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The Standard of Proof in EC
Merger Control – The Impact of
Airtours, Schneider and Tetra
Laval

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Summary

Three cases decided by the CFI, *Airtours*, *Schneider Electric* and *Tetra Laval*, along with the ECJ's judgement in the appeal of the *Tetra Laval* case, may have changed the way the Courts and the Commission approach questions of proof in the future. In these cases, the CFI did not hesitate to conclude: "*the contested decision does not establish to the requisite legal standard that the modified merger would give rise to significant anti-competitive effects.*"

The question of burden and standard of proof in EC merger proceedings has previously not received thorough attention from the legislator, the Courts or experts in the field of competition law. Indeed, the New Merger Regulation does not contain any specific provisions on the subject. Nevertheless, the four judgements signal an increasing willingness by the Courts to scrutinize the Commission and even present the possibility of the Courts substituting their opinion for the assessment of the Commission. However, the cases have also added a great deal of uncertainty as to what the new standard actually entails. It is essential for the future legal certainty that the ambiguities surrounding the standard of proof be resolved. This thesis will attempt to resolve what different standards of proof were applied in the recent judgements and how these standards may affect future merger proceedings, particularly, in light of the New Merger Regulation and the accompanying Horizontal Merger Guidelines.

The analysis will show that the standard of proof in EC Merger Control is far from clear. However, some inferences can be drawn from the four judgements analysed in this paper. *Airtours* and *Schneider* show that the Courts will be likely to use flaws in the Commission's own market investigation when overturning the Commission's predictions. Thus the judgements demonstrate the Courts being rigorous in their assessment of historic facts. Furthermore, *Tetra Laval* illustrates that the Courts will be more ready to overturn hypothetical predictions made by the Commission of the effects of a merger, which do not immediately create a change in the market structure, if they are not based on particularly strong evidence.

Furthermore, the cases illustrate uncertainty as to what standard of proof to apply in merger proceedings. I would tend to favour adopting a probability approach to the standard of proof in merger cases. As it is not really possible to prove anything, the probability approach provides a flexible way of ensuring that the standard of proof remains the same, while at the same time making it harder to prove improbable events, thus guaranteeing just outcomes based on facts and not the hypothetical predictions of the Commission. The more remote or improbable a given anti-competitive effect is, the more compelling the evidence required to prove that it will, in all likelihood, occur.

1 Introduction

1.1 Background and Purpose

Three cases decided by the Court of First Instance (CFI), *Airtours*, *Schneider Electric* and *Tetra Laval*, along with the European Court of Justice (ECJ) judgement in the appeal of the *Tetra Laval* case, may have changed the way the Courts and the Commission approach questions of proof in the future. In these cases, the CFI did not hesitate to conclude: “*the contested decision does not establish to the requisite legal standard that the modified merger would give rise to significant anti-competitive effects.*”¹

The question of burden and standard of proof in EC merger proceedings has previously not received thorough attention from the legislator, the Courts or experts in the field of competition law. Indeed, the New Merger Regulation does not contain any specific provisions on the subject. Nevertheless, the four judgements signal an increasing willingness by the Courts to scrutinize the Commission and even present the possibility of the Courts substituting their opinion for the assessment of the Commission. However, the cases have also added a great deal of uncertainty as to what the new standard actually entails. Parts of the judgements suggest that the Courts have applied different standards of proof. Consequently, “it may be the case that the standard of proof in merger cases is not uniform. On the contrary, much will depend on the merger concerned, the economic theory applied, the evidence available, and the scope for value judgement.”² Nevertheless, it is essential for the future legal certainty that the ambiguities surrounding the standard of proof be resolved. This thesis will attempt to resolve what different standards of proof were applied in the recent judgements and how these standards may affect future merger proceedings, particularly, in light of the New Merger Regulation³ and the accompanying Horizontal Merger Guidelines.⁴

1.2 Material on the Subject

Due to the absence of regulation surrounding the area prior to the recent case law developed by the EC Courts, none of the leading textbooks on competition law contains any thorough treatment of the subject. However,

¹ Case T-5/02, *Tetra Laval v. Commission* (2002) ECR II-4381, para. 336, (Henceforth: *Tetra Laval* (CFI)).

² Bailey, “Standard of proof in EC merger proceedings: A common law perspective,” C.M.L.R.; 2003, 40, p 864 (Henceforth: Bailey).

³ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (Henceforth: The New Merger Regulation).

⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2004, C31/5 (Henceforth: Horizontal Merger Guidelines).

there are a number of academic articles available on the topic. Most notably Bailey, “Standard of proof in EC merger proceedings: A common law perspective” - although written before the ECJ judgement in the appeal of the Tetra Laval case. There are also a few shorter articles available in the European Competition Law Review, but none provide an in depth analysis of the subject. Nevertheless, the opinions of both the CFI in Tetra Laval, Airtours and Schneider and the ECJ in Tetra Laval are quite exhaustive and after careful examination provide some clarifications.

1.3 Method and Delimitations

The method used consists of traditional legal research and analysis of legislation, case law and academic writings. The subject matter has been limited to deal only with substantive questions of proof in EC Merger Proceedings. Procedural questions are therefore left outside the scope of this paper and will only be mentioned when this is necessary to clarify the legal context. The paper has also been limited to focus on the recent developments provided by the four judgements. A brief outline of the case law prior to these developments is provided in Chapter 3, but will only provide a concise overview.

When conducting the analysis of Airtours and Tetra Laval I found it helpful to create tables with the various pleas, the Courts responses and my own comments in different columns. In the table for the ECJ judgement in the Tetra Laval case I have also included cross references to the CFI’s judgement for clarification. The method did provide a useful overview of the Courts reasoning surrounding the standard of proof applied in different legal contexts. I have therefore included the tables as a supplement for the benefit of the reader and references to the numbers of the different pleas in the table are provided in the footnotes dealing with each plea.

1.4 Disposition

The thesis will start by giving a general framework of the role of proof in merger proceedings. It will then briefly outline the legal position prior to the four judgements. The analysis of the four judgements will then be conducted very thoroughly in order to clarify the Courts’ standpoint and any changes in its reasoning due to the subject matter and other circumstances. The judgements will then be reconciled and analysed in light of the New Merger Regulation in order to assess the future implications of the Courts’ new standpoint. I realise reading the extracts of the Court judgements can be quite tedious. However, it is an essential part of the thesis to provide the Courts’ exact wording on the standard of proof, in order to clarify how they have approached the issue. I have attempted to reduce the amount of text as much as possible and underlined the important statements to facilitate the understanding of the Courts’ standpoint.

2 The Role of Standard of Proof in EC Merger Control

A general outline of the role of the standard of proof in EC Merger Control will here be given. In particular, it will be important to determine to what extent the role of proof is different in merger proceedings as opposed to other litigation. Generally speaking, “the standard of proof is important in at least two primary ways: first, the standard of proof may have a critical bearing on the outcome of an appeal; secondly, it is a source of guidance for both the Commission and the notifying parties. It guides them on the yardstick against which the Court will measure the legality of a Commission merger decision.”⁵ The burden and standard of proof are closely connected. This thesis will focus on the standard of proof, but the link to the burden of proof will be explained and clarified below. When the term “questions of proof” is used it refers to both standard and burden proof.

2.1 Background

The EC Courts’ unwillingness to approach questions of proof in the past is mainly the product of four factors. Firstly, the EC Courts’ position, as judicial review bodies, has limited their role in the merger process in accordance with article 230 of the EC Treaty. On matters of substance, judicial review must take account of the Commission’s margin of discretion when dealing with questions of an economic nature, such as whether a merger is compatible with the common market.⁶ The Courts have therefore been reluctant to overturn a Commission decision in the absence of a “*manifest error of assessment*.”⁷ Secondly, merger cases involve reasoning rather unfamiliar to lawyers. “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 the future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.”⁸ The different approach to facts that merger proceedings involve may thus have caused the Courts and the legislature to be hesitant in laying down precise rules regarding questions of proof and instead trust to the economic expertise of the Commission. Thirdly, “whilst accepting that the infringement must be proved to the requisite legal standard the European Court, faced with the

⁵ Bailey, p. 845.

⁶ Case T- 342/99, *Airtours v. Commission*, (2002) E.C.R. II-2585, para. 64 and *Tetra Laval* (CFI), para. 119.

⁷ *Airtours*, paras. 19-47.

⁸ Case C-12/03, *Commission v. Tetra Laval*, (2005) ECR I-00987, para. 42, (Henceforth: *Tetra Laval* (ECJ)).

different traditions of the Member States, has deliberately avoided defining the standard of proof.”⁹ The many legal cultures represented by the Court may thus have impeded the evolvement of precise legal guidelines on the subject. Fourthly, the Courts may have taken into account the tight time limits under which the Commission has to operate under both the new and the old Merger Regulations.¹⁰

These factors have contributed to the slow development of the law in this area. However, the CFI has itself highlighted the importance of laying down a precise standard of proof on several occasions. In *Dunlop Slazenger*, a case concerning an Article 81 infringement, it said: “As a preliminary point, the requirement of legal certainty, on which economic operators are entitled to rely, entails that when there is a dispute concerning the existence of infringement of competition law the Commission, which bears the burden of proving infringements which it finds, *must adduce evidence which will sufficiently establish the existence of the facts constituting the infringement.*”¹¹ Although merger cases are different from antitrust infringements, the commercial parties involved must nonetheless be able to rely on the certainty of the law.

2.2 The Concept of Proof

It is beyond the scope of this paper to give an all-inclusive presentation of the concept of proof in judicial proceedings. The standard of proof in EC merger proceedings is, in any event, largely influenced by the context in which it operates and therefore bears little resemblance to the role of proof in Court proceedings in the various Member States. The vast differences in these legal cultures have also resulted in the EC Courts developing their own concept of proof - especially in the competition field. The best guidance, on the EC Courts’ view of the role of proof, is therefore to be found in the EC case law analysed below. Nevertheless, it is useful to briefly outline the concept of proof in some national jurisdictions, in order to provide a contextual framework and a point of reference.

The standard of proof distinguishes between alleging or reasonably suspecting that something is going to happen and actually proving that, as a matter of law, it will happen. The party that bears the burden of proof must put evidence before the Court, that meets the required standard of proof, and establishes whether an event did, or would be likely to, occur. For instance, in criminal cases, it is generally for the prosecution to bear the burden of proof and it must usually prove guilt beyond a reasonable doubt or to some

⁹ Louveaux and Gilbert, “The Standard of Proof under the Competition Act” E.C.L.R. (2005) Issue 3, p. 173.

¹⁰ Art 10 (6) of of Council Regulation (EEC) No 4064/89/EEC on the control of concentrations between undertakings, (Henceforth: The Old Merger Regulation) and Art 10 (6) of the The New Merger Regulation.

¹¹ Case T-43/92, *Dunlop Slazenger v. Commission* (1994) ECR II-441, para. 79.

other comparable standard.¹² By placing the entire burden of proof on the prosecutor, the legal system attempts to prevent erroneous convictions.¹³ This shows how important the burden and standard of proof are for the general question of legal certainty and how they reflect certain values inherent in a legal system.

Since certainty is rarely attainable in resolving disputes, the law relies on probability instead. There is inevitably a degree of judgement involved in this sort of evaluation and the probability does not boil down to precise percentages in reality. Nevertheless, the law has sought to define the degree of probability appropriate for different types of proceedings. In common law systems, three main standards can be distinguished: proof beyond reasonable doubt, proof on the balance of probabilities and manifest error or unreasonable standard. There is no measurable difference or quantifiable gap between these standards, but it is possible to distinguish the varying precision required by the three standards. The balance of probabilities is a lower standard of proof than proof beyond a reasonable doubt. In essence, it means that if it is proven there is a 51% chance that an event will occur then, as a matter of law, is treated as a fact. Nevertheless, the standard is flexible. In practice, the more unlikely that a given event occurred or will occur, the stronger the evidence required to establish that it did or will occur on the balance of probabilities. The standard of manifest error is typically used in administrative law, such as that practiced by the EC Courts.¹⁴

However, the standard of proof is worded in different jurisdictions, it is common ground that the standard is higher for the prosecution in criminal cases than for the parties in a civil case. Nonetheless, in civil jurisdictions there is often not one conceptual framework for the standard of proof in civil cases. In Sweden, for instance, the relevant standard of proof is often to be found within the different rules governing a particular issue. It may thus be the case that a party disputing a will may be required to produce proof to a standard different from that of a party to a claim in contracts. There are numerous expressions regarding the standard of proof in the Swedish civil legislation. However, Ekelöf suggests using only four terms to express the varying standards: presumably, probably, established and obvious (*antagligt, sannolikt, styrkt och uppenbart*). In case a particular rule does not express the level of proof required by a party, Ekelöf suggests the Courts should be guided by the purpose of the legislation and apply a standard of proof that best fulfils this purpose.¹⁵ Indeed, the introduction of EC legislation on the national arena has added another field of law where the appropriate standard of proof needs to be established. In civil cases stemming from EC antitrust regulation, one of the most contentious topics

¹² Bailey, p.848-849 and see also the Swedish Supreme Court case NJA 1980 s.738.

¹³ Per Olof Ekelöf, *Rättegång – Fjärde Häftet*, 6th edition, Norstedts Juridik, 1992, p. 113 (Henceforth: Ekelöf).

¹⁴ Bailey, p. 851-853.

¹⁵ Ekelöf, p. 69-70 and 86.

concern the proper standard of proof to apply.¹⁶ It is obvious that there are as many theories of the standard of proof within the EC as there are jurisdictions (if not more) and, as mentioned above, this may be one of the reasons for the EC Courts' hesitation in laying down precise rules concerning this issue. However, the recent judgements suggest a need for clear principles - to guide both the Commission and the merging parties. We now move on to how the EC Courts have grappled with these questions.

2.3 Proof in EC Merger Control

The ground for allowing or prohibiting a merger within the EC can be found in Article 2 (2) and (3) of both the New and the Old Merger Regulations. The possible implications of the new wording of the article will be dealt with in Chapter 6. What is important for present purposes is the fact that both the new and old versions of the article consist of two provisions explaining the opposite sides of the same legal effect. That is, article 2(2) of the Old Merger Regulation provides that a merger should be allowed if it “does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market.” Article 2(3) then provides the flipside of this coin: “a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it should be declared incompatible with the common market.”

There has been considerable debate as to whether Article 2 provides that the burden of proof in EC merger proceedings is equal. That is, if the merging entities have an equally large obligation to show the merger to be lawful as the Commission has to show the merger to be unlawful. Indeed, in its appeal to the ECJ in *Tetra Laval*, the Commission complained that the CFI had applied the provision contrary to its perfectly symmetrical legal requirements.¹⁷ However, the proceeding analysis of the cases will show that the Courts do not support a perfect symmetry and I for one do not see how such an approach would be possible to apply in practice.¹⁸ As AG Tizzano notes in his opinion in *Tetra Laval*: “By stipulating that, if the Commission does not make a decision in good time, the concentration must be deemed authorised, the Community legislature demonstrates as a matter of fact that it considers that, in the case of uncertainty as to whether or not the transaction is compatible with the common market, the interest of the undertakings seeking to make the merger must prevail.”¹⁹ The burden of proof thus lies on the Commission to prove that the two conditions in

¹⁶ Torbjörn Andersson, *Dispositionsprincipen och EG's Konkurrensregler*, Iustus Förlag, 1999, p. 162.

¹⁷ *Tetra Laval* (ECJ), para. 29.

¹⁸ See for instance *Tetra Laval* (ECJ), para. 41 referring to *Tetra Laval* (CFI), para. 155 and *Airtours*, para. 63, requiring the Commission to provide sufficient evidence to convince the Court.

¹⁹ Opinion of AG Tizzano in *Tetra Laval*, ECR 2005 p. I-00987, para. 67, referring to article 10(6) of the Old Merger Regulation.

Article 2 (3), of the both the New and the Old Merger Regulation, have been met. However, this says nothing of the standard of proof it must fulfil in order to satisfy this burden. It is this standard that the EC Courts have grappled with in the recent judgements.

The provision governing the role of judicial review in EC merger proceedings is article 230 of the EC Treaty. This provision technically only provides four limited grounds for judicial review: lack of jurisdiction, procedural error, error of law and misuse of power. However, Sir Christopher Bellamy QC, when United Kingdom Judge in the CFI, explained three further grounds of review added by case law: error of fact, error of appreciation and absence of reasoning. He also added: “on the primary facts I think that one can say that there is now quite a place for judicial control of whether or not the facts are proved to the requisite legal standard. We are somewhat coy about exactly what the relevant standard is; it is not really defined yet in the case law. But in practice, it is something quite close to proof beyond reasonable doubt.”²⁰ However, Sir Christopher Bellamy here only refers to the primary facts and does not mean to include an explanation of the standard of proof required of the Commissions’ economic assessment. On matters of substance, judicial review traditionally has had to take account of the Commission’s margin of discretion when dealing with questions of an economic nature, such as whether a merger is compatible with the common market.²¹

The rather vague concept of requisite legal standard has been used in both antitrust enforcement and merger control.²² However, merger cases are different from antitrust infringements and very peculiar from a legal standpoint, as they are not concerned with what has happened but rather what may occur in the future. “While better evidence is always desirable, refining or raising the standard of proof in merger cases glosses over a second difficulty – that often the results of a merger are not susceptible to proof one way or another.”²³ This is inherent in the fact that one cannot prove that a certain event may take place in the future. “The issue in merger cases is not whether an event happened. Instead, the issue is establishing what effect a merger is likely to have on a given market. Applying the ECMR therefore involves an evaluation of the degree of likelihood that a merger will be incompatible with the common market in the future, and whether that likelihood has been established to some standard of proof. This evaluation inevitably involves a certain amount of judgement and is one of the reasons why the Community Courts have traditionally left a margin to the Commission’s assessment.”²⁴

²⁰ Sir Bellamy QC, Antitrust and the Courts Roundtable, in Fordham Annual Antitrust Conference 369, 389 (1999) in Mark Clough, “The Role of Judicial Review in Merger Control” *Northwestern Journal of International Law & Business*; Spring 2004; 24,3 p. 729 (Henceforth: Clough).

²¹ Case T-102/96, *Gencor v. Commission*, (1999) ECR II-753, paras. 164 and 165.

²² Cases T-7/89 *Hercules v. Commission* (1991) ECR II-1711, para. 59 and *Airtours*, para. 294.

²³ Howarth, “Tetra Laval/Sidel: Microeconomics or Microlaw?” *E.C.L.R.*; 2005, issue 7, p.371 (Henceforth: Howarth).

