

Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions

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The article examines the European Court of Justice's ("ECJ") ruling in Commission v. Tetra Laval regarding the scope of judicial review by the Court of First Instance ("CFI") in the merger control area and the standard of proof incumbent on the European Commission (the "Commission") to support its merger decisions. First, the article describes how the ECJ ruling confirms that the CFI must ensure a thorough judicial review and provides precise guidance on the tests to be applied by it. The authors suggest such guidance applies to all types of merger decisions, including those adopted under the new EC Merger Regulation. Additionally, the article acknowledges a perceptible convergence of the courts of several Member States on the need for meaningful judicial review, in line with the Community Courts' case law. Then, the article examines the ECJ's reasoning as regards the standard of proof, and how the Commission must carry out its prospective analysis and substantiate its decisions. Based on the ruling, the authors conclude that the standard of proof should be the same for all types of mergers and for both clearance and prohibition decisions. Finally, on the question of whether the ruling also applies to antitrust decisions, the authors suggest that the need to establish convincingly the merits of an argument is more significant than the type of decision. The Commission will have to be more convincing in complex cases, particularly where it relies on novel theories of competitive harm.

On 15 February 2005, the European Court of Justice ("ECJ") handed down its second ever ruling in the merger control area, and the first on appeal.¹ As virtually all observers expected, it is a landmark ruling settling fundamental issues regarding, in particular, the scope of the judicial review of the substantive assessments contained in EU merger decisions and the standard of proof incumbent on the European Commission (the "Commission"). The ECJ upheld the Court of First Instance ("CFI") 2002 ruling annulling the *Tetra Laval/Sidel* prohibition decision.² Even though other CFI judgments in important cases have been delivered³ or are expected⁴ during the last months of 2005, the *Tetra Laval II* ruling is poised to be the most important so

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¹ Case C-12/03 P, *Commission v. Tetra Laval* ("*Tetra Laval II*"), judgment of 15 February 2005, not yet published in the European Court Report ("ECR"). Latham & Watkins acted as co-counsel for Tetra Laval.

² Case T-5/02, *Tetra Laval v. Commission* ("*Tetra Laval I*"), [2002] ECR II-4381, and Commission Decision 2004/124/EC of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2416—*Tetra Laval/Sidel*), OJ 2004 L 43, p. 13.

³ Case T-87/05, *EDP-Energias de Portugal v. Commission*, ("*EDP*") judgment of 21 September 2005, not yet published in the ECR, where the CFI, despite the finding of fundamental legal errors committed by the Commission, dismissed the challenge against the first and only prohibition decision since 2002 (Commission Decision of 9 December 2004, in Case COMP/M.3440, *ENI/EDP/GDP*) when the CFI overturned three such decisions (Cases T-342/99, *Airtours v. Commission*, [2002] ECR II-2585; T-310/01, *Schneider Electric v. Commission*, [2002] ECR II-4071; and *Tetra Laval I*, as note 2 above.). Latham & Watkins acted as leading co-counsel for EDP.

⁴ Case T-210/01, *General Electric v. Commission*, OJ 2001 C 331, p. 24,—see also the twin Case T-209/01, *Honeywell v. Commission*, OJ 2001 C 331, p. 23,—concerning the most publicised prohibition by the Commission in the merger control area (Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement—Case COMP/M.2220, *General Electric/Honeywell*, OJ 2004 L 48, p. 1).

far in this area. The ECJ's teachings on the intensity of the judicial review of the Commission's assessment in merger cases and on the standard of proof that the Commission has to satisfy will condition the application of the EC Merger Regulation in the coming years.

This article examines the parts of the *Tetra Laval II* ruling where the ECJ has opined on those issues. An analysis of the intensity of the judicial review of procedural errors (e.g. breaches of the parties' rights of defence),⁵ errors in the proof or the accuracy of facts⁶ and errors of law (e.g. the dismissal of behavioural undertakings because considered inadmissible as a matter of principle)⁷ committed by the Commission is therefore beyond the scope of this article. For present purposes, it is sufficient to note that for these other types of errors the Commission does not enjoy any margin of discretion and the review conducted by the Community Courts is consequently very strict.⁸ In substance, as regards these errors the Courts can exercise "full jurisdictional control".

⁵ See, e.g. *Schneider Electric v. Commission*, as note 3 above, at ¶¶ 437-462. Procedural errors may include a lack of or an inadequate reasoning (see, e.g. Case C-378/00, *Commission v. European Parliament and Council*, [2003] ECR I-937, ¶ 34), even though a lack of reasoning is generally considered an error of law in violation of Article 253 EC. According to AG Tizzano, in this respect the review will determine "whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness" (opinion in *Tetra Laval II*, as note 1 above, at ¶ 88).

⁶ See, e.g. Case T-342/00, *Petrolescence and SG2R v. Commission*, [2003] ECR II-1161, ¶ 101, for a classic restatement of the law as regards the degree of the Commission's discretion in this respect. In *Airtours v. Commission*, *Schneider Electric v. Commission*, *Tetra Laval I* and Case T-114/02, *BaByliss v. Commission*, [2003] ECR II-1279, which all resulted in the annulment of Commission's decisions, the CFI did not refrain from reviewing without restraint whether the Commission had got right the facts which supported its predictions and theories of harm. In his opinion in *Tetra Laval II*, AG Tizzano noted that "[w]ith regard to the findings of fact, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained" (¶ 86). However, it should be stressed that it is often difficult to draw a line between the Commission's fact-finding and its assessment of the facts (see, e.g. *Airtours v. Commission*, as note 3 above, at ¶¶ 123-133, for a striking example). The CFI has often shown its willingness to engage in a highly detailed critical examination of both the accuracy of the facts and their assessment by the Commission. In *Airtours v. Commission*, for example, the CFI found several instances in which the Commission could not justifiably rely on certain characteristics of the market to support its conclusion that the merger would result in the creation of a collective dominant position.

⁷ See *Tetra Laval I*, as note 2 above, at ¶ 161, read together with ¶ 429 of the *Tetra Laval/Sidel* Commission decision. For another recent example of an error of law committed by the Commission which justified the annulment of a merger decision, see Case T-310/00, *MCI v. Commission*, judgment of 28 September 2004, not yet published in the ECR, where the CFI decided that the Commission had exceeded the limits of its competence by adopting a merger decision after the parties had informed it that they were abandoning the proposed merger and sought to withdraw the original notification.

⁸ For a more detailed discussion, see Bo Vesterdorf, *Certain Reflections on Recent Judgments Reviewing Commission Merger Control Decisions*, in *A True European—Essays for Judge David Edward*, Hart Publishing, Oxford and Portland (Oregon), 2003, chapter 10, spec. pp. 136 *et seq.*; Emmanuel Coulon, *Le rôle du juge*, in *Le nouveau droit communautaire de la concurrence*, Alexis Mourre (Ed.), FEC-Bruyant, Paris-Brussels, 2004, p. 67, spec. pp. 97 *et seq.*; Bo Vesterdorf, *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, address given at the British Institute of International & Comparative Law, Third Annual Merger Control Conference, London, 6 December 2004, available at <http://www.biiicl.org/admin/files/Standard_of_proof_Bo_Vesterdorf.pdf>, a revised version of which is published in (2005) *European Competition Journal*, p. 3; and Malcolm Nicholson, Sarah Cardell, and Bronagh McKenna, *The Scope of Review of Merger Decisions under Community Law*, (2005) *European Competition Journal*, p. 123.

I. THE CASE

The ECJ judgment ends a long-running saga. On 30 October 2001, the Commission had prohibited Tetra Laval's acquisition of Sidel primarily on the basis of conglomerate concerns, although conglomerate mergers are in general competitively neutral. Through its "Tetra Pak" business, the Swiss-Swedish Tetra Laval group is the leading manufacturer of aseptic and non-aseptic carton packaging systems (both manufacturing equipment and consumables) for liquid food and drink. French company Sidel is a leader in plastic (polyethylene terephthalate, "PET") packaging equipment that is used to produce another type of liquid food packaging (in particular Stretch Blow Moulding, "SBM", machines for making empty PET bottles).

Besides the horizontal overlaps and the risks of vertical foreclosure, the Commission was particularly concerned regarding the effects resulting from the conglomerate nature of the transaction. According to the Commission, as a result of Sidel's acquisition Tetra Laval would have been able to leverage its dominance in the carton packaging market to achieve dominance in the neighbouring plastics packaging market. Tetra Laval would have been in the position to persuade its customers who were switching to PET to choose Sidel's SBM machines. In turn, this would have also eliminated potential competition across packaging systems, thus depriving Tetra Laval of any incentive to lower prices and innovate.

