

**The European Commission's Discretionary Powers vis-à-vis  
Judicial Review of the Economic Assessment of  
Prospective Mergers**

**Examensarbete med praktik  
Konkurrensrätt, 20 poäng**

**Författare: Kristofer Carlin  
Handledare: Prof. Torbjörn Andersson**

**HT 2005**

# Contents

<b>1 Introduction</b>	<b>pg. 3</b>
<b>1.1 Scope</b>	<b>pg. 3</b>
<b>1.2 Purpose and Outline</b>	<b>pg. 4</b>
<b>1.3 Method</b>	<b>pg. 4</b>
<b>2 European Competition Policy and the Commission’s Institutional Role</b>	<b>pg. 5</b>
<b>2.1 Aims of Competition Law and Development of EC Competition Policy</b>	<b>pg. 5</b>
<b>2.2 The Commission’s Institutional Role</b>	<b>pg. 6</b>
<b>2.3 The European Commission’s Judicial Role and Competition Policy</b>	<b>pg. 7</b>
<b>3 EC Merger Control</b>	<b>pg. 9</b>
<b>3.1 History of EC Merger Control</b>	<b>pg. 9</b>
<b>3.2 Merger Legislation</b>	<b>pg. 10</b>
<b>4 <i>Tetra Laval</i> – An Eyeful of EC Merger Control</b>	<b>pg. 12</b>
<b>4.1 Introduction</b>	<b>pg. 12</b>
<b>4.2 Background – the Envisaged Merger</b>	<b>pg. 12</b>
<b>4.3 The CFI’s Judgement</b>	<b>pg. 13</b>
<b>4.4 The Commission’s Appeal to the ECJ</b>	<b>pg. 14</b>
<b>4.5 French Administrative Law</b>	<b>pg. 15</b>
<b>4.6 The ECJ’s Judgement</b>	<b>pg. 17</b>
<b>4.6.1 “Convincing Evidence” – Standard of Proof</b>	<b>pg. 17</b>
<b>4.6.2 Judicial Review</b>	<b>pg. 18</b>

<b>5 Review of Discretionary Decisions</b>	<b>pg. 20</b>
<b>5.1 Discretion in the Eyes of a Judge</b>	<b>pg. 20</b>
<b>5.2 Concluding Remarks</b>	<b>pg. 24</b>
<b>6 Beyond <i>Tetra Laval</i> – Adversarial Procedure or Status Quo</b>	<b>pg. 26</b>
<b>7 Conclusion</b>	<b>pg. 30</b>
<b>References</b>	<b>pg. 31</b>

# 1 Introduction

The European Commission is an institution with multiple roles in the European legal order. Regardless if it plays the role of *Guardian of the Treaty* or the role as the *motor of European integration* its ubiquitous geist hovers over the pillars of the European project reminiscent of the Phantom of the Opera. However, the gravity of its presence and the implicit legal consequences on Member States and private parties is wholly conditional on what legal competence the European Commission (Commission) possesses, since the EC/EU is based on a conferral of powers.

## 1.1 Scope

European competition law is a concrete area of Community law where the vestiges of the Commission's exercise of power are manifest and discernible to private parties and Member States. This thesis will focus on the Commission's discretionary powers in EC merger control. The terms "discretion" and "discretionary powers" are interchangeably used and refer to the Commission's degree of freedom of decision and action in the field of economic assessments. The Commission's discretion in the area of complex economic assessments of mergers will solely be dealt with in this essay. The Commission's discretion in other areas of competition law, such as fixing fines, will not be discussed.

In its role as investigator and initial judge of proposed concentrations, the European Commission has extensive powers which directly affect Member States and/or private parties. The Court of First Instance's (CFI) string of annulment judgements in 2002 of three of the Commission's prohibition decisions regarding mergers, raised serious doubts towards the Commission's ability of assessing the economic consequences of proposed mergers between undertakings.<sup>1</sup> The three judgements "were scathing in their criticism of the Commission's appreciation of the facts and treatment of evidence" and forced the Commission to propose a reform package in order to maintain the

---

<sup>1</sup> Case T-342/99, *Airtours v. Commission (Airtours)*, [2002] E.C.R. II-2585, Case T-310/01, *Schneider Electric v. Commission*, [2002] E.C.R. II-4071, Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381.

institutional framework in which the Commission approves or prohibits mergers<sup>2</sup>. In *Tetra Laval*,<sup>3</sup> the intricate and dynamic interplay of the Commission's administrative and judicial powers comes to light.

### 1.2 Purpose and Outline

Drawing from the case of *Tetra Laval*, this essay aims to describe the origin of the administrative framework of EC merger control. Drawing from the parties' arguments in *Tetra Laval*, the Commission's "discretion in economic matters" will be juxtaposed to the Community Courts exercise of judicial review. Does the current institutional framework guarantee an adequate level of judicial review? The Commission's discretion will be analyzed against the background of its institutional role under the EC Treaty.

This essay will initially discuss the purpose of competition law and the Commission's institutional role in the Community. Then focus is shifted to the Commission's scrutiny of mergers and an ensuing discussion of *Tetra Laval*. Against the backdrop of the case, the essay will touch on the related issue of the rationale behind letting the very same institution investigate and adjudicate envisaged mergers. Consequently, this paper will venture into the origins of the EC merger control framework, administrative law.

### 1.3 Method

This thesis is prepared using "legal method". This implies application of statutory law and case-law, the use of analogy, deduction, induction, summation, comparison and modelling, which is natural considering the developments in the area stems from case-law, and as such have developed over time. This makes it relevant both to approach the case of *Tetra Laval* descriptively and analytically.

The sources used consist to a large part of the relevant case-law from the ECJ and the CFI. In addition to this, a number of books and articles have been used.

---

<sup>2</sup> Levy, Nicholas, "EU Merger Control: From Birth to Adolescence", (2003) *World Competition* 195-218, at 211.

<sup>3</sup> Case C-12/03 P, *Commission v. Tetra Laval (Tetra Laval)*, [2005] E.C.R. I-987.

## 2 European Competition Policy and the Commission's Institutional Role

### 2.1 Aims of Competition Law and Development of EC Competition Policy

In order to understand why the Commission has wide-ranging competence to shape competition policy, the essence of having rules of competition in the Community legal order has to be understood. The purpose and application of competition law is tied to the theory that free market economies (free enterprise) are the most efficient and successful in providing the people with the best products at the lowest price (and enhance countries' GNP). Therefore monopolies and other factors such as market distorting agreements (prize-fixing, market splitting etc.) must be prohibited in order to secure that producers can produce at free will and at the point of time they find the most opportune (i.e. with an eye on demand/supply). Competition law is a safety-mechanism for economies that rely on the free-enterprise model. Hence, the traditional goals of competition law are to avoid monopolies and to improve the efficiency of the market. European competition law has an additional goal, market integration. This goal resulted from the founding fathers' vision of abolishing national barriers to trade and creating common market in Europe.

The founding fathers assumed that an open (and competitive) market, rather than state control or private monopoly, was the best way of securing economic efficiency, as regards both allocation of resources and efficient production.<sup>4</sup> This conviction is explicitly evident in the EC Treaty, since the Treaty presupposes that the Member States have open market economies.<sup>5</sup>

In order to achieve the objective of a common market, article 3g of the EC Treaty states that the Community shall have *a system ensuring that competition in the internal market is not distorted*. Here the additional "European aim" of competition rules comes to light. The rules on competition were to function as a complement to the rules on free movement that seek to prevent barriers to trade.<sup>6</sup> The European Court of Justice noted as early as in the 1960s that competition rules (article 81 EC Treaty) were designed to prevent private parties from reconstructing such barriers to trade between member states

---

<sup>4</sup> Bellamy & Child, *European Community Law of Competition*, pp. 39.

<sup>5</sup> See principles in art. 4 to achieve objectives in art. 2 of EC Treaty.