²⁴ Bailey p.860.

3 The legal position prior to Airtours, Schneider and Tetra Laval

In order to assess the impact of the Courts decisions in Tetra Laval, Airtours and Schneider, a brief outline of the case-law prior to these judgements will be provided. An early case concerning the standard of proof was the ECJ's decision in *France v. Commission*, a case regarding the validity of the Commission's finding of collective dominance between Kali und Salz and SCPA in the potasch market. The ECJ held that the Commission's decision was not "sufficiently well-founded" to prove conclusively the existence of a collective dominant position. The Court stated that: "the Commission's finding that the holding of Kali & Salz and SCPA in the Kali-Export cartel may have an impact on their competitive behaviour in the Community would not appear to be supported by a sufficiently cogent and consistent body of evidence... it would appear that the Commission *has not established to the necessary legal standard* the existence of a casual link between Kali & Salz and SCPA's membership of the export cartel and their anticompetitive behaviour on the relevant market."²⁵ The standard of a cogent and consistent body of evidence established in this case was later cited by the Commission, in its appeal to the ECJ in *Tetra Laval*, as describing the correct standard of proof to be applied in EC merger proceedings.²⁶

Another example of the Courts' previous approach to questions of proof concerns an article 82 infringement, but gives a clear indication of how the Courts previously viewed their role when deciding competition cases that came before them. In the *Italian Flat Glass Case*, the CFI held: "the Court considers that, although a Community Court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that *does not mean that it has jurisdiction to remake the contested decision...*" and "*the Court considers that it is not for itself ... to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition.*"²⁷ In the case of *RJB Mining*, the CFI held that its review would be confined to establishing whether the Commission had "*manifestly erred*" in its application of the merger provisions. It went on to say that the term "*manifest*" should be understood to mean that: "*the failure to observe legal provisions is so*

²⁵ Case C-68/94 *France v. Commission* (1998) ECR I-1375, at para. 228, (Henceforth: *Kali & Salz*).

²⁶ *Tetra Laval* (ECJ), paras. 26-27.

²⁷ Case T-68/89, *Societa Italiano Vetro v. Commission* (1992) ECR II-1403, at paras. 319-320.

*serious that it appears to arise from an obvious error of evaluation.*²⁸ Indeed, in its appeal to the ECJ in *Tetra Laval*, the Commission maintained that the CFI was wrong in going beyond assessing whether the Commission had committed a manifest error and instead required it produce convincing evidence.²⁹

Furthermore, in the 1996 case of *Gencor*, Bailey notes that the CFI responded to the applicant's challenges in two ways. "First, on a number of occasions the Court found that the applicant had not adduced the necessary proof to vindicate its assertions or disprove the Commission's analysis."³⁰ Secondly, the CFI considered whether the Commission had taken due account of the points raised by the applicant and given proper reasons in its decisions.³¹ The overall conclusion of the Court was that the Commission neither erred in law *nor manifestly erred in its assessment*.³² The *Gencor* judgement seems to suggest that the standard of proof previously applied by the CFI refers to the following propositions:

- did the Commission take into account a legally irrelevant factor?
- or fail to take into account a legally relevant factor?
- was the Commission's decision vitiated by insufficient or erroneous reasoning, thereby constituting an infringement of Article 253 EC?
- Was the Commission's decision one which no reasonable body could have reached?³³

The case law prior to the judgements in *Airtours*, *Tetra Laval* and *Schneider*, show the EC Courts being very hesitant in overturning the Commissions findings. The judicial review has been limited to determining if the Commission's decision is based on sufficiently cogent and consistent evidence and whether or not the Commission committed a manifest error in its assessment. Furthermore, the previous case law never shows the Courts replacing the Commission's conclusions with its own.

²⁸ Case T-156/98, *RJB Mining plc v. Commission*, (2001) ECR II-337, at para. 87.

²⁹ *Tetra Laval* (ECJ), para. 27.

³⁰ *Gencor*, paras. 234, 283, 290.

³¹ referring to *Gencor*, paras. 245, 261, 288, 295.

³² Bailey, p. 862.

³³ Bailey, p. 863.

4 The Judgements in Airtours, Schneider and Tetra Laval

It is important to conduct a thorough analysis of the cases in order to determine what the new legal position actually entails. Indeed some of the remarks in the cases imply that the new standard of proof adopted by the Courts may have a limited field of application. The case of Tetra Laval, for instance, was concerned with the special situation of a conglomerate merger. Furthermore, there are implications from the Courts in the judgements that the standard of proof may vary depending on the subject matter being dealt with. It may be the case, for instance, that a different degree of proof is required when the Commission is attempting to establish what has actually occurred as opposed to establishing the likelihood of an event occurring in the future. The ECJ was unfortunately not entirely clear regarding possible differences in the standard of proof, but its reasoning in Tetra Laval can be compared to that of the CFI in Airtours and Schneider in order to attempt to clarify the current legal position (or absence thereof).

4.1 The Airtours Judgement

The Commissions' decision to block the merger between Airtours and First Choice, on the ground that the merger would create a collective dominant position between the three largest short-haul package holiday companies in the U.K, was overturned by the CFI on June 6, 2002. This was the first case in which the CFI overturned a negative Commission Decision under the ECMR.

In its first plea, Airtours complained the Commission had departed from previous practice in its separation of the markets into one for long haul and one for short haul package holidays. The Court described this plea as an error in law.³⁴ The Court noted that the Commission had taken account of a number of factors in defining the relevant product market while at the same time acknowledging evidence to the contrary presented by Airtours.³⁵ The Court found that the Commission had not exceeded its discretion: "The fact that the Commission did not consider decisive (i) changing consumer tastes (ii) the growing importance of substitutability between long-haul package holidays to destinations such as Florida and the Dominican Republic, and short-haul packages or (iii) the growth of the market for long-haul packages over recent years *is not sufficient to support a finding that the Commission exceeded the bounds of its discretion* in concluding that short-haul package holidays are not within the same product market as long-haul packages."³⁶

³⁴ *Airtours*, para. 21, (Table nr: 1).

³⁵ *Ibid.* para. 25.

³⁶ *Ibid.* para. 44.

In this instance the Court seemed to take a restricted view of its role in judicial review, by merely acknowledging that the Commission had taken account of Airtours' arguments and not questioning the Commission's assessment. The Court also found the Commission reasoning sufficient: "the Decision discloses, in a clear and unequivocal fashion, the Commission's reasoning relating to the definition of the relevant market, in such a way as to enable the Community Courts to exercise their power of review."³⁷

The second and third plea were assessed as one and concerned infringement of article 2 of The Old Merger Regulation, in that the Commission erroneously found the concentration would create a collective dominant position, and violation of the duty to state reasons, as required by Article 253 of the EC Treaty. In order for a concentration to be prohibited according to the Old Merger Regulation, the Court noted that it must create or strengthen a dominant position which would significantly and lastingly impede competition.³⁸

Regarding the burden of proof, the Court noted that it is up to the Commission to convince the Court: "As the Commission itself has emphasized, it is also apparent from the judgement in *Kali & Salz* that, *where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof.* The evidence must concern, in particular, significant factors, such as, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators."³⁹ The Court then confirms the Commission's implicit margin of discretion: "Furthermore, the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confers on the Commission a *certain discretion, especially with respect to assessments of an economic nature.*"⁴⁰

So far the Court seems to follow its previous precedents and not engage in a substantial review of the Commission's findings. However, according to Bailey; "whilst the wording of the requisite legal standard has remained the same in *Airtours*, *Schneider Electric* and *Tetra Laval*, the CFI's application of that standard appears to tell a different story from the one described above. The judgements may be interpreted to indicate a departure from the way the standard of proof has been applied in previous cases."⁴¹

Airtours claimed the Commission had not showed that the three remaining tour operators would have an incentive to cease competing with each other after the merger, and even if so, the absence of any deterrents would prevent

³⁷ Ibid. para. 47, referring to the Commission's Decision, paras. 5-28, (Table nr: 2).

³⁸ Ibid. para. 58, referring to *Kali & Salz* paras. 78-79 and *Gencor*, paras. 94, 170, 180 193.

³⁹ Ibid. para. 63 referring to para. 104 of Commission decision of 20 May 1998 *Price Waterhouse/Coopers & Lybrand* (case IV/M.1016 (OJ 1999 L 50, p. 27)).

⁴⁰ Ibid. para. 64, (Table nr: 3).

⁴¹ Bailey, p. 846.

the emergence of a dominant oligopoly.⁴² Airtours first contested the Commission's argument, that the ways in which the market previously operated and the fact that competition was effective in the past, were not significant factors.⁴³ The Court sided against the Commission's standpoint on this question of law: "one of the questions which the Commission is required to address where there is alleged to be collective dominance is whether the concentration referred to it would result in effective competition in the relevant market being significantly impeded. If there is no significant change in the level of competition obtaining previously, the merger should be approved because it does not restrict competition. *It follows that the level of competition obtaining in the relevant market at the time when the transaction is notified is a decisive factor.*"⁴⁴

However, the Commission nevertheless challenged the arguments Airtours made regarding the competitiveness of the market. The Commission tried to show that a tendency towards collective dominance existed prior to the proposed merger and gave a planning error made by all the large tour operators in 1994, as an example of the consequences of oversupply in the market. However, the CFI noted that the Commission's decision acknowledged that cautious capacity planning was a feature of the relevant market.⁴⁵ "In those circumstances and as the Commission has not denied that the relevant market was competitive prior to the notification (in particular at the time of the 1995 crisis), the episode which occurred in that year and to which the Decision attaches great weight *cannot, as such, constitute evidence that a tendency towards collective dominance already existed in the industry.*"⁴⁶ The CFI thus found that the Decision in this case was not supported by sufficient evidence and that parts of it were inconsistent with the conclusions reached by the Commission.

The Commission's argument that the package holiday market had changed, since a 1997 report by the UK Monopolies and Mergers Commission had found it highly competitive, was also challenged by the Court. It found the horizontal and vertical integration, that had occurred on the market since the report was published, "*less significant than the Commission alleges.*"⁴⁷ The Court instead proceeded to make its own assessment of the horizontal integration: "it is apparent from the documents before the Court that the development, between 1996 and 1999, of the market shares of Thomson, Airtours and First Choice *does not prove that their shares of the short-haul market have increased significantly.*"⁴⁸ In this instance the Court did not agree with the Commission's evaluation of the evidence. However, it did not make a prediction of possible future events, but merely assessed the historic market developments. In addition, the Court found the

⁴² *Airtours*, para. 70-73.

⁴³ *Ibid.* para. 79-81, (Table nr: 4).

⁴⁴ *Ibid.* para. 82.

⁴⁵ *Ibid.* para. 83-88, (Table nr: 5).

⁴⁶ *Ibid.* para. 89.

⁴⁷ *Ibid.* para. 101, (Table nr: 6).

⁴⁸ *Ibid.* para. 102, (Table nr: 7).

Commission's contention that the vertical integration was further evidence of collective dominance to be inconsistent, because the Decision was based at the same time on the premise that a strategy of vertical integration is necessary in order to compete with the large tour operators.⁴⁹ In this instance, evidence to the contrary was not presented by Airtours, but the Court did not hesitate to use inconsistencies in the Commission's own decision to strike down the Commission's findings.

When assessing the volatility of historic market shares – important for the development of tacit collusion – the Commission was of the opinion that growth by acquisition should be ignored. It argued that the quota to be allocated to each member of the presumed oligopoly could be calculated by simply adding the market shares of the purchaser and the target.⁵⁰ However, the Court again made reference to inconsistent statements in the Commission's own decision, which suggested that an acquisition by one of the major operators resulted, not in the mathematical addition of the market shares of the purchaser and the target, but in a temporary loss of market share. Consequently, it believed growth by acquisitions should be included in the assessment of the historic volatility of the market.⁵¹ Even though the Court refers to evidence put forward by the Commission itself, it is clear that the two bodies disagree as to what effect that information has on the economic assessment.

The Court then turned to the findings on low demand growth. It held that: “the Commission's findings are based on an incomplete and incorrect assessment of the data submitted to it during the administrative procedure.”⁵² The Court found that the Commission had construed a document, which it relied upon, without regard to its actual wording and overall purpose. In addition, the Commission was found to have failed to take account of data relating to demand growth for the two years preceding the notification.⁵³ In this case, the Court finds that the Commission failed to provide any meaningful evidence and thus committed a manifest error of assessment.

With regard to demand volatility, the Court first concluded that it was indeed higher than the Commission had found.⁵⁴ It then turned to the Commission's assessment of the impact of demand volatility: “the Commission is not entitled to rely on the fact that tour operators, to protect themselves against sudden downward volatility in demand, plan capacity cautiously, preferring to increase it later if demand proves to be particularly strong, for the purposes of denying the relevance in this instance of a factor which is significant as evidence of oligopolistic dominance, such as the degree of market stability and predictability... Furthermore, the

⁴⁹ Ibid. para. 105, (Table nr: 8).

⁵⁰ Ibid. para. 110-111, (Table nr: 9).

⁵¹ Ibid. para. 114-116.

⁵² Ibid. para. 127, (Table nr: 10).

⁵³ Ibid. para. 128-131.

⁵⁴ Ibid. para. 140, (Table nr: 11).

Commission did not regard either the operators' caution or demand volatility to be restrictive of competition in the pre-merger market. *Caution cannot therefore be interpreted, as such, as evidence of a collective dominant position* rather than as a characteristic of a competitive market of the kind that existed at the time of the notification."⁵⁵ The Court thus not only disputed the evidence put forward by the Commission, but also called into question the economic assessment of that evidence by not allowing the Commission to rely on the caution of the operators. It was not the factual groundwork that was disputed by the Court, but rather the effect that the facts would be allowed to have on the economic assessment.

In its assessment of the market transparency, the Court noted that it is necessary to consider whether, in practice, at the time when total capacity is set, each member of the oligopoly can ascertain the overall level of capacity offered by the individual tour operators. The Commission alleged that each of the four integrated operators is well able to monitor the total amount of holidays offered by each of the others and that changes made by each individual operator at that stage may be identified by the other major tour operators as a result of their dealings with hotels or their discussions about seat requirements.⁵⁶ However, the Court found that: "*the Commission fails to prove those allegations.*"⁵⁷ It notes that it cannot be ascertained from the Decision how much information an integrated tour operator may obtain by virtue of the fact that several such operators may be in contact with the same hotels or by discussing airline seat requirements with one another.⁵⁸ Nevertheless, the Court does not stop at merely concluding the lack of supporting evidence in the Commission's Decision, but rather goes on to explain why it finds the position put forward by Airtours more feasible.⁵⁹ The Court concludes: "It follows from the foregoing that *the Commission made errors of assessment when it concluded that if the transaction were to proceed, the three major tour operators remaining after the merger would have an incentive to cease competing with one another.*"⁶⁰

The Court then turns to the allegedly inadequate nature of the deterrents which the Commission alleges will secure unity within the supposed dominant oligopoly. The fact that there is scope for retaliation goes some way to ensuring that the members of the oligopoly do not in the long run break ranks by deterring each of them from departing from the common course of conduct. The Court defines the standard of proof as follows: "*the Commission must not necessarily prove that there is a specific retaliation mechanism involving a degree of severity, but must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of*

⁵⁵ Ibid. para. 142.

⁵⁶ Ibid. paras. 170-171, (Table nr: 12).

⁵⁷ Ibid. para. 172.

⁵⁸ Ibid. paras. 173-175.

⁵⁹ Ibid. paras. 175-180.

⁶⁰ Ibid. para. 182.

conduct to the detriment of the other oligopolists.”⁶¹ This is a rather vague statement by the Court as it says the Commission must not “prove”, but that it must “establish” that a retaliation mechanism exists. The fact that the Commission must establish something is actually another way of saying it must prove this but the Court does not clarify what standard of proof is required. It then notes that: “the characteristics of the relevant market and the way that it functions make it more difficult for retaliatory measures to be implemented quickly and effectively enough for them to act as adequate deterrents.”⁶² The Commission thus had not established that sufficient deterrents existed and the Court actually found the market characteristics directly unresponsive of the Commission’s view.

The estimation of the likely reaction of smaller tour operators, potential competitors and consumers as a counterbalance was then examined. “The Court observes in limine that, *to prove conclusively the existence of a collective dominant position in this instance, the Commission should also have established that the foreseeable reactions of current and future competitors and consumers would not jeopardize the results expected from the large tour operators’ common policy.*”⁶³ Regarding the possible response of smaller tour operators, the Court came to the following conclusion: “The Commission’s arguments seeking to stress the difficulties that smaller tour operators have in reaching the minimum size at which they are capable of competing effectively with the four large operators *are thus immaterial to an assessment* of the ability of smaller operators and new entrants to increase capacity in order to take advantage of the opportunities afforded by product shortages.”⁶⁴ The Court noted that Airtours had provided several examples of small tour operators putting on extra capacity, without challenge from the Commission.⁶⁵

Concerning the Commission’s response to Airtours contention that Cosmos should be seen as likely future competitors, the Court notes that: “the Commission is not entitled to rely on the fact that Cosmos currently tends to favor the large tour operators over the small ones as regards sales of airline seats in order to establish that, were capacity restricted to below a competitive level, Cosmos would not put its own interests above those of the members of the alleged dominant oligopoly.”⁶⁶ The Court thus places weight on the ability of the smaller competitors to pick up any surplus demand and not, as the Commission does, on their ability to compete full out with the dominant firms. The Commission was in this instance not allowed to rely on current behavior in order to support its findings regarding possible future behavior. This seems to be a correct approach in the current circumstances, as there is nothing to suggest that Cosmos would continue its behavior if the dominant firms were to earn super competitive profits. As

⁶¹ Ibid. para. 195, (Table nr: 13).

⁶² Ibid. para. 197, (Table nr: 14).

⁶³ Ibid. para. 210, (Table nr: 15).

⁶⁴ Ibid. para. 214, (Table nr: 16).

⁶⁵ Ibid. para. 218.

⁶⁶ Ibid. para. 223, (Table nr: 17).

the Court has already noted, there was no collective dominant position prior to the notification of the merger. However, it is a clear example of the Court substituting its view for that of the Commission of the likely future effect of the merger.