On 25 October 2002 the CFI annulled the prohibition decision on several grounds.⁹ In substance, the CFI found that the Commission made several errors in assessing the likely effects of the merger. Following a thorough analysis of the evidence relied upon by the Commission, the CFI decided that the Commission had failed to prove any of the alleged negative effects of the merger on competition. Ultimately, the CFI held that 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".¹⁰ The CFI found that in *Tetra Laval/Sidel* the Commission had failed to satisfy this standard.

II. THE APPEAL

Of the three 2002 CFI rulings overturning as many prohibitions on substantive grounds, *Tetra Laval I* is the only one challenged by the Commission before the ECJ. It did so even though in all three rulings the CFI scrutinised the decisions with similar intensity, holding the Commission to virtually the same standard of proof. The Commission decided to lodge an appeal because it "considers that the CFI judgment in

⁹ The *Tetra Laval I* ruling was adopted almost exactly a year after the decision and only about nine months after Tetra Laval's challenge, decided by the CFI under the so-called "fast-track" procedure (see Article 76a of the CFI Rules of Procedure, "CFI RoP"). While the ECJ also has similar rules for a fast-track procedure (see Article 62a ECJ RoP), upon the Commission's request it decided the *Tetra Laval II* case under a quasi fast-track procedure, by giving it "priority" (see Article 55(2) ECJ RoP).

¹⁰ *Tetra Laval I*, as note 2 above, at ¶ 155 (emphasis added).

[*Tetra Laval I*] raises problems of legal principle concerning several aspects of the work of the Commission in the field of merger control”.¹¹

More specifically, the Commission considered that “the CFI has [. . .] exceeded its role, which is to review the administrative decision of the Commission for clear errors of fact or reasoning, and not to substitute its view of the case for that of the Commission”.¹² Moreover, the Commission believed that “the CFI has imposed a disproportionate standard of proof for merger prohibition decisions [thus] upset[ting] the balance between the interests of the merging parties and the protection of consumers, which is provided for in the Merger Regulation”.¹³ The Commission raised both these points in its first plea. This article discusses those parts of the ECJ ruling dealing with it.

III. THE RULING: THE SCOPE OF JUDICIAL REVIEW

In *Tetra Laval I*, the CFI recalled that:

“the substantive rules of the [EC Merger] Regulation, in particular Article 2, confer on the Commission a *certain discretion*, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations”.¹⁴

When discussing the appropriate standard of review of the substantive assessment in merger decisions, the CFI cited in particular, as authority supporting its approach, the ECJ ruling in *Kali & Salz*¹⁵ and its own recent *Airtours v. Commission* ruling.

In the appeal, the Commission complained that the CFI had actually departed from the case law and had gone too far. In the Commission’s view, the case law recognised its “wide discretion” and, consequently, set forth a clear limitation to the power of judicial review of the Community Courts.¹⁶

¹¹ Commission press release IP/02/1952 of 20 December 2002.

¹² *Ibid.*

¹³ *Ibid.* The Commission also objected to the CFI’s holding that behavioural commitments can be appropriate because, according to the Commission, they do not solve “the structural problems created through certain mergers and are very difficult, if not impossible to monitor” (*ibid.*). On this point, the ECJ upheld the CFI (*Tetra Laval II*, as note 1 above, at ¶¶ 79-88). Moreover, the Commission disagreed with the CFI’s decision to require the Commission to consider the extent to which the incentives of a merged entity to leverage its market power from one market into a neighbouring market may be reduced, or even eliminated, because such conduct may be illegal under EC or national competition law. In this respect, the ECJ found that the CFI erred in law. It did not quash, though, the ruling because the lower Court’s judgment was also based on other findings which were in themselves sufficient to justify the annulment of the decision (*Tetra Laval II*, as note 1 above, at ¶¶ 74-78).

¹⁴ *Tetra Laval I*, as note 2 above, at ¶ 119 (emphasis added); the reference to the “certain margin of discretion” enjoyed by the Commission is repeated at ¶ 162.

¹⁵ Joined Cases C-68/94 and C-30/95, *France et al. v. Commission* (“*Kali & Salz*”), [1998] ECR I-1375.

¹⁶ *Tetra Laval II*, as note 1 above, at ¶ 37. According to the Report of the Hearing, containing a more detailed summary of the parties’ pleas and arguments, “[b]y its first plea in law, the Commission alleges that the Court of First Instance while claiming to apply the standard of manifest error of assessment, applied in fact a different standard of ‘convincing evidence’. In so doing the Court of First Instance infringed Article 230 EC [which allows for the judicial review of Commission decisions on specified legal grounds] insofar as it disregarded the Commission’s margin of discretion in respect of complex factual and economic assessments” (¶ 18).

The ECJ disagreed with the Commission. It first noted that the CFI had correctly set out the test to be applied when carrying out the judicial review of a merger decision. In this regard, the ECJ observed that the CFI had rightly recalled that the Community Courts “must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations”.¹⁷ Thus, there is no doubt that the Commission needs—and actually has—a margin of discretion as regards the substantive assessment of concentrations under the EC Merger Regulation. However, this ruling shows clearly that such discretion is far from unlimited. Indeed, it could now be argued that *Tetra Laval II* confirms that the Commission enjoys “a certain discretion”¹⁸ as opposed to a “wide discretion” as claimed by the Commission. This results in particular from the very strong statement of the ECJ at ¶ 39:

“[w]hilst the Court recognises 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”.

The ECJ thus underlined the CFI’s fundamental role in the review of Commission decisions, particularly in merger cases. While the CFI will continue to exercise judicial self-restraint with respect to the Commission’s economic findings, it is now clear that the need to respect its “margin of discretion” will not prevent the CFI from looking closely at the Commission’s assessment based on the interpretation of economic information. This is particularly important in view of the increasing use of sophisticated economic analysis in merger cases.¹⁹

III.A. “THE TESTS TO BE APPLIED BY THE CFI”

The reasoning of the ECJ is not limited to the reference to catch-phrases such as “wide discretion”, “certain discretion” and “margin of discretion” which may be seen as mere “labels” and could thus not mean much until put to the test of judicial review. Rather, the ECJ delineated the extent to which the CFI can and must review the economic assessments in merger decisions, “the tests to be applied in the exercise of its power of judicial review”.²⁰ It did so in what is probably the most detailed explanation

¹⁷ *Ibid.*, at ¶ 38.

¹⁸ This very language is used by the ECJ both in *Tetra Laval II*, as note 1 above, at ¶ 38, and in *Kali & Salz*, as note 15 above, at ¶ 223.

¹⁹ In *EDP* (as note 3 above), though, the CFI returns to the notion that in the sphere of complex economic assessments the Commission enjoys a “wide discretion” (¶ 63). Making what would appear to be a rare use of precedents, the CFI includes the *Tetra Laval II* ruling among the authorities supporting this proposition. More specifically, the CFI cites ¶ 38 of *Tetra Laval II*, where no reference is made to a “wide discretion”. The CFI citation of *Tetra Laval II* is difficult to explain. As noted above in the main text, at ¶ 38 the ECJ only refers to a “certain discretion”, in response to the Commission’s claim that it enjoys a “wide discretion” (see ¶ 37). The seemingly more deferential standard applied by the CFI may have had some influence on the CFI’s approach to the applicant’s more complex economic arguments aimed at undermining the foundations of the Commission’s economic reasoning. Arguably, the CFI could have gone further in its analysis of such arguments (without the risk of substituting its views for those of the Commission). Ultimately, the *EDP* ruling creates uncertainty in an area where the ECJ seemed to have brought, at last, some clarity (following the patch traced in the only other ECJ ruling in the area of merger control, *Kali & Salz*).

to date in the Community Courts' case law of what judicial review of merger decisions is all about:

“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”.²¹

Based on the ECJ's approach in *Kali & Salz*, in his opinion AG Tizzano stressed that judicial review must be “adequate” and described it with language that has certainly inspired the above passage from the judgment:

“As is also clear from the approach taken by the Court of Justice in *Kali and Salz*, those duties imposed on the Commission make it possible for the Community judicature to exercise an adequate review. Without entering into the merits of the Commission's assessments, it can in particular ascertain whether the factual information on which such assessments are based is accurate and whether the conclusions drawn as to fact are correct; whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors; and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness”.²²

What was key in *Kali & Salz* as well as in *Tetra Laval I* was not so much the “legal standard” for the judicial review, but the way in which the Courts actually applied it. In *Kali & Salz*, the ECJ very carefully looked at each one of the elements relied upon by the Commission to conclude that the merger would have resulted in a situation of collective dominance.²³ It thus reviewed the Commission decision thoroughly. Clearly, the CFI took notice of that analysis when deciding subsequent cases of collective dominance (like *Kali & Salz*),²⁴ as well as other cases such as *Tetra Laval I* (conglomerate effects) and *Verband der freien Rohnverke* (vertical and horizontal effects).²⁵ Ultimately, both Courts undertook an analysis along the lines of what the passages above state.

