salz*, that the Commission's analysis of a merger producing a conglomerate effect is subject to requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance and that it calls for a close examination of the circumstances which are relevant for an assessment of that effect on the con-

69. *Id.* ¶ 155 (footnotes omitted).
70. *Id.* ¶ 162.
71. Tetra Laval Appeal, *supra* note 7, O.J. C 70/3, at 4 (2003).

> ditions of competition on the reference market. Although the Court of First Instance stated, in paragraph 155, that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence of the circumstances which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger.[72]

What is undisputed is that the ECJ, to a large extent, agrees with the substance of the CFI's assessment regarding the appropriate standard of proof. Interestingly, however, the language that the ECJ uses is not quite as strong as the CFI's language. For example, the ECJ refers to a "close examination" of the circumstances as opposed to a "particularly close examination." In paragraph 42 of its judgment, the ECJ, referring to the Commission's analysis of conglomerate mergers, stresses that they "must be carried out with great care"[73] while the CFI prefers the expression "precise examination supported by convincing evidence."[74] While perhaps the choice of words by the ECJ points to an intention to avoid linguistic extremes,[75] it is submitted that the ECJ's slightly more subdued language does not subtract anything from the force of the central message which both the CFI and ECJ delivered to the Commission: in situations where the effect of a merger is not clearly anticompetitive,[76] and in particular where that effect is only predicted to occur in the future,[77] the Commission will need to have a particularly convincing case in order to withstand the Courts' scrutiny. This is not "because of a new or heightened legal standard of proof."[78] It is simply the manifestation of a natural process of evolution, whereby the Courts respond to the increasing sophistication of competition

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72. *Tetra Laval ECJ*, Case C-12/03 P, [2005] E.C.R. I-987, ¶¶ 40-41, [2005] 4 C.M.L.R. 8, 638-39.

73. *Id.* ¶ 42.

74. *Tetra Laval CFI*, Case T-05/02, [2002] E.C.R. II-4381, ¶ 155, [2002] 5 C.M.L.R 28, 1225.

75. An intention that in the institutional context of the EC is very understandable.

76. For example, in a conglomerate merger scenario.

77. Note that the further in the future the predicted effect, the more convincing the evidence must be to support the prediction.

78. *See* Vesterdorf, *supra* note 22, at 33.

law, economic theory and of the fact-finding resources available to the Commission.

III. *STANDARD OF REVIEW*

As discussed above, the standard of judicial review of the Commission's decisions is a theoretically distinct but clearly related concept to the standard of proof.[79] The standard of review relates to the Courts' judgment as to whether or not the Commission's decision can stand, i.e., the Courts' assessment of whether the Commission has met the standard of proof incumbent upon it. In practical terms, it has been recognized that the standard of review is linked to the standard of proof in the sense that, for example, the Court cannot demand of the Commission to prove its case to a very exacting standard and then only exercise superficial judicial review.[80] *Tetra Laval ECJ* indicates that the standard of review and proof will be considered, pragmatically, to form part of the wider question: "Has the Commission established a convincing case?" It also stands for the Courts unwillingness to engage in linguistic or theoretical debates about the differences in the two concepts. Prior to examining this particular aspect of the *Tetra Laval* decisions and their implications, however—and to the extent that it is possible to isolate the discussion of standard of review from that of standard of proof—it is worth briefly summarizing the precise scope of the review exercised by the Courts.

A. *Appeal/Judicial Review*

It is worth clarifying at the outset the use of different terminology relating to the Courts' review of Commission decisions. An "appeal" involves the decision or judgment in question being brought before the courts in order for them to review the law and facts upon which the decision or judgment is based. The Courts will, if necessary, overturn the decision or judgment and replace its own findings for that of the first instance decision-maker. Judicial review, on the other hand, refers to an application made to a court to review the legality of an administrative

79. *See supra* Part I.A.