(by ex. participating in cartels) which the Treaty aimed at abolishing.<sup>7</sup> The Commission stated in its first Report on Competition Policy that “(...) Community competition policy must pursue goals specifically involved in the setting up and running of the Common Market”.<sup>8</sup>

However, it is interesting to note that the European competition policy has in fact developed and shifted with the realization of the common market. In 1991, the Commission noted that “...a vigorous competition policy,(...) is a key element in maintaining both the efficient functioning of market and competitive pressures.”<sup>9</sup> The importance of the competition rules as a safeguard against agreements that could recreate trade barriers has gradually been phased out with the attainment of the common market.<sup>10</sup> As the common market has matured, the competition policy of the Community now strives more unanimously to achieve the “classic” aims of competition law, namely to avoid agreements or behaviour which disrupts the core elements of competition; to provide a functioning and efficient market which assures that the citizens get products of good quality and prize. Consequently, the Commission stated in 1999 that “the first objective of competition policy is the maintenance of competitive markets. (...) The second is the single [common] market objective”.<sup>11</sup>

The policy change is linked to the gradual realization of the common market. The shift in focus, is undoubtedly a result of the metamorphosis of the Member States’ economies. The markets that once were characterized by all kinds of national protective trade measures (tariffs, absurd state aid programmes etc.) are now part of a bigger and more open single European market.

## 2.2 The Commission’s Institutional Role

The European Commission plays a prominent and dynamic role in the European legal system. Under article 211 of the EC Treaty, the Commission’s mission is *to ensure the*

---

<sup>6</sup> Bellamy & Child, *European Community Law of Competition*, pp. 40.

<sup>7</sup> Cases 56 & 58/64, *Consten and Grundig v. Commission*, [1966] E.C.R. 299.

<sup>8</sup> Ist Report on Competition Policy (1972), Bullentin of the European Communities, vol. 5, 1972, pp 20.

<sup>9</sup> XXIst Report on Competition Policy (1991), point 3.

<sup>10</sup> During the early years, the Competition policy focused on examining vertical agreements, such as distribution agreements. By restricting active and/or passive sales, undertakings could in effect reimpose the barriers to trade the Treaty aimed to abolish.

*proper functioning and development of the common market.* In order to fulfil this extensive and weighty task, the same article empowers the Commission to ensure that the provisions of the EC Treaty and measures taken by the institutions pursuant thereto are applied. Further, the second indent of article 211 empowers the Commission to deliver recommendations or opinions on matters dealt with in the EC Treaty. Additionally, the Commission has its own power of decision and may be conferred powers upon by the European Council to implement measures decided by the latter. Consequently, the Commission may be dubbed the long-legged spider of the web of EC law. Its competence is far-reaching and the function of a *motor of integration* is inherent in the 'job description' under article 211 EC Treaty. As an actor in an institutional structure that lacks a thorough doctrine of separation of powers, it is crucial to acknowledge that its decisions are influenced by the fact that the Commission has a whole array of powers which are legislative, administrative, executive and judicial in nature.<sup>12</sup> Exercised in symbiosis, these powers provide the Commission with a powerful tool for policy-making. The epithet *motor of integration* is a manifest sign of the Commission's success as a policy-maker in the Community.

### 2.3 The European Commission's Judicial Role and Competition Policy

The European Commission's judicial role in competition matters is Janus-faced in the sense that the Commission acts both as an investigator and a judge. Besides bringing actions against Member States when they act in breach of Community law, the Commission also, in areas such as competition law, acts as investigator and initial judge of EC Treaty violations. The two-sided character of the Commission's function is the same, regardless if the violation was made by a private firm or by a Member State.<sup>13</sup>

Under article 85 of the EC Treaty, the Commission is empowered to investigate and decide cases where the rules of competition in article 81 and 82 of the EC Treaty are suspected of having been infringed. Although the Commission's decisions are subject to judicial review by the Community Courts, the Commission can shape and direct the outline of European competition policy by selectively bringing cases which raise unclear issues. This provides the Commission with a mechanism through which the

---

<sup>11</sup> XXIX Report on Competition Policy (1999), points 2-3.

<sup>12</sup> Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, pp. 19.

<sup>13</sup> *Ibid.*, 20.

Commission can give guidance to national competition authorities and courts as to the more precise meaning of broadly framed Treaty articles. <sup>14</sup> Not surprisingly, the Commission can be regarded as the “designer of EC competition policy”.<sup>15</sup>

---

<sup>14</sup> Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, pp 20.

<sup>15</sup> *Ibid.*

## 3 EC Merger Control

### 3.1 History of EC Merger Control

The development of EC merger control, or control of concentrations, has unravelled with the gradual creation of a European single market.<sup>16</sup> European competition policy has historically revolved around articles 81 (prohibited agreements between undertakings) and 82 (abuse of dominant position) of the EC Treaty. Since the EC Treaty is silent on the control of mergers, the supervision of concentrations was in the early stages of the Community restricted to the Commission's control of compliance with article 82.<sup>17</sup> In the notorious *Continental Can* case, the European Court of Justice (ECJ) held that an undertaking abuses its dominant position if it strengthens its position in such a way that the degree of dominance reached substantially fetters competition.<sup>18</sup> The limited supervision was problematic since it restricted the control of mergers to those that were made between dominant undertakings. It is interesting to note, that the Commission as early as the 1960s had realized this shortcoming.<sup>19</sup> However, it would take another 30 years until a legal instrument dealing solely with concentrations was agreed upon by the Member States.<sup>20</sup> The reason for this delay might partly be explained by the political importance that is linked to an instrument through which mergers between undertakings may be restricted or prohibited. Massive lay-offs, new investments or withdrawn investments are in many cases very tangible results of mergers. The politicians of the Member States were reluctant to surrender these powers to the Community.<sup>21</sup> As in many other fields of Community law, it was a judgement of the ECJ that put an end to the politicians' squabble. In the *BAT-Reynolds*<sup>22</sup> case the Court conferred competence on the Commission to supervise mergers under article 81 of the EC Treaty (in addition

---

<sup>16</sup> Navarro, Font, Folguera, and Briones, *Merger Control in the European Union*, Oxford University Press, 2002, pp. 3.

<sup>17</sup> Lenaerts, Koen & Van Nuffel, Piet, *Constitutional Law of the European Union*, Sweet & Maxwell, 2<sup>nd</sup> edition, pg. 257.

<sup>18</sup> Case 6/72, *Continental Can and Euroemballage v. Commission*, [1973] E.C.R. 215, para. 26

<sup>19</sup> Slot, Piet Jan, "A View From The Mountain: 40 Years of Developments in EC Competition Law" (2004) C.M.L.R. 443-473, at 460.

<sup>20</sup> Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the control of concentrations between undertakings, [1989] O.J. L395/1.

<sup>21</sup> Broberg, Morten P., *The European Commission's Jurisdiction to Scrutinize Mergers*, Kluwer Law International, 2003, 1 pp.

<sup>22</sup> Joined Cases 142-156/84, *British Tobacco Company et al. v. Commission*, [1987] E.C.R. 4487

to article 82) which “created an atmosphere conducive for the adoption of the Merger control Regulation [Reg 4064/89].”<sup>23</sup>

### 3.2 Merger Legislation

Regulation 4064/89 introduced the basic principles upon which the current merger control regulation 139/2004<sup>24</sup> (ECMR) is based. Regulation 4064/89 clearly spelt out the Commission’s exclusive jurisdiction to clear or prohibit concentrations<sup>25</sup> with a Community dimension<sup>26</sup>. It introduced the “one-stop-shop” mandatory notification procedure for the concentrations that fell within its jurisdiction<sup>27</sup> as well as market-oriented, competition-based criteria.<sup>28</sup> The Commission was empowered to impose fines and competence to restore competition by ordering the undoing of a prohibited merger transaction.<sup>29</sup> The strict (and very short) deadlines for decision-making provided for legal certainty for the parties to the concentration.<sup>30</sup> Finally, decisions of the Commission are subject to scrutiny by the Community courts.<sup>31</sup> These principles manifest themselves also in the current merger control legislation, Regulation 139/2004 (ECMR). However, developments in case-law and the limited (financial and staff) resources of the Commission has led to some reforms, among which the most important include the possibility of referral to national authorities of concentrations with a community dimension under article 9 ECMR and a reformed substantive test which allows for the intervention against more types of anti-competitive mergers<sup>32</sup>.