III.B. THE LIMITS TO THE CFI'S POWERS OF REVIEW

Tetra Laval II thus confirms what can now be considered settled case law. It shows how sweeping the Community Courts' powers of judicial review in the merger control area are. The only limit to those powers is that the Courts cannot substitute their own

²⁰ *Tetra Laval II*, as note 1 above, at ¶ 45.

²¹ *Ibid.*, at ¶ 39.

²² Opinion in *Tetra Laval II*, as note 1 above, at ¶ 88.

²³ *Kali & Salz*, as note 15 above, at ¶¶ 225-250.

²⁴ See *Airtours v. Commission*, as note 3 above; and Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753, where the standard is set out at ¶¶ 160-165 and applied, e.g. at ¶¶ 199-216.

economic assessment for that of the Commission.²⁶ AG Tizzano was particularly clear in this respect.²⁷

The ECJ, though, did not refer to this limit (nor did it in *Kali & Salz*). While the Commission had claimed that in *Tetra Laval I* the CFI had “substitute[ed] its view for that of the Commission on a number of central points”,²⁸ at ¶ 46 the ECJ simply dismissed the claim finding that the CFI had not “exceeded the limits applicable to the review of an administrative decision by the Community Courts”. Arguably, with this statement, the ECJ implicitly confirmed the above limit to judicial review. Considering the extent and thoroughness of the analysis by the CFI and the fact that AG Tizzano thought that the CFI had in certain instances “trespassed” the limit,²⁹ the ECJ silence on this conceptually important issue can also be read as an indication that the Court is not keen to criticise the CFI for engaging in a thorough scrutiny of the Commission’s reasoning and findings.

To substantiate its plea that the CFI had exceeded its powers, the Commission claimed that the CFI had substituted its own assessment for that of the Commission with respect to the predicted growth of PET packaging for a number of certain beverages. While AG Tizzano agreed with the Commission, the ECJ dismissed the Commission’s arguments in this respect in just one paragraph.³⁰ The ECJ pointed out that such arguments related to findings of fact by the CFI for which the Court had been able to rely on various items in the contested decision itself.³¹ The different views expressed by AG Tizzano and the ECJ show how difficult it is to draw a distinction between an “adequate review” by a Court looking closely at the Commission’s complex economic assessments and undue interference by a Court that in substance substitutes its views for those of the Commission.

Remarkably, the ECJ did not make reference to the standard of the “manifest error of assessment”, traditionally used to determine the limit of judicial review. It had not mentioned it in *Kali & Salz* either. This may be read as a signal that the intensity of judicial scrutiny finds few genuine obstacles and that, besides “labels”, what counts is the substance of the judicial scrutiny where the objective is to determine whether the Commission committed the errors alleged by the applicant and these are such as can

²⁵ Case T-374/00, *Verband der freien Rohnwerke et al. v. Commission*, [2003] ECR II-2275, ¶ 105 for the legal standard and, e.g. ¶¶ 107-150 for its application.

²⁶ See, e.g. *Petrolescence and SG2R v. Commission*, as note 6 above, at ¶ 101; and T-158/00, *ARD v. Commission*, [2003] ECR II-3825, ¶ 329.

²⁷ Where he wrote that “[t]he rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly [...] to enter into the merits of the Commission’s complex economic assessments or to substitute its own point of view for that of the institution” (opinion in *Tetra Laval II*, as note 1 above, at ¶ 89).

²⁸ Notice of the case in OJ 2003, C 70, p. 3 (see under plea 1, ground 2), or, in other words, “[the CFI] imposed its own findings, which were contrary to those of the Commission” (*Tetra Laval II*, as note 1 above, at ¶ 31).

²⁹ Opinion in *Tetra Laval II*, as note 1 above, at ¶ 92-111.

³⁰ *Tetra Level II*, as note 1 above, at ¶ 46; for a similar reaction about a second example offered by the Commission, see ¶ 47.

³¹ For a further discussion, written before the publication of the *Tetra Laval II* ruling, of the different views on specific points taken by the CFI and AG Tizzano as regards the boundaries of judicial review, see Malcolm Nicholson, Sarah Cardell, and Bronagh McKenna, as note 8 above, at pp. 134-136.

lead to the annulment of the decision concerned. After all, in the past the CFI had already annulled a merger decision due to a “a series of errors of assessment”, not one of which qualified as “manifest”.³²

III.C. THE RULING IS SIGNIFICANT FOR ALL MERGER DECISIONS AS WELL AS UNDER THE NEW EC MERGER REGULATION

At this point, one question comes naturally to mind: does the ruling apply only to conglomerate mergers? Or does it apply also to situations of collective dominance (since the ECJ cited *Kali & Salz*)? Or does it apply to all kinds of mergers? Arguably, the ECJ did not limit its holding to any particular type of mergers. Far from limiting the above standard of judicial review to decisions concerning conglomerate mergers and mergers giving rise to collective dominance, in *Tetra Laval II* the Court emphasised that “[s]uch a review is *all the more necessary* in the case of a prospective analysis required when examining a planned merger with conglomerate effect”.³³ This is understood by the authors as meaning that an “adequate” judicial review along the lines described above is *always* necessary, particularly—and not only—in conglomerate merger cases.

In this respect, the ECJ seems to confirm a position that the CFI had already adopted by stating that:

“It should be observed, first, that the [EC Merger Control] Regulation, particularly at Article 2(2) and (3), does not draw any distinction between, on the one hand, merger transactions having horizontal and vertical effects and, on the other hand, those having a conglomerate effect. It follows that, *without distinction between those types of transactions, a merger can be prohibited only if the two conditions laid down in Article 2(3) are met* (see paragraph 120 above). Consequently, a merger having a conglomerate effect must, *like any other merger* (see paragraph 120 above), be authorised by the Commission if it is not established that it creates or strengthens a dominant position in the common market or in a substantial part of it and that, as a result, effective competition will be significantly impeded”.³⁴

³² See, e.g. *Airtours v. Commission*, as note 3 above. While not making reference to the standard of judicial review set out by the ECJ in *Tetra Laval II*, in *EDP* (as note 3 above) the CFI seems to return to the standard of the “manifest error of assessment”. After recognising that, as regards complex economic assessments, the Commission enjoys a “wide discretion” (¶ 63), the CFI recalls that, in this respect, “review by the Community courts [...] must be limited to ensuring the absence of [...] manifest errors of assessment” (¶ 151). Such a standard seems to have had some influence on the outcome of the case. Ultimately, in judgment where there are numerous references to this standard the CFI upheld the Commission’s prohibition on the ground that the applicant had failed to show such manifest errors. Indeed, a careful reading of the Report of the Hearing and the judgment reveals that the CFI refrained from entering into some of the most complex arguments, including those developed by the applicant’s economists both in a paper attached to the application and – at length – at the oral hearing (besides legal arguments, the applicant put forward also several economic arguments in an attempt to show the various errors allegedly committed by the Commission). It is now difficult to see how the “manifest error” standard can be reconciled with the seemingly more stringent standard set out in both *Kali & Salz* and *Tetra Laval II*, where the ECJ only recognised that the Commission has a “certain discretion” and never made reference to the requirement that errors need to be “manifest” to justify an annulment (for instance, the ECJ did not make such a reference at ¶ 38 of the *Tetra Laval II* ruling, which is however cited by the CFI at ¶ 151 of the *EDP* judgment as an authority for the “manifest error” standard). Again, the *EDP* ruling seems to reintroduce some ambiguity as to the proper standard and, in turn, intensity of judicial review, an issue that the ECJ had apparently resolved.

³³ *Tetra Laval II*, as note 1 above, at ¶ 39 (emphasis added).

³⁴ *Tetra Laval I*, as note 2 above, at ¶ 146 (emphasis added).