80. *See*, Vesterdorf, *supra* note 22, at 6-8.

body's decision.[81] The review does not involve a discussion of the facts and law in the way an appeal on the merits does. Rather, it involves a hands-off review, requiring the court reviewing the decision only to look at whether the decision is so unreasonable that no reasonable decision-maker could have made it.

The EC Treaty provision giving authority for acts of the Community institutions (including the Commission) to be reviewed by the Community judicature is Article 230.[82] This Article gives the Community Courts power to review (inter alia) Commission decisions on the following grounds: lack of competence, misuse of powers, infringement of an essential procedural requirement, or infringement of the Treaty or of any rule of law relating to its application.[83] The terminology used in Article 230 and the Statute of the Court of Justice (also applicable to the CFI) shows that parties apply for the legality of Commission decisions to be reviewed by the CFI, and can subsequently appeal that judgment to the ECJ on points of law.[84] In this sense, the initial review by the CFI[85] is, in some respects, akin to a judicial review, and cases are brought before the ECJ as appeals on points of law.[86]

Applications to the Court that deal with substantive issues, as opposed to procedural issues, relate primarily to alleged errors of law, errors of fact and errors of appreciation. Historically, the standard of review applied to each has been considered to be different, and therefore we consider these separately below. It should be noted, however, that there is no clear line discernible between the three—for example, where the Commis-

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81. *See* Mark Clough, *The Role of Judicial Review in Merger Control*, 24 NW. J. INT'L L. & BUS. 729, 729-30 (2004).

82. *See* EC Treaty, *supra* note 1, art. 230, O.J. C 325/33, at 126 (2002).

83. *See id.*

84. Under Article 56 of the Statute, "an appeal may be brought before the Court of Justice" from a judgment of the CFI. Under Article 58 of the Statute, appeals to the ECJ must be on points of law only, "on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance." Protocol on the Statute of the Court of Justice, arts. 56, 58, O.J. C 325/167, at 179-80 (2002) (annexed to the Consolidated TEU and the Consolidated EC Treaty).

85. Or, exceptionally, by the ECJ, depending on the party appealing the decision. *See, e.g.*, *Kali & Salz*, Joined Cases C-68/94 & 30/95, [1998] E.C.R. I-1375.

86. *See, e.g.*, Opinion of Advocate General Tizzano, *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 59.

sion has made an error of fact, its appreciation of the (erroneous) facts is also likely to be incorrect.

B. *Errors of Law*

Errors of law can be considered by both the CFI and, on appeal, the ECJ.[87] Appreciation of the law is the sole competence of the Courts.[88] Therefore, where the Courts consider the Commission's decision to be predicated on an erroneous assessment of the law they will replace the Commission's interpretation with their own. In this respect, the standard of review is at its highest vis-à-vis questions of law.[89]

That errors of law remain entirely subject to review by the Courts is consistent with the provisions of the EC Treaty granting the Community Courts competence to construe its provisions, and with Member States' own legal systems, where questions of law are subject ultimately to interpretation by the courts.

C. *Errors of Fact*

Errors of fact, on the other hand, are subject only to review by the CFI, as appeals to the ECJ may be on matters of law only, as noted above. Although past and present market conditions and behavior are of course relevant to a merger investigation, the EC Merger Regulation requires the Commission to show that the merger will significantly impede effective competition, thus requiring a forward-looking assessment.[90] Moreover, mergers typically raise questions of an economic nature. The Courts have consistently held that the Commission enjoys a margin of discretion in its assessment of matters of an economic nature.

However, this margin of discretion is not unlimited. It is carefully circumscribed by what the Commission is authorized to do under the EC Merger Regulation.[91] The EC Merger Regula-

87. *See* EC Treaty, *supra* note 1, art. 225, O.J. C 325/33, at 124 (2002).

88. *See id.* art. 220, O.J. C 325/33, at 122 (2002).