---

<sup>23</sup> Slot, Piet Jan, “A View From The Mountain: 40 Years of Developments in EC Competition Law” (2004) C.M.L.R. 443-473, at 461.

<sup>24</sup> Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings, [2004] O.J. L24/1.

<sup>25</sup> The definition is centered around lasting change in control. See art. 3(1) Merger Regulation. Hence, the definition includes a number of business transaction e.g. acquisition, mergers, joint ventures.

<sup>26</sup> Art. 1 Merger Regulation

<sup>27</sup> Jurisdiction defined from quantitative thresholds of the concentration’s size, art. 1 Merger Regulation.

<sup>28</sup> Substantive test involved the assessment of whether the transaction creates or strengthens a dominant position as a result of which effective competition in the common market is significantly impeded. See art. 2.2 ECMR. See further, XXXIIIrd Report on Competition Policy (2003), pp.4 and 66.

<sup>29</sup> Article 8(4) Merger Regulation.

<sup>30</sup> Following notification, the Commission has to render a decision within one month (in case of second “phase” investigation, within four months, art. 10 (1) and 10(2) Merger Regulation). If fail to do so, the concentration will be cleared., art. 10(6).

<sup>31</sup> Article 16 and 21 Merger Regulation.

<sup>32</sup> See article 2 ECMR and p. 25 of the preamble. In essence, the reform gives the Commission the possibility to block such transactions that “merely” ‘significantly impede effective competition in the common market’. The transaction does not necessarily have to create or strengthen a dominant position.

Nonetheless, the system of *ex ante* administrative control of mergers and the Commission's wide powers of investigation and enforcement established by the Merger Regulation is ever still the foundation of the Community's merger control.

The main purpose of this paper is to describe the European Commission's discretion in the economic assessment of envisaged mergers and the state of judicial review in this field of Community law. As we shortly shall see below (section 4), these two issues are closely related. For this purpose, the introduction of the merger regulations meant that the Commission's authority to supervise mergers was explicitly laid down in Community legislation. Similarly, the establishment of an administrative system of merger control has important implications on the role of the Community courts and the standard of judicial review they ought to apply.<sup>33</sup> If *BAT-Reynolds* was the starting point for a more extensive control of concentrations, the merger regulation 4064/89 provided the Commission with a foundation to build the extended control on. However, as conventional in EC law, the performance of the Community Courts finally shape and determine the application and interpretation of legislation.<sup>34</sup> Therefore, a more minute description of the workings of the ECMR will not be given. Instead, focus will be on the relevant case-law.

---

<sup>33</sup> Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", pp. 7.

<sup>34</sup> Article 220 EC Treaty, Bernitz, Ulf, *Europarättens grunder*, Norstedt, 2002, pp. 69.

## 4 *Tetra Laval* – An Eye-ful of EC Merger Control

### 4.1 Introduction

General Advocate Tesouro's remarks in *Kali & Salz*<sup>35</sup> serve as a veracious description of the scene of controversy in *Tetra Laval*:

“in principle, given the nature of competition, the rules thereon leave a *large degree of autonomy to the administrative authority*, which is responsible for assessing the specific aspects of any particular case in order to reach the *most appropriate decisions*. Similarly, it is common ground that the task of the Community's judicature in this field requires some latitude in assessing the economic value of the rules.”<sup>36</sup>

Tesouro's statement is a summary of the Community courts traditional limited review of the Commission's economic assessments.<sup>37</sup> This limited scope of review was precisely what the Commission supported its appeal in *Tetra Laval* on. In its first ground of appeal the Commission argued that the CFI had exceeded its scope of judicial review and that the court had applied a disproportionate standard of proof.<sup>38</sup> This paper will focus on the Commission's first ground of appeal. The CFI's judgement, the arguments of the Commission and the ECJ's judgement will be further developed below.

### 4.2 Background – the Envisaged Merger

In 2001, Tetra Laval BV's French subsidiary Tetra Laval SA (Tetra Laval) acquired Sidel SA (Sidel), a French company (by public bid). Tetra Laval is active (and dominant) in the market for equipment and consumables used in the production of carton packaging for liquid food. Sidel is a leading producer of stretch blow moulding (SBM) machines that are used to produce liquid food packaging made of plastics material PET (polyethylene terephthalate).

The Commission prohibited the merger on the grounds that Tetra Laval could 'leverage' its dominant position on the market for carton packaging equipment/consumables into the neighbouring market for SBM machines by persuading its customers who were switching to PET to choose Sidel's SBM machines (“conglomerate effects”/“leverage

---

<sup>35</sup> Joined Cases C-68/94, *France et al v. Commission (Kali & Salz)*, [1998] E.C.R. I-1375.

<sup>36</sup> See *Kali & Salz*, cit. Opinion para 21 (emphasis added).

<sup>37</sup> Bailey, David, “Scope of Judicial Review Under Article 81EC”, (2004) C.M.L.R. 1327-1360, at 1335.

effect”). The Commission also argued that the elimination of Sidel as a significant potential competitor in the packaging market would deprive Tetra Laval of any incentive to lower prices and innovate in that market.<sup>39</sup> Finally, the increase in Tetra Laval’s strength in the general packaging market would marginalize competitors and raise barriers to entry in the packaging industry as a whole.

#### 4.3 The CFI’s Judgement

In its judgement, the CFI explicitly referred to the “discretion” in economic matters that the Commission argues the same court has limited. The CFI states the following in the contested judgement:

“As a preliminary point, it must be recalled that the substantive rules of the Regulation [4064/89], 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* (Joined cases C-68/94 and C-30/95 *France and Others v. Commission* (‘Kali & Salz’) [1998] ECR I-1375, paragraphs 223 and 224; Case T-102/96 *Gencor v. Commission* [1999] ECR II-753, paragraphs 164 and 165; and Case T-342/99 *Airtours v. Commission* [2002] ECR II-2585, paragraph 64).”<sup>40</sup>

The Court of First Instance defined the conglomerate nature of the merger as “a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers”.<sup>41</sup> Further, the CFI recognized that the Commission may prohibit a merger due to concerns of conglomerate effects. The Court specifically noted that if the markets in question are neighbouring markets and one of the parties to the transaction already holds a dominant position on one of the markets, “the means and capacities brought together by the transaction may immediately create conditions allowing the merged entity in the first market to *leverage* its way as to acquire, in the relatively near future, a dominant position on the other

---

<sup>38</sup> *Tetra Laval*, cit., para 19. Further, Commission press release IP/02/1952 of 20 December 2002.

<sup>39</sup> Commission Decision 2004/124/EC of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416 – Tetra Laval/Sidel) (OJ 2004 L 43, p. 13). For summary, see *Tetra Laval*, cit. Para 7-11.

<sup>40</sup> Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381, para 119 (emphasis added).

<sup>41</sup> Case T-5/02, *Tetra Laval v. Commission*, para 142.

market.”<sup>42</sup> The CFI distinguishes between such mergers with conglomerate effects that “immediately” changes the conditions of competition on the second market from those that as a result of conduct by the merged entity lead to the creation of a dominant position (on second market) “only after a certain time”<sup>43</sup>. The CFI then proceeds to draw an analogy between conglomerate effect cases to merger cases such as *Kali & Salz*<sup>44</sup> and *Airtours*<sup>45</sup> where the creation of collective dominance was anticipated. Consequently, the CFI concludes that the “Commission’s analysis (...) calls for a particularly close examination of the circumstances” and proof of anti-competitive conglomerate effects must be backed up by “convincing evidence”.<sup>46</sup>

As a result of the Commission’s failure to produce “convincing evidence” of the anti-competitive effects it alleged the envisaged merger would create, the CFI annulled the Commission’s prohibition decision due to a manifest error of assessment.<sup>47</sup>

#### 4.4 The Commission’s Appeal to the ECJ

The Commission’s first ground of appeal is based on two points. Firstly, by requiring the Commission to present “convincing evidence”, the CFI had applied and set a standard of proof that was higher than that of “a cogent and consistent body” as previously formulated by the ECJ in *Kali & Salz*<sup>48</sup>. Secondly, the Commission argued that the CFI, by not confining its review to establishing whether the institution had committed a “*manifest error of assessment*”, the CFI in fact had infringed the “wide discretion” that it enjoys in economic matters according to case-law<sup>49</sup>. The ‘manifest error of assessment test’ entails ascertaining whether *the facts on which the Commission’s assessment was based were correct, whether the conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account*.<sup>50</sup> The Commission further states that the standard of “convincing evidence” “transforms the role of the Community Courts into that of a

---

<sup>42</sup> Case T-5/02, *Tetra Laval v. Commission*, para 151 (emphasis added).