The Court then observes that after the merger the three large tour operators as a whole would supply less than half of the airline seats supplied to third parties. Furthermore it states: “*there is no evidence that the situation would be substantially altered as a result of the concentration*, contrary to the Commission’s contention that the merged entity consisting of the applicant and First choice would be likely to further rationalize airline seats and that the small operators’ problems would be exacerbated by a reduction in the number of seats available.”⁶⁷ The Court accepted Airtours’ submission that the small tour operators may obtain airline seats for a season from four sources: overseas carriers; scheduled airlines; low cost carriers; independent charter airlines based in the UK.⁶⁸ It found that: “*the arguments put forward by the Commission to show that those sources of supply are not viable are not persuasive.*”⁶⁹ For instance, regarding overseas carriers, the Court held: “the Commission’s argument that aircraft used by overseas carriers must usually fly to the UK in the morning and return in the evening, which is inconvenient for consumers, has no factual basis, since the average flight time to a European destination is about two hours.”⁷⁰ In this instance, the Court conducts an evaluation of the evidence from both parties and sides against the Commission. Nonetheless, it is also a clear example of the Court overturning the Commission’s economic predictions and substituting them for its own, on the basis of factual errors.

The Court then went on to consider whether tour operators in other countries of the Community or in the UK long-haul foreign package holiday would be capable of entering the UK short-haul foreign package holiday market if capacity were to be restricted. The Court again refers to the MMC report, which suggests that barriers to entry are relatively low and the Commission’s own decision, admitting that a collective dominant position cannot be sustained if barriers to entry are insignificant.⁷¹ The Court also found that consumers are able react to a rise in prices even though they act in isolation, and that the Commission thus had underestimated the role of the UK consumers, who are in a position to try to obtain better prices from small tour operators.⁷² Barriers to entry and consumer preferences are certainly areas requiring an economic assessment. It is therefore noteworthy that the Court makes its own assessment of the evidence and reaches an entirely different conclusion than the Commission.

⁶⁷ Ibid. para. 232, (Table nr: 18).

⁶⁸ Ibid. para. 234.

⁶⁹ Ibid. para. 235.

⁷⁰ Ibid. para. 239.

⁷¹ Ibid. para. 262-264, (Table nr: 19).

⁷² Ibid. para. 274-275.

Regarding the assessment of the impact of the transaction, the Court first noted that even though the transaction would result in increased concentration, the Commission did not regard the fact that the combined market share was already high (above 80%) as sufficient to establish that there was a collective dominant position.⁷³ Concerning the appraisal of whether a collective dominant position might be created, the Court held that: “the assessment of the foreseeable impact of the operation on other competitors in the market must ascertain whether those competitors would be in a position to challenge the stability of the alleged dominant oligopoly. *The Court has found that the Commission did not prove that they would be incapable of doing so.*”⁷⁴ In response to the Commission’s assertion that the purchase of airline seats between the major operators constituted commercial links, the Court noted: “*As the Commission has not provided evidence to the contrary, there must be a presumption that the conditions obtaining in the relevant market prior to the concentration the fact that each integrated tour operator buys airline seats from, and sells its products to , companies owned by a competitor no more constitutes evidence of interdependence than it does independence.*”⁷⁵

The Court concluded: “In the light of the foregoing, the Court concludes that the 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.*”⁷⁶

4.2 The Schneider Judgement

The case concerns the merger between Schneider, a company engaged in the manufacture and sale of products and systems in the electrical distribution, industrial control and automation sectors, and Legrand, a company specialised in the manufacture and sale of electrical equipment for low voltage installations. The industrial sector affected by the concentration consists of low voltage electrical equipment, in particular switchboards and their components. Wholesalers buy the electrical equipment from Schneider and Legrand, assemblers put together the equipment to fit the customers needs and installation engineers fit the switchboards at the end-users premises.⁷⁷

“In the general analysis set out between recitals 489 and 520, the Commission emphasises the low price sensitivity of demand for low-voltage electrical equipment. Consequently, an overall rise in the price of electrical equipment would have little, or indeed no, effect on demand. The Commission also considers that installation engineers and switchboard

⁷³ Ibid. para. 279.

⁷⁴ Ibid. para. 280, (Table nr: 20).

⁷⁵ Ibid. para. 289, (Table nr: 1).

⁷⁶ Ibid. para. 294.

⁷⁷ *Schneider*, paras. 13-14, 42 and 50-53.

assemblers show significant loyalty to their manufacturer's brand and do not readily desert that manufacturer even if they are offered lower prices by competing producers. The Commission makes clear, however, that such brand loyalty is not absolute... Where, because the brand is one of the main factors which determine electricians' choices, a particular brand represents a significant barrier to market entry or diversification by manufacturers on other sectoral markets, the extent of the product range is, in the Commission's view, a further factor in the manufacturer's success.”⁷⁸

“In the Commission's view, the merged entity will become an irresistible force in the distribution of the products concerned owing to its ability to reinforce its current market positions, at the expense of its competitors, owing to its unrivalled geographic coverage, its privileged relations with wholesalers, its unequalled product range and its incomparable variety of brands. Given the atomised nature of demand from switchboard assemblers and installation engineers and their loyalty to the best-known brands, the new group will be in a position to impose price rises, without their effect being negated by corresponding losses in market share (recitals 592 and 688). The Commission concludes that the transaction is likely to have a particularly acute effect on the price of panel-boards (recital 612), cableways (recital 641) and ultra terminal electrical equipment (recital 688).”⁷⁹

By its second plea, Schneider argues that the Commission committed manifest errors in its appraisal of the impact of the concentration and of the commitments submitted by Schneider in order to render the transaction compatible with the common market.⁸⁰ This plea is in turn divided into several parts and the first concerns the price elasticity of demand. The point on which the Commission and Schneider disagree is the price sensitivity of demand *vis-à-vis* each manufacturer, which is actually one and the same as the issue of purchasers' loyalty to manufacturers' brands. “Second, Schneider submits that the Commission cannot, without being inconsistent, find that the high degree of brand loyalty of switchboard assemblers and installation engineers puts competitors in a better position to withstand the concentration and at the same time find that such brand loyalty none the less represents a significant barrier to market entry which should be taken into account for the purposes of analysing the anti-competitive effects of the transaction.”⁸¹

Schneider argues that the increased sale of items being promoted shows that switchboard assemblers and installation engineers change brands quickly when the prices change.⁸² However, the Court finds this insufficient to disprove the Commission's conclusions: “In those circumstances, the increase in certain manufacturers' sales of promotion items - on the

⁷⁸ Ibid. paras. 117-120.

⁷⁹ Ibid. paras. 124-126.

⁸⁰ Ibid. para. 73.

⁸¹ Ibid. para. 130 and 132.

⁸² Ibid. para. 13.

assumption that it was to the detriment of competitors - *does not seem, in itself, to be capable of affecting what the Commission found to be the significant brand loyalty of switchboard assemblers and installation engineers.* In fact, it is not inconceivable that the increase in sales of products promoted by the manufacturers can be accounted for by wholesalers.”⁸³ Accordingly, Schneider had “*not shown*” that the Commission was wrong in using price sensitivity of overall demand for low-voltage electrical equipment instead of relying on cross elasticity of demand. Regarding the alleged inconsistencies in the Commission’s analysis, the Court finds that penetration of a national sectoral market may prove difficult for a new competitor due to the brand loyalty. Furthermore, that this is not inconsistent with the fact that brand loyalty may also be a factor which puts a manufacturer already present on the market in a better position to withstand the impact of the concentration.⁸⁴

In its third plea, Schneider alleges that the Commission overestimated the strength of the merged entity. Schneider found that: “the Commission cannot complain that the future entity would become the unchallenged European leader, whilst the strict national definition of the markets which it had undertaken shows, on the contrary, the narrow geographic limits of the competition problems identified.”⁸⁵ The Court goes on to explain the factors which the Commission relied upon to conclude that there were national markets for distribution and final panel-board components. It also noted that the Commission’s findings regarding the strengthening of the entity’s dominant position on the national markets were in part based on the positions held by the merged entity outside those markets, inasmuch as the Commission took account of its unrivalled geographic coverage.⁸⁶ However, the Court finds the Commission’s use of considerations outside the national markets unsubstantiated: “the creation or strengthening of a dominant position on national sectoral markets could, in this instance, *be apprehended only on the basis of evidence of economic power relating to those markets, possibly supplemented by a consideration of transnational effects, assuming such effects should be shown to exist in the present case.* However, that is not the position.”⁸⁷

After reviewing the Commissions’ own findings on the market for switchboard components and ultraterminal equipment, the Court concludes: “the transaction, as the documentary material in the Decision itself shows, in reality poses competition problems only in France and on six other national markets. Admittedly, as pointed out at paragraph 171 above, it is in principle open to the Commission to take account of transnational effects which may increase the impact which a concentration has on each of the national sectoral markets deemed relevant. *Those effects may not be presumed to exist, however: on the contrary, the Commission must provide*

⁸³ Ibid. para. 138-139.

⁸⁴ Ibid. paras. 142-144.

⁸⁵ Ibid. para. 150.

⁸⁶ Ibid. para. 156-164.

⁸⁷ Ibid. para. 171.

sufficient evidence that they do. It must be pointed out that, in order to provide evidence of the competition problems which would arise on the sectoral markets affected by the concentration and referred to at recitals 782 and 783, *the Commission focused exclusively on the power which the merged entity would have on all the other national sectoral markets in Table 30, without weighing that power against the competitive strength of its competitors on those markets.* None of those competitors features in Table 30.”⁸⁸ The Court thus finds the Commission’s analysis to be based on insufficient evidence. The Court’s, by now familiar, criticism of the Commission’s failure to take account of the entity’s competitors stands out in this respect. Furthermore, the Court does not accept the Commission’s method of establishing dominance on the national markets, simply by referring to the entity’s dominant position on the European level, without sufficient evidence to show that these transnational effects exist.

The Court goes on to review the assessment of the impact of the merger and, in referring to the table showing the different national markets affected, it finds: “Nor does Table 30 indicate whether the strength attributed to the merged entity on each of the national markets listed would result from the transaction or from the presence on those markets, prior to the transaction, of one or other of the notifying parties.”⁸⁹ The Court thus requires the Commission to provide a thorough analysis of the market prior to the merger in order to assess the impact of the transaction. In particular, the Commission must show that it is the merger that gives rise to competition problems. In conclusion, the Court finds the Commission’s analysis of the merged entity’s geographic coverage to be an incorrect application of Article 2(3) of the Old Merger Regulation.⁹⁰

In its fourth plea, Schneider alleges inconsistencies in the analysis of the structure of competition at wholesaler level. The Court starts by noting that the Commission’s general analysis of the relative strength of manufacturers and wholesalers was insufficient and that it should have conducted a country-by-country assessment⁹¹. Furthermore, it notes: “*the examination carried out by the Commission does not prove that the new entity would be an unavoidable trading partner for wholesalers nor that they would be incapable of exercising any competitive restraints on it.*”⁹²

The Court notes: “First, it does not appear that the Commission's method of gauging the wide variations which it found in the extent to which distribution was concentrated on the various national markets *provided a sufficiently reliable basis for the conclusions it reached about the relative strengths of manufacturers and wholesalers.*”⁹³ To make its point, the Court shows that the Commission’s finding, that the structure of distribution in

⁸⁸ Ibid. paras. 177-181.

⁸⁹ Ibid. para. 183.

⁹⁰ Ibid. para. 191.

⁹¹ Ibid. para. 197.

⁹² Ibid. para. 198.

⁹³ Ibid. para. 199.

Portugal is divided, is flawed - seeing that two wholesalers have 40% of the market.⁹⁴ Furthermore, the Court finds the Commission's conclusion that in countries where the distribution is not concentrated wholesalers have little room to exert competitive pressure on the manufacturers, to be inconsistent with other parts of the Decision. The Court finds several parts of the Commission's Decision referring to internal documents produced by Legrand showing competition to be fierce in markets with many distributors.⁹⁵ It thus concludes: "contrary to the Commission's contention at recital 581, it cannot be taken as proved that the merged entity would be an unavoidable trading partner for the wholesalers"⁹⁶

The Court also finds it impossible to assess whether the national wholesalers will find the merged entity an irresistible force, as the Commission does not provide any indication of how distribution of low-voltage equipment as a whole is concentrated nationally.⁹⁷ It goes on: "The 30 to 40% bracket sales of low-voltage electrical equipment by wholesaler [A] (4) in Italy attributed to the Schneider-Legrand group in Table 31 is not an adequate basis for an accurate assessment of the economic power which that group will have vis-à-vis distributors in that country."⁹⁸ This is seemingly a traditional review of the evidence by the CFI. It reviews the facts and the Commission's own Decision to see if the Commission's findings are based on a consistent and coherent body of evidence. In conclusion, it finds that "neither the fact that the merged entity will be an unavoidable trading partner for wholesalers nor their inability to exercise competitive constraints on it have been properly demonstrated."⁹⁹ Nevertheless, the Court in this instance does overturn a future prediction made by the Commission, albeit, by finding the factual basis flawed.

The Court's analysis of the remaining pleas follows a similar pattern to the one described above. The Fifth plea alleges errors in the analysis of the impact of the concentration on the various national sectoral markets. The Court again finds the Commission's analysis to be based on general facts, which are not specific enough to support its conclusions: "It is clear that its hypothetical approach led the Commission to overestimate the new group's power on certain of the national sectoral markets affected by the transaction."¹⁰⁰ For instance, the Commission mistakenly took into account the entire range of products throughout the EEA for the purpose of assessing the entity's economic power on each of the national markets.¹⁰¹ The sixth plea alleges manifest errors of assessment in the analysis of the impact of the concentration on certain national markets for panel-board components. After reviewing the Commission's analysis, the Court again finds the Commission's assessment of the pressure exerted by competitors

⁹⁴ Ibid. para. 201.

⁹⁵ Ibid. para. 203-207.

⁹⁶ Ibid. para. 208.

⁹⁷ Ibid. para. 218.

⁹⁸ Ibid. para. 220.

⁹⁹ Ibid. para. 230.

¹⁰⁰ Ibid. para. 246.

¹⁰¹ Ibid. para. 262.

unsatisfactory: “in refusing to include in ABB's and Siemens' market shares their integrated sales of panel-board components, *the Commission underestimated the economic power of the merged entity's two main competitors and correspondingly overestimated that entity's strength.*”¹⁰² This failure to take account of the competitive pressure exerted by ABB and Siemens, through their integrated sales in the bidding process for large construction projects, is also exemplified in the proceeding pleas concerning the Danish and Italian markets.¹⁰³

The Commission's analysis of the impact on the Danish market for final panel-board components is then reviewed by the Court.¹⁰⁴ The Court finds that the Decision does not support the conclusion that the merged entity would, even if it were found to be dominant, significantly impede competition on the Danish market. It found that the Commission “*had not proved*” that the transaction would eliminate a direct competitor on the Danish market, as Legrand was too small to be considered a serious rival to Schneider.¹⁰⁵ The Court notes that the Commission did not prove that Legrand had privileged access to the major international wholesalers. It holds: “*That lack of proof is all the more striking* in that Denmark does not feature in Table 31, reproduced at paragraph 217 above, from which the Commission draws the specific conclusion, at recital 573, that each of the parties accounts for a very considerable proportion of the turnover of the main wholesalers, if all low-voltage electrical equipment is taken together.”¹⁰⁶ Lastly, the Court again criticises the Commission's lack of assessment of the entity's competitors. In this regard, it notes that a finding of market leadership does not in itself establish that any dominant position resulting from the transaction would significantly impede effective competition on those markets.¹⁰⁷ The Court concludes: “*It follows that there is not sufficient evidence either that the merger would result in a dominant position on the Danish markets for final panel-board components or, even if that were the case, that effective competition on those markets would be significantly impeded.*”¹⁰⁸

The eight plea is concerned with errors in the analysis of the impact of the concentration on the Italian markets for distribution and final-board components. The arguments are similar to the ones made during the assessment of the Danish market. Nevertheless, it may be useful to note the statement made by the Court, as regards the new entity's relations with wholesalers: “the Court observes that the Commission, having stated at recital 567 that the merged entity will be a particularly unavoidable trading partner for wholesalers in France and, to a lesser extent, in ... Italy, notes, at recital 569, that Legrand has very good relations with distributors there.

¹⁰² Ibid. para. 296.

¹⁰³ Ibid. paras. 318 and 373.

¹⁰⁴ Ibid. paras. 314-315.

¹⁰⁵ Ibid. para. 322-329.

¹⁰⁶ Ibid. para. 336.

¹⁰⁷ Ibid. paras. 343-344.

¹⁰⁸ Ibid. para. 349.

*Owing to their lack of precision, those two findings do not assist in proving to the requisite legal standard that the merged entity will be an unavoidable trading partner for Italian wholesalers.”*¹⁰⁹ Thus the Court does not accept mere speculations by the Commission without concrete evidence to support them.

The concluding remarks of the Court, regarding the review of the Commission’s assessment of the impact of the merger, are particularly insightful: “The Court considers the errors, omissions and inconsistencies which it has found in the Commission’s analysis of the impact of the merger *to be of undoubted gravity.*”¹¹⁰ However, the Court continues: “*None the less, however incomplete a Commission decision finding a concentration incompatible with the common market may be, that cannot entail annulment of the decision if, and to the extent to which, all the other elements of the decision permit the Court to conclude that in any event implementation of the transaction will create or strengthen a dominant position as a result of which effective competition will be significantly impeded...* In that regard, the errors found do not in themselves suffice to call in question the objections which the Commission raised in respect of each of the French sectoral markets... In the light of the factual findings in the Decision, *it is impossible not to subscribe to the Commission’s conclusion that the proposed transaction will create or strengthen on the French markets, where each of the notifying parties was already very strong, a dominant position as a result of which effective competition will be significantly impeded in the common market.*”¹¹¹ Nevertheless, the Court finds the economic analysis underpinning the findings on the other national markets inadequate.¹¹²

Bailey puts forward two ways of understanding this conclusion by the Court. The first is that the Court has reserved the right for itself to determine how Article 2 (3) of the Merger Regulations should be applied to the evidence in a particular case. The second view, which supports the more traditional role of the Court, indicates that the Court would not annul a Commission decision where that decision enables it to exercise its power of judicial review.¹¹³ It is not entirely clear from this judgement which view is more correct. Much of the reasoning by the Court relates to the factual basis underpinning the Commission’s assessment and one can therefore not conclude that the Court has reserved the right to make its own economic evaluations of the evidence.

4.3 The Tetra Laval Judgements

The decision of the CFI in Tetra Laval was believed by many to have gone too far in scrutinizing the Commission. According to a press release made

¹⁰⁹ Ibid. para. 397-398.

¹¹⁰ Ibid. para. 404.

¹¹¹ Ibid. para. 412-413 and 415.

¹¹² Ibid. para. 419.