89. For examples of cases where the Courts have annulled Commission decisions on the basis of an error of law see *Nungesser v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1982] 1 C.M.L.R. 278, and *Suiker Unie v. Commission*, Case 40/73, [1975] E.C.R. 1663, [1975] 1 C.M.L.R. 295.

90. *See* EC Merger Regulation, *supra* note 2, art. 2(3), O.J. L. 24/1, at 7 (2004).

91. It is also arguable that the Commission has limited its own discretion by publishing notices and guidelines in relation to its interpretation of certain types of mergers or aspects of the EC Merger Regulation. *See, e.g.*, Guidelines on the Assessment of

tion lays down a substantive test which must be applied by the Commission in every case. If the test is met, the Commission must approve the merger, if it is not, the Commission must prohibit it unless it accepts remedial action by the undertakings concerned.

The delineation and definition of this discretion is becoming increasingly important as the Commission and the merging parties frequently rely on economic analyses and modelling to show that the merger will or will not lead to anti-competitive effects. In view of the margin of discretion, it has been suggested that the CFI's review of the facts upon which the Commission's decision is based (which is inherently tied up with its assessment of them) must be relatively hands-off, i.e., the Court should be hesitant to conclude that the Commission has erroneously interpreted the facts before it.

In practice, however, the CFI has increasingly scrutinized the "facts" upon which the Commission relies. This is demonstrated, for instance, in the *Airtours* and *Tetra Laval CFI* judgments of 2002. The judgment in *Tetra Laval ECJ* also indicates that factual errors include not only inaccurate or incomplete information, but also the erroneous interpretation of such information.[92] As the scrutiny of errors of fact is linked to the scrutiny of the Commission's assessment of the facts, this point will be considered further below. At this stage, however, it can be noted that the CFI is right to look at errors of fact on the face of the record (and the interpretation of them), and to challenge Commission decisions on this basis. Although not all the "facts" in a merger investigation are necessarily clear cut, it cannot be right that the Commission's understanding of the evidence put before it goes unchecked. A good example of judicial review of the alleged facts of a case is the CFI's review of the *Airtours* decision.[93] There, the Court discovered numerous examples of Commission errors. Discussing the Commission's assessment of a study on demand for short-haul packaged holidays, for example, the CFI remarked that:

> [I]t is apparent from a cursory examination of that document

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Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, O.J. C 31/5 (2004).

92. *See* Clough, *supra* note 81, at 753-54.

93. *See Airtours*, Case T-342/99, [2002] E.C.R. II-2585, [2002] 5 C.M.L.R. 7.

> that the Commission's reading of it was inaccurate. Thus, at paragraph 92 of the Decision, it states that it also noted that the overall average annual growth rate . . . was quite low, whilst no statement to that effect is made in the extract sent to the Court. Conversely, the Commission ignored the emphasis placed by the author of the extract on the massive increase in foreign holiday sales that has taken place over the last twenty years. It follows that the Commission construed that document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding that the rate of market growth was moderate in the 1990s and would continue to be so.[94]

This makes clear that the CFI will indeed look at the facts upon which the Commission bases its decision and examine whether the Commission erroneously stated those facts and consequently came to an incorrect conclusion as to the competitive effects of the merger. Where it does, this may be a ground for annulling the decision (as was the case in *Airtours*), provided that the errors identified go to the heart of the case and that the Commission's decision is no longer coherent and defensible, on the basis of the remaining elements of the case.

While the CFI's willingness to engage with the Commission's findings of fact is a welcome trend, it has raised one interesting question for the future, as illustrated by *Tetra Laval ECJ*. In its decision, the ECJ found the Commission's challenge of the CFI's findings to be partly inadmissible,[95] to the extent that it required the ECJ to "call into question the Court of First Instance's assessment of the evidence, which cannot be the subject of review by the court in appeal proceedings."[96] The ECJ's unwillingness to scrutinize the CFI's assessment of evidence is hardly surprising, in light of the fact that the ECJ does not adjudicate on questions of fact. While this principle is well established, it is arguable that questions of fact can sometimes be recast as questions of law.[97] The extent to which the ECJ will be

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94. *Id.* ¶ 130.