<sup>43</sup> *Ibid.*, para 154.

<sup>44</sup> *Kali & Salz*, cit., para. 222.

<sup>45</sup> *Airtours*, cit., para. 63.

<sup>46</sup> Case T-5/02, *Tetra Laval v. Commission*, para 155.

<sup>47</sup> Case T-5/02, *Tetra Laval v. Commission*, para 336.

<sup>48</sup> *Tetra Laval*, cit. Para 27.

<sup>49</sup> *Tetra Laval*, cit. Para 27.

<sup>50</sup> *Tetra Laval*, cit., AG Tizzano’s Opinion, para 64.

different body which is competent to rule on the matter in all its complexity and which is entitled to substitute its view for those of the Commission.”<sup>51</sup>

Consequently, the Commission argued that the CFI had exceeded its jurisdiction under article 230 of the EC Treaty.<sup>52</sup> According to the Commission, the two points of the first ground of appeal are intertwined, since the imposed “disproportionate” standard of proof automatically entails that the CFI undertakes a review that goes beyond its “role, which is to review the administrative decision of the Commission for clear errors of fact or reasoning”.<sup>53</sup> This statement encapsulates the essence of this paper. Does the CFI in effect disturb the institutional balance envisaged by the EC Treaty in its review of the economic consequences of the envisaged merger between Tetra Laval and Sidel? Or is its review actually in conformity with the CFI’s duties under article 220 of the EC Treaty; to *ensure that in the interpretation and application of this Treaty the law is observed?*

Tetra Laval contended that the arguments made by the Commission regarding the CFI’s call on “convincing evidence” was a question of semantics, not related to the substantive examination of the CFI.<sup>54</sup> According to Tetra Laval, the CFI respected the Commission’s margin of discretion and did not exceed the bounds of its power of judicial review, but merely found that the Commission had failed to establish leveraging.<sup>55</sup>

In order to fully understand the essence of the Commission’s appeal and its reference to its inherent “discretion” under EC merger control, a venture into the French origin of this theory/doctrine is necessary before going into the ECJ’s judgement.

#### 4.5 French Administrative Law

In order to understand, and to answer the important question of how the CFI’s review of the Commission’s decision can be reconciled with the principle that the

---

<sup>51</sup> *Tetra Laval*, cit., AG Tizzano’s Opinion, para 64.

<sup>52</sup> See *Tetra Laval*, cit. paras 17-19.

<sup>53</sup> Commission press release IP/02/1952 of 20 December 2002.

<sup>54</sup> *Tetra Laval*, cit. Para 32.

<sup>55</sup> *Tetra Laval*, cit. Para 34.

Commission's assessment must be accepted unless there is a *manifest error*, one has to look at the underlying principles of French administrative law. Given the fact that the provisions organizing the ECJ and its initial Rules of Procedure (including the rules of procedure of the CFI) were mainly inspired by French administrative law and in particular the *recours pour excès de pouvoir*, this theory is of fundamental importance in understanding the scope of judicial review of the Community Courts.<sup>56</sup> Likewise, the question if the judicial review of the CFI is in conformity with the institutional framework of the EC Treaty (see section 4.4), is ultimately, an issue of reconciling the Commission's administrative powers with the Community Court's powers of judicial review.

In French administrative law, the theory and procedure of *recours pour excès de pouvoir* is a cornerstone in the review of the legality of an administrative act.<sup>57</sup> This theory may be translated as a "trial against an act".<sup>58</sup> This theory comes into play in the present context, since the Commission made an appeal for annulment in *Tetra Laval* and "requests for annulment (...), among others, their rules of admissibility and their effects are historically based on the theory of 'recours pour excès de pouvoir'".<sup>59</sup>

When a French administrative court is faced with action of this kind, the court seeks to decide the "objective legality of the referred decision."<sup>60</sup> Every French administrative court looks for due authority and the observance of the prescribed procedure and form (e.g. state reasons).<sup>61</sup> The Court will also examine if the decision violates a superior norm. If any of these principles have been violated or disregarded, the decision may be annulled, wholly or partly.<sup>62</sup>

However, the intensity of the review can be separated into two categories; "full review"/"normal review" and "restricted"/"limited review".<sup>63</sup> The former kind of review is review over the legality of the act (in some cases including test of necessity and proportionality), as opposed to the latter which involves testing for procedural and

---

<sup>56</sup> Legal, "Standard of Proof and Standards of Judicial Review in EU Competition Law", pp. 2.

<sup>57</sup> Schwarze, *European Administrative Law*, pp. 263.

<sup>58</sup> Legal, "Standard of Proof and Standards of Judicial Review in EU Competition Law", pp. 1.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Schwarze, *European Administrative Law*, pp. 264.

<sup>62</sup> Legal, "Standard of Proof and Standards of Judicial Review in EU Competition Law", pp. 2.

formal defects, testing the accuracy of the supporting facts. <sup>64</sup> Exercising “full review” the court interprets the law and checks if, for example a substantial rule of procedure has been violated in the administration’s decision.

Limited review on the other hand, sprung from the need of the executive within the law to have freedom of decision and action; namely *discretion* (pouvoir discrétionnaire). This discretion empowers the authorities to make their own appraisal of the facts and freedom of decision in areas of law where the administration has special competence, e.g. economic or technical knowledge.<sup>65</sup> In order to reconcile this freedom of the administration with the individual’s need for legal protection, the Conseil d’Etat devised a limit to the discretion: *manifest error in the appraisal of the facts* (erreur manifeste d’appréciation).<sup>66</sup> Thus, the cradle of the Commission’s persistent reference to its discretion is found in French administrative law and was perhaps inspired by G. Braibant: “L’administration a le droit de se tromper dans son appréciation, mais elle n’a pas le droit de commettre une erreur manifeste, c’est-à-dire une erreur qui se caractérise à la fois par sa gravité et par son évidence.”<sup>67</sup> However, as Schwarze puts it: “the right to error” within the freedom of decision does not entitle the administration to make an “absurd choice”.<sup>68</sup>

## 4.6 The ECJ’s Judgement

### 4.6.1 “Convincing Evidence” – Standard of Proof

Regarding the first point of ground of appeal, the standard of “convincing evidence”, ECJ (the Court) notes that the Community Courts must “establish whether the evidence relied on is factually accurate, reliable and consistent”.<sup>69</sup> The Court clarifies that “convincing evidence” essentially is a term used by the CFI and not, as the Commission argued, a new standard of proof: “it [CFI] by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of

---

<sup>63</sup> Legal, “Standard of Proof and Standards of Judicial Review in EU Competition Law”, pp. 3.

<sup>64</sup> Schwarze, *European Administrative Law*, pp.269.

<sup>65</sup> *Ibid.*, pp. 261.

<sup>66</sup> Schwarze, *European Administrative Law*, pp. 267.

<sup>67</sup> Schwarze, *European Administrative Law*, pp. 267.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Tetra Laval*, cit. Para 39.

evidence, which is to establish convincingly the merits of an argument or, as in the present case a decision on a merger.<sup>70</sup>

The Court continues to describe the essence of merger control and the difficulties involved in examining of future effects of a specific transaction: “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 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.”<sup>71</sup> Consequently, “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.”<sup>72</sup>

The ECJ proceeds to recognize that specifically conglomerate mergers are difficult to assess, since the prospective analysis firstly has to take “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.”<sup>73</sup>

#### 4.6.2 Judicial Review

For the sake of refreshing the memory, the Commission claimed in this part that the CFI had carried out a judicial review beyond the scope of what the Court had previously indicated in case-law and in effect limited the Commission’s “discretion.”