¹¹³ Bailey, p.861.

before the appeal, the Commission found the standard of proof imposed by the CFI to be “disproportionate” to the review of legality under Article 230 EC and “impossible to apply in practice.”¹¹⁴ In its appeal to the ECJ, the Commission relies on five grounds, all of which relate to the standard of proof in some way.¹¹⁵ The ECJ agreed with almost all of the CFI’s conclusions but what is far more interesting, from our perspective, is how the two Courts reasoned and how they approached the questions of proof raised before them.

4.3.1 The Judgement of the CFI

Tetra is the world leader in liquid food carton packaging. Tetra also has more limited activities in the plastic packaging sector, mainly as a converter, particularly of high density polyethylene (hereinafter HDPE) bottles. Sidel is the world leader for the production and supply of SBM machines and also active in barrier technology. The case concerns the blocking of a merger between Sidel and Tetra Laval.¹¹⁶

Because the judgements rely on technical distinctions, it is necessary to give some background surrounding the packaging industry. Four types of packaging are used for liquid food: carton packaging, plastic packaging (the material being either ‘PET’ or ‘HDPE’), cans and glass. The contested decision focuses on ‘sensitive’ products. These include milk and liquid dairy products (‘LDPs’), fruit juices and nectars, fruit-flavoured still drinks (FFDs) and tea and coffee drinks. In some cases, the products must be protected against light or oxygen. Research is currently being carried out into barrier technology to make PET more suitable for these products.¹¹⁷ Certain acidic products, such as milk and fruit juices, must either be packaged in aseptic conditions or distributed in chilled form. It is more difficult to retain aseptic conditions when packaging in PET, because the process consists of several stages, as opposed to carton packaging. First of all, a plastic tube made of resin called a preform must be produced, then an empty bottle must be formed by placing the preform in a ‘stretch blow moulding’ machine (‘SBM machine’) containing the appropriate mould for the desired shape and, in a final step only, the bottle must be filled and closed. Converters manufacture empty packaging and supply it to liquid producers.¹¹⁸

According to the Commission, the notified merger would encourage Tetra to ‘leverage’ its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who are switching to PET in order to package certain sensitive

¹¹⁴ Commission press release, IP/02/1952, “Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice, 20 Dec 2002.

¹¹⁵ *Tetra Laval* (ECJ), para. 17.

¹¹⁶ *Tetra Laval* (CFI), paras. 9-26.

¹¹⁷ *Tetra Laval* (ECJ), paras. 3-4.

¹¹⁸ *Ibid.* paras. 5-6.

products to choose Sidel's SBM machines, thereby excluding much smaller competitors and turning Sidel's leading position on the market for SBM machines for sensitive products into a dominant position.¹¹⁹ The Commission also concluded that, given the weak competition on the markets for equipment and consumables for carton packaging, the merger of Tetra with the leading producer on the growing market for PET equipment, a market which is closely related to that for carton, would eliminate an important source of potential competition. Tetra entered into a number of commitments, including a commitment to keep Tetra and Sidel separate for 10 years, not to make joint offers for both its carton products and SBM machines made by Sidel and to comply with its obligations under Commission Decision 92/163/EEC of 24 July 1991.¹²⁰ The Commission took the view that such commitments were insufficient to resolve the structural competition concerns raised by the notified merger and argued that it would be virtually impossible to monitor compliance with them.¹²¹

The relevant parts of the CFI judgement concerning questions of proof start with Tetra's second plea. Tetra alleges infringement of Article 2 of the Old Merger Regulation, by arguing that the merger would not create the negative horizontal and vertical effects envisaged by the Commission. Just as in *Airtours*, the CFI begins by emphasising the discretion enjoyed by the Commission: "*As a preliminary point, it must be recalled that the substantive rules of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature.*"¹²²

The Commission maintains that its decision did not refer to the creation of a dominant position as a result of the horizontal or vertical effects taken in isolation, but rather it was created by a combination of factors. However, the Court found that the Commission did consider vertical and horizontal effects to support its findings.¹²³ Regarding the horizontal effects and the market for low-capacity SBM machines, the Court finds: "the commitment by the applicant to divest itself of Dynaplast means that the merger would not strengthen in any way the share of that market currently held by Sidel. *This precludes Sidel's position from being strengthened on that market and, a fortiori, the transaction from significantly impeding competition in that part of the SBM machine market.*"¹²⁴ Concerning the market for barrier technologies, the Court refers to inconsistencies in the Commission's own decision: "the Commission acknowledges that the effects of the notified transaction would significantly enhance the merged entity's position in that market, *but not to the extent that a dominant position would be created.* The Commission could have hardly found otherwise, since the combination of Tetra's and Sidel's activities in this area would only provide the merged

¹¹⁹ Ibid. paras. 8-9.

¹²⁰ Relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31.043 – Tetra Pak II) (OJ 1992 L 72, p. 1).

¹²¹ Ibid. paras. 10-11.

¹²² *Tetra Laval* (CFI), para. 119.

¹²³ Ibid. paras. 123-124.

¹²⁴ Ibid. para. 128.

entity with a market share in the order of [10-20%]”¹²⁵ The Court here clarifies a number of points. Firstly, the Commission must always produce sufficient evidence to support its findings, even if those findings are not a decisive part of the final Decision. Secondly, it is clear that the Commission must show the creation of a dominant position under the Old Merger Regulation, in order to conclude that competition would be impeded. Similarly to *Airtours*, the Court is not hesitant to use inconsistencies in the Commission’s own findings to support its conclusions.¹²⁶ As a result of its findings, the Court concluded that the Commission made a manifest error of assessment in so far as it relied on the horizontal effects to support its finding that a dominant position would be created through leveraging.¹²⁷

Turning to vertical integration, the Commission maintained that the vertical integration of the merged entity could lead to converters being foreclosed from the market. However, the Court disagreed: “concerning the Commission’s post-commitment concern that the converters will purchase more readily from Sidel once Tetra had divested itself of its interests in preforms, thereby strengthening the position of the merged entity, *no cogent evidence to that effect was put forward by the Commission in the contested decision, other than the reference to the responses to the market investigation...* Since there is currently strong competition in the preforms market, that reassurance for some converters would at most only slightly reduce the scope for Sidel’s competitors to sell SBM machines to them.”¹²⁸ Regarding the Commission’s concern that the merged entity would be able to offer totally integrated PET solutions, the Court took a different view. According to the Court, the evidence in this instance pointed only to a limited change in the entity’s ability to offer integrated solutions.¹²⁹ In light of the foregoing, the Court concluded that it had “*not been shown that the modified merger would result in sizeable or, at the very least, significant vertical effects on the relevant market for PET packaging equipment*”¹³⁰ and that consequently, the Commission had committed a manifest error of assessment in relying on those effects. Predicting the future behaviour of the merged entity’s customers is indeed a very speculative exercise, containing a large spectrum for individual judgement. Nevertheless, the Court requires the Commission to produce cogent evidence to support its findings even in this respect. The Court’s finding of the inability to offer integrated PET solutions does not require the same amount of individual judgement, as the assessment is based on hard evidence.

However, the conglomerate effects alleged by the Commission could suffice to justify the decision on their own according to the Court. The CFI starts by pointing out that mergers of this type do not have a pre-existing competitive relationship and can therefore not be presumed to create anti-competitive effects. Nevertheless, the Court acknowledges that they can produce such effects in certain cases. As a preliminary point, the Commission emphasized

¹²⁵ Ibid. para. 131.

¹²⁶ See *Airtours*, para. 105, on p.14.

¹²⁷ *Tetra Laval (CFI)*, para. 132.

¹²⁸ Ibid. para. 136-137.

¹²⁹ Ibid. para. 138.

¹³⁰ Ibid. para. 140.

the intrinsically prospective nature of its analysis, in which it must assess the future effects of a merger transaction notified to it. However, the Court stressed that article 2 of the Merger Regulation makes no distinction between mergers with conglomerate effects and those with horizontal and vertical effects. The Commission must thus authorise the merger if it does not create or strengthen a dominant position, which results in effective competition being significantly impeded.¹³¹

The Court then starts by assessing the possibility of leveraging. It acknowledged that conglomerate mergers raise a number of specific problems, which must be examined in turn. Considering the temporal aspects of conglomerate effects, the Court focuses on the nature of the prospective analysis in such cases. Tetra was of the opinion that the ability of creating a dominant position must be established with certainty, while the Commission, referring to *Kali & Salz*, stressed the inherently prospective nature of the analysis.¹³² The Court concludes that for the Commission to realistically be able to control mergers with solely or principally conglomerate effects, it must be given some leeway. “*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.*”¹³³

Regarding the specific nature of the conglomerate effects, the Court first distinguishes between mergers immediately creating a dominant position on the market and the ones where this would take place only after a certain lapse of time and through conduct engaged in by the merger entity. It goes on to state: “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. 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.*”¹³⁴ The CFI also notes that the fact that conglomerate-type mergers are presumed to be neutral or even beneficial for competition, calls for a particularly close examination of the evidence.

The Commission saw three potential ways for the new entity to leverage from the aseptic carton market: by predatory pricing, price wars and by granting loyalty rebates. After noting that such conduct would most probably be illegal for the merged entity to engage in, the Court held that: “*Although it cannot therefore be presumed that Community law will not be*

¹³¹ Ibid. para. 141-146.

¹³² Ibid. para. 148-149.

¹³³ Ibid. para. 153.

¹³⁴ Ibid. para. 154-155, referring to: *Kali & Salz*, para. 222, and *Airtours v Commission*, para. 63.

*complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission... Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely.. Moreover, the fact that the applicant offered commitments regarding its future conduct is also factor which the Commission should have taken into account...*¹³⁵

The Court notes that the Commission did not carry out such assessments and continues: “*It follows from the foregoing that it is necessary to examine whether the Commission based its analysis of the likelihood of leveraging from the aseptic carton markets, and of the consequences of such leveraging by the merged entity, on sufficiently convincing evidence.* In the course of that examination it is necessary, in the present case, to take account only of conduct which would, at least probably, not be illegal. 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.*”¹³⁶ The Court thus gives the Commission some margin of discretion when dealing with conglomerate mergers but at the same time stresses the importance of convincing evidence to show the likelihood of anti-competitive effects. It also requires the Commission to take account of the fact that the entity might be deterred in engaging in certain conduct, owing to its possible illegality. It also implies that the less immediate a possible anticompetitive effect is, the more proof is required by the Commission.

Regarding the possibility of leveraging, the Court notes: “The Commission's analysis of foreseeable leveraging as a result of the modified merger is based on mostly objective, well-established evidence. The analysis of the close links between the markets for carton packaging and PET packaging *is based on a series of factors which, taken together, support the findings of the Commission to the requisite legal standard .*”¹³⁷ The Court also found the Commission's assertion that the PET market would grow by 2005, rendering leveraging possible, to be supported by evidence fulfilling the requisite legal standard.¹³⁸ The Court thus agreed with the Commission that leveraging would be *possible* owing to the future development of the market.

Nevertheless, the Court found it necessary to assess whether the entity would have an *incentive* to leverage. It starts by examining the Commission's assertion that the PET use in the sensitive product segment

¹³⁵ Ibid. para. 159 and 161.

¹³⁶ Ibid. para. 162.

¹³⁷ Ibid. para. 192.

¹³⁸ Ibid. para. 195.

will grow significantly in the period up to 2005. Regarding UHT milk, the Court simply disagrees with the Commission: “*The Court finds that the use of PET will not actually increase for UHT milk...*”¹³⁹ The Court then evaluates the rest of the LDP market and finds: “that the PCI report, the only independent study to concentrate on the LDP market, predicts growth as a result of which PET use will be 9.2% of the fresh non-flavoured milk market in 2005 (PCI, p. 64). In addition there is the fact that, for aseptic packaging, the Warrick report predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks... *On the basis of that evidence, the Commission has not shown what it claims to have shown in its defence, namely that its forecasts for LDPs are based on a prudent analysis of the independent studies or on a solid, coherent body of evidence obtained by it through its market investigation. The growth estimates adopted by the Commission (paragraph 209 above) are not really very convincing...* As regards juices, the *Commission's forecast is even less convincing...* Although a certain amount of growth in those segments is likely, especially for premium products, *convincing evidence of the extent of the growth is lacking.*”¹⁴⁰ However, the CFI found the predicted growth of the use of PET for FFD’s and tea/coffee drinks to be supported by the independent studies and not overestimated by the Commission.¹⁴¹ In this instance the CFI does not hesitate to substitute the Commissions market investigation for its own economic assessment of the evidence.

However, having regard to the fact that PET use will probably increase by 2005, even if less sharply than that forecast by the Commission, the CFI believes that the incentive to leverage cannot be excluded. As noted above, the Court here only takes account of practices which would probably not constitute an abuse of a dominant position. It then examines the consequences of Tetra’s commitment not to make any joint offerings of Tetra Pak carton products together with Sidel’s SBM machines and Tetra’s existing obligations under a previous Commission decision prohibiting the company from abusing its dominant position and concludes that the merged entity’s possible means of leveraging would be quite limited as a result of the commitments. It also notes that Sidel’s past practices of price discrimination do not constitute sufficient evidence that the merged entity would continue to behave in a similar way, especially in light of the obligations imposed on such an entity.¹⁴² The burden of proof placed on the Commission in this instance is rather high and requires very hypothetical reasoning. If past practices cannot be regarded as proof of future conduct, it is very hard for the Commission to “prove” anything. Rather the CFI demands an evaluation of how the merged entity would behave given the future circumstances it would operate in. This begs the question of what sort of company the Court has in mind: a rational, law abiding and well run company? Indeed, the Court’s standpoint seems to call for a great deal of speculation and consequently increases the likelihood of differences of opinion.

¹³⁹ Ibid. para. 211.

¹⁴⁰ Ibid. para. 212 – 214.

¹⁴¹ Ibid. para. 215.

¹⁴² Ibid. para. 216-223.

In considering the market for SBM machines, the Court first examines the evidence on which the Commission relies on in distinguishing specific sub-markets for SBM machines by reference to the end use – that is the packaging of sensitive products. The Court agrees that sensitive products belong to the same product segment. However, it goes on to highlight evidence that points to the non-specific nature of the SBM machines, such as the low cost of changing a machine to be more compatible for use with PET filling machines.¹⁴³ It then concludes: “*The contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use.* Consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines.”¹⁴⁴

The Court then considers foreseeable foreclosure effects on the market for low-capacity SBM machines. After accepting evidence put forward by Tetra regarding the intense competition on the market, the Court goes on to criticise the Commission for neglecting to take this information into account: “*The contested decision, which does not take account of this very pertinent information, merely accepts, without further explanation, that since 1998 Sidel has experienced a decline of only [0-10%] in the low-capacity machines market (recital 238). This single fact is not sufficient to support the Commission's finding that the merged entity would face negligible competition, especially if it did not have Dynaplast's means and capacity.* The contested decision does not provide evidence to show that the merged entity would be able to capture a particularly large proportion of Dynaplast's former customers or obtain through other means enough new customers to enable it to achieve a dominant position on the low-capacity SBM machine market, *either in the near future or especially by 2005.*”¹⁴⁵ The last statement made by the Court again implies a higher standard of proof for events alleged to occur only after a certain lapse of time. Potential flaws in the Commission’s analysis thus seem to become even more significant if the Commission is attempting to show the likelihood of remote events.

The Court also finds that the Commission had failed to prove the supposed saturation of the market for low-capacity SBM machines used for packaging non-sensitive products to the “*requisite legal standard*”. Regarding the packaging of sensitive products, the Court referred to the Commission’s analysis as not being “*convincing*”. It continued to assess the Commission’s findings and held: “*Although this latter explanation (by the Commission) is not clearly erroneous, the fact remains that a significant proportion of the SBM machines used to package sensitive products will, in all likelihood, be low-capacity machines.*”¹⁴⁶ In these two instances, the Court reaches the same conclusion but uses a rather different approach. Regarding the market

¹⁴³ Ibid. para. 260-266.

¹⁴⁴ Ibid. para. 269.

¹⁴⁵ Ibid. para. 274 – 275, Dynaplast was a company in the SBM machines market, which Tetra had committed to divesture if the merger was cleared.

¹⁴⁶ Ibid. para. 278-279.

for non-sensitive products, the Court uses the familiar terminology of the “requisite legal standard”. However, in the case of sensitive products the Court makes its own assessment of the evidence and, not only disagrees with the Commission, but reaches its own conclusion regarding the future characteristics of the market based on what it finds likely to occur. The Court thus concludes that the Decision had not provided “sufficiently convincing evidence” to show that the merged entity would be able to create a dominant position by 2005 by leveraging its current carton customers.¹⁴⁷

Regarding the market for high-capacity machines, the Court agrees with the Commission that Sidel holds a leading, albeit not a dominant position, on this market. The Court then goes on to assess whether the merged entity would be able to gain a dominant position by 2005 and weaken the remaining competition, by leveraging directed at Tetra’s current customers on the carton markets. The Court acknowledges the advantages that Tetra’s reputation gives Tetra in being able to offer its current customers aseptic PET filling machines. However, it notes that some factors diminish the foreseeable importance of these advantages, most of which are not assessed adequately in the contested decision.¹⁴⁸

*“First, the first-mover advantage has been overestimated in the present case. The foreseeable growth in PET use among Tetra's current customers on the aseptic carton market is not considerable (see paragraphs 201 to 216 above). Thus, it is not very likely that its dairy customers will want to switch from carton to PET, since there is no barrier against light which can be used in a commercially satisfactory manner and the cost of PET is higher than that of carton and HDPE (see paragraph 34 above).”*¹⁴⁹ The Court again not only disagrees with the Commission, but also makes its own assessment of the possible future developments. Furthermore, the Court finds: “Second, Tetra's commitment not to offer sales of its carton products bundled with SBM machines would reduce the scope for leveraging.”¹⁵⁰ “Third, the Commission committed an error in finding that, apart from SIG, [n]o other supplier of packaging equipment will be able to offer both carton and PET packaging equipment (recital 372).. it is clear that at least two major competitors of Tetra in the carton packaging equipment markets are already able to offer both carton and PET products, and to do so without the constraints on the range of PET equipment that would apply to offerings of bundled sales by the merged entity.”¹⁵¹ The Court reiterates its stance that the Commission must take account of the constraints placed on the merged entity as a result of its obligation not to abuse its dominant position.

The Court goes on: “The Court's assessment of the foreseeable effects of leveraging by the merged entity is also hampered by the absence in the contested decision of an adequate analysis of the competition which Sidel must face in the market for high-capacity machines. The competition

¹⁴⁷ Ibid. para. 281.

¹⁴⁸ Ibid. para. 284-287.

¹⁴⁹ Ibid. para. 288.