95. *Tetra Laval ECJ*, Case C-12/03 P, [2005] E.C.R. I-917, ¶ 105.

96. *Tetra Laval ECJ*, Case C-12/03 P, [2005] E.C.R. I-917, ¶ 104.

97. For example, whether the CFI has correctly assessed the facts or not is a question of fact. However, if there is evidence suggesting that it has effectively substituted its own assessment for that of the Commission, then arguably the issue becomes a legal one in the sense that the CFI can be said to have overstepped its jurisdiction and acted ultra vires. This is in essence what the Commission argued in *Tetra Laval ECJ*. If how-

amenable to such attempts to merge issues of fact and law is certainly a question for the future, the answer hinging on the level of self-restraint of the CFI, on the one hand, and the level of tolerance of the ECJ on the other hand, to attempts by the CFI to replace the Commission's view with its own.

D. *Error of Appreciation*

Related to the question of errors of fact is the question of errors of appreciation. As set out above, errors of fact and of appreciation are very closely linked and, to some degree, the separation of the two concepts is merely semantics.[98]

Throughout the case law, the CFI has annulled Commission decisions where they contain "errors of assessment."[99] The meaning of this term has evolved over time: as the CFI increasingly probes the factual basis of Commission decisions, it increasingly finds erroneous conclusions drawn on the basis of these facts. This necessarily impacts upon the delicate division of power between the Commission and the Courts: it is the Commission which is charged with the assessment of the case and which must take a decision, subject to judicial review by the Courts. The Commission therefore has some degree of freedom (or "margin of appreciation") in understanding the facts as presented to it and in drawing conclusions from them, in particular as regards decisions of an economic nature. The ECJ laid down in *Kali & Salz*, and has emphasized in judgments (such as *Gencor*, *Airtours*, *Tetra Laval ECJ*, etc.) since then, that the Commission's investigation of a merger involves making assessments of an economic nature.[100] The Commission, therefore, must be granted some margin of appreciation in its assessments of merger cases:

> [T]he basic provisions of the [Merger] Regulation, in particu-

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ever, this argument is never allowed to succeed, there is a risk that the CFI's own errors of fact could be unchecked, and this is a risk equal in gravity to that of the Commission's errors not being addressed. Equally, the legal qualification of facts by the CFI is also subject to review by the ECJ.

98. *See supra* Section II.B.

99. *See e.g.*, *Tetra Laval CFI*, Case T-05/02, [2002] E.C.R. II-4381, ¶¶ 134, 140, 141, 197-9, 283, 308, 335-6; *see also Airtours*, Case T-342/99, [2002] E.C.R. II-2585, ¶¶ 26, 32, 65, 120, 181-2, 294; Gencor Ltd. v. Commission, Case T-102/96, [1999] E.C.R. II-879, ¶ 245.

100. *See Kali & Salz*, Joined Cases C-68/94 & 30/95, [1998] E.C.R. I-1375, ¶151 (describing the Commission's "economic assessment").

> lar Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations."[101]

Regrettably, to date, the Courts have not provided guidance on the precise scope of the Commission's discretion and on what specific issues the Commission enjoys such discretion. It is hoped that the Courts will provide clarity on the issue in the future, in the wake of the *Tetra Laval* decisions. Below we offer some remarks on the possible implications of the *Tetra Laval ECJ* judgment.