In substance, the CFI held that, since the Commission must carry out the same analysis regardless of the specific nature of the merger at hand, the judicial review of a merger decision will always be conducted in the same fashion. As noted above, the CFI had already recalled, and applied, the “*Kali & Salz* standard” in several judgments concerning a variety of mergers.

The CFI took the same approach with respect to the assessment (including of remedies) contained in clearance decisions.³⁵ Was it correct? Or is the “*Tetra Laval II* standard” relevant only when the CFI reviews prohibition decisions? Again, the authors see no reason to limit the scope of *Tetra Laval II* to prohibition decisions. In confirming the continued validity of its holding in *Kali & Salz*, concerning a clearance decision (with remedies), the ECJ itself has shown that the same close scrutiny of the Commission’s analysis is required regardless of the final outcome. AG Tizzano took the same position noting that the Community Courts’ judicial review includes ascertaining:

“whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of *the compatibility or otherwise* of a concentration with the common market satisfy requirements of logic, coherence and appropriateness”.³⁶

Tetra Laval II raises a third fundamental question: does it also apply to the judicial review of decisions adopted under the “new” EC Merger Regulation?³⁷ After all, *Tetra Laval/Sidel* was decided under the “old” EC Merger Regulation.³⁸ There is no reason to believe that *Tetra Laval II* came to light as an already obsolete precedent as a result of the 1 May 2004 effective date of the new EC Merger Regulation. The ECJ reasoning applies to the review of the Commission’s use of its discretion “especially with respect to assessments of an economic nature”.³⁹ The modification of the substantive test introduced with Article 2 of the new EC Merger Regulation does not change this.⁴⁰ When it decided to appeal the *Tetra Laval I* ruling, the Commission itself was well aware of this and the implications that the ECJ ruling would have had in the future. In the press release announcing the appeal, the Commission stated that it “considers that the CFI judgment in [*Tetra Laval I*] raises problems of legal principle concerning several aspects of the work of the Commission in the field of merger control”.⁴¹

³⁵ See *Verband der freien Rohrwerke v. Commission*, as note 24 above; and *Petrolessence and SG2R v. Commission*, as note 6 above.

³⁶ Opinion in *Tetra Laval II*, as note 1 above, at ¶ 88 (emphasis added).

³⁷ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004, L 24, p. 1), which came into force on 1 May 2004.

³⁸ Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989, L 395, p. 1).

³⁹ *Tetra Laval II*, as note 1 above, at ¶ 38.

⁴⁰ For a discussion of this and other changes in the new EC Merger Regulation and their practical effects, see Michael G. Egge, Matteo F. Bay, and Javier Ruiz Calzado, *The New EC Merger Regulation: a Move to Convergence*, (Fall 2004) ABA Antitrust magazine, p. 37.

⁴¹ Commission press release IP/02/1952, as note 11 above.

IV. SIMILAR SCOPE OF JUDICIAL REVIEW AT MEMBER STATE LEVEL

The relevance of the judicial review of Commission merger decisions, including where third parties challenge clearance decisions, has indisputably increased.⁴² This seems also true in a number of Member States. Even from a “Brussels perspective”, this is not irrelevant. Referrals of a merger from the Commission to the Member States and vice-versa are now more common as the result of the changes to the referral mechanisms introduced in the new EC Merger Regulation.⁴³ Moreover, judgments of national courts reviewing the legality of merger decisions often apply similar standards and, at times, refer to the standards applied by the Community Courts when setting out their own standards of review. It is therefore worth noting that, perhaps not surprisingly, in several Member States the intensity of the judicial scrutiny of merger decisions adopted by the National Competition Authorities (“NCAs”) or the Government (depending on the institutional setting of the merger control system) is often similar to that approved of by the ECJ in *Tetra Laval II*.

In 2004, the French *Conseil d’Etat* (the Supreme Administrative Court with jurisdiction over all antitrust and merger decisions) annulled the Ministry of Economy’s decision authorising the *SEB/Moulinex* merger after conducting a review of the Ministry’s assessment that in certain instances virtually replaced that assessment with its own.⁴⁴

In Germany, the full judicial review of decisions by the *Bundeskartellamt* (the German Federal Cartel Office) has been established for a long time.⁴⁵ The point is, therefore, not discussed in any judgment over the past ten years. An exception exists only where the statute expressly confers a discretion upon the enforcement authority and as regards decisions by the Federal Minister of Economics. None of these exceptions are applicable to decisions by the German Federal Cartel Office relating to mergers.

Between 2002 and 2005, various rulings of the highest Italian courts clearly established the competent courts’ power to conduct a “pervasive control” of the assessments made by the *Autorità Garante della Concorrenza e del Mercato* (the Italian Competition Authority, “ICA”) in merger decisions (as well as in antitrust decisions). In *ICA v. ENEL*, the *Consiglio di Stato* (the Supreme Administrative Court) applied that standard when reviewing the assessment of the effectiveness of the remedies imposed by

⁴² To the point that now parties contemplating a merger raising difficult substantive issues may at times consider whether a clearance can ultimately be obtained following the annulment of what initially could be a prohibition decision.

⁴³ In a ruling of 1 April 2005, *Unichem v. OFT*, [2005] CAT 8, the UK Competition Appeal Tribunal (“CAT”) favourably noted the similarity of the scope of judicial review in merger cases by the UK and Community Courts emphasising that “[t]he *Tetra Laval* case is, in any event, of interest as to the approach to be adopted by a Court exercising a similar jurisdiction to that of the [CAT]. We also note that under [the old Merger Regulation] and now Regulation 139/2004 there is scope for mergers which originally fall for consideration under the Community system to be dealt with by the OFT (and vice versa): see Articles 9 and 22” (at ¶ 169; emphasis added).

⁴⁴ Ruling of 6 February 2004, in Case No. 249262-252297-252350-252809, *Royal Philips Electronic et al. v. Ministre de l’Economie*.

⁴⁵ See Werner, *Handbuch des Kartellrechts*, Wiedemann (Ed.), 1999, section 54, ¶ 96, with further references.

the ICA on the parties in the *Enel/Wind-Infostrada* merger, and ultimately finding that they were disproportionate.⁴⁶ In 2004, the same Court noted in *Meal Tickets*, a ruling where it cites *ICA v. Enel*, that the only limit to its powers of judicial review is that it may not substitute its views for those of the ICA.⁴⁷ In *Meal Tickets*, the *Consiglio di Stato* made explicit reference to the fact that the “Community Courts have in fact reviewed very often in a very detailed manner the Commission’s economic analysis”.⁴⁸ More recently, in a landmark ruling of 29 April 2005 the full court of the *Corte di Cassazione Civile* (the Supreme Civil Court) upheld this case law.⁴⁹

In Spain, the judicial control of merger decisions by the Government has been particularly intense. All the challenges so far adjudicated (eight) have resulted in total or partial annulment on procedural and/or substantive grounds. In 2002, the Spanish *Tribunal Supremo* closely examined one of the key remedies imposed by the Spanish Government during its clearance of a merger and ultimately annulled it on the ground that the remedy was not appropriate to cure the competitive concerns identified in its opinion to the Government by the *Tribunal de Defensa de la Competencia* (the Spanish Competition Authority).⁵⁰ In its ruling, the *Tribunal Supremo* highlighted the importance of the principle of free enterprise. Through its findings, it gave clear indications that because of the protection the principle enjoys in the Constitution any attempt to limit its scope shall be thoroughly scrutinised. The scrutiny will focus on the reasoning, the appropriateness and the proportionality of the decision.⁵¹

Historically, in reviewing the legality of government decisions the UK courts have applied the “Wednesbury unreasonableness” standard (named after a famous case of 1947).⁵² The Competition Appeal Tribunal (“CAT”) has applied the same standard with respect to the judicial review of merger decisions.⁵³ The CAT has recently considered that standard equivalent to that set forth by the ECJ at ¶ 39 of the *Tetra Laval*

⁴⁶ Ruling of 1 October 2002, No. 5156, *ICA v. Enel*, Section 25 (it concerns a decision rendered by the ICA following the referral from the Commission under Article 9(2) of the old EC Merger Regulation of the part of the proposed transaction involving the market for the supply of electricity, after an initial merger filing in Brussels also covering telecommunications markets, see Commission Decision of 19 January 2001, in Case No. COMP/M.2216, *Enel/FT/Wind/Infostrada*, ¶ 15; and ICA Decision of 28 February 2001 in Case No. C4438, *Enel-France Télécom/New Wind*, ICA Bulletin n. 18/2001, p. 45); for detailed comments, see Angelo Lalli, *La sindacabilità giurisdizionale del potere neutrale dell’Autorità ed il procedimento di controllo in materia di concentrazioni*, (2003) Foro amm. CDS, p. 232. More recently, see also the *Consiglio di Stato* ruling of 21 March 2005 No. 1113, *Fondiarie Industriale Romagna v. ICA*, where the Court agreed with the third party challenging a clearance decision with remedies that certain remedies were insufficient to cure the competitive issues identified by the ICA (see Section 7).