¹⁵⁰ Ibid. para. 292.

¹⁵¹ Ibid. para. 293.

provided by its three major competitors, SIG, SIPA and Kronos, is *underestimated...* The contested decision should have examined in more detail the ability of that competition to resist leveraging on the part of the merged entity.”¹⁵² The Court again notes the necessity of the Decision containing enough information for the *Court* to be able assess the foreseeable effects. However, it also makes its own assessment by finding that the competition was underestimated by the Commission. In conclusion, the Court finds that the evidence “did not justify a finding” that the entity’s competitors would be marginalized by 2005 due to leveraging by that entity directed at Tetra’s current customers on the carton markets.¹⁵³

The Court then turns to the contention that Tetra would be able to strengthen its current dominant position in carton packaging by eliminating a source of significant competitive constraint. “The Court finds in that regard that when the Commission relies on the elimination or significant reduction of potential competition, even of competition which will tend to grow, in order to justify the prohibition of a notified merger, *the factors which it identifies to show the strengthening of a dominant position must be based on convincing evidence.* The mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market may constitute an important factor, as the contested decision finds, but does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position.”¹⁵⁴

The Court notes that the Commission relied on its overestimation of the potential growth of PET packaging for sensitive products, when concluding that significant competitive pressure will be eliminated as a result of the merger.¹⁵⁵ The Court concludes: “Thus it has not been shown that, in the event of elimination or significant reduction of competitive pressure from the PET markets, Tetra would have an incentive not to reduce its carton packaging prices and would stop innovating.”¹⁵⁶ In particular, the Court finds that the Commission had not shown why Tetra’s competitors would not take advantage of Tetra’s possible decision to raise prices or innovate less.¹⁵⁷ The overall conclusion of the Court is therefore: “the contested decision *does not establish to the requisite legal standard* that the modified merger would give rise to significant anti-competitive conglomerate effects.”¹⁵⁸

4.3.2 The Judgement of the ECJ

The Commission’s appeal to the ECJ was a unique opportunity for the Court to clarify the standard of proof. Unfortunately, as we shall see, the ECJ

¹⁵² Ibid. para. 294.

¹⁵³ Ibid. para. 306.

¹⁵⁴ Ibid. para. 312.

¹⁵⁵ Ibid. para. 324.

¹⁵⁶ Ibid. para. 325.

¹⁵⁷ Ibid. paras. 327 and 330.

¹⁵⁸ *Tetra Laval* (ECJ), para. 336.

judgement leaves a number of questions unanswered. It must first be pointed out that according to Article 225 of the EC Treaty and Article 51 of the Statute of the ECJ, an appeal may be brought against a judgement of the CFI on “points of law only”. It follows that the CFI “has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts.” Consequently, many of the Commission’s pleas were found inadmissible by the ECJ.

The ECJ begins by considering the general question of the standard of proof: “By its first ground of appeal, the Commission contests the judgement under appeal in so far as the Court of First Instance required it, when adopting a decision declaring a concentration incompatible with the common market, *to satisfy a standard of proof and to provide a quality of evidence in support of its line of argument which are incompatible with the wide discretion which it enjoys in assessing economic matters.* It thus complains that the Court of First Instance infringed Article 230 EC by exceeding the limits of its power of review established by case-law and, as a result, misapplied Article 2(2) and (3) of the Regulation by creating a presumption of legality in respect of certain concentrations.”¹⁵⁹ The Commission then explains what it believes to be the correct standard of proof: “from the principles referred to in *Kali & Salz* and from the review carried out by the Court in that case that it is required to examine the relevant market closely, weigh up all the relevant factors, and base its assessment on evidence which is factually accurate, is not clearly insignificant and is capable of substantiating the conclusions drawn from it and that it must reach its conclusions on the basis of consistent reasoning. The Commission takes the view, first of all, that the standard of ‘convincing evidence’ differs substantially, in degree and in nature, both from the obligation to produce ‘cogent and consistent’ evidence, established in *Kali & Salz*, and from the principle that the Commission’s assessment must be accepted unless it is shown to be manifestly wrong. The standard is different in degree because, unlike the standard of ‘convincing evidence’, *that of cogent and consistent evidence does not rule out the possibility that another body might reach a different conclusion* if it were competent to give a decision on the matter. The standard required is likewise different in nature inasmuch as it transforms the role of the Community Courts into that of a different body which is competent to rule on the matter in all its complexity and which is entitled to substitute its views for those of the Commission. The Court of First Instance was inconsistent in that it referred to the test of manifest error of assessment yet applied a very different test.”¹⁶⁰

Nevertheless, the ECJ notes that, just as in *Airtours*, the CFI begun by pointing out the discretion enjoyed by the Commission: “*As a preliminary point, it must be recalled that the substantive rules of the Regulation, in particular Article 2, confer on the Commission a certain discretion,*

¹⁵⁹ Ibid. para. 19.

¹⁶⁰ Ibid. para. 26- 27 referring to paras. 220-224 of *Kali & Salz*, (Table nr: 22).

especially with respect to assessments of an economic nature.”¹⁶¹ The ECJ then confirms this point of law as the starting point for determining the standard of proof that needs to be satisfied by the Commission: “It should be observed that, in paragraph 119 of the judgement under appeal, the Court of First Instance correctly set out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as laid down in the judgement in *Kali & Salz*.”¹⁶²

However, the ECJ goes on to state that: “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.*”¹⁶³

Furthermore, the ECJ seems to agree with the CFI’s requirement of convincing evidence to prohibit a merger. “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.*”¹⁶⁴ This is an ambiguous statement by the ECJ. I agree with the Commission that the two standards of convincing evidence and absence of manifest errors are not identical and that the ECJ should have specified which one should be used. To state that the CFI did not raise the standard of proof by referring to “*convincing evidence*” and then adding that the essential function of evidence is to establish the merits of a merger decision *convincingly*, hardly clarifies the matter. In addition, the ECJ seems to imply the need for a more rigorous review of the evidence when the merger is blocked because of its conglomerate effects.

“Next, *the Commission submits that a margin of discretion is inherent in any prospective analysis.* The likelihood of certain market developments within a foreseeable time-frame must be determined on the basis of the market situation, observable trends and other appropriate indicators. To require that the Commission’s assessment be, in effect, based on undisputed or virtually unequivocal evidence, irrespective of its merit, would deprive

¹⁶¹ *Tetra Laval* (CFI), para. 119.

¹⁶² *Tetra Laval* (ECJ), para. 38.

¹⁶³ *Ibid.* para. 39.

¹⁶⁴ *Ibid.* para. 41.

the Commission of its function of evaluating the evidence and attaching, for justifiable reasons, more weight to some sources than to others.”¹⁶⁵

However, the ECJ has a seemingly different view of the what this prospective analysis entails: “*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 effective 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.*”¹⁶⁶ This method of evaluating the evidence seems very similar to the balance of probabilities approach used in civil cases in common law jurisdictions.¹⁶⁷ It also appears very different from the standard of manifest errors of assessment put forward by the Commission and confirmed by the Court as the correct standard to be used in Competition cases.¹⁶⁸

The Court goes on to consider the special circumstances surrounding conglomerate type mergers: “The analysis of a ‘conglomerate-type’ concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. *That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission’s conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.*”¹⁶⁹ Consequently, the ECJ concludes that the CFI did not err in law when it exercised its power of judicial review or when it specified the quality of evidence required by the Commission while attempting to prohibit a conglomerate type merger under Article 2(3) of the Merger Regulation.¹⁷⁰

By way of illustration of the judicial review carried out by the Court of First Instance in the judgement under appeal, the Commission refers, in

¹⁶⁵ Ibid. para. 28, (Table nr: 23).

¹⁶⁶ Ibid. paras. 42-43.

¹⁶⁷ Bailey, p. 852.

¹⁶⁸ See *Tetra Laval* (ECJ), para. 48, where the ECJ refers to the annulment of the Commission’s decision as being based on insufficient, incomplete, insignificant and inconsistent evidence, which are the criteria identified by the Commission as the correct standard of proof established by the *Kali & Salz* case (para. 26).

¹⁶⁹ Ibid. para. 44 referring to *Tetra Laval* (CFI), paras. 142-155, (Table nr: 24).

¹⁷⁰ Ibid. para. 45.

particular, to the assessment of the growth in the use of PET packaging for sensitive products.¹⁷¹ The ECJ holds: “it is not apparent from the example given by the Commission, which relates to the growth in the use of PET packaging for sensitive products, that the Court of First Instance exceeded the limits applicable to the review of an administrative decision by the Community Courts. Contrary to what the Commission claims, paragraph 211 of the judgement under appeal merely restates more concisely, in the form of a finding by the Court of First Instance, the admission made by the Commission at the hearing, which is summarised in paragraph 210 of the judgement, that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. In paragraph 212 of the judgement under appeal, the Court of First Instance gave the reasons for its finding that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only the PCI report contained information on the use of PET for milk packaging. .. In paragraph 213 of the judgement under appeal, the Court of First Instance merely stated that the Commission’s analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in the other reports.”¹⁷²

The ECJ found the other grounds under this appeal inadmissible, as they related to findings of fact by the CFI and only settled that the CFI had been able to base its conclusions on various items in the Commission’s decision.¹⁷³ The ECJ thus found that the CFI had “explained and set out the reasons why the Commission’s conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence.”¹⁷⁴ This being the standard that the Commission had referred to as the correct standard established in the *Kali & Salz* case.¹⁷⁵

By its second ground of appeal, the Commission firstly complains that the Court of First Instance infringed Articles 2 and 8 of the Regulation in that it required the Commission to take account of the impact which the illegality of certain conduct would have on the incentives for the merged entity to engage in leveraging.¹⁷⁶ The ECJ noted that the CFI had referred to the need to examine all the relevant information in the section of the judgement dealing with questions of proof in conglomerate mergers.¹⁷⁷ It then went on: “Since the view is taken in the contested decision that adoption of the conduct referred to recital 364 in that decision is an essential step in leveraging, *the Court of First Instance was right to hold that the likelihood of its adoption must be examined comprehensively*, that is to say, taking account, as stated in paragraph 159 of the judgement under appeal, both of

¹⁷¹ Ibid. para. 30-31 referring to *Tetra Laval* (CFI), paras. 210-215, 289, 288, 328, (Table nr: 25).

¹⁷² Ibid. para. 46.

¹⁷³ Ibid. para. 47 referring to *Tetra Laval* (CFI), paras. 289, 288 and 328, (Table nr: 26).

¹⁷⁴ Ibid. para. 48.

¹⁷⁵ Ibid. para. 26.

¹⁷⁶ Ibid. para. 52 referring to *Tetra Laval* (CFI), paras. 154-162 and 217-224, (Table nr: 27).

¹⁷⁷ Ibid. para. 71-72 referring to *Tetra Laval* (CFI), paras. 148-162.

the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. However, it would run counter to the Regulation's purpose of prevention to require the Commission, as was held in the last sentence in paragraph 159 of the judgement under appeal, to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue."¹⁷⁸ The Court found that such an assessment would be too speculative and, consequently, that the CFI had erred in law in rejecting the Commission's conclusions solely on this ground.¹⁷⁹ In this instance, the ECJ thus found the evidential burden, that was placed on the Commission by the CFI, too burdensome and impossible to fulfil in practice. It may be seen as odd that the only place where the ECJ finds the evidential burden placed on the Commission too high regards the assessment of the risk of detection of future illegal conduct – an area where the Commission's level of expertise would assumingly be very high. Compared to the other evidential burdens placed on the Commission, such as predicting the future incentive to leverage, assessing the risk of detection of illegal conduct would seem just as speculative. Would there not be more evidence available, for example, statistical data from the national authorities?

Secondly, the Commission contends that the CFI's argument, regarding the alleged failure of the Commission to take account of the commitments offered by Tetra, was contrary to the settled case law expressed in *Gencor*. However, the ECJ found that the CFI had not departed from the position it had adopted in *Gencor*, "namely that there will be a significant impediment to effective competition if there is a lasting alteration of the structure of the relevant markets as a result of a concentration having the direct and immediate effect of creating conditions in which abusive conduct is possible and economically rational."¹⁸⁰ The ECJ found the present case entirely different from *Gencor*, which concerned the creation of dominant duopoly in the platinum and rhodium markets: "In the present case, it is true that the notified merger was capable of slightly altering the structure of the market for carton inasmuch as the merged entity could strengthen the dominant position which Tetra had held for some time on that market and which, moreover, had been the subject of a Commission decision pursuant to Article 82 EC. However, it was not effective competition on the carton market which the Commission intended to protect by prohibiting the merger but competition on the market for PET equipment, in particular that for low and high capacity SBM machines used for sensitive products. *The structure of that market would not have been immediately and directly affected by the notified merger but it could have been so affected only as a result of leveraging and, in particular, abusive conduct by the merged entity on the*

¹⁷⁸ Ibid. paras. 74-75.

¹⁷⁹ Ibid. para. 78.

¹⁸⁰ Ibid. para. 79, (Table nr: 28).

carton market.”¹⁸¹ The ECJ thus agreed with the CFI in that the Commission had to take into account behavioural commitments offered by Tetra when assessing the likelihood of leveraging on the market for PET equipment. Furthermore, the fact that the CFI had only concluded that the Commission had not taken account of the commitments, did not amount to insufficient reasoning or distortion of the Commission decision, according to the ECJ.¹⁸²

By its third ground of appeal, the Commission submits that the Court of First Instance erred in law by applying an erroneous test of judicial review and infringed Article 2 of the regulation in so far as it held, in paragraph 269 of the judgement under appeal, that ‘the contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use’ and that, ‘consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines.’¹⁸³ The Commission specifically complained of the CFI’s unwillingness to accept price-discrimination as proof of distinct sub markets. However, the ECJ responded that it was not the Commission’s use of price-discrimination as proof of distinct markets that was contested by the CFI but rather the evidence it used to support its application in the current circumstances.¹⁸⁴ Furthermore, the Commission’s challenge of the rest of the CFI’s findings, as to the generic nature of SBM machines, was inadmissible as they related to the CFI’s assessment of the evidence .¹⁸⁵

By its fourth ground of appeal, the Commission submits that the Court of First Instance infringed Article 2 of the Regulation, distorted the facts and failed to take account of certain arguments by refusing to recognise the merits of its finding that Tetra would strengthen its dominant position in the carton sector.¹⁸⁶ The ECJ starts by referring to the factors the Commission has to take into account when assessing a merger and repeats the importance of a comprehensive evaluation of all the facts: “The Court of First Instance was therefore right to point out in paragraph 312 of the judgement under appeal – and, in doing so, did not infringe Article 2 of the Regulation – that, although constituting an important factor, as the contested decision finds, *the mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position... the Commission has to show that, if there is a reduction in potential competition, this will tend to strengthen Tetra’s dominant position in relation to its competitors on the aseptic carton markets.*”¹⁸⁷ The CFI could thus rely on the potential reaction

¹⁸¹ Ibid. para. 82-83.

¹⁸² Ibid. paras. 85-88.

¹⁸³ Ibid. para. 90 referring to *Tetra Laval* (CFI), paras. 259-269, (Table nr: 29).

¹⁸⁴ Ibid. para. 103, referring to *Tetra Laval* (CFI), paras. 259 and 268.

¹⁸⁵ Ibid. para. 104 referring to *Tetra Laval* (CFI), paras. 259-269.

¹⁸⁶ Ibid. para. 106 referring to *Tetra Laval* (CFI), paras. 312, and 316-333, (Table nr: 30).

¹⁸⁷ Ibid. para. 126-128.

of the competitors when refuting the Commission's arguments regarding Tetra's incentive to stop innovating and raise prices.¹⁸⁸

By its fifth ground of appeal, the Commission claimed that the Court of First Instance infringed Article 2(3) of the Regulation by rejecting its findings as to the creation of a dominant position on the market for SBM machines.¹⁸⁹ The ECJ found that: "Assessment of the arguments put forward by the Commission shows that the majority of them relate to the Court of First Instance's assessment of the evidence, which is not subject to review by the Court in appeal proceedings. This is true of the Commission's complaint that the Court of First Instance failed to take account of certain factors which it considers to be relevant or took account of other factors which it considers to be irrelevant, whether that be in relation to low or high-capacity SBM machines or to the consideration of customers switching from glass packaging."¹⁹⁰ As for the CFI's reasoning allegedly being inadequate, the ECJ held: "with regard to the argument alleging a failure to state reasons for the finding, in paragraph 305 of the judgement under appeal, that the converters' dependency on Sidel had not been established convincingly, it need be stated only that the Court of First Instance *gave concise but adequate reasons* for that finding in the final sentence of paragraph 305."¹⁹¹ The appeal was accordingly dismissed by the ECJ.

It is thus clear that ECJ will not readily disagree with the conclusions reached by the CFI. In this respect, one should bear in mind the more extensive experience of the CFI in the field of competition law and the authority this gives to its judgements: "As the CFI has gained in experience and confidence, it has become bolder and more ready to depart from decisions of the Court of Justice in which passage of time or changing social or economic conditions have revealed flaws."¹⁹² It is also apparent that the ECJ supports the rigorous review undertaken by the CFI in this case, but it is not entirely clear what standard of proof will be applied by the Courts in different contexts. In the next Chapter, the reasoning of the Courts in all four judgements will attempt to be reconciled.

¹⁸⁸ Ibid. paras. 131-132 referring to *Tetra Laval* (CFI), paras 316-332.

¹⁸⁹ Ibid. para. 134 referring to *Tetra Laval* (CFI), paras. 307, 279, 284, 294, (Table nr: 31).

¹⁹⁰ Ibid. para. 143.

¹⁹¹ Ibid. para. 146, (Table nr: 32).

¹⁹² Brown & Jacobs, *The Court of Justice of the European Community*, 5th edition, Sweet & Maxwell, 2000, p.376.