E. *The Impact of* Tetra Laval ECJ

1. The Merger of Standard of Review with Standard of Proof

Tetra Laval ECJ offers valuable insights into the ECJ's thinking on questions of standards of review and standard of proof. On a general level, it is evident that the ECJ's intention is to approach issues of proof pragmatically and not to be constrained by conceptual or linguistic issues. As explained above, the Commission argued in its appeal that the CFI had wrongly raised the standard of proof via the application of a heightened standard of review.[102] Before rejecting this argument,[103] the ECJ made it clear that what matters is the overall strength of the Commission's case and not the presumed dichotomy between standard of proof and standard of review:

> Although the Court of First Instance stated, in paragraph 155, that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence, of the circumstances

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101. *Kali & Salz*, Joined Cases C-68/94 & 30/95, [1998] E.C.R. I-1375, ¶ 223-24, [1998] 4 C.M.L.R. at 829; *Gencor*, [1999] E.C.R. II-879, ¶¶ 164-65; *Airtours*, Case T-342/99, [2002] E.C.R. II-2585, ¶ 64.

102. Which, in the Commission's view, amounted to substituting the CFI's view for that of the Commission. *See* Tetra Laval Appeal, supra note 7, O.J. C 70/3, at 4, ¶ 1 (2003) ("[I]n the application of this standard of judicial review, the Court of First Instance exceeded the role of the Community Courts . . . in particular by substituting its view for that of the Commission on a number of central points.").

103. *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶¶ 48-51.

> which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger.[104]

As the ECJ repeats in various paragraphs, it is the "quality of evidence" that matters.[105] The Opinion of Advocate General Tizzano is in similar vein.[106] In Advocate General Tizzano's words:

> For my part, I agree with *Tetra* that the Court of Justice cannot linger over the carrying out of a purely formal linguistic or semantic assessment in order to establish whether or not the Court of First Instance committed an error of law in applying too rigorous a judicial review or in claiming a standard of proof too high for decisions prohibiting mergers. I believe rather that the Court of Justice must look to the heart of the matter, assessing in concrete terms whether, beyond the formal aspect, the Court of First Instance did in fact carry out a review inconsistent with the relevant provisions of Community law and incompatible with the particular judicial role entrusted to it by the Treaty.[107]

There appears to be little doubt that on this point the ECJ has done exactly as Attorney General Tizzano urges, namely that standard of review and standard of proof form part of a general, unified concept of "the quality of evidence." In other words, the standard of proof and the standard of review in cases involving complex economic assessments are so closely linked that they can and should be discussed in the same light.

2. The Evolution of the Court's Review of the Commission's Margin of Appreciation

The recent CFI and ECJ judgments in *Tetra Laval* have shed some light on the scope of the Commission's margin of appreciation in merger cases. Arguably, the issue first arose in *Airtours*, the earliest of the high profile judgments annulling Commission decisions. In *Airtours*, following an in-depth review of the Commission's findings the CFI reached the conclusion that: "[T]he

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104. *Id.* ¶ 41.

105. *See id.* ¶¶ 37, 44-45.

106. *See* Opinion of Advocate General Tizzano, *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 68.

107. *Id.* ¶ 71.

Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created."[108]

The CFI's approach in *Airtours* must be read in light of the ECJ's judgment in *Tetra Laval ECJ*. The CFI in that case took a similar approach to *Airtours*, scrutinizing the Commission's factual claims, its analysis of them, and the conclusions it drew as to the merger's likely competitive impact on the market and it quashed the Commission's decision, finding it to be vitiated by numerous errors of assessment. On appeal, the ECJ upheld the CFI's interventionist approach:

> Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.[109]

This language is revealing in several respects. First, it can be argued that this is a statement of principle and is not limited to the facts of the case, nor specifically to conglomerate mergers. It can be inferred that the elements[110] of judicial review listed by the court are relevant in all competition cases, and indeed, that is the way it should be.

Second, although the Court has recognized that the Commission enjoys a margin of discretion in matters involving economic assessments, it will conduct a detailed analysis or re-examination of the Commission's fact findings as well as the legal and

108. *Airtours*, Case T-342/99, [2002] E.C.R. II-2585, ¶ 294.

109. *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 39.