The Court recognizes that it is established case-law that the Commission has a certain discretion in economic matters. However, “that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature.”<sup>74</sup> The Court concludes its findings on the scope of judicial review and describes the role of the Community Courts by stating:

“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.”<sup>75</sup>

---

<sup>70</sup> *Tetra Laval*, cit. Para 41.

<sup>71</sup> *Ibid.*, Para 42.

<sup>72</sup> *Ibid.*, Para 43.

<sup>73</sup> *Ibid.*, Para 44.

<sup>74</sup> *Ibid.*, Para 39.

<sup>75</sup> *Ibid.*, Para 39.

Notably, the Court dismissed the Commission's argument that the CFI had substituted its own view for that of the Commission in connection with the analysis of the predicted growth of PET packaging for a number of sensitive beverages. The Court succinctly stated that the CFI conclusions are "findings of fact". Since the CFI's findings of fact are not subject to review by the ECJ in appeal proceedings, the Court states that it is unnecessary to give a ruling on the merits of those findings.<sup>76</sup> However, the Court notes that there were various items in the contested decision which enabled the CFI to base their findings on.<sup>77</sup>

The excerpt above is a veritable endorsement of the review undertaken by the CFI. Evidently, the Court finds that their review can be reconciled with the principle that the Commission's assessment must be accepted unless it is shown to be *manifestly wrong*. In other words, ECJ's description of judicial review is equivalent to 'ascertaining whether the facts on which the Commission's assessment was based were correct, whether the conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account'. The ECJ's description seems to converge with the manifest error standard. The ECJ's description is essentially an alternative way of expressing the need of supporting the assessment in a decision with sound evidence so that the underlying substantive legal rule can be considered to have been met. Accordingly, to reassure that the decision contains no *manifest error of assessment*.

Nonetheless, in light of the strong opinion among some commentators that the ECJ had in fact intensified their review, the issue of the review of discretionary decisions merits further discussion.<sup>78</sup> In the following section, excerpts from Judge Vesterdorf's dissection of the CFI's judicial review will serve as an illustrative preface to the concluding remarks on the Commission's discretion in economic matters.

---

<sup>76</sup> Art. 225 of EC Treaty.

<sup>77</sup> *Tetra Laval*, cit. Para 47.

<sup>78</sup> Howarth, David, "Tetra Laval/Sidel: Microeconomics or Microlaw", (2005) E.C.L.R. at 371, Völcker and Charro, "Tetra Laval – a landmark judgement on EC merger control", (2005, March 8) Competition Law Insight, pp. 3, Bay, Calzado and Weitbrecht, "Judicial Review in the EU and the 'fast track' procedure", Global Competition Review, available at: [http://www.globalcompetitionreview.com/ear/08\\_judicial.cfm](http://www.globalcompetitionreview.com/ear/08_judicial.cfm) , last viewed 2005-12-18.

## 5 Review of Discretionary Decisions

### 5.1 Discretion in the Eyes of a Judge

When discussing the relationship between the Commission's discretion in economic assessment of mergers and the review of the Community Courts, a characteristic feature of competition cases must be recognized; the essential distinction between law, facts and assessment of facts. While pure questions of law and pure questions of fact are subjected to a full and unqualified review of legality, the assessment of facts, if it is complex, is subjected to a review limited *in principle* to the manifest error of assessment.<sup>79</sup>

Judge Vesterdorf, President of the CFI, describes the CFI's full review of questions of law: "interpretation of the law is the prerogative of the Community judicature". He continues, in this aspect of its review, "the CFI simply checks whether or not the Commission applied correctly the law as interpreted by the Community Courts."<sup>80</sup> In respect to the CFI's review of facts: "Control of facts is intensive and, again, in this field there is no room for discretion on part of the Commission. This is inherent in the nature of a control of the accuracy of facts. Either a fact is correct or it is not."<sup>81</sup>

The *assessment* of facts on the other hand, is based on the manifest error standard which respects the Commission's discretion and the division of powers between the Commission and the Court. A reasonable justification for applying the manifest error standard is that "once the legal criteria and correctness of the facts underpinning a merger decision are established by the Courts, there is considerable scope for divergence in considering whether on the basis of those criteria and facts, the merger will or will not result in significant anti-competitive effects."<sup>82</sup> Judge Vesterdorf contends that the CFI adhered to the established judicial review standard (manifest error) in *Tetra Laval* since the CFI first fully controlled the correctness of the facts and the legal criteria applied by the Commission and, then, assessing whether the

---

<sup>79</sup> Legal, "Standard of Proof and Standards of Judicial Review in EU Competition Law", pp. 4 (emphasis added).

<sup>80</sup> Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", pp. 13.

<sup>81</sup> *Ibid.*

<sup>82</sup> Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", pp. 14.

Commission committed manifest errors of appreciation. In fact, the CFI referred to the “manifest error” standard at least 11 times in its judgement.<sup>83</sup>

Notwithstanding the fact that Vesterdorf emphasizes the “essential” distinction between law, facts and assessment of facts, this theoretical distinction is not as easily drawn in practice. As described above (4.6.2), the ECJ found that the question of the predicted growth of PET packaging for a number of sensitive beverages was “finding of fact”, not an “assessment of facts”. The Commission complained in its appeal that the CFI failed to demonstrate that the Commission’s estimates of the growth in use of PET were based, first, on factual errors, secondly, on findings of fact which were not established or on conclusions drawn from manifestly insignificant evidence, thirdly, on inconsistencies or errors in reasoning or, fourthly, on the omission of relevant factors.<sup>84</sup> So what kind of examination of the Commission’s decision did the CFI actually perform?

In essence, the CFI stated that the Commission’s forecasts of the increase in use of PET for certain products was exaggerated. The CFI explained that evidence provided was unfounded by stating that, of the three independent reports cited by the Commission, only one report contained information on the use of PET packaging for milk. Conclusively, the CFI 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 other reports cited.<sup>85</sup>

In order to come to these conclusions, the CFI undoubtedly *assessed* the Commission’s evaluation of the forecasts, i.e. the *assessment of facts*. Hence, when reviewing the Commission’s assessment of complex economic matters, the Courts inevitably review their assessment facts, although this is not explicitly said in the judgements. Even though the review of the Commission’s assessment of complex economic matters is supposed to be limited to *manifest errors*, the example shows that it is challenging to discern the borderline between fact, i.e. where review is comprehensive (“full”), and *assessment* of a fact, where review is supposed to be limited.

This dilemma exposes a grey-zone inherent in the review of discretionary decisions. Illustrative of this feature is the ECJ’s crass statement regarding the Commission’s

---

<sup>83</sup> Vesterdorf, “Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts”, pp. 19.

<sup>84</sup> *Tetra Laval*, cit. Para 31.

<sup>85</sup> *Ibid.*, Para 46.

complaints of the CFI's review of their assessment of the predicted growth in use of PET; "it is not apparent" that the CFI exceeded the limits applicable to the review of an administrative decision.<sup>86</sup> This issue exemplifies the difficulties posed when trying to make the distinction between facts and *assessment of facts* in the individual case. The distinction is not as crystal clear as it is presented in theory.

