Exploring the role of legal presumptions under the 'convincing evidence' standard in EC merger control

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This article addresses the problem of increasing complexity and sophistication of the economic and legal assessment of concentrations under EC merger control regime. It evaluates the potential role that legal presumptions might play in facilitating the assessment of complex economic evidence and increasing legal certainty of the merger assessment process.

1. Introduction

(A) Application of the substantive test in the merger assessment

Prior to engaging in the detailed discussion regarding the potential significance of legal presumptions that could assist competition authorities and courts in assessing complex economic evidence brought up in the process of assessment of concentrations notified under the new EC Merger Regulation (ECMR)[1], we shall briefly discuss recent developments in EC merger control, which emphasize the need for further development of legal mechanisms so as to provide for a competent and efficient appreciation of economic theories and economic evidence.

Over the last five years a line of events occurred in EC merger control that for the purposes of the present discussion we shall label as increasing economic complexity and sophistication of the merger assessment.[2] Among the most notable developments was the adoption of the new ECMR in 2004, which has modified the wording of the substantive test that the European Commission and Community Courts apply in determining whether a particular concentration is compatible with the Common Market.

The reformulation of the substantive test did not change the course of the assessment process but has shifted the focus of attention.[3] Under the old test, dominance was the necessary indicator, without which the Commission could not block a merger. Thus, attention was concentrated on the structural analysis of the market, more specifically - on the identification of the market shares and market power of the merging undertakings, which would assist in the determination of the dominant position. Although being a

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[1]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24, 29.01.2004, 1-22, Article 2(2).

[2]This can be supported by the empirical evidence regarding increasing input of the economic experts in the competition cases. See Neven., A. 'Competition Economics and Antitrust in Europe' (2006), Economic Policy, 743-791. See also Schmidtchen, D., Albert, M. and Voigt, S. (eds) The More Economic Approach to European Competition Law, Mohr Siebeck: Tuebingen, 2007.

[3]See generally Riesenkampff, A. 'The New E.C. Merger Control Test under Article 2 of the Merger Control Regulation' (2003-2004) 24 Nw. J. Int'l L & Bus. 715-727.

necessary element, dominance alone could not suffice for the Commission to prohibit a merger. As a second step the Commission had to prove that, as a result of a creation or strengthening of a dominant position, the proposed merger would negatively affect competition on the relevant market. The 'significant impediment of effective competition' (SIEC) test[4] directs the focus of the Commission's analysis away from the determination of dominance, i.e. the acquisition by the merged entity of market power, to how this market power affects the relevant market, its effects on the existing level of competition and its effects on other market players – competitors (actual and potential) and consumers.

Nevertheless, post-reform merger control enforcement suggests that the SIEC test has not changed the Commission's assessment in a radical way: it continues to focus on finding dominance and the new wording of the substantive test and the Guidelines issued to clarify its application have made a difference only in a handful of cases.[5] One can also see the main role of the new wording in the clarification of the two-tier analysis that already existed under the old test and in closing the potential gap of under-enforcement in oligopolistic markets.[6]

It follows from the aforementioned considerations that the modifications to the substantive test introduced by Regulation 139/2004 should not be viewed as a radical legislative intervention, but rather as a reaction and reflection of tendencies already articulated and developed in the jurisprudence of the Community Courts. Even prior to the adoption of the new ECMR, Community Courts were actively scrutinizing the Commission's assessment in the second step of this process – namely, the potential effects on competition on the relevant market. The modification of the wording of the substantive test and certain institutional and procedural reforms introduced by the new ECMR were prompted by the annulment of the Commission's prohibition decisions, among others, in *Schneider*[7] and especially *Airtours*[8] , where the Commission failed to prove the existence or creation of collective dominance among the remaining market players post-merger.

In *Airtours* the CFI articulated the 'convincing evidence' standard when it stated that where the Commission seeks to prohibit a merger based on the collective dominance concerns 'it is incumbent upon [the Commission] to produce convincing evidence thereof'[9]. Some authors submitted that Airtours heralded an introduction of a new standard

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[4]ECMR, Article 2(2): 'A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of creation or strengthening of a dominant position, shall be declared compatible with the common market'.

[5]Roeller, L.-H., 'The Impact of the Substantive Test in European Merger Control' in Current Competition Law V (Philip Marsden, Michael Hutchings, Peter Whelan (eds.), London: British Institute of International and Comparative Law, (2007), 24-44. This view can be supported by the official statistics of the European merger control (21 September 1990 to 31 October 2007), which indicates only 20 prohibitions out of more than 3500 notified concentrations. The number of mergers cleared with commitments is more significant – 83, but it is difficult to assess their importance, as these decisions were not scrutinized by the Community Courts. Statistics is available at <http://ec.europa.eu/comm/competition/mergers/statistics.pdf>.

[6]Roeller, L.-H. & de la Mano, M., 'The Impact of the New Substantive Test in the European Merger Control' European Commission, January 22, (2006), available at <http://ec.europa.eu/dgs/competition/economist/new_substantive_test.pdf>.