110. Namely the accuracy, reliability, consistency, probative value and completeness of evidence.

economic analysis on which the decision is based.[111] In doing so, the Court will seek to assure themselves that the Commission's decision meets the requirements of logic, accuracy, consistency and appropriateness and that it is adequately reasoned. However, the Court in *Tetra Laval ECJ* was careful to explain that the CFI must not substitute its own point of view to that of the Commission. In practice, a bright line between substitution and the detailed review that is permissible by the CFI may prove difficult to draw.

3. The Scope of the Commission's Discretion Today—Some Observations

Tetra Laval ECJ also raises, however, the important question of the scope of the Commission's discretion, in particular the matters on which the Commission is arguably sovereign. Based on the current state of development of the Courts' case-law, we can suggest the following as possible areas where the Commission will likely continue to enjoy a broad discretion: First, in relation to market definition the Courts have generally held that the Commission enjoys a broad margin of discretion. Consequently, the Courts have tended to shy away from scrutinizing the Commission's definition of relevant markets, provided, however, that the Commission's analysis is consistent and the evidence provided in support of it is cogent. A notable example of a case where the CFI has reviewed closely the Commission's market definition is *Schneider Electric SA v. Commission*.[112] In assessing the compatibility of the merger in question, the Commission in *Schneider* found that it would strengthen or create a dominant position in several narrowly defined product and national markets.[113] However, when assessing the effects on competition the Commission conducted its analysis at the European level describing *Schneider* as a "European leader,"[114] thus departing from its previous methodology of narrowly defined geographic markets. The example serves to show that where the Commission's assessment is fraught with inconsistencies (and hence lacks logic and

111. *See* Opinion of Advocate General Tizzano, *Tetra Laval ECJ*, Case C-12/03 P, [2004] E.C.R. I-987, ¶ 39.

112. *Schneider*, Case T-310/01, [2002] E.C.R. II-4071.

113. In terms of product market definition for example the Commission found that there were nine different market segments for electrical parts. *Id.* ¶ 48.

114. *Id.* ¶¶ 148, 149.

coherence), then the CFI will challenge the Commission's analysis.

Second, the case-law of the Courts suggests that the Commission is entitled to a broad margin of discretion in relation to its choice of theory of harm applied to a case, provided, importantly, that the theory in question is consistent with, and is supported by, the underlying facts of the case. The *Babyliss SA v. Commission* case,[115] concerning the partial annulment of the SEB-Moulinex merger, is a good example in this context. In this case, the Commission used an inverse "range effects" theory to support its finding that the merger did not raise significant concerns in certain member states because "any attempt at anti-competitive conduct in the dominated markets would be penalised by smaller purchases of SEB-Moulinex products in the other markets."[116]

The CFI found that the particular theory invoked was not supported by adequate evidence.[117] In fact, the Commission admitted that it had failed to conduct a detailed economic review of the possible implications of its unusual application of the range effects theory.[118] Consequently, the CFI concluded that the Commission had misapplied the "range effects" theory as commonly understood.[119]

The Commission also appears to have a significant margin of appreciation as to the conduct of the administrative process, provided that it is competent to review the merger and that it respects the time limits set out in Article 10 of the EC Merger Regulation, as well as the conditions for suspension of those time limits.[120] For example, in *Kaysersberg SA v. Commission*, the CFI held that the Commission may suspend the relevant period under Article EC Merger Regulation "if it considers that it is not in possession of all the information necessary in order to adopt

115. *See* BaByliss SA v. Commission, Case T-114/02, [2003] E.C.R. II-1279.

116. *Id.* ¶ 356.

117. *Id.* ¶¶ 356, 358, 363.

118. *Id.* ¶ 359.

119. *Id.* ¶ 356.