Since the control of concentrations is centred around considerations of an economic nature, the assessment of prospective economic scenarios is a fundamental part in applying the ECMR. Consequently, the administrative application of the law is essentially based on non-legal appraisal, i.e. determining whether or not an envisaged merger will significantly impede effective competition in the common market. Although the institutional division of tasks implies that the Commission's choices and assessments as to economic and other policy matters are not to be replaced by those of the Community Courts, this separation of powers can not be interpreted so strictly so as to make it impossible to criticize the Commission's assessments. Such a narrow interpretation would for instance lead to the unsatisfying result that the Courts (in cases the Commission is the defendant) would be forced to declare non-procedural pleas of law (e.g. an erroneous application of Article 82 of the EC Treaty) inadmissible so as not to interfere with the Commission's discretionary powers making economic and public interest assessments.<sup>87</sup> This scenario would amount to a "denial of justice" because pleas alleging infringement of the market related articles 81 and 82 of the EC Treaty, including the ECMR, concern the application of "the law", and the duty of the Community Courts is to make sure *the law is observed*.<sup>88</sup> Tiili, judge at the CFI, gives an interesting insight into the procedure of reviewing of the Commission's discretionary decisions: "It is clear that the [Community] Courts must test the soundness of the Commission's appraisals."<sup>89</sup> The judge continues: "this means, however, that judges are obliged to examine the administrative file, thereby inevitably bringing themselves intellectually close to building their own bridge from the facts, via the legal framework of the case, to a legal outcome *in casu*."<sup>90</sup> These statements are insightful, because they

---

<sup>86</sup> *Tetra Laval*, cit., para 46.

<sup>87</sup> Tiili, V & Vanhamme, J., "The Power of Appraisal" (*Pouvoir d'appréciation*) of the Commission of the European Communities vis-à-vis the Powers of Judicial Review of the Communities' Court of Justice and Court of First Instance", *Fordham International Law Journal* (Vol. 22), 885-901, at 888.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

reveal the intricacy of applying the *manifest error of appraisal* standard. To determine the appropriate balance between the Court's judicial review and the Commission's discretionary powers is not an easy task. In *Tetra Laval*, the ECJ confirmed Tiili's view that the Community Courts must test the soundness of the Commission's appraisals: "that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature."<sup>91</sup> As suggested by the Court, the intensity of the Community Courts' review will vary from case to case depending on the complexity of the issue involved and the quality of the facts at hand. However, the reality of the EC Treaty's separation of powers force the Courts to continue to apply the somewhat Byzantine standard of *manifest error*, but its merits must nonetheless be acknowledged: "the Courts must not redo the Commission's work, but must nevertheless do something, so they solely check for *manifest* mistakes in the Commission's assessments, thereby cutting the separation of powers knot nicely through the middle."<sup>92</sup>

Despite Judge Vesterdorf's assurances that the CFI's review of the Commission's economic assessments is restrained, some commentators contend that the CFI has implicitly raised the standard of proof in merger cases and consequently intensified their judicial review.<sup>93</sup> This essay will not delve into the question of what standard of proof is the most appropriate in EC merger proceedings, but with regard to Bailey's interpretation of the recent case-law, the ECJ made it quite clear that its endorsement of the CFI's requirement that the Commission provide "convincing evidence," "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 a decision on a merger."<sup>94</sup> The Court states the rather obvious and indisputable truth; an assessment has to be backed up by reasoning and solid evidence.

---

<sup>91</sup> *Ibid.*, Para 39.

<sup>92</sup> Tiili, V & Vanhamme, J., "The Power of Appraisal" (*Pouvoir d'appréciation*) of the Commission of the European Communities vis-à-vis the Powers of Judicial Review of the Communities' Court of Justice and Court of First Instance", *Fordham International Law Journal* (Vol. 22). 885-901, at 898.

<sup>93</sup> Bailey, David, "Standard of Proof in EC Merger Proceedings: A Common Law Perspective", (2003) *C.M.L.R.* 845-888, at 847-850 and 886. The two standards are symbiotically linked, since the standard of proof determines how much evidence is needed for the Commission to prove its case. The standard of review, by contrast, is the standard, or to what extent it reviews the Commission's decision.

<sup>94</sup> *Tetra Laval*, cit. Para 41.

## 5.2 Concluding remarks

In the same paragraph of the judgement that the ECJ confirmed that the Commission has a certain discretion in economic matters, it simultaneously upheld the CFI's review of the Commission's economic assessment.<sup>95</sup> In the eyes of some lawyers the judgement set a standard for a more incisive judicial review by the Community Courts.<sup>96</sup> The same commentators were baffled when the CFI "returned" to the traditional standard of review in the recent merger judgement of 21 September in Case T-87/05, *EDP-Energias de Portugal v. Commission*.<sup>97</sup> However, this critique runs short of any consequence, it rather exposes a lack of basic understanding of the administrative law principles upon which EC judicial review is based.

The ECJ's double-sided stance with regard to endorsing the Commission's discretion on the one hand, and on the other hand supporting the review undertaken by the CFI is symptomatic of a legal system that has conferred discretionary powers to an administration. If the Court were to say anything else, they would in fact contradict the ECMR and the EC Treaty. As shown above (3.2), powers have been conferred on the Commission to investigate, gather evidence and in the first instance make an assessment of a merger's compatibility with the common market. EC merger control is performed within an institutional system, in which the Commission has been considered to be the best suited to make the first judgement on a merger. Additionally, the non-legal nature of the appraisal of an envisaged merger is such, that a margin of discretion is innate in the institutional framework. The limits of the discretionary powers are in essence decided by the Courts, guided by the manifest error of appraisal standard and with due regard to the "division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system".<sup>98</sup> The review of the Commission's economic assessment will necessarily have to be limited to manifest errors. Anything else, would be contrary to how judicial review is set out to be performed under article 230 of the EC Treaty.

---

<sup>95</sup> *Tetra Laval*, cit., para 39.

<sup>96</sup> Bay, Calzado and Weitbrecht, "Judicial Review in the EU and the 'fast track' procedure", Global Competition Review, available at: [http://www.globalcompetitionreview.com/ear/08\\_judicial.cfm](http://www.globalcompetitionreview.com/ear/08_judicial.cfm), last viewed 2005-12-18.

<sup>97</sup> Bay, Calzado and Weitbrecht, "Judicial Review in the EU and the 'fast track' procedure", Global Competition Review, available at: [http://www.globalcompetitionreview.com/ear/08\\_judicial.cfm](http://www.globalcompetitionreview.com/ear/08_judicial.cfm), last viewed 2005-12-18.

In the context of the Commission's institutional role, its policy-making function must not be neglected. The discretion in economic matters has been left partly for that reason; the Commission is not merely the investigator or judge of the competition rules, but likewise the policy-maker. Undoubtedly the Commission understands the weight of its adjudicative function in terms of policy-making. The appeal of the CFI's succinct judgement in *Tetra Laval* can be seen as an effort to uphold the respect for an institution, which effectively is the court of first instance in merger cases. At the end of the day, the lawyer has another look at the case-law, not the latest published guidelines.

---

<sup>98</sup> *Tetra Laval*, cit., Opinion by AG Tizzano, para 89.

## 6 Beyond *Tetra Laval* – Adversarial Procedure or Status Quo

The CFI's judgement in *Tetra Laval* and the preceding annulment judgements in 2002 sparked a lively debate on reforming EC Merger Control. The judgements exposed severe errors and inadequate assessments of facts in the Commission's decisions.<sup>99</sup> Consequently, the administrative procedure in which the Commission in first instance decides if a notified merger shall be cleared or prohibited came under heavy fire.

The main concern was that the same Commission officials assess the evidence, state the case against a notified concentration, determine how far that case is proved, and finally decide whether to approve or prohibit a transaction.<sup>100</sup> This criticism is easy to grasp in the light of the massive financial and political consequences that many times result from blocked mergers. From a Swedish perspective, the public uproar in connection with the blocked merger between Volvo Trucks and Scania may serve as a reminder of how volatile this issue is not only in business circles but also among politicians and employees.<sup>101</sup> Why keep a system in which some of the responsible institution's decisions have shown clear signs of lack of competence and questionable economic assessments? On the basis of the Commission's multi-sided role in EC merger control cases, US lawyers, including the former Deputy Assistant Attorney General of the US Antitrust Division, William Kolasky, question the if the EC's administrative (or inquisitorial) system can guarantee legal certainty as effectively as the US adversarial system of merger control: "The knowledge that facts will have to stand up to judicial scrutiny and that witnesses will have to survive the cauldron of cross-examination acts as a disciplining tool on DOJ [Dept. Of Justice] officials. The Commission's decision-making, on the other hand, requires only *self-discipline*."<sup>102</sup> Along similar lines, an

---

<sup>99</sup> Levy, Nicholas, "EU Merger Control: From Birth to Adolescence", (2003) *World Competition* 195-218, at 211.