5 Reconciling the Judgements

5.1 A Change in the Standard of Proof?

Certain commentators have been of the opinion that the judgements have not really changed the standard of proof at all: “As demonstrated in *Airtours* and by an apparently similar exercise carried out by the Court in *Tetra Laval* and *Schneider*, there are two main approaches pursued during the CFI’s review of an appeal under Article 230 of the EC Treaty. First, the CFI reviews the evidence to verify carefully if the factual findings are based on cogent evidence. Second, it checks whether the reasons for conclusions are consistent with those factual findings and, *without substituting its own judgement* for the assessment resulting from the Commission’s exercise of its discretion, confirms whether or not the Commission has made any manifest errors.”¹⁹³

It is also suggested by Bailey that the CFI’s judgements in the three recent cases do not represent a new approach to questions of proof. Indeed, in *Kali & Salz*, the ECJ’s reasoning was very similar to that of the CFI in *Tetra Laval* and *Airtours* almost 10 years later. When considering the creation of a collective dominant position in *Kali & Salz*, the ECJ called for a “close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.”¹⁹⁴ This requirement for applying strict scrutiny of the relevant facts was reiterated and relied upon by the CFI and the ECJ in the four judgements.¹⁹⁵ The EC Courts have also previously stressed the need for evidence of the competitive pressure of existing and potential competitors, for instance, in *Kali & Salz* the ECJ stated: “*to assess with a sufficient degree of probability the effect which a concentration might have on competition on the relevant market it is essential to rely on a rigorous analysis of the competitors weight.*”¹⁹⁶ This stance was reiterated by the CFI in all three of the recent merger cases.¹⁹⁷ However, Bailey concludes: “Although the ECJ has not spoken of adducing convincing evidence, what may be taken as departure from the previous case law is not so much the language used, as the approach the CFI has adopted. On several occasions, the CFI may be considered to have displaced the discretionary judgement of the Commission in the recent merger cases.”¹⁹⁸

¹⁹³ Clough, p. 733.

¹⁹⁴ *Kali & Salz*, para. 222.

¹⁹⁵ Bailey, p. 859, referring to *Airtours*, para. 130, *Schneider*, para. 246 and *Tetra Laval* (CFI), para. 289-290 and see also *Tetra Laval* (ECJ), para. 46.

¹⁹⁶ *Kali & Salz*, para. 246.

¹⁹⁷ Bailey, p. 859-860, referring to *Airtours*, para. 62, *Schneider*, para. 340 and *Tetra Laval* (CFI), para. 293.

¹⁹⁸ Bailey, p.860-861.

In this context it is also appropriate to mention the case of EDP. “Given little more than seven months after *Tetra Laval* (ECJ), the CFI states that, as regards complex economic assessments, the Commission enjoys a ‘wide discretion’. It goes on to review the Commission’s analysis under a standard of manifest error of assessment. Ultimately, the CFI upheld the Commission’s prohibition on the ground that the applicant had failed to show such manifest errors. The debate about the proper standard of judicial review in merger cases in merger control is likely to continue.”¹⁹⁹ However, it is too early to tell whether this case represents a step back from the cases scrutinized in this paper. Given that the standard of proof adopted in *Airtours* was reaffirmed²⁰⁰ by both Courts in *Tetra Laval*, more decisions are certainly required in order to determine whether a departure has been made from the precedent established by *Tetra Laval* and *Airtours*.

I believe it has been shown that the Court did substitute its own opinion for that of the Commission on several occasions, especially in the *Tetra Laval* judgements. For instance, the CFI found: “*the first-mover advantage has been overestimated in the present case*. The foreseeable growth in PET use among Tetra's current customers on the aseptic carton market is not considerable.”²⁰¹ The Court thus makes its own assessment of the evidence and predicts less growth than the Commission. Similarly, the CFI found the Commission’s reasoning, regarding the use of SBM machines for the packaging of sensitive products, not “*clearly erroneous*” but that “*in all likelihood*” the result will be different from the one predicted by the Commission.²⁰² Indeed, the ECJ held that the discretion granted to the Commission does not mean that the Courts have to “*refrain from reviewing*” the Commission’s interpretation of information of an economic nature.”²⁰³ “The line between discretion and interpretation is often fine and disappointed merger parties will be likely (and well-advised!) to test it in the future.”²⁰⁴ It is now essential to clarify what this new approach actually entails. To what standard will the Courts hold the Commission in future merger proceedings and is the standard dependant on the context in which it is being applied?

5.2 Different Standards of Proof in EC Merger Control?

In response to the Commission’s first plea in the appeal to the ECJ, Tetra argued: “the Commission’s first ground of appeal is merely a semantic discussion of the terms used in the judgement under appeal and does not

¹⁹⁹ Andreas Weitbrecht, “EU Merger Control in 2005 – An Overview” in E.C.L.R.; 2006, issue 2, p. 43, referring to Case T87/05, EDP-Energias de Portugal SA v. Commission, September 21, 2005, not yet reported, paras. 63.

²⁰⁰ *Tetra Laval*, (ECJ), para. 40 and *Tetra Laval* (CFI), para. 155.

²⁰¹ *Tetra Laval* (CFI), para. 288.

²⁰² *Tetra Laval* (CFI), para. 279, on p. 32.

²⁰³ *Tetra Laval*, (ECJ), para. 39, on p. 35-36.

²⁰⁴ Howarth, p. 371.

relate to the substantive examination carried out by the Court of First Instance. *The Commission's argument is to no avail since there is no consistent terminology with regard to the requisite standard of proof.*"²⁰⁵ Indeed, AG Tizzano had a similar opinion: "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 .. 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 CFI did in fact carry out a review ... incompatible with the particular judicial role entrusted to it by the Treaty."²⁰⁶ I agree that what should be examined is the concrete method in which the Courts conducted their review of the decisions. However, I also believe the Courts' use of different expressions, for describing the level of proof required within different contexts, suggests a fair deal of uncertainty as to what standard to actually impose on the Commission. Consequently, noting the language used in different contexts is a significant part of the analysis of the legal position presented by the Courts. It is important to now attempt to reconcile the different judgements and the approach taken by the Courts. As has been seen throughout the analysis, the Courts have made use of a number of different terms when explaining the standard of proof in relation to different issues. These include: *plausible, particularly plausible, convincing evidence, requisite legal standard, likely and in all likelihood.*

Beginning with *Airtours*, it is possible to conclude that this judgement did not substantially depart from the approach taken by the Courts in the past when conducting judicial review. The fact that the Commission did not appeal the decision, suggests it found the CFI's conclusions reasonable enough not to challenge them at the ECJ. The response by the CFI to the first plea, regarding the definition of the relevant market, would also seem to support the upholding of the Commission's discretion. Specifically, the Court noted that the Decision contained sufficient reasoning on this point for the Court to be able to review its quality. However, it places the burden on the Commission to provide *convincing* evidence.²⁰⁷ Referring to the reasoning of the CFI in *Airtours* when dealing with the market definition, Bailey is of the view that: "The lower standard of proof seemingly applied by the CFI to market definition may have been appropriate in the light of the value judgement inherent in defining the relevant market. This suggests that the standard of proof may vary according to whether there is scope for value judgement on the issue in question and on the evidence available. For example, defining the relevant market is very different from identifying whether or not a firm entered the market on a particular date."²⁰⁸

Although I agree that perhaps there should be more discretion for the Commission when dealing with value judgements, I am not sure whether the definition of the relevant market requires a particularly wide discretion, compared to other issues being dealt with in merger proceedings. The

²⁰⁵ *Tetra Laval* (ECJ), para. 32.

²⁰⁶ Opinion of AG Tizzano in *Tetra Laval*, para. 71.

²⁰⁷ *Airtours*, para. 21-64 on p. 11-12.

²⁰⁸ Bailey, p. 863, referring to *Airtours*, para. 44.

definition of the relevant market is, after all, an area that mainly deals with the assessment of past events, for which there are many items of evidence available to assess. Among these are, for example, Commission questionnaires, price correlation studies, cross-price elasticities, presence of price discrimination and the technical ability of companies to switch their production.²⁰⁹ Nevertheless, the definition of the relevant market requires a degree of judgement due to the complex nature of the economic data and the vast differences of opinion regarding almost all matters dealing with economics. However, this evaluation seems no different from the one undertaken by Courts on many other controversial issues. The point is that the definition of the relevant market does not entail the same degree of prospective analysis as other matters being dealt with in merger proceedings. The fact that there is scope for disagreement on an issue should not, in my view, result in the Court requiring a lower standard of proof. Indeed, in *Tetra Laval*, the CFI did overturn the Commission's finding of distinct sub markets for SBM machines based on end-use - without challenge from the ECJ.²¹⁰

Continuing with *Airtours*, the CFI required the Commission to conduct a thorough review of the market prior to the proposed merger. The Courts' review of this assessment was not very different from what Courts ordinarily do, that is, review the facts and the legal conclusions drawn from them. Thus it is not surprising that the Court overturned the Commission's findings in this regard, when these were based on inconsistencies and insufficient evidence. Nevertheless, as the Court goes on, it is clear that it not only challenges the quality of the Commission's factual basis but also the quality of its economic assessment. For example, in reaching a different conclusion, from the Commission, regarding the level of horizontal integration on the market, the volatility of the historic market shares and the findings of demand volatility, the Court makes its own assessment based on the evidence before it.²¹¹

When the Court overturns the Commission's prediction, that the remaining tour operators would have an incentive to cease competing with each other after the transaction, it bases its conclusion on the failure of the Commission to prove the underlying legal requirements. For instance, that the Commission did not prove that the market would be sufficiently transparent. However, the Court's statement, regarding the degree of proof necessary for showing the existence of sufficient deterrents, is all but clear. The fact that the Court seems to differentiate between the Commission having to prove something and merely having to establish something, suggests a different degree of proof, although the Court hardly clarifies what this difference might entail. The Court hints at the fact that it, in this instance, is reviewing

²⁰⁹ Alistair Lindsay, *The EC Merger Regulation: Substantive Issues*, Sweet & Maxwell, 2003, p.73-102, and the Commission Notice on the definition of the relevant product market for the purposes of Community competition law (1997) O.J. C372/3.

²¹⁰ *Tetra Laval* (CFI), para. 269, on p. 31.

²¹¹ *Airtours*, paras. 70-142, on p. 13-15.

the possible characteristics of the market *after* the merger and that it therefore gives the Commission some discretion.²¹²

However, in finding the Commission's assessment of the likely behaviour of Airtours competitors and customers in the future market to be wrong, the Court must be seen as having infringed on the discretion usually granted to the Commission. The Court also confirms that the burden of proof indeed is on the Commission, as it must be presumed that the fact that each integrated tour operator buys airline seats from, and sells its products to companies owned by a competitor, no more constitutes evidence of interdependence than it does independence.²¹³ In conclusion, one notes that the Court was not hesitant to overturn the Commissions' predictions of the future. However, when doing so, it often based its findings on factual errors made by the Commission in the investigation of the historic market.

Similarly to *Airtours*, the CFI in *Schneider*, starts by finding in the Commission's favour regarding the first plea. It finds that Schneider had "*not shown*" that the Commission was wrong in using a certain method of analysis. However, in reviewing the Commission's contention that the merger will create a dominant position, the Court does not allow the Commission to rely on a presumption of transnational effects resulting from the entity's position on the EEA market as a whole. Rather, the Commission must provide "*sufficient evidence*" of their existence. It is not entirely clear exactly what this evidence must consist of, but it is clear that it must include an assessment of the competitive pressure exerted on the entity on the markets where the Commission alleges impediment of competition. Furthermore, the Commission must show that it is the merger that gives rise to impediment of competition and it must consequently provide a thorough analysis of the market prior to the transaction – a view already made clear in *Airtours*.²¹⁴

As the Court turns to the assessment of the mergers impact on the structure of competition at wholesaler level, it does not shy away from overturning the Commission's predictions on the basis that it has "*not proved*" these forecasts. However, it is not necessarily the predictions themselves that the Commission has not proved, but rather the underlying facts, which the Court find insufficient and inadequate. It is not clear whether the Court actually disagrees with the Commission's opinion, but it does find the evidence insufficient nonetheless. All in all, the overturning of the various pleas by the Court is conducted through findings of flaws in the factual groundwork. It is true that it is a matter of economic assessment to include, for example, integrated sales. However, it is not a case of making future predictions, but rather a review of the historic facts. In its assessment of the Danish market, the Court makes it clear that the Commission must assess the pressure exerted by competitors in order to conclude that a merger will result in significant impediment of competition. Thus it is clear that the Court could

²¹² Ibid. paras. 170-197, on p. 15-16.

²¹³ Ibid. paras. 210-294, on p. 16-18.

²¹⁴ *Schneider*, paras. 135-191, on p. 19-21.

be just as rigorous in its review of a finding of significant impediment to competition as in reviewing a finding of dominance.²¹⁵

The last comments made by the Court, regarding the need for the Court to be able to conclude that the transaction is incompatible with the common market, are quite dubious. A similar statement was made by the Court in *Airtours*, where the CFI found the first part of the Decision containing sufficient reasoning for the Court to be able to exercise its power of review²¹⁶. However, in *Schneider*, the Court implies that it itself must be able to conclude, from the evidence in the Decision, that the merger would significantly impede competition. Nevertheless, I would hold that the comments represent a rather restricted view of the Courts' role in judicial review. It is clear from both cases that the CFI was mainly concerned with reviewing the factual groundwork, which was obviously flawed. The actual merits of the Commission's predictions themselves were therefore somewhat insignificant, as they were based on insufficient, inconsistent and incoherent evidence.

We now turn to the two judgements in *Tetra Laval*. It is clear that both the CFI and the ECJ, at least technically, agree that the Commission has a certain discretion with regard to economic matters. However, in paragraph 39 of its judgement, the ECJ goes on to state that the Commission's discretion "does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature." However, this hardly clarifies matters. Considering the first part of the CFI's judgement, concerning vertical and horizontal effects, it is clear that the Commission must provide proof of all elements that it relies upon in its decision. It is also apparent, from the Courts' assessment of the vertical integration, that it will hold the Commission to a high standard of proof, even for events for which it is difficult to generate concrete evidence, such as the future behavior of the entity's customers.²¹⁷

Turning to the two Courts' view of conglomerate effects, it is clear that the CFI does not presume that conglomerate mergers create anticompetitive effects and will therefore hold the Commission to a high standard of proof. It calls for a "*particular close examination of the circumstances*" alleged to produce conglomerate effects. The ECJ seems to agree with this view, as it states that a review of the Commission's interpretation "*is all the more necessary*", in the case of a prospective analysis required when assessing alleged conglomerate effects. At the same time the Courts note the prospective nature of the analysis of conglomerate mergers. The CFI holds that for the Commission to realistically be able to control conglomerate mergers, it suffices for it to show that the merger would "*in all likelihood*" create a dominant position significantly impeding competition. Meanwhile, the ECJ suggests that a prospective analysis entails assessing various chains

²¹⁵ Ibid. paras. 197-397, on p.21-24.

²¹⁶ Ibid. paras. 404-419 and *Airtours*, para. 47, on p.12.

²¹⁷ *Tetra Laval* (CFI), paras. 119, 123-140 on p. 27-28 and *Tetra Laval* (ECJ), para. 38-39 on p.35.

of cause and effect to ascertain “*which of them are the most likely*”. Both Courts imply that the length of time it would take for the anti-competitive effects to arise, means that the chains of cause and effect are uncertain and difficult to establish. The CFI therefore requires the Commission’s analysis be “*particularly plausible*”, while the ECJ suggests it should be “*plausible*”.²¹⁸

It is clear that the Courts grapple with the fact that a prospective analysis inherently calls for a degree of discretion, while at the same time requiring uncertain predictions to be supported by stronger evidence, in order to ascertain whether they will occur. The paradox thus lies in the fact that the more unlikely an event is, the more evidence is required to prove that it will happen - at the same time, this evidence will be harder to ascertain than when attempting to prove that a highly likely event will occur. The Commission’s discretion will thus be more diminished, the more unlikely an event is, but also when it is needed the most. In *Tetra Laval*, the Courts seem to favor the certainty of a correct outcome in place of the Commission’s discretion.

Nonetheless, the ECJ finds that the CFI’s comments suggesting that the Commission must produce “*convincing evidence*” by no means added a condition to the requisite standard of proof. However, in the next sentence, the ECJ holds that the essential function of evidence is to establish the merits of an argument “*convincingly*”. The ECJ also upholds all of the CFI’s findings, where it required the Commission to produce convincing evidence.²¹⁹ For instance, the CFI not only required the Commission to show a possibility of leveraging but also to show that the merged entity would have an incentive to leverage. Giving the foregoing considerations, it is obvious that the CFI would not allow the Commission to rely on an uncertain estimation of the likely growth of PET use to prove the entity would have an incentive to leverage. Indeed, the ECJ found that the CFI had not exceed the bounds of its power of judicial review by requiring the Commission to produce convincing evidence of the extent of growth predicted.²²⁰

The ECJ also agreed that the Commission needed to examine the entity’s incentive to leverage comprehensively - even taking account of the reduction of this incentive due to the illegality of the conduct in question. However, it found that the CFI had been wrong in demanding the Commission to assess the extent of which the incentive would be reduced, as a result of the unlawfulness of the conduct - as this exercise would be too speculative. However, the ECJ did find that the CFI had not erred in requiring the Commission to take account of the behavioral commitments offered by Tetra, as the alleged dominant position would only arise as a result of certain behavior by Tetra and not through a direct change in the

²¹⁸ *Tetra Laval* (CFI), paras. 141-162 on p. 29-30 and *Tetra Laval* (ECJ), paras. 39-45 on p.35-37.

²¹⁹ *Tetra Laval* (ECJ), para. 41, on p. 36.

²²⁰ *Tetra Laval* (CFI), paras. 192-215 on p. 30 and *Tetra Laval* (ECJ), para. 46 on p.37-38.

structure of the market. Thus it seems that the Commission must take account of the circumstances the merged entity will operate in after the merger, including restraints on its conduct as a result of commitments and legal provisions. However, the assessment of the legal restraints need not be all-inclusive. This standpoint seems very unclear.²²¹

I would interpret the Courts' standpoint as indicating that, in order for the Commission to block a merger, not resulting in a structural change on the market, it must provide convincing evidence of the merged entity's incentive to leverage. Furthermore, when a dominant position can arise only as a result of certain conduct, the Commission must take account of behavioral commitments offered by the parties. I find it peculiar that the only instance where the ECJ held that the evidential burden was too high for the Commission, regarded assessing the future possibility of the entity getting caught infringing Article 82. Indeed, this hardly indicates anti trust enforcement being predictable or based on legal certainty. However, the burden placed on the Commission is still rather high and makes control of conglomerate mergers very difficult in practice. It may therefore be argued that they are better regulated after the merger, through article 82 ECT.