⁴⁷ Ruling of 2 March 2004 No. 926, *Gemeaz Cusin et al. v. ICA* (“*Meal Tickets*”), Section 3.3.

⁴⁸ *Ibid.*

⁴⁹ Ruling of 29 April 2005 No. 8882, *Milano Assicurazioni et al. v. ICA*, Sections 5.1 and 6.

⁵⁰ Ruling of 2 April 2002 No. 9844, *Prosegur Compañía de Seguridad v. Consejo de Ministros*.

⁵¹ The Court considered that the Government’s imposition of a price cap for three years was a disproportionate remedy and an inadmissible attack to such principle (see p. 12; for a more detailed discussion, see Juan Andrés García Alonso, *El control jurisdiccional en material de control de concentraciones español*, 2005, *Gaceta Jurídica de la UE y de la Competencia*, n. 237, p. 16).

⁵² Ruling of the Court of Appeal of 7-10 November 1947, *Associated Provincial Picture Houses v. Wednesbury Corporation*, [1948] 1 KB 223.

⁵³ Ruling of 3 December 2003, *IBA Health v. OFT* (“*IBA Health I*”), [2003] CAT 27, upheld by the Court of Appeal with a ruling of 19 February 2004, *OFT v. IBA Health* (“*IBA Health II*”), [2004] EWCA Civ 142.

II ruling.⁵⁴ The rigor and thoroughness of the analysis in the CAT's rulings show that, in substance, the intensity of its review mirrors that of the Community Courts.⁵⁵

V. THE RULING: THE STANDARD OF PROOF

In its appeal against *Tetra Laval I*, the Commission's first plea also covered the issue of the standard of proof for merger decisions. As noted above, the first plea therefore resulted in a combination of two main arguments, one concerning the standard of judicial review, the other the standard of proof. This is due to the close link existing between the two issues. As President Vesterdorf put it, "albeit different concepts, the standard of proof and standard of review are so closely linked as to become inseparable", and "the intensity of judicial control [...] will fluctuate depending on the underlying standard of proof required by the administrative body having taken the decision on the merits [...]".⁵⁶ A discussion of the standard of proof will therefore lead to a better understanding of the standard of judicial review.

The Commission argued during its appeal that the CFI, in requiring the Commission to produce "convincing evidence", had applied a higher standard than that—set forth in *Kali & Salz*—of a "cogent and consistent body of evidence".⁵⁷ According to the Commission, the "convincing evidence" standard was an unreasonably high standard to satisfy before it could block a proposed merger and was inconsistent with the principle that the Commission's assessment must be accepted unless it is shown to be manifestly wrong. In substance, the Commission claimed that the test actually applied in *Tetra Laval I* was no longer whether the applicant has established that the Commission has committed a manifest error of assessment, but whether it has cast sufficient doubts regarding the convincing nature of the Commission's case. *Tetra Laval* countered inter alia that the Commission's argument was "merely a semantic discussion of terms used" by the Community Courts.⁵⁸

In rejecting the Commission's arguments, the ECJ explained the nature and the quality of the evidence required in merger cases. It thus showed that in substance *Tetra Laval* was right, as the same explanation would be equally relevant for the "cogent and

⁵⁴ See *Unichem v. OFT*, as note 42 above, at ¶¶ 158-175. The parallel drawn in *Unichem v. OFT* between the EC and the UK standards of judicial review is not surprising, as Sir Christopher Bellamy, the CAT President, is a former CFI judge.

⁵⁵ Also in the United States—where the courts determine whether the claims brought by the antitrust authorities are founded and, therefore, there is no judicial review of the legality of a "merger decision"—the courts have often shown how far they go in the assessment of the Government's claims (see, e.g. *U.S. v. Oracle Corporation*, 331 F. Supp. 2d 1098, 1101 (N.D. Cal. 2004), where in a very long opinion that is highly fact-intensive and relies heavily on antitrust economics Judge Walker detailed his disagreement with virtually every part of the DOJ's assessment and allegations, based on a unilateral effects theory of harm)—Latham & Watkins was counsel for Oracle. For another recent example of thorough review of the Government's arguments to challenge a proposed merger, see *Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004), where the Court denied the FTC's motion for preliminary injunction based on a coordinated effects theory.

⁵⁶ Bo Vesterdorf, as note 8 above, at p. 6; see also David Bailey, *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, (2003) CML Rev., p. 845, at p. 850.

⁵⁷ *Kali & Salz*, as note 15 above, at ¶ 228.

⁵⁸ *Tetra Laval II*, as note 1 above, at ¶ 32.

consistent body of evidence” standard, as it was actually applied by the ECJ itself in *Kali & Salz*.⁵⁹

The ECJ was particularly clear in deciding in favour of Tetra Laval also regarding the standard of proof the Commission must meet in its decisions and the Commission’s tasks when examining mergers. It held that the evidence on which the Commission relies must be “factually accurate, reliable and consistent”, “contain all the information which must be taken into account in order to assess a complex situation”, and should be “capable of substantiating the conclusions drawn from it”.⁶⁰ Moreover, as confirmation of the continued validity of the standard set forth in *Kali & Salz* on which the CFI had relied, the ECJ recalled that the Commission’s investigation “calls for a close examination of the circumstances which are relevant for an assessment of [the effects of the merger] on the conditions of competition on the reference market”, adding that such “precise examination [must be] supported by convincing evidence”.⁶¹

V.A. THE EVIDENCE IS NEEDED TO CONVINC

The way in which the ECJ dealt with the Commission’s arguments that the “convincing evidence” standard was too demanding is quite remarkable. The ECJ simply stated that, if the CFI used the terms “convincing evidence”:

“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”.⁶²

⁵⁹ This was the position of the CFI, as it referred to the standard of proof incumbent on the Commission using as synonyms the expressions “convincing evidence” and “cogent evidence” in rulings explicitly relying on *Kali & Salz*; *Airtours v. Commission* (¶¶ 63 and 294, respectively); and *Tetra Laval I* (e.g. ¶¶ 155, 223, 327 and 137, respectively).

⁶⁰ *Tetra Laval II*, as note 1 above ¶ 39.

⁶¹ *Ibid.*, at ¶ 40.

⁶² *Ibid.*, at ¶ 41. In his opinion, AG Tizzano described the evidence required from the Commission as a body of “solid elements gathered in the course of a thorough and painstaking investigation” (¶ 74). Ironically, it was the Commission which, in a merger decision, had first stated that *Kali & Salz* imposed on it a “strong burden of proof”, or the obligation to produce “*preuves solides*” (in the French version of the decision); see Commission decision of 20 May 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, *Price Waterhouse/Coopers & Lybrand*, Case IV/M.1016 (OJ 1999 L 50, p. 27, ¶ 104). In *Airtours v. Commission*, the CFI took explicitly into account the Commission’s recognition in *Price Waterhouse/Coopers & Lybrand* of the quality of the evidence that must support its conclusions (see ¶ 63). In the French version of both *Airtours v. Commission* and *Tetra Laval I*, “convincing evidence” is “*preuves solides*” (not an insignificant detail, considering that French is the working language of the Community Courts; it allows to draw a direct connection between the Commission’s understanding of *Kali & Salz* and the standards used in these subsequent rulings).

Some Member State courts have already recognised that their NCAs are subject to a similar standard of proof. In the United Kingdom, for instance, the courts have decided that “the onus is firmly on the OFT to satisfy the [CAT] that it had *solid*, logical and properly reasoned grounds for [its decision]” (*IBA Health I*, as note 52 above, at ¶ 214; emphasis added) or “*solid*, sufficiently certain, and properly reasoned grounds” (*ibid.*, at ¶ 230, emphasis added; both points are cited approvingly by the Court of Appeal in *IBA Health II*, as note 52 above, at ¶ 54).

A similar standard of proof in merger cases seems to be applied by US courts, when assessing the merits of the Government’s claims (see *DOJ v. Oracle Corporation*, as note 54 above, where the Court’s opinion is of particular interest not just because of its detailed analysis of a unilateral effects case, but also because of what it teaches us about the types of evidence a court is likely to find persuasive—or in this case, unpersuasive—in proving the basic elements of a merger case).