<sup>100</sup> *Ibid.*, at 209.

<sup>101</sup> Letter ("Öppet brev") sent to the Commission by labor organizations at Volvo and Scania: available at: <http://www.metall.se/home/metall/nybrev.nsf/0/d75de7d3958f21e14125689e002b5279?OpenDocument>, last viewed 2005-12-15, Prime Minister Göran Persson appealed personally to Commissioner Monti, see "Monti says, Keep on truckin'", *TIME europe*: available at: <http://www.time.com/time/europe/magazine/2000/0327/volvo.html>, last viewed 2005-12-15, Prime Minister Göran Persson "disappointed with the prohibition of merger between Volvo and Scania" [author's translation] available at: <http://www.svt.se/nyheter/2000/000315/106.html>, last viewed 2005-12-15.

<sup>102</sup> Kolasky, W, "Mario Monti's Legacy: A U.S. Perspective", (2005, vol 1) *Competition Policy International* 155-177, at 167 (emphasis added). Further, W. Kolasky, address before George Mason University Symposium Washington DC, November 9, 2001, "Conglomerate Mergers and Range Effects:

interesting vision for EC Merger Control involves establishing an administrative tribunal within the Commission. This entails reorganizing DG Competition into a prosecuting section and an adjudicative section. However, as observed by Neven, the tribunal's independence from the "prosecutors" must be assured in a credible way.<sup>103</sup>

This vision is certainly interesting, since the "Judges" would be specialists in the field of competition law and would be familiar with the complex theories that have to be considered in some mergers (e.g. conglomerate effects). These expert judges, would deal solely with competition matters on a daily basis and would reasonably adjudicate merger cases quicker than the CFI's judges, who have a wide range of cases on their desks. However, the flip side of the coin, is exactly the specialist character of the tribunal. For all their expertise, could these streamlined judges guarantee that all the other (other than economic assessment under ECMR) complexities and peculiarities of EC law would be dealt with as pertinent as the judges of the CFI do? This is doubtful. Ultimately, EC law is dynamic and principles devised in one area of the law are often applied in another. A judge of the CFI deals with many areas of Community law and is consequently well informed of recent development. Moreover, as shown above (2.2), the Commission has many roles under the EC Treaty (e.g. policy-maker). The establishment of a Tribunal within the Commission would demand a major revision of the Treaty. Something unfeasible in times when the task of reaching unanimity over the EU budget appears Sisyphean. Suffice to say, reform of the EC merger control is a balancing act; the parties' interest of a transparent decision procedure that ensures judicial review on the one hand, and the institutional framework of the EC Treaty on the other hand.

A good balance appears to have been reached. The "reform package" presented subsequent to the CFI's landmark judgements in 2002 was not overwhelmingly well received by commentators.<sup>104</sup> However, these reforms among which included the appointment of a Chief Economist to assist the Commission officials in cases involving

---

It's a Long Way from Chicago to Brussels", p. 13. Available at:

<http://www.usdoj.gov/atr/public/speeches/9536.htm> , last viewed 2005-09-27.

<sup>103</sup> Neven, Damien, "Competition economics and antitrust in Europe", Preliminary paper, pp. 35, available at: <http://www.economic-policy.org/pdfs/Neven%20Paper%20panel%20version.pdf> , last viewed 2005-12-16. Authorisation granted by the author to cite. A revised version will be published in February, 2006 in Economic Policy.

<sup>104</sup> Lévy, cit., pp. 232.

complex economic theories and the establishment of a “peer review” system under which phase II cases are examined by two independent teams of Commission officials, seem to have hit home.<sup>105</sup> In September 2005, the CFI upheld the Commission’s prohibition decision regarding the acquisition of Gás de Portugal by Energias de Portugal (EDP) and Italian ENI.<sup>106</sup> The CFI confirmed the Commission’s competitive analysis which included an adequate approach to remedies.<sup>107</sup> This judgement was a veritable victory for the Commission’s reformed approach to reviewing notified mergers. On an equally positive note, the CFI upheld the Commission’s prohibition decision in the long-running and widely debated case of GE/Honeywell, although the Commission’s assessment regarding the conglomerate effects of the merger was criticized.<sup>108</sup> William Kolasky, the former Assistant Attorney General must be impressed by the these recent cases; the Commission officials’ *self-discipline* has been reinvigorated.

The CFI’s three merger cases in 2002 signalled a trend towards a more stringent judicial review by the CFI.<sup>109</sup> W. Kolasky, who in connection with the Commission’s prohibition decision regarding the GE/Honeywell merger in the year 2001 had questioned the legal certainty under EC merger control, observes that the CFI’s three annulment judgements in 2002 ‘go a long way toward dispelling concerns about a lack of effective judicial review of Commission merger decisions’.<sup>110</sup>

*Tetra Laval* and these recent cases are tangible proof of an administrative system that guarantees adequate judicial review. On the one hand, the upheld prohibition decisions show that the Commission’s decisions stand up to the close scrutiny of a court and that the Commission’s discretion in economic matters is appropriate. On the other hand, the

---

<sup>105</sup> Commission Press Release SPEECH/04/477, “A reformed competition policy: achievements and challenges for the future”, Further, Commission Press Release SPEECH/03/200, Commissioner Monti’s speech at Georgetown University.

<sup>106</sup> Case T-87/05, *EDP-Energias de Portugal v. Commission*, judgement of 21 September 2005, not yet published in the E.C.R.

<sup>107</sup> Case T-87/05, para 80-82.

<sup>108</sup> Case T-210/01, *GE v Commission*, judgement of 14 December 2005, not yet reported in the E.C.R., para 364 and 470.

<sup>109</sup> Case T-342/99, *Airtours v. Commission (Airtours)*, [2002] E.C.R. II-2585, Case T-310/01, *Schneider Electric v. Commission*, [2002] E.C.R. II-4071, Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381

<sup>110</sup> Lévy, cit., pp. 232. Quote is an excerpt from Remarks by W. Kolasky before the American Bar Association Fall Forum, Washington DC, November 7, 2003, “Global Competition: Prospects for

CFI's control is sufficiently thorough to satisfy the private parties' demands on legal protection. The CFI plays a vital role in guaranteeing legal certainty for the parties' to a blocked merger. It was in fact created due to the need for a *court* to review comprehensively and rigorously the factually complex decisions of the Commission in the field of competition.<sup>111</sup>

Finally, in the discussion about future reform of the present inquisitorial system and when comparing Europe's system with the US model, an important peculiarity of the EC merger control has to be recalled; its function in the realization of the European project called the EC/EU. Critics might argue that the goal of a common market has been attained. Hence, the Commission's role as the initial arbiter in merger cases is a thing of the past, since the Commission no longer needs the tool of competition law in order to ensure the attainment of the common market. Consequently, there is no longer the need for the Commission to supervise every proposed merger with a Community dimension. However, these critics have turned a blind eye to the EC Treaty; under article 211 of the EC Treaty, the Commission's mission is not solely to secure the creation of the common market but also to ensure its *proper functioning*. The legislator is convinced that we will see a trend of corporate reorganizations in the form of mergers in the future.<sup>112</sup> All mergers are "welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community."<sup>113</sup> However, not all mergers are in the interest of the Community. The Commission has been considered to be best suited to safeguard the interests of the Community in the first instance.<sup>114</sup> In light of the fauna of interests that the legislator envisages competition policy to encompass, this instrument is more suitable in the hands of a pro-active and effective administration, as opposed to a court which has to adhere to more time-consuming procedures.

---

Convergence and Cooperation", available at <http://www.usdoj.gov/atr/public/speeches/200446.pdf>, last viewed 2005-12-16.

<sup>111</sup> Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", pp. 13.