[7]Schneider Electric SA v Commission, T-310/-1, 2002 ECR II 4071, See also 'European Court Deals Successive Blows to European Commission's Merger Review Policy', Antitrust 6 (2002), Dechert, available at <http://www.dechert.com/library/Antitrust%2011-02.PDF>.

[8]Airtours plc v Commission, T-342/99, 2002 ECR II 2585 (hereinafter Airtours Judgment).

[9]Id., paragraph 63.

for the burden of proof, one which indicated 'a clear change in the standards for merger review in Europe'.[10] However, one can also look at the 'convincing evidence' standard as simply a clarification of the standard that should and has been applied before. This is the view reflected in the ECJ's judgment in *Tetra Laval*. [11]

The same standard worked against the Commission when applied in the subsequent landmark judgments of *Tetra Laval*[12] and *General Electric*[13]. These failures in the Commission's methodology and quality of the evidence warranted certain institutional and procedural reforms that further increased the complexity of merger assessment. The most notable institutional innovations consisted in the introduction of the office of Chief Economist and the appointment of peer review panels which would test the solidity of the team's position in Phase II cases.[14]

Modifications to the procedural rights of the Commission have also added to the complexity and length of merger investigations. The new ECMR granted the Commission the right to extend its Phase II proceedings in agreement with the parties for up to 20 days[15] ; this has furnished the Commission with more time to collect evidence and to discuss any necessary commitments with the parties. According to Berg, this is the price that must be paid for the improvement of scrutiny and avoidance of low-quality decisions which have been compromised by time constraints.[16]

(B) Increasing complexity of economic analysis in merger control

Certain modifications to the Commission's methodology of analysis were also warranted by the focal shift towards the competitive effects on the relevant market and away from the finding of dominance. The Commission's practice of merger assessment under the old ECMR was traditionally based on structuralist foundations[17] and it applied the substantive assessment test in a two-step process: first it determined the relevant market and secondly it calculated market shares of the merging parties and compared it with the market shares of the remaining competitors. Consequently, this simplified two-step assessment

[10]Guerrero, K., 'A New 'Convincing Evidence' Standard in European Merger Control' (2003-2004) 72 U. Cin. L. Rev. 249

[11]Commission v Tetra Laval, Case C-12/03P (2005) (hereinafter Tetra Laval ECJ Judgment), at paragraph 48: 'It follows from these examples that the Court of First Instance carried out its review in the manner required of it, as set out in paragraph 39 of this judgment. It explained and set out the reasons why the Commission's conclusions seemed to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence' (emphasis added).

[12]Tetra Laval v Commission, Case T-5/02 (2002) (hereinafter Tetra Laval CFI Judgment).

[13]General Electric v Commission, Case 210/01(2005) (hereinafter GE/Honeywell Judgment).

[14]The effectiveness of this mechanism could be disputed taking into account the fact that it was a peer review panel that brought about a reversal of the negative perception of the Sony/BMG merger (Sony/BMG, Case COMP/M.3333 (2004) (hereinafter Sony/BMG Decision), which resulted in the unconditional clearance subsequently annulled by the CFI in its landmark Impala judgment (Impala v Commission, T-464/04 (2006) (hereinafter Impala Judgment). See Kirch, P., 'A Practical Guide to the New EU Merger Control Rules (Effective May 1, 2004)', Stay Current, (July 2004), Paul Hastings Attorneys, available at <http://paulhastings.com/assets/publications/64.pdf?wt.mc_ID=64.pdf>.

[15]Regulation 139/2004, Article 10(3).

[16]Berg, W. 'New EC Merger Regulation: A First Assessment of Its Practical Impact' (2003-2004) Nw. J. Int'l L. & Bus. 24: 683-714, at page 702.

[17]See generally Bertolini A. & Parisi F., 'The Rise of Structuralism in European Merger Control' (1996), 32 Stanford J. Int'l L. 13.

allowed the Commission to make certain inferences as to whether the merger is problematic and it requires an in-depth assessment. [18]The structuralist approach warranted the application of structuralist presumptions and they were preserved under the new ECMR in the Commission's administrative Guidelines.[19]

However, the recent annulment of the Commission's decisions by the Community Courts indicates that the previously applied methodology might be insufficient for a proper analysis of proposed concentrations, particularly in the non-horizontal cases. There are at least two broad areas in merger assessment where traditional structuralist analysis and presumptions alone were found to be insufficient in satisfying the requirements of the established burden of proof standard. These areas include the assessment of the future conduct of the merging undertakings and forecasting the overall effect on the relevant market, including the effect on prices and reaction of the actual and potential competitors.