In discussing more in detail the Commission's task in these cases, the ECJ referred to the difficulties inherent to the particular nature of merger review and noted that:

“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 [...], 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”.⁶³

“Thus—continued the ECJ—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*”.⁶⁴

This way, the ECJ gave very helpful guidance on two important issues concerning the Commission's tasks as regards the prospective analysis that characterises merger control decisions. First, the need to examine the factors determining the state of competition on a given market that might be altered by the proposed merger. Second, the need to do it by closely scrutinising the various possible chains of cause and effect and by concluding which one has a greater chance of occurring.

Then, the ECJ considered more specifically the situation of conglomerate mergers. It emphasised that, because of the need to predict future events over a lengthier period of time, the quality of the evidence to be produced by the Commission is particularly important.⁶⁵ This statement seems to signal that the Court is likely to demand that the Commission be more convincing in cases where it proposes novel or particularly complex theories of competitive harm or it applies them to sectors where *prima facie* they seem difficult to fit.

V.B. IS THE STANDARD OF PROOF THE SAME FOR ALL TYPES OF MERGERS?

The authors believe that the ECJ did not raise the standard of proof in general, nor did it mean to make it harder to satisfy in conglomerate mergers.⁶⁶ The evidence must always be convincing. Indeed, as noted above, the “convincing evidence” standard appears to be a reformulation of the standard already set forth in *Kali & Salz* (“cogent and consistent body of evidence”). In light of the close link between standard of judicial

⁶³ *Tetra Laval II*, as note 1 above, at ¶ 42 (emphasis added).

⁶⁴ *Ibid.*, at ¶ 43 (emphasis added).

⁶⁵ “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 means 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 *Contd.* 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” (¶ 44).

⁶⁶ For a different view on this issue, expressed before *Tetra Laval II*, see Mario Siragusa, *Judicial Review of Competition Decisions under EC Law*, paper for the UK Competition Commission's lecture of 21 September 2004, London, on *Judicial Control of Competition Decisions*, p. 4, with a discussion of *Tetra Laval I*, <http://www.competition-commission.org.uk/our_role/cc_lectures/judicial_control_210904_siragusa.pdf>.

review and standard of proof, the equally intense judicial review by the ECJ in *Kali & Salz* and by the CFI in *Tetra Laval I* (upheld by the ECJ) seems to confirm this point.

Also, as if to stress that its ruling is not limited to certain types of mergers, the ECJ even noted that “a prospective analysis of the kind necessary *in merger control* must be carried out with great care”.⁶⁷ Moreover, only after setting out in several paragraphs the standard of proof generally applicable to merger cases,⁶⁸ did the ECJ go on to highlight the difficulties inherent in conglomerate mergers and, as a result, the particular relevance the evidence has in these cases.⁶⁹

V.C. IS THE STANDARD OF PROOF THE SAME FOR BOTH CLEARANCE AND PROHIBITION DECISIONS?

The last sentence of ¶ 44 in *Tetra Laval II*—in particular the language about “a decision declaring the concentration incompatible with the common market”—could give rise to a different question, whether the “*Tetra Laval*” standard of proof applies only to prohibition decisions. The authors believe that this is not the case.⁷⁰

At the time of the appeal the Commission explicitly took the position that *Tetra Laval I* stood for a higher (and excessive) standard of proof for prohibition decisions only.⁷¹ The ECJ, though, did not explicitly address the Commission’s argument that the “convincing evidence” standard of proof effectively creates a presumption in favour of the legality of mergers.

Important elements seem to suggest that the ECJ’s reasoning as regards the standard of proof is equally applicable to clearance decisions. This would support the view that the EC Merger Regulation contains a principle of neutrality toward the lawfulness of a merger.

First, the holding at ¶ 44 that the “quality of the evidence” is “particularly important” to support a prohibition in a conglomerate situation follows—as noted above—five paragraphs where the ECJ deals extensively with the standard of proof in general. More specifically, in those paragraphs the ECJ explained that “the essential function of the evidence [...] is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger”.⁷² Such function is the same, regardless of the outcome. It would be surprising to hear from the ECJ that, if a clearance decision is challenged, the standard of proof used as a yardstick to determine whether the Commission has proved its case is different. Moreover, the ECJ stated that the objective

⁶⁷ *Tetra Laval II*, as note 1 above, at ¶ 42 (emphasis added).

⁶⁸ *Ibid.*, at ¶¶ 39–43.

⁶⁹ See citation above from ¶ 44 of *Tetra Laval II*, as note 1 above.

⁷⁰ President Vesterdorf seems to be of the same view when, before embarking on a discussion of the amount of evidence required, he asks “how much evidence is required before the Commission can prohibit (or authorise) a merger under the Merger Regulation?”, in *Standard of Proof in Merger Cases*, as note 8 above, at p. 17. For a different position, see Michael M. Collins, *The Burden and Standard of Proof in Competition Litigation and Problems of Judicial Evaluation*, (2004) ERA Forum, n. 1, p. 66, at pp. 75–76.

⁷¹ See press release of 20 December 2002, as note 11 above.

⁷² *Tetra Laval II*, as note 1 above, at ¶ 41.

of the Commission's analysis is that of "ascertaining which of the [various chains of cause and effect] is *most likely*".⁷³ The Commission's task under the EC Merger Regulation is that of exploring all possible scenarios, ultimately to determine which one is "most likely" and, in turn, to prohibit or to authorise a concentration depending on whether the most likely scenario affects competition or not. Incidentally, this seems to show that the standard of proof *à la Tetra Laval* is that of the "balance of probabilities".⁷⁴

Second, and more fundamentally, as regards the standard of proof in *Tetra Laval II* the ECJ explicitly approves the CFI's reliance on the standard set forth in *Kali & Salz*, a judgment concerning a clearance decision (with remedies), where the Court held in very general terms that:

"[the] approach [based on the use of a prospective analysis of the reference market] warrants 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".⁷⁵

Third, in reviewing the legality of merger clearance decisions, the CFI consistently adhered to the notion of the "requisite legal standard" of proof, without distinguishing a new standard on the basis of the nature of the decision concerned.⁷⁶

Incidentally, it is probably worth noting that the Commission itself is convinced that the symmetrical obligation imposed on it by Article 2(2) and (3) of the EC Merger Regulation

"namely either to prohibit a concentration [...] or, as a symmetrical but opposite obligation, to approve it [...] reflects the intention of the Community legislature to protect equally the private interests of the parties to the concentration and the public interest in maintaining effective competition and in consumer protection [and] calls for the application of a symmetrical test in relation to the standard of proof required of the Commission *since it must prove the merits of its assessment equally in both cases*".⁷⁷

If it is correct that the Commission must always support its decisions with "convincing evidence", one is left to wonder about the standard of proof incumbent on the party challenging a clearance decision. An analysis of this question is beyond the

⁷³ *Ibid.*, at ¶ 43 (emphasis added).

⁷⁴ See Götz Drautz, *Conglomerate and vertical mergers in the light of the Tetra Judgment*, in (2005) EC Competition Policy Newsletter, n. 2, p. 35. By referring to the need for determining which outcome is "most likely", the ECJ seems to suggest that it does not envisage the possibility of grey areas, thus departing from the position taken by AG Tizzano. Based on the hypothesis that concentrations are presumptively legal, he suggested that, since there is a "grey area" of cases in which it is particularly difficult to foresee the effects of the notified transaction, in such cases the Commission is under an obligation to clear the transaction (opinion in *Tetra Laval II*, as note 1 above, ¶¶ at 75–81). President Vesterdorf shares AG Tizzano's opinion (see Bo Vesterdorf, as note 8 above, at p. 28 of the paper; *contra*, see David Bailey, as note 55 above, at pp. 870–871). Arguably, with those words the ECJ implicitly admitted that the correct test is that of the "balance of probabilities". In any case, what is certain is that no "grey area decision" will ever be adopted. Once the decision to authorise or to prohibit is taken, it is drafted accordingly in the most convincing way. The Commission must prove its case "convincingly" regardless of whether it clears or blocks a merger.

⁷⁵ *Kali & Salz*, as note 15 above, at ¶ 222 (emphasis added).

⁷⁶ See Cases T-290/94, *Kaysersberg v. Commission*, [1997] ECR II-2137, ¶ 178; and *BaByliss v. Commission*, as note 6 above, at ¶¶ 356 and 363.