<sup>112</sup> Preamble, p. 3, Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings, [2004] O.J. L24/1.

<sup>113</sup> *Ibid.*, p. 4

<sup>114</sup> Preamble, p. 17, Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings, [2004] O.J. L24/1.

## 7 Conclusion

This essay sets out to answer the question if adequate judicial review is provided by the existing merger control system. In light of the purpose and the institutional framework of EC merger control, the answer must be affirmative. The main lesson to be drawn from this exposé of the Commission's discretionary powers in the field of EC merger control, is to recognize the underlying principles of administrative law. The case of *Tetra Laval* shows that the Commission's discretion in terms of assessments of economic matters is not unchecked, on the contrary, the Community Courts perform a rather stringent control. *Tetra Laval* was a wake-up call. It called the Commission's attention to the fact that discretion has been granted for a reason; on the presumption that the Commission, as opposed to a court, has superior knowledge and resources to make an adequate judgement on the compatibility of mergers with the common market. The *manifest error of appraisal* standard is designed to ensure that the Commission's exercise of power is checked and is a reminder of their responsibility to deliver decisions which are legally sound, or as put by G. Braibant:

*“L’erreur manifeste est, dans la domaine de la logique, ce qu’est le détournement de pouvoir dans le domaine de la morale.”<sup>115</sup>*

It is the view of the author, that the judicial review performed by Community Courts in *Tetra Laval* was a skillful balancing act. Their review heeded calls for certainty with regard to the Commission's application of the controversial “conglomerate-effects theory” and yet remained within the confines of the limited review, as stipulated by the EC Treaty and case-law. The standard of *manifest error of appraisal* was not neglected, on the contrary, both courts were wholly aware of the EC's *modus operandi* as a “community based on *administrative* law”.<sup>116</sup>

---

<sup>115</sup> Schwarze, *European Administrative Law*, pp. 267.

<sup>116</sup> Schwarze, *European Administrative Law*, pg. 4 (emphasis added). Schwarze's quote is a travesty on the ECJ's statement in Case 294/83 “*Les Verts*” [1986] E.C.R. 1339, para 23: “une communauté de droit” (a community based on law).

## References

### Case-law

#### European Court of Justice

Cases 56 & 58/64, *Consten and Grundig v. Commission*, [1966] E.C.R. 299

Case 6/72, *Continental Can and Euroemballage v. Commission (Continental Can)*, [1973] E.C.R. 215

Joined Cases 142-156/84, *British Tobacco Company et al. v. Commission (BAT-Reynolds)*, [1987] E.C.R. 4487

Joined Cases C-68/94, *France et al v. Commission (Kali & Salz)*, [1998] E.C.R. I-1375

Case C-12/03 P, *Commission v. Tetra Laval (Tetra Laval)*, [2005] E.C.R. I-987

#### Court of First Instance

Case T-342/99, *Airtours v. Commission (Airtours)*, [2002] E.C.R. II-2585

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

Case T-210/01, *GE v Commission*, judgement of 14 December 2005, not yet reported in the E.C.R.

Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381

Case T-87/05, *EDP-Energias de Portugal v. Commission*, judgement of 21 September 2005, not yet reported in the E.C.R.

### Commission Documents

#### Commission Decision

Commission Decision 2004/124/EC of 30 October 2001, declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416 – Tetra Laval/Sidel) (OJ 2004 L 43, p. 13)

### Competition Policy Reports

Ist Report on Competition Policy (1972), Bullentin of the European Communities, vol. 5, 1972

XXIst Report on Competition Policy (1991)

XXIX Report on Competition Policy (1999)

XXXIIIrd Report on Competition Policy (2003)

### Commission Press Releases

Commission Press Release IP/02/1952 of 20 December 2002, “Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice, available at: <http://www.europa.eu.int/rapid> , last viewed 2005-12-18

Commission Press Release SPEECH/03/200 of 4 April 2003, Commissioner Monti’s speech at Georgetown University, available at: <http://www.europa.eu.int/rapid> , last viewed 2005-12-16

Commission Press Release SPEECH/04/477 of 28 October 2004, “A reformed competition policy: achievements and challenges for the future”, available at: <http://www.europa.eu.int/rapid> , last viewed 2005-12-16

### Books

Bellamy Sir C, Child G, *European Community Law of Competition*, Sweet & Maxwell, 5<sup>th</sup> edition, (Bellamy & Child, *European Community Law of Competition*)

Bernitz, Ulf, *Europarättens grunder*, Norstedt, 2002

Broberg, Morten P., *The European Commission’s Jurisdiction to Scrutinize Mergers*, Kluwer Law International, 2003

Hildebrand, Doris, *The Role of Economic Analysis in the EC Competition Rules*, Kluwer Law International, 2002 (Hildebrand, *The Role of Economic Analysis in EC Competition Rules*)

Lenaerts, Koen & Van Nuffel, Piet, *Constitutional Law of the European Union*, Sweet & Maxwell, 2<sup>nd</sup> edition, 2005

Navarro, Edurne & Font, Andrés & Folguera, Jaime & Briones, Juan, *Merger Control in the European Union*, Oxford University Press, 2002

Schwarze, Jürgen, *European Administrative Law*, Sweet & Maxwell, 1992 (Schwarze, *European Administrative Law*)

#### Articles

Bailey, David, “Standard of Proof in EC Merger Proceedings: A Common Law Perspective”, (2003) C.M.L.R. 845-888

Bailey, David, “Scope of Judicial Review Under Article 81EC”, (2004) C.M.L.R. 1327-1360

Kolasky, W, ”Mario Monti’s Legacy: A U.S. Perspective”, (2005, vol 1) *Competition Policy International* 155-177

Levy, Nicholas, “EU Merger Control: From Birth to Adolescence”, (2003) *World Competition* 195-218

Slot, Piet Jan, “A View From The Mountain: 40 Years of Developments in EC Competition Law” (2004) C.M.L.R. 443-473

Tiili, V & Vanhamme, J., ”The Power of Appraisal” (*Pouvoir d’appréciation*) of the Commission of the European Communities vis-à-vis the Powers of Judicial Review of the Communities’ Court of Justice and Court of First Instance”, *Fordham International Law Journal* (1999, Vol. 22). 885-901

### Internet Sources

Bay, Calzado and Weitbrecht, “Judicial Review in the EU and the ‘fast track’ procedure”, Global Competition Review, available at:

[http://www.globalcompetitionreview.com/ear/08\\_judicial.cfm](http://www.globalcompetitionreview.com/ear/08_judicial.cfm) , last viewed 2005-12-18

Kolasky, William, address before George Mason University Symposium Washington DC, November 9, 2001, “Conglomerate Mergers and Range Effects: It’s a Long Way from Chicago to Brussels”, available at:

<http://www.usdoj.gov/atr/public/speeches/9536.htm> , last viewed 2005-09-27

Legal, Hubert, “Standard of Proof and Standards of Judicial Review in EU Competition Law”, Fordham Annual Conference on International Antitrust Law and Policy, 2005, pp. 1, available at: [http://listes.cru.fr/sympa/d\\_read/creda-concurrence/Art/Legal-Fordham2005.pdf](http://listes.cru.fr/sympa/d_read/creda-concurrence/Art/Legal-Fordham2005.pdf) , last viewed 2005-11-15 (Legal, “Standard of Proof and Standards of Judicial Review in EU Competition Law”)

Neven, Damien, “Competition economics and antitrust in Europe”, Preliminary paper, available at: <http://www.economic-policy.org/pdfs/Neven%20Paper%20panel%20version.pdf> , last viewed 2005-12-16 [A revised version will be published in February, 2006 in Economic Policy] (Neven)

Vesterdorf, Bo, ”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.biicl.org/admin/files/Standard\\_of\\_proof\\_Bo\\_Vesterdorf.pdf](http://www.biicl.org/admin/files/Standard_of_proof_Bo_Vesterdorf.pdf) , last viewed 2005-12-10

[A revised version of which is published in European Competition Journal (2005) Hart Publishing, p.3] (Vesterdorf, ”Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts”)