The CFI did not hesitate to also overturn the Commission's findings, with regard to the market definition for SBM machines, on the grounds of insufficient evidence - the ECJ also upheld this finding. In considering the foreseeable foreclosure effects on the market for low-capacity SBM machines, the CFI stated that the evidence does not support the Commission's conclusions "*either in the near future or especially by 2005.*" The CFI seems to imply that potential defects in the Commissions' analysis will become more significant if the Commission is trying to show the likelihood of remote events. In its further analysis of the potential developments of the market for low and high capacity machines, the CFI finds the Commission's conclusions unlikely and instead provides its own predictions of what the likely evolution of the markets will look like. A major part of the Court's criticism relates to the inadequate nature of the assessment to the potential reaction of the entity's competitors. According to both Courts, the reaction of the entity's competitors must also be taken into account when assessing the possible strengthening of a dominant position due to a reduction in potential competition.²²²

Thus, according to *Tetra Laval*, a merger must be authorised if it is not established that in all likelihood it will create or strengthen a dominant position. "These comments do not seem to be confined to conglomerate effects, though they are especially important for them."²²³ In *Tetra Laval*,

²²¹ *Tetra Laval* (CFI), paras. 159-161 on p. 29 and paras. 216-223 on p. 31 and *Tetra Laval* (ECJ), paras. 71-88, on p.38-40.

²²² *Tetra Laval* (CFI), paras. 260-312 on p. 31-35 and *Tetra Laval* (ECJ), paras. 90-146 on p.40-41.

²²³ John Temple Lang, "Two Important Merger Regulation judgements : the implications of Schneider-Legrand and Tetra Laval-Sidel in E.L.R. 2003, vol 28(1), p.269. (Henceforth: Temple Lang)

the CFI seems to suggest that the alleged creation of conglomerate effects and collective dominance calls for a particular close examination of the circumstances producing such effects, as it states that they are conditioned by similar requirements.²²⁴ It seems reasonable to assume that it is harder to prove the allegations the Commission made in *Tetra Laval*, concerning conduct the entity would be more or less likely to engage in within the next five years. Thus, the Court may not have raised the standard of proof, but merely wanted the Commission to provide further evidence, if the Commission wanted to show to the requisite legal standard, that these rather hypothetical events would occur. “By contrast, it might be argued that the requisite legal standard was more readily attained in *Gencor* when it blocked a merger which would have led to a dominant duopoly and where the competitive constraints were relatively weak.”²²⁵

“Still, the more straightforward and irrefutable the Commission’s argument for prohibiting a merger and the more probable an event will occur, the more likely the standard of proof will be satisfied. In addition, the definition of the relevant market in *Airtours* shows that the standard of proof may vary according to the degree of judgement involved. Thus it may be the case that the standard of proof in merger cases is not uniform. On the contrary, much will depend on the merger concerned, the economic theory applied, the evidence available, and the scope for value judgement.”²²⁶ However, it may also be argued that the standard of proof should not vary according to effects that a merger might have, but rather the difference lies in the conditions necessary for proving whether or not a dominant position will be established or reinforced as a result of the merger.²²⁷

Cook and Kerse provide the following analysis of the current legal position: “At the time of writing, the judgement of the ECJ in *Tetra Laval* represents the most recent and authoritative statement on the standard of proof which the Commission must meet in a decision under the Regulation. *It is not without its ambiguities but we suggest that the Commission must establish that an effect is more likely than not to occur as a result of a concentration before a prohibition or the imposition of conditions is justified.* The adverse effects on competition must be attributable to the notified concentration and those effects must be significant. The issue of causation is more than usually complicated because in merger assessments it involves predicting the future rather than seeking to attribute responsibility for an event or chain of events which have already happened.”²²⁸

Some commentators suggest the Courts should have elaborated on the probability approach they touched upon in *Tetra Laval*: “A more economic approach would acknowledge that the uncertainty and information imperfections exist in reality and seek to structure the decision-making by

²²⁴ *Tetra Laval* (CFI), paras. 154-155, on p. 28.

²²⁵ Bailey, p. 864.

²²⁶ *Ibid.* p. 864.

²²⁷ *Ibid.* p.859.

²²⁸ Cook & Kerse, p. 215, referring to *Tetra Laval* (ECJ), paras. 39-40 and 43-44.

applying probability and/or discount factors to possible results, or designing decision rules that minimise the total expected error costs over all cases where the uncertainty arises, thereby maximising total welfare. This sort of weighted probability approach better reflects what happens in real markets... At times the CFI started down this path and articulated some probability thresholds (“in all likelihood”, “particularly plausible”) but none was elaborated or applied in the same manner as the convincing standard.”²²⁹ It is interesting to note that the test applied by US Courts in merger proceedings consists of proving on the balance of probabilities whether the merger will substantially lessen competition.²³⁰

In conclusion, the judgements represent an increasing willingness by the Courts to scrutinize the Commission’s economic assessment and even substitute their own opinion for that of the Commission. However, *Airtours* and *Schneider* show that the CFI will be likely to use flaws in the Commission’s own market investigation when overturning the Commission’s predictions. Thus the judgements demonstrate the Courts’ being rigorous in their assessment of historic facts. Furthermore, *Tetra Laval* illustrates that the Courts will be more ready to overturn hypothetical predictions made by the Commission of the effects of a merger, which do not immediately create a change in the market structure, if they are not based on particularly strong evidence.

I would tend to favour adopting a probability approach to the standard of proof in merger cases. As it is not really possible to prove anything, the probability approach provides a flexible way of ensuring that the standard of proof remains the same, while at the same time making it harder to prove improbable events, thus guaranteeing just outcomes based on facts and not the hypothetical predictions of the Commission. It now seems clear that the merging parties should be given the benefit of the doubt in borderline cases, at least where the effects on competition will not arise as an immediate consequence of the merger. The more remote or improbable a given competitive effect is, the more compelling the evidence required to prove that it will, in all likelihood, occur.

²²⁹ Howarth, referring to *Tetra Laval* (CFI), paras. 153, 162 and 234.

²³⁰ Section 7 Clayton Act 1914, 15 USC 18 and *US v. Baker Hughes* 908 F.2d 981 (D.C.Cir. 1990), in Bailey, p.874.

6 The Impact of The Judgements – Particularly In Light of The New Merger Regulation

An assessment of the possible impact of the judgements, in light of the New Merger Regulation and the accompanying Horizontal Merger Guidelines will now be provided. As is well known, the test of compatibility in Article 2 was changed from the dominance test to the significant impediment to effective competition test (SIEC) in the new Merger Regulation. There is considerable debate as to what effects this change will have in practice. “Although the new test is careful to preserve the jurisprudence of the Community Courts and the decisional practice of the Commission by retaining reference to the creation or strengthening of dominance, the intention was undoubtedly to widen the test of incompatibility... The emphasis on dominance arguably did not create the most appropriate analytical framework within which to carry out merger appraisals, as *Airtours/First Choice* illustrated.”²³¹

The Horizontal Merger Guidelines draw a distinction between unilateral and co-ordinated effects to explain the type of competitive harm that may result from a merger.²³² The New Merger Regulation provides a better ability to protect against unilateral effects, which is the tendency of a horizontal merger to result in higher prices, simply by virtue of the fact that a merger will eliminate direct competition between the two merging firms, even if all other firms in the market continue to compete independently. “Although so-called unilateral effects may be difficult to predict and prove in practice, economic principle recognizes that harm to competition may arise in circumstances where co-ordinated effects (collective dominance) do not arise or cannot be established to the requisite standard.”²³³ The Commission can now assess transactions under a theory of non-collusive oligopoly behaviour without there being evidence of co-ordinated effects or scope for single dominance. However, in the Horizontal Merger Guidelines, the Commission emphasizes that “most cases of incompatibility ... will continue to be based upon a finding of dominance.”²³⁴

Furthermore, the requirements for proving collective dominance, established in *Airtours* are almost literally repeated in the part of the Horizontal Merger Guidelines dealing with coordinated effects.²³⁵ However, some

²³¹ Cook & Kerse, p.209-210, referring to Recital 26 of The New Merger Regulation.

²³² Horizontal Merger Guidelines, p.22.

²³³ Cook & Kerse, p. 211.

²³⁴ Horizontal Merger Guidelines, para. 4.

²³⁵ *Ibid.* para. 29-57.

commentators believe the introduction of unilateral effects will diminish the importance of collective dominance. “In the Guidelines, the Commission states under unilateral effects that mergers which remove important competitive constraints in concentrated markets are likely to be anti-competitive.”²³⁶ Although its policy on unilateral effects is not yet crystallised, it is evident from this statement and a number of unilateral effects cases that the Commission can now apply unilateral effects theories in cases where it previously could only apply collective dominance theories. The threshold (and burden of proof) applied by the Commission for a finding of unilateral effects is lower than that required for a finding of collective dominance. The Commission Guidelines indicate that it will rely upon economic theory and empirical evidence, which indicates that many mergers would result in a unilateral price increase, particularly those mergers between suppliers who are active on fairly concentrated markets.”²³⁷ The Courts may thus have to review the standard of proof for unilateral effects in the future. Furthermore, the Horizontal Merger guidelines do not deal with conglomerate effects and “the issue of conglomeracy is one of particular uncertainty in the application of the new Regulation.”²³⁸

Nevertheless, whatever the practical effects of the New Merger Regulation will be on the substantive tests applied, the recent judgements have shown that the EC Courts will not hesitate to review the Commission’s prospective economic reasoning. “The CFI’s approach in *Schneider* and *Tetra Laval* further demonstrates the degree to which it will not merely scrutinize the assessment the Commission makes on key issues such as market definition or dominance, but the quality, cogency and comprehensiveness of the facts and evidence forming the foundation of the merger decision.”²³⁹ The New Merger Regulation is therefore not likely to change the rigorous approach taken by the EC Courts in the four judgements, even though the substantive test has been changed.

It has been suggested by some commentators that the EU should move closer to a US judicial based system, with the Commission acting as a prosecutor and the Court taking the first binding decision²⁴⁰. However, others suggest that while reform is necessary, “full judicialization by way of replacement of the Commission as the deciding body by a Court of law, pursuant to the US model is, at least for the time being, not warranted.”²⁴¹ “There is clearly a need for more internal verification of the quality of the evidence underlying the case-handlers’ conclusions. This is the role to be

²³⁶ Horizontal Merger Guidelines, para. 25.

²³⁷ Baxter & Dethmers “Collective Dominance Under EC Merger Control – After *Airtours* and the Introduction of Unilateral Effects is there Still a Future for Collective Dominance?” in E.C.L.R.; 2006, issue 3, p. 159 referring to the Horizontal Merger Guidelines para. 26.

²³⁸ Cook & Kerse, p. 230.

²³⁹ Cook & Kerse, p.378.

²⁴⁰ Temple Lang, p. 272.

²⁴¹ Carl Baudenbacher, “Judicialization of European Competition Policy” in 2002 *Fordham Corp. Law Inst.* 000 (B Hawk, Ed 2003) , p. 367.

played by the Hearing officer.”²⁴² Nevertheless, judicial review remains the essential safeguard in EC Merger Control. In this respect it is worthy to note: “To date, appeals have been made against 32 Commission merger decisions. Of the 28 which have come to judgement the Commission’s decision has been annulled, at least in part, in seven cases. This rate of success for applicants does not suggest a lack of judicial control.”²⁴³

I would argue that the four judgements, especially *Tetra Laval*, may nonetheless call for the implementation of a judicial based system. If the reasoning in *Tetra Laval* is relied upon in future cases and the Commission has to show that a merger is more likely than not to create anticompetitive effects, then it would certainly be more appropriate for a specialised Court to review the evidence by the Commission and take the first binding decision. Nonetheless, one thing is certain, the Courts’ ambiguous approach to the standard of proof will cause more parties to try their luck and demand a review of the Commission’s decisions and such a development will raise more calls for a complete reform of the current system.

²⁴² Filip Ragolle, “Schneider Electirc v. Commission: The CFI’s Response to the Green Paer on Merger Review“ in E.C.L.R, 2003, issue 4, p.179.

²⁴³ Cook & Kerse, p.357.

7 Conclusion

The preceding analysis has shown that the standard of proof in EC Merger Control is far from clear. However, some inferences can be drawn from the four judgements analysed in this paper. The judgements represent an increasing willingness by the Courts to scrutinise the Commission's economic assessment. *Airtours* and *Schneider* show that the Courts will be likely to use flaws in the Commission's own market investigation when overturning the Commission's predictions. Thus the judgements demonstrate the Courts being rigorous in their assessment of historic facts. Furthermore, *Tetra Laval* illustrates that the Courts will be more ready to overturn Commission predictions, which are hypothetical and do not immediately create a change in the market structure, if they are not based on particularly strong evidence.

I would tend to favour adopting a probability approach to the standard of proof in merger cases. As it is not really possible to prove anything, the probability approach provides a flexible way of ensuring that the standard of proof remains the same, while at the same time making it harder to prove improbable events, thus guaranteeing just outcomes based on facts and not the hypothetical predictions of the Commission. The more remote or improbable a given competitive effect is, the more compelling the evidence required to prove that it will, in all likelihood, occur.

Furthermore, whatever the practical effects of the New Merger Regulation will be on the substantive tests applied, the recent judgements have shown that the EC Courts will not hesitate to review the Commission's prospective economic reasoning. "The CFI's approach in *Schneider* and *Tetra Laval* further demonstrates the degree to which it will not merely scrutinize the assessment the Commission makes on key issues such as market definition or dominance, but the quality, cogency and comprehensiveness of the facts and evidence forming the foundation of the merger decision."²⁴⁴ The New Merger Regulation is therefore not likely to change the rigorous approach taken by the EC Courts in the four judgements, even though the substantive test has been changed.

I would argue that the four judgements, especially *Tetra Laval*, may call for the implementation of a judicial based system. If the reasoning in *Tetra Laval* is relied upon in future cases, and the Commission has to show that a merger is more likely than not to create anticompetitive effects, then it would certainly be more appropriate for a specialised Court to review the evidence by the Commission and make the first binding decision. Nonetheless, one thing is certain, the Courts' ambiguous approach to the standard of proof will cause more parties to try their luck and demand a review of the Commission's decisions and such a development will raise more calls for a complete reform of the current system.

²⁴⁴ Cook & Kerse, p.378.

Supplement: Overview of Airtours and Tetra Laval

Airtours

Nr	Plea	CFI findings	My own comments
1.	Commission had departed from previous practice in its separation of the markets into one for long haul and one for short haul package holidays.	The Court noted that the Commission had taken account of a number of factors in defining the relevant product market while at the same time acknowledging evidence to the contrary presented by Airtours. ²⁴⁵ The Court found that the Commission had not exceeded its discretion	In this instance the Court seems to take a restricted view of its role in judicial review, by merely acknowledging that the Commission had taken account of Airtours' arguments and not questioning the Commission's assessment.
2.	the decision did not contain sufficient reasoning	"the Decision discloses, in a clear and unequivocal fashion, the Commission's reasoning relating to the definition of the relevant market, in such a way as to enable the Community Courts to exercise their power of review." ²⁴⁶	
3.	<i>where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce <u>convincing</u> evidence thereof</i>	The evidence must concern, in particular, significant factors, such as, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators ²⁴⁷	The Court clarifies the legal standpoint
4.	Airtours first contested the Commission's argument that the ways in which the market previously operated and the fact that competition obtained in the past were not significant factors ²⁴⁸	The Court sided against the Commission's standpoint on this question of law: <i>It follows that the level of competition obtaining in the relevant market at the time when the transaction is notified is a decisive factor.</i>	

²⁴⁵ para 25

²⁴⁶ para 47, referring to the Commission's Decision, paras 5-28

²⁴⁷ para 63

²⁴⁸ para 79-81

5.	The Commission tried to show that a tendency towards collective dominance existed prior to the proposed merger and gave a planning error made by all the large tour operators in 1994, as an example of the consequences of oversupply in the market	“the episode which occurred in that year and to which the Decision attaches great weight <i>cannot, as such, constitute evidence that a tendency towards collective dominance already existed in the industry.</i> ” ²⁴⁹	The CFI thus found that the Decision in this case was not supported by sufficient evidence.
6.	The Commission’s argument that the package holiday market had changed, since a 1997 report by the UK Monopolies and Mergers Commission had found it highly competitive, was also challenged by the Court.	It found the horizontal and vertical integration that had occurred on the market since the report “ <i>less significant than the Commission alleges.</i> ” ²⁵⁰	
7.	The Court instead proceeded to make its own assessment of the horizontal integration	“it is apparent from the documents before the Court that the development, between 1996 and 1999, of the market shares of Thomson, Airtours and First Choice does not prove that their shares of the short-haul market have increased significantly.” ²⁵¹	In this instance the Court did not agree with the Commission’s evaluation of the evidence. However, it did not make a prediction of the possible future developments but merely assess the historic market developments.
8.		the Court found the Commission’s contention that the vertical integration was further evidence of collective dominance to be inconsistent, because the Decision was based at the same time on the premise that a strategy of vertical integration is necessary in order to compete with the tour operators ²⁵²	In this instance, evidence to the contrary was not presented by Airtours, but the Court does not hesitate to use inconsistencies in the Commission’s own decision to strike down its findings.
9.	When assessing the volatility of historic market shares – important for the development of tacit collusion - the Commission was of the opinion that growth by acquisition should be ignored.	However, the Court again made reference to inconsistent statements in the Commission’s own decision, which suggested that an acquisition by one of the major operators resulted, not in the mathematical addition of the market shares of the purchaser and the target, but in a temporary loss of market share.	Even though the Court refers to evidence put forward by the commission itself, it is clear that the two bodies disagree as to what effect that information has on the economic assessment.

²⁴⁹ para 89

²⁵⁰ para 101

²⁵¹ para 102

²⁵² para 105

10.	The Court then turned to the findings on low demand growth	“the Commission’s findings are based on an incomplete and incorrect assessment of the data submitted to it during the administrative procedure.” ²⁵³ The Court found that the Commission had construed a document, which it relied upon, without regard to its actual wording and overall purpose. ²⁵⁴	In this case the Courts’ findings appear to show that the Commission failed to provide any meaningful evidence and thus committed a manifest error of assessment.
11.	demand volatility	the Court first concluded that it was indeed higher than the Commission had found. ²⁵⁵ It then turned to the Commission’s assessment of the impact of demand volatility: “the Commission is not entitled to rely on the fact that tour operators, to protect themselves against sudden downward volatility in demand, plan capacity cautiously	The Court thus not only disputed the evidence put forward by the Commission, but also called into question the economic assessment of that evidence by not allowing the Commission to rely on the caution of the operators.
12.	The Commission alleges that each of the four integrated operators is well able to monitor the total amount of holidays offered by each of the others and that changes made by each individual operator at that stage may be identified by the other major tour operators as a result of their dealings with hotels or their discussions about seat requirements. ²⁵⁶	However, the Court found that: “ <i>the Commission fails to prove those allegations.</i> ” ²⁵⁷ It notes that it cannot be ascertained from the Decision how much information an integrated tour operator may obtain by virtue of the fact that several such operators may be in contact with the same hotels or by discussing airline seat requirements with one another. ²⁵⁸	Nevertheless, the Court does not stop at merely concluding the lack of supporting evidence in the Commission’s Decision, but rather goes on to explain why it finds the position put forward by Airtours more feasible. ²⁵⁹
13.	The Court then turns to the allegedly inadequate nature of the deterrents which the Commission alleges will secure unity within the supposed dominant oligopoly	: “the Commission must not necessarily prove that there is a specific retaliation mechanism involving a degree of severity, <i>but must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct to the detriment of the other oligopolists.</i> ” ²⁶⁰	This is a rather vague statement by the Court as it says the Commission must not “prove”, but that it must “establish” that a retaliation mechanism exists. The fact that the Commission must establish something is actually another way of saying it must this but does not clarify what standard is required.
14.	The assessment of the individual deterrents	“the characteristics of the relevant market and the way that it functions make it more difficult for retaliatory measures to be implemented quickly and effectively enough for them to act as adequate deterrents	The Commission thus had not established that sufficient deterrents existed and the Court actually found the market characteristics directly unresponsive of the Commission’s view.