⁷⁷ *Tetra Laval II*, as note 1 above, at ¶ 29 (emphasis added), which shows that the Commission is well aware of the difficulties inherent in any attempt to prioritise the notifying parties' rights over a possible impediment to competition. In favour of the principle of neutrality is David Bailey, as note 55 above, at pp. 875–878.

scope of this article. The authors, though, note that the CFI has often stated that to successfully challenge the legality of a clearance decision, including the assessment of the remedies, the applicant must show that the Commission has committed a “manifest error of assessment”.⁷⁸ However, the CFI has used the same language also in some of the judgments concerning prohibition decisions. In *Tetra Laval I*, for instance, where the CFI thoroughly applied the “convincing evidence” standard, the “manifest error of assessment” is mentioned several times to explain why it rejected certain of the applicant’s arguments.⁷⁹ This would appear to mean that the standard of proof for those challenging a clearance decision is at least as high as that incumbent on the merging parties when challenging a prohibition decision.

V.D. DOES THE SAME STANDARD OF PROOF APPLY TO ANTITRUST DECISIONS?

The ECJ reasoning in *Tetra Laval II* on the type of analysis that is required in the area of merger control raises one more question: is the standard of proof *à la Tetra Laval* different from that applicable to decisions adopted by the Commission under Articles 81 and 82 EC? At ¶ 42 of the ruling, the ECJ states that:

“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” (emphasis added).

Since special care must be used for the analysis of future, as opposed to past or current events, the ECJ seems to suggest that the judges want to be particularly convinced that future events have good chances to occur. This does not necessarily mean that the standard of proof for decisions concerning past or current conduct is lower. Though, by claiming that the “*Tetra Laval* standard” is excessive, an argument it never raised before in antitrust cases, the Commission seems to be convinced that this is the case.

However, the Commission’s task to prove what happened in the past is also burdensome. Even for past events, the Commission must ensure that it takes all relevant data into account and that it does so in a consistent and complete fashion.⁸⁰

⁷⁸ See, e.g. *ARD v. Commission*, as note 25 above, at ¶ 194; and *BaByliss v. Commission*, as note 6 above, at ¶ 222.

⁷⁹ As noted above, though, the ECJ is not particularly interested in the debate of whether errors of assessment need to be “manifest” to justify an annulment. Based on the language at ¶ 39 of *Tetra Laval II*, it would be sufficient for the applicant to show that the Commission relied on evidence that is not “factually accurate, reliable and consistent”, or that is not “capable of substantiating the conclusions drawn from it” (i.e., the situation underlying *Airtours v. Commission*, as note 3 above). Also, based on ¶ 41 of the judgment, the applicant should show that the Commission failed to carry out a “precise examination, supported by convincing evidence, of the circumstances which allegedly produce [the anticompetitive] effects” (as in, e.g., *Tetra Laval I*, as note 2 above, and *BaByliss v. Commission*, as note 6 above, at ¶ 409).

⁸⁰ The Commission noted that the need for “convincing evidence” applies beyond the area of merger control. For instance, in a cartel decision it stated that “[a]s regards the practicalities of proof, the Commission considers that besides demonstrating the existence of a cartel by *convincing evidence*, it is also necessary to prove that

There is certainly a sort of paradox in requiring the Commission to be (more) convincing in proving future than past events. The need for the Commission to carry out particularly well the prospective analysis of merger decisions before concluding that a merger cannot go forward may be explained by reference to the principle of free enterprise and the firms' right to reach the dimensions they deem appropriate in an increasingly global economy. Also, competition policy instruments such as Article 82 EC, prohibiting abuses by firms in a dominant position, offer the Commission the possibility of intervening after the merger is consummated.

Even though this delicate issue is beyond the scope of this article,⁸¹ the authors would like to suggest to approach it from a different angle: does the standard of proof vary depending on the complexity of the case?⁸² Arguably, it does not.⁸³ A Commission decision should always be grounded on a sufficient body of evidence and a reasoning that is convincingly capable of supporting it. The ECJ is clear on this point.

However, both in the merger control area and with respect to antitrust decisions, there are cases that are more complex than others, especially when they involve reliance on novel and more sophisticated economic theories. In the merger area, one simply needs to think of a case with straightforward horizontal overlap and high post-merger market share, as opposed to a case like *Tetra Laval/Sidel*. In the antitrust area, there is a difference, for example, between the comparatively low efforts required to apply Article 81(1) EC in a cartel decision based on the firms' acknowledgment of their wrongdoing

Contd.

each suspected participant adhered to the common scheme", see Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865—PVC) (OJ 1994 L 239, p. 14, ¶ 25; emphasis added). With language on which it may have subsequently relied in *Kali & Salz*, in the *Wood Pulp* cartel case the ECJ found that "[i]n the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission" (joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö et al. v. Commission* [1993] ECR I-1307, ¶ 127; emphasis added). For a detailed discussion, see David Bailey, as note 55 above, at pp. 855 *et seq.*

⁸¹ It is probably worth noting, however, that in some Member States the national courts reviewing the legality of NCA decisions have defined a standard of review and, in turn, a standard of proof that, in substance, do not seem to distinguish between merger decisions and antitrust decisions. In Italy, for instance, in *Meal Tickets* the *Consiglio di Stato* held that the same "pervasive" standard of judicial review is applicable to both merger and antitrust decisions. In a ruling of 22 March 2001 (Case No. 1699, *Telecom Italia Mobile (TIM) v. ICA*), the *Consiglio di Stato* summarised settled case law by stating that, in the absence of "smoking guns" (*per se* convincing evidence), a finding of antitrust violations must be based on "serious, precise and unequivocal" evidence (¶ 4.3.1). In the United Kingdom, relying on the standard of the balance of probabilities—similar to that applied in the review of merger cases—the CAT has consistently made reference to the need for the OFT analysis to be "robust and soundly based", and held that "the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case" (see, e.g. ruling of 6 July 2005, *ME Burgess et al. v. OFT*, [2005] CAT 25, ¶¶ 115–120; emphasis added).

⁸² For a discussion of this point, see also Bo Vesterdorf, *Certain Reflections on Recent Judgments*, as note 8 above, at pp. 141–144, where the issue is first also looked at from the point of view of the Commission's margin of discretion and the consequent intensity of the judicial review; Bo Vesterdorf, *Standard of Proof in Merger Cases*, as note 8 above, at pp. 21–22; David Bailey, as note 55 above, at pp. 851–854, 864; Michael M. Collins, as note 69 above, at p. 79, and Malcolm Nicholson, Sarah Cardell, and Bronagh McKenna, as note 8 above, at pp. 137–140.

⁸³ For a different position, see Mario Siragusa, as note 65 above, at p. 4, who expressed the view that "the burden of proof for historical facts should be considerably higher than that for predictions [...] because it does not involve complex economic assessments but simply the proper application of evidence rules".

under the Leniency Notice,⁸⁴ and those necessary to support a decision under Article 81(3) EC.⁸⁵

In more complex cases, then, regardless of whether it applies Articles 81 and 82 EC or the EC Merger Control regulation, the Commission will find it harder to satisfy what seemingly appears to be the same standard: “to establish convincingly the merits of an argument”.⁸⁶ The standard will require a more extensive investigation, or—in the words of AG Tizzano—an investigation that will be genuinely “thorough and painstaking”. Arguably, in the merger area the difficulty is greater because the Commission is called to conduct a prospective analysis of future events, an inherently more difficult exercise than the analysis of past facts in antitrust cases.⁸⁷ And that difficulty will be even greater when the Commission decides to use novel economic theories, or even a combination of them. In *Oracle/PeopleSoft*,⁸⁸ for instance, the Commission initially pursued and ultimately abandoned a combination of unilateral and coordinated effects theories.⁸⁹ Proving in the same case a combination of different theories of harm such as this without incurring contradictions—an easy prey of the

⁸⁴ Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002, C 45, p. 3).

⁸⁵ For a recent example of an Article 81(3) decision annulled because of the Commission’s poor analysis, see Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00, *M6 et al. v. Commission*, [2002] ECR II-3805, spec. ¶ 82), concerning an Article 81(3) EC decision adopted after the CFI had annulled a first individual exemption decision in the same matter in particular because the Commission had failed “to examine carefully and impartially all the relevant aspects in the individual case” (Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision et al. v. Commission*, [1996] ECR II-649, ¶¶ 93 *et seq.*).