120. For an example of a case regarding the timing of the announcement of a Commission decision see *MCI v. Commission*, Case T-310/00, [2004] 5 C.M.L.R. 26. The Court annulled the Commission's decision, and held that the Commission lacked the necessary competence to adopt the contested decision under the EC Merger Regulation, because the parties had withdrawn their notification and had abandoned the proposed merger in the form notified to the Commission.

its decision."[121] Thus, assuming the Commission has all the information necessary to adopt its decision,[122] it may not suspend the time limit purely because it feels that a party had submitted its proposed commitments at a very late stage.[123]

Equally, the Commission enjoys a margin of discretion in determining whether, and if so, when, to accept remedies to address substantive concerns.[124] Nonetheless, as demonstrated in the *Tetra Laval* decisions, the Courts will conduct a detailed review to ensure that the Commission did not err in accepting or rejecting the remedies offered. Furthermore, the Courts have held that the Commission's discretion to refer cases to national competition authorities is broad but not without boundaries.[125]

CONCLUSION

On a general level, it is clear in the wake of the *Tetra Laval* judgments that the Courts' scrutiny of Commission decisions has evolved: The in-depth consideration of the facts, and the conclusions the Commission draws from them, will be the subject of intense scrutiny by the CFI and—the ECJ has now confirmed—the CFI does not exceed its power by conducting this kind of analysis. The choice of the term "evolution" is important, in that it suggests that there has been no sudden or radical change in the standard of review of the Courts. Rather, what we have witnessed has been an organic process of the Courts responding to the increased sophistication of the Commission's decisions and of competition law in general. In this sense, one could legitimately argue that it is only natural that the "requisite legal standard" is not interpreted today in the same way as it was thirty years ago when *Continental Can Co. v. Commission*[126] was decided.

Time will tell how this evolution will affect the Commission's own practices. Hopefully, the Commission's response will be to further enhance the quality of its evidence in order to withstand the vigorous scrutiny of the CFI. If viewed in the context

121. Kaysersberg SA v. Commission, Case T-290/94, [1997] E.C.R. II-2137, ¶145.

122. An assumption which in itself is at the discretion of the Commission.

123. *See Kaysersberg*, Case T-290/94, [1997] ECR II-2137, ¶145.

124. *See* Royal Philips Electronics NV v. Commission, Case T-119/02, [2003] E.C.R. II-1433, ¶ 238.

125. *See id.* ¶¶ 355-66.

126. Europemballage Corp. and Continental Can Co. v. Commission, Case 6/72, [1973] E.C.R. 215.

of the Commission's newly introduced internal checks and balances, the *Tetra Laval* judgments can also be seen as an incentive for, or a warning to, the Commission to continue with and intensify its internal reform.[127]

This Article has examined some of the underlying factors that influence the application of the standards of proof and review. Ultimately, questions of proof should be addressed pragmatically, and always in conjunction with the underlying facts of each case.

The judgment in *Tetra Laval ECJ* and other recent cases appear to favor this approach. In particular, while the Courts still couch their findings in the language of "manifest error" or "requisite legal standard," the intensity of their review and the concomitant quality of evidence that the Commission will have to produce varies depending on the inherent likelihood of the anticompetitive effects alleged.

That these issues have been tested in difficult areas of merger control, such as conglomerate mergers and collective dominance, and the fact that a number of Commission decisions have been annulled, should not come as a surprise to anyone. It is precisely in these areas of law—where it is not readily apparent that a concentration would have anti-competitive effects—that the Commission must intensify its efforts to produce cogent, well-argued and complete decisions.

We can only welcome the Courts' willingness to cast a critical eye on the Commission's merger decisions, and look to the future for the beneficial effects of this approach for all involved—the Courts, the Commission, the undertakings engaging in merger activity, and ultimately, consumers.

127. The Commission has adopted certain internal reform measures to improve its decision-making, most notably it has appointed a Chief Competition Economist (Professor Lars-Hendrik Röller) and established a "devil's advocate" panel to enhance the internal review of its decisions and procedures. Both are steps in the right direction, but there is ample scope for enhancing their role, as well as for rethinking some of the proposals made in the responses to the Commission's Green Paper, which were never implemented.