²⁵³ para 127

²⁵⁴ para 128-130

²⁵⁵ para 140

²⁵⁶ para 170-171

²⁵⁷ para 172

²⁵⁸ para 173-175

²⁵⁹ para 175-180

²⁶⁰ para 195

15.	The estimation of the likely reaction of smaller tour operators, potential competitors and consumers as a counterbalance is then examined.	. “The court observes in lime that, <i>to prove conclusively the existence of a collective dominant position in this instance, the Commission should also have established that the foreseeable reactions of current and future competitors and consumers would not jeopardize the results expected form the large tour operators’ common policy.</i> ” ²⁶¹	
16.	Regarding the possible response of smaller tour operators	“The Commission’s arguments seeking to stress the difficulties that smaller tour operators have in reaching the minimum size at which they are capable of competing effectively with the four large operators <i>are thus immaterial to an assessment</i> of the ability of smaller operators and new entrants to increase capacity in order to take advantage of the opportunities afforded by product shortages” ²⁶²	
17.	Regarding the Commission’s response to Airtours contention that Cosmos should be seen as likely future competitors, the Court notes that:	“the Commission is not entitled to rely on the fact that Cosmos currently tends to favor the large tour operators over the small ones as regards sales of airline seats in order to establish that, were capacity restricted to below a competitive level, Cosmos would not put its own interests above those of the members of the alleged dominant oligopoly.” ²⁶³	The Court thus places weight on the ability of the smaller competitors to pick up any surplus demand and not, as the Commission does, on their ability to compete full out with the dominant firms. The Commission was in this instance not allowed to rely on current behavior in order to support its findings regarding possible future behavior. This seems to be a correct approach in the current circumstances, as there is nothing to suggest that Cosmos would continue its behavior if the dominant firms were to earn super competitive profits. As the court has already noted, there was no collective dominant position prior to the notification of the merger. However, it is nevertheless a clear example of the Court substituting its view of the likely future effect of the merger.

²⁶¹ para 210

²⁶² para 214

²⁶³ para 223

18.	The court then observes that after the merger the three large tour operators as a whole would supply less than half of the airline seats supplied to third parties. Furthermore it states:	: “ <i>there is no evidence that the situation would be substantially altered as a result of the concentration</i> , contrary to the Commission’s contention that the merged entity consisting of the applicant and First choice would be likely further to rationalize airline seats and that the small operators’ problems would be exacerbated by a reduction in the number of seats available.” ²⁶⁴ The Court accepted Airtours’ submission that the small tour operators may obtain airline seats for a season from four sources: overseas carriers; scheduled airlines; low cost carriers; independent charter airlines based in the UK. ²⁶⁵ It found that: “ <i>the arguments put forward by the Commission to show that those sources of supply are not viable are not persuasive.</i> ” ²⁶⁶	In this instance the Court conducts an evaluation of the evidence from both parties and sides against the Commission. Nonetheless, it is also a clear example of the Court overturning the Commission’s economic predictions and substituting them for its own on the basis of factual errors.
19.	The Court then went to consider whether tour operators in other Countries of the Community or in the UK long-haul foreign package holiday would be capable of entering the UK short-haul foreign package holiday market if capacity were to be restricted.	The Court again refers to the MMC report, which suggests that barriers to entry are relatively low and the Commission’s own decision, admitting that a collective dominant position cannot be sustained if barriers to entry are insignificant. ²⁶⁷ The Court also found that consumers are able react to a price rise even though they act in isolation, and that the Commission thus had underestimated the role of the UK consumers, who are in a position to try to obtain better prices from small tour operators. ²⁶⁸	Barriers to entry and consumer preferences are certainly areas requiring an economic assessment. It is therefore noteworthy that the Court makes its own assessment of the evidence and reaches an entirely different conclusion than the Commission.
20.	Concerning the assessment of whether a collective dominant position might be created	“the assessment of the foreseeable impact of the operation on other competitors in the market must ascertain whether those competitors would be in a position to challenge the stability of the alleged dominant oligopoly. The Court has found that the Commission did not prove that they would be incapable of doing so.” ²⁶⁹	

²⁶⁴ para 232

²⁶⁵ para 234

²⁶⁶ para 235

²⁶⁷ para 262-264

²⁶⁸ para 274-275

²⁶⁹ para 280

21.	In response to the Commission's assertion that the purchase of airline seats between the major operators constitutes commercial links, the Court notes:	"As the Commission has not provided evidence to the contrary, there must be a presumption that the conditions obtaining in the relevant market prior to the concentration the fact that each integrated tour operator buys airline seats from, and sells its products to , companies owned by a competitor no more constitutes evidence of interdependence than it does independence." ²⁷⁰	
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²⁷⁰ para 289

Tetra Laval (ECJ)

Nr	Plea	CFI	ECJ findings	My comments
22.	<p>The Commission takes the view, first of all, that the standard of ‘convincing evidence’ differs substantially, in degree and in nature, both from the obligation to produce ‘cogent and consistent’ evidence, established in <i>Kali & Salz</i>, and from the principle that the Commission’s assessment must be accepted unless it is shown to be manifestly wrong. The standard is different in degree because, unlike the standard of ‘convincing evidence’, that of cogent and consistent evidence does not rule out the possibility that another body might reach a different conclusion if it were competent to give a decision on the matter. The standard required is likewise different in nature inasmuch as it transforms the role of the Community Courts into that of a different body which is competent to rule on the matter in all its complexity and which is entitled to substitute its views for those of the Commission. The Court of First Instance was inconsistent in that it referred to the test of manifest error of assessment yet applied a very different test.”²⁷¹</p>	119	<p>Nevertheless, the ECJ notes that, just as in <i>Airtours</i>, the CFI begun by pointing out the discretion enjoyed by the Commission: “<i>As a preliminary point, it must be recalled that the substantive rules of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature.</i>”²⁷² The ECJ then confirms this point of law as the starting point for determining the standard of proof that needs to be satisfied by the Commission: “It should be observed that, in paragraph 119 of the judgement under appeal, the Court of First Instance correctly set out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as laid down in the judgement in <i>Kali & Salz</i>.”²⁷³ However, the ECJ goes on to state that: “Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, <i>that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature.</i> 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. <i>Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.</i>”²⁷⁴</p> <p>Furthermore, the ECJ seems to agree with the CFI’s requirement of convincing evidence to prohibit a merger. “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, <i>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.</i>”²⁷⁵</p>	<p>This is an ambiguous statement by the ECJ. I would agree with the Commission that the two standards of convincing evidence and absence of manifest errors are not identical and that the ECJ should have specified which one should be used. To state that the CFI did not raise the standard of proof by referring to “<i>convincing evidence</i>” and then adding that the essential function of evidence is to establish the merits of a merger decision <i>convincingly</i>, hardly clarifies the matter. In addition, the ECJ seems to imply the need for a more rigorous review of the evidence when the merger is blocked because of its conglomerate effects.</p>

²⁷¹ para 26- 27 referring to paras 220-224 in the *Kali & Salz* judgement

²⁷² *Tetra Laval* (CFI), para. 119.

²⁷³ *Tetra Laval* (ECJ), para. 38.

²⁷⁴ *Ibid.* para. 39.

²⁷⁵ *Ibid.* para. 41.

23.	<p>“Next, the Commission submits that a margin of discretion is inherent in any prospective analysis. The likelihood of certain market developments within a foreseeable time-frame must be determined on the basis of the market situation, observable trends and other appropriate indicators. To require that the Commission’s assessment be, in effect, based on undisputed or virtually unequivocal evidence, irrespective of its merit, would deprive the Commission of its function of evaluating the evidence and attaching, for justifiable reasons, more weight to some sources than to others.”²⁷⁶</p>		<p>However, the ECJ has a seemingly different view of the what this prospective analysis entails: “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 effective 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 <i>likely</i>.”²⁷⁷</p>	<p>This method of evaluating the evidence seems very similar to the balance of probabilities approach used in civil cases in common law jurisdictions.²⁷⁸ It also appears very different from the standard of manifest errors of assessment put forward by the Commission and confirmed by the Court as the correct standard to be used in Competition cases.²⁷⁹</p>
24.	<p>The Court goes on to consider the special circumstances surrounding conglomerate type mergers:</p>	142-155	<p>“The analysis of a ‘conglomerate-type’ concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission’s conclusion that, if such a decision were not adopted, the economic development envisaged by it would be <i>plausible</i>.”²⁸⁰</p>	<p>Consequently, the ECJ concludes that the CFI did not err in law when it exercised its power of judicial review or when it specified the quality of evidence required by the Commission while attempting to prohibit a conglomerate type merger under Article 2(3) of the Merger Regulation.²⁸¹</p>

²⁷⁶ para 28

²⁷⁷ para 42-43

²⁷⁸ Bailey, p. 852.

²⁷⁹ See *Tetra Laval (ECJ)*, para. 48, where the ECJ refers to the annulment of the Commission’s decision as being based on insufficient, incomplete, insignificant and inconsistent evidence, which are the criteria identified by the Commission as the correct standard of proof established by the *Kali & Salz* case (para. 26).

²⁸⁰ para 44 referring to paras 142-155 of the CFI’s judgement

²⁸¹ para 45

25.	By way of illustration of the judicial review carried out by the Court of First Instance in the judgement under appeal, the Commission refers, in particular, to the assessment of the growth in the use of PET packaging for sensitive products. ²⁸²	210-215	“it is not apparent from the example given by the Commission, which relates to the growth in the use of PET packaging for sensitive products, that the Court of First Instance exceeded the limits applicable to the review of an administrative decision by the Community Courts. Contrary to what the Commission claims, paragraph 211 of the judgement under appeal merely restates more concisely, in the form of a finding by the Court of First Instance, the admission made by the Commission at the hearing, which is summarised in paragraph 210 of the judgement, that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. In paragraph 212 of the judgement under appeal, the Court of First Instance gave the reasons for its finding that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only the PCI report contained information on the use of PET for milk packaging. .. In paragraph 213 of the judgement under appeal, the Court of First Instance merely stated that the Commission’s analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in the other reports.” ²⁸³	
26.	The ECJ found the other grounds under this appeal inadmissible, as they related to findings of fact by the CFI and only settled that the CFI had been able to base its conclusions on various items in the Commission’s decision. ²⁸⁴	288-9 328	The ECJ thus found that the CFI had “explained and set out the reasons why the Commission’s conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence.” ²⁸⁵ This being the standard that the Commission had referred to as the correct standard established in the <i>Kali & Salz</i> case. ²⁸⁶	

²⁸² Ibid. para. 30-31 referring to *Tetra Laval* (CFI), paras. 210-215, 289, 288, 328.

²⁸³ Ibid. para. 46.

²⁸⁴ Ibid. para. 47 referring to *Tetra Laval* (CFI), paras. 289, 288 and 328.

²⁸⁵ para 48

²⁸⁶ Ibid. para. 26.

27.	By its second ground of appeal, the Commission firstly complains that the Court of First Instance infringed Articles 2 and 8 of the Regulation in that it required the Commission to take account of the impact which the illegality of certain conduct would have on the incentives for the merged entity to engage in leveraging. ²⁸⁷	148-162 and 217-224	“Since the view is taken in the contested decision that adoption of the conduct referred to recital 364 in that decision is an essential step in leveraging, <i>the Court of First Instance was right to hold that the likelihood of its adoption must be examined comprehensively, that is to say, taking account, as stated in paragraph 159 of the judgment under appeal, both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.</i> However, it would run counter to the Regulation’s purpose of prevention to require the Commission, as was held in the last sentence in paragraph 159 of the judgment under appeal, to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.” ²⁸⁸ The Court found that such an assessment would be too speculative and, consequently, that the CFI had erred in law in rejecting the Commission’s conclusions solely on this ground. ²⁸⁹	In this Instance, the ECJ thus found the evidential burden that was placed on the Commission by the CFI too burdensome and impossible to fulfil in practice. It may be seen as odd that the only place where the ECJ finds the evidential burden placed on the Commission too high regards the assessment of the risk of detection of future illegal conduct – an area where the Commission’s level of expertise would assumingly be very high. Compared to the other evidential burdens placed on the Commission, such as predicting the future incentive to leverage, assessing the risk of detection of illegal conduct would seem just as speculative and would there not be more evidence available, for example, statistical data form the national authorities?
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²⁸⁷ para 52 referring to paras 154-162 and 217-224 of the CFI’s judgement

²⁸⁸ paras 74-75

²⁸⁹ para 78

28.	Secondly, the Commission contends that the CFI's argument, regarding the alleged of failure of the Commission to take account of the commitments offered by Tetra, was contrary to the settled case law expressed in <i>Gencor</i> .	161	However, the ECJ found that the CFI had not departed from the position it had adopted in <i>Gencor</i> , "namely that there will be a significant impediment to effective competition if there is a lasting alteration of the structure of the relevant markets as a result of a concentration having the direct and immediate effect of creating conditions in which abusive conduct is possible and economically rational." ²⁹⁰ The ECJ found the present case entirely different from <i>Gencor</i> , which concerned the creation of dominant duopoly in the platinum and rhodium markets. "In the present case, it is true that the notified merger was capable of slightly altering the structure of the market for carton inasmuch as the merged entity could strengthen the dominant position which Tetra had held for some time on that market and which, moreover, had been the subject of a Commission decision pursuant to Article 82 EC. However, it was not effective competition on the carton market which the Commission intended to protect by prohibiting the merger but competition on the market for PET equipment, in particular that for low and high capacity SBM machines used for sensitive products. The structure of that market would not have been immediately and directly affected by the notified merger but it could have been so affected only as a result of leveraging and, in particular, abusive conduct by the merged entity on the carton market." ²⁹¹	The ECJ thus agreed with the CFI in that the Commission had to take into account behavioural commitments offered by Tetra when assessing the likelihood of leveraging on the market for PET equipment. Furthermore, the fact that the CFI had only concluded that the Commission had not taken account of the commitments, did not amount to insufficient reasoning or distortion of the Commission decision, according to the ECJ. ²⁹²
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²⁹⁰ para 79

²⁹¹ para 82-83

²⁹² Ibid. paras. 85-8.

29.	By its third ground of appeal, the Commission submits that the Court of First Instance erred in law by applying an erroneous test of judicial review and infringed Article 2 of the regulation in so far as it held, in paragraph 269 of the judgment under appeal, that ‘the contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end-use’ and that, ‘consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines’. ²⁹³ The Commission specifically complained of the CFI’s unwillingness to accept price-discrimination as proof of distinct sub markets.	259-268	However, the ECJ responded that it was not the Commission’s use of price-discrimination as proof of distinct markets that was contested by the CFI but rather the evidence it used to support its application in the current circumstances. ²⁹⁴ Furthermore, the Commissions challenge of the rest of the CFI’s findings, as to the generic nature of SBM machines, were inadmissible as they related to the CFI’s assessment of the evidence. ²⁹⁵	
30.	By its fourth ground of appeal, the Commission submits that the Court of First Instance infringed Article 2 of the Regulation, distorted the facts and failed to take account of certain of its arguments by refusing to recognise the merits of its finding that Tetra would strengthen its dominant position in the carton sector. ²⁹⁶	312, 316-333	“The Court of First Instance was therefore right to point out in paragraph 312 of the judgement under appeal – and, in doing so, did not infringe Article 2 of the Regulation – that, although constituting an important factor, as the contested decision finds, <i>the mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position... the Commission has to show that, if there is a reduction in potential competition, this will tend to strengthen Tetra’s dominant position in relation to its competitors on the aseptic carton markets.</i> ” ²⁹⁷	The CFI could thus rely on the potential reaction of the competitors when refuting the Commission’s arguments regarding Tetra’s incentive to stop innovating and raise prices. ²⁹⁸

²⁹³ para 90 referring to paras 259-269 of the CFI’s judgement

²⁹⁴ Ibid. para. 103, referring to *Tetra Laval* (CFI), paras. 259 and 268.

²⁹⁵ Ibid. para. 104 referring to *Tetra Laval* (CFI), paras. 259-269.

²⁹⁶ para 106 referring to paras 312, and 316-333 of the CFI’s judgement

²⁹⁷ Ibid. para. 126-128.

²⁹⁸ Ibid. paras. 131-132 referring to *Tetra Laval* (CFI), paras 316-332.

31.	By its fifth ground of appeal, the Commission claims that the Court of First Instance infringed Article 2(3) of the Regulation by rejecting its findings as to the creation of a dominant position on the market for SBM machines. ²⁹⁹	307, 279, 284, 294	The ECJ found that: “Assessment of the arguments put forward by the Commission shows that the majority of them relate to the Court of First Instance’s assessment of the evidence, which is not subject to review by the Court in appeal proceedings. This is true of the Commission’s complaint that the Court of First Instance failed to take account of certain factors which it considers to be relevant or took account of other factors which it considers to be irrelevant, whether that be in relation to low or high-capacity SBM machines or to the consideration of customers switching from glass packaging.” ³⁰⁰	
32.		305	As for the CFI’ reasoning being inadequate, the ECJ held: “with regard to the argument alleging a failure to state reasons for the finding, in paragraph 305 of the judgment under appeal, that the converters’ dependency on Sidel had not been established convincingly, it need be stated only that the Court of First Instance gave concise but adequate reasons for that finding in the final sentence of paragraph 305.” ³⁰¹	

²⁹⁹ para 134 referring to paras 307, 279, 284, 294 of the CFI’s judgement

³⁰⁰ Ibid. para. 143.

³⁰¹ para 146

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