⁸⁶ “It would require more convincing evidence to conclude that it was more likely than not that the sighting of an animal in the park was a lion that it would to satisfy the same standard of probability that the animal was a dog”, David Bailey, as note 55 above, at p. 853, referring to the opinion in an English case. According to a 1963 opinion of the US Supreme Court, it will be easier for the US antitrust authorities to convince it of the merits of a case if the case is a straightforward one (see David Bailey, as note 55 above, at pp. 873–874, fn. 117). For a good illustration of the seemingly close correlation between the complexity of a case and the difficulty of discharging the burden of proof incumbent on the antitrust agency concerned, see *Fed. Trade Comm’n v. Arch Coal, Inc.*, as note 54 above, where, in denying the FTC’s motion for preliminary injunction in a case based on a coordinated effects theory, Judge Bates was influenced by the complexity of the Government’s case and the novelty of the theory on which it rested: “[t]he case is complex, and represents an attempt by the FTC to enjoin transactions that do not reduce the number of competitors and only modestly increase the concentration in what has been a very competitive market. Moreover, the case rests on a novel FTC theory of likely future ‘tacit coordination’ among competitors to restrict production, as opposed to direct coordination of prices. In the end, the Court concludes that the FTC and the States have not met their burden [...] to show a likelihood that the challenged transactions will substantially lessen competition” (p. 3 of the opinion). As regards the proof required to substantiate the allegations, Judge Bates noted also that “[w]hat this means is that the FTC must show projected future tacit coordination, which itself may not be illegal, which is speculative and difficult to prove, and for which there are few if any precedents” and that “[t]he novel approach taken by the FTC in this case makes its burden to establish anticompetitive effects in the post-merger [...] market more difficult” (pp. 33 and 35).

⁸⁷ In *Tetra Laval II*, as note 1 above, the ECJ underlined the importance that “the consideration of a lengthy period of time in the future” plays in increasing the difficulties attached to the prospective analysis of a conglomerate-type concentration where “the chains of cause and effect are dimly discernible, uncertain and difficult to establish” (¶ 44). Besides the merger control area, antitrust decisions may also require the more difficult analysis of long term harm. Competition Commissioner Kroes is well aware of this. She has recently stated that, as regards the application of Article 82 EC, “[w]e need to take into account not only short term harm, but also medium and long term harm arising from the exclusion of competitors. [...] We cannot just wash our hands of responsibility and say that competition law cannot or should not protect the consumer against negative medium to long term effects, just because it is difficult to assess” (Neelie Kroes, “Preliminary Thoughts on Policy Review of Article 82”, speech at the Fordham Law Institute, New York, 23 September 2005; emphasis added).

⁸⁸ Decision No. COMP/M.3216 of 26 October 2004, *Oracle/PeopleSoft*.

⁸⁹ *Ibid.*, at ¶¶ 187–214. The Commission abandoned them because, based on the evidence available to it, it could not conclude that the future “anticompetitive scenarios” it initially envisioned would have been a likely outcome.

CFI—would have been a formidable task. Where in *Oracle/PeopleSoft* the unilateral effects theory was presumably also premised on the significant product differentiation,⁹⁰ a coordinated effects theory (i.e. collective dominance) traditionally depends on a finding of homogeneity of the products concerned and a sufficient degree of transparency in the market.⁹¹

VI. CONCLUSIONS

The much awaited ruling in *Tetra Laval II* confirms that the judicial review of merger decisions should be thorough and the evidence supporting them convincing. It should not be seen as an invitation of judicial activism by the CFI that will disturb the separation of powers of the European Community Institutions and more specifically interfere with the administrative discretion of the Commission. It is a mature judgment decided by the highest Court of the European Community sitting in a full court session, confirming and clarifying a number of important points already embodied in the existing case law of the Community Courts. The Commission and private parties had already learnt and applied the lessons that could be drawn from that case law. Now, they will all benefit from the important confirmation that virtually all those lessons are and will be good law for the foreseeable future.⁹²

After the three Court defeats in 2002, the Commission had already introduced a number of internal and procedural changes (Chief Economist, peer review, regular meetings with the merging parties and third parties, etc.),⁹³ which have quickly resulted in more thorough investigations, a more detailed reasoning in complex cases and greater attention to the notifying parties' arguments in response to third parties' criticism of a proposed transaction. With *Tetra Laval II*, recent practice can only be confirmed and refined.

Besides having to provide more information to the Commission at a very early stage and cooperate more closely with the Commission's staff, firms are now well aware of the potential for judicial review. Based on recent experience, they can more easily push through cases that may seem to fall in the so-called "grey zone".⁹⁴ Moreover,

⁹⁰ *Ibid.*, at ¶ 213, albeit in the framework of the discussion of coordinated effects—which would seem to confirm the inherent contradiction of a theory of harm combining both unilateral and coordinate effects.

⁹¹ For a more detailed discussion, see Javier Ruiz Calzado, *Los efectos unilaterales en el control de concentraciones: reflexiones a propósito del asunto Oracle/PeopleSoft*, (2005) Anuario de la Competencia, Fundación ICO, forthcoming.

⁹² The most recent judgment in the merger control area, however, reintroduces some uncertainty. As we have seen above in notes [19] and [31, now 32], in *EDP* the CFI seems to depart from the "standards" and the consequent intensity of judicial review of the ECJ rulings in *Kali & Salz* and *Tetra Laval II*. It does so with respect to fundamental issues, such as the Commission's margin of discretion in the sphere of complex economic assessments and the nature of the errors affecting such assessment that the applicant seeking the annulment of a decision needs to prove.

⁹³ For a more detailed discussion of these and other changes and their influence on the Commission's merger control practice, also within a wider trans-Atlantic perspective of increasing convergence, see Michael G. Egge, Matteo F. Bay, and Javier Ruiz Calzado, *The New EC Merger Regulation: Recipe for Profound Change or More of the Same?*, ABA 8th Annual Competition Conference, Fiesole (Florence), 17-18 September 2004, <http://www.lw.com/resource/publications/_pdf/pub1063_1.pdf>, and (2004) *Il Diritto dell'Unione Europea*, p. 461.

when considering a transaction that does not need to be closed within months, at least in the form or with the structure originally envisioned, the merging parties have now started considering judicial review—especially of a speed now made possible under the “fast-track” procedure—as a potentially relevant part of an overall process.

However, the lessons that can be drawn from *Tetra Laval II* go beyond all this and will be felt for years. The confirmation of the sweeping scope of judicial review and the depth and breadth of the generally applicable “convincing evidence” standard of proof will prove particularly helpful in those cases where the Commission will rely on novel theories of competitive harm—like unilateral effects—or a combination of them. The DOJ defeat and the Commission’s radical change of direction in the *Oracle/PeopleSoft* case provide a good illustration of the intrinsic difficulties of proving a unilateral effects case to “the adequate legal standard” before Courts that strongly believe on the need for a thorough judicial review of the government’s claims or merger decisions.

The ECJ judgment is also valuable in its endorsement of the CFI as the primary element of the various checks and balances that exist in EC merger control. Particularly now, when in *EDP v. Commission* the CFI has shown that it can decide an appeal in a merger case in under seven months, judicial review has become an integral part of an overall merger control system that has truly come of age. Singularly relevant is the ECJ’s decision to uphold the CFI’s thorough analysis of even the Commission’s most complex economic assessments.

The intensity of the review by the Community Courts does not seem to be disproportionate. According to AG Tesouro, the scope of the “review of legality” of merger decisions should not be construed narrowly as such review “appears all the more necessary if it is borne in mind [...] the twofold nature of the Commission’s functions—a power of inquiry and investigation, coupled with the decision-making power [...]”.⁹⁵

At a time when the Commission and the 25 Member States have just introduced greater cooperation and exchanges also in the merger control area, the perceptible convergence of the highest courts at Member State level around the need for a sound and meaningful judicial review is a particularly welcome development.

The standard of proof is high, but legal certainty has increased. The Commission bears the same burden of proof of what it decides under either Article 2(2) or 2(3) of the EC Merger Regulation. And it should not come as a surprise that the Luxembourg Judges seem to need comparatively more convincing evidence when the Commission relies on novel theories of harm or applies classic ones to situations that *prima facie* do not fit with them. After all, as the ECJ very aptly put it, “the essential function of evidence [...] is to establish convincingly the merits of an argument”, all arguments, both the plain ones and those that are more audacious.

⁹⁴ See, e.g. Commission Decision of 19 July 2004 No. COMP/M.3333, *SONY/BMG*. According to those close to the Commission investigation, this case might have been decided differently if not for the internal “checks and balances” introduced in 2002 (the reasoning of the decision lets transpire the last-minute change of direction).

⁹⁵ Opinion in *Kali & Salz*, as note 15 above, at ¶ 21.