For example, in *Airtours* the CFI formulated a three-pronged test for assessing the likelihood of the undertaking adopting alleged anticompetitive conduct: this is the so called 'ability-incentive-impact' framework.[20] Since the Airtours decision this legal framework has been followed by the Commission[21] with a varying degree of success, until the recent *Impala* judgment raised doubts regarding the 'correct' legal test that should be applied to conduct a merger analysis.[22] The deficiency in the Commission's analysis was also revealed in the assessment of the incentives for the merging undertakings to engage in certain commercial practices. For example, in the case of *GE/Honeywell* the Commission based one of its theories of competitive harm on the submission that the merged entity will have the incentive to disrupt the supply of engine starters manufactured by Honeywell to other engine manufacturers competing with GE.[23] The CFI explained that the commercial interests of the undertaking, namely the profitability of engaging in certain behaviour, will constitute convincing evidence which the Commission had not adequately presented in the case before it, because the Commission did not conduct an analysis of the costs and profits borne by the merged entity in employing the alleged anticompetitive practices.[24]

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[18]See Van den Bergh, R. and Camesasca, P., European Competition Law and Economics: A Comparative Perspective, 2nd ed. London: Sweet & Maxwell (2006), 399.

[19]According to the Horizontal Guidelines, mergers resulting in concentration over 50% of market share in one undertaking may by themselves be evidence of the existing dominant position and mergers which do not bring the market share of the merged entity above 25% of the relevant market may be presumed to be compatible with the Common Market. See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (hereinafter Horizontal Guidelines) OJ C 31/5, 5.2.2004, paragraphs 17, 18. Similarly, in the Draft Non-Horizontal Guidelines the Commission provided for the 30% threshold, which is intended to separate potentially non-problematic mergers that do not raise concentration level above this threshold in each of the markets concerned. See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (hereinafter Non-Horizontal Guidelines), paragraph 25.

[20]Airtours Judgment, at paragraph 62: 1) members should possess information and ability to monitor 2) there should be incentives to sustain the collusive practices over time 3) proof that reaction of competitors and consumers would not jeopardize the results expected from the common policy.

[21]Telia/Sonera, Case COMP/M.2803 (2002), at paragraph 91: 'in assessing whether [vertical foreclosure issue] is significant, it is necessary to establish that the merged entity will have the incentive to foreclose, but also whether it has the ability to do so, and whether it will have any significant effect on competition on the market in question'.

[22]Impala Judgment, at paragraph 251: CFI stretched the limits of the Airtours test, stating that 'signs, manifestation and phenomena inherent in the presence of dominant position' might constitute 'indirect evidence' that will also satisfy the formal Airtours test.

[23]General Electric/Honeywell, Case No COMP/M.2220, at paragraph 420.

[24]GE/Honeywell Judgment, at paragraph 297.

Another factor that might constitute a departure from the traditional structuralist presumptions and adoption of new economic tools in identifying and quantifying competitive effects on the relevant market was the introduction of the efficiency defence in European merger control. As Ilzkovitz and Meiklejohn note in their work, 'the introduction of an efficiency defence, which will require quantification not only of efficiency gains but also of the competition effects, would therefore represent a major change in the whole process of EU merger analysis'.[25] In order to be able to make this quantification, the Commission will be forced to develop a methodology that would allow for the measurement of the alleged competitive harm and expected efficiencies in common denominators, and the subsequent balancing of these results against one another . However, due to the adherence to the consumer welfare standard and the subsequent formulation of high procedural requirements for invoking the efficiency defence, its role in the EC merger will presumably remain marginal.[26]

Taking into account all the above mentioned developments in EC merger control and using the scale for assessing the hierarchy of anti-trust rules based on their complexity developed by Brodley,[27] one would have to acknowledge that European merger control has already reached one of the highest levels of complexity and sophistication. Complex cases, especially in the area of non-horizontal concentrations, underscore a necessary preference for more sophisticated economic methods of analysis compared to the traditional structural analysis.[28] Unfortunately, economic theory that is supposed to provide exacting methodological tools for the purposes of merger assessment 'is of necessity subjective, value-laden and, ultimately, imprecise, offering no unique answers'.[29] As Van den Bergh notes in the discussion on the use of economic theories and economic evidence in merger assessment, even basic concepts such as market power and dominance leave substantial scope for subjective interpretation by the individuals and institutions involved in a merger control case ranging from judges and competition authorities to lawyers and experts.[30]

This conflict has reflected itself in the parallel assessment of economic evidence by the Commission and Community courts, which has led to diverging conclusions.[31] The ECJ

[25]Ilzkovitz, F. and Meiklejohn, R., 'European Merger Control: Do We Need an Efficiency Defence?' in European Merger Control: Do We Need and Efficiency Defence? (Fabienne Ilzkovitz and Roderick Meiklejohn, eds.) Edward Elgar, (2006), at page 72.

[26]See generally Svetlicinii, A., 'Assessment of the Non-Horizontal Mergers: is there a Chance for the Efficiency Defense in EC Merger Control' (2007) E.C.L.R. 28(10): 529-538.

[27]See Brodley, J., 'In Defense of Presumptive Rules: An Approach to Legal Rulemaking for Conglomerate Mergers' in The Conglomerate Corporation: An Antitrust Law and Economics Symposium (Roger D. Blair and Robert F. Lanzillotti, eds.), Cambridge, (1981), at page 252. The author creates a hierarchy of the antitrust rules, based on their complexity. As determinant criteria he offers following three factors: 1) the number of legal elements 2) difficulty in proving individual legal elements and 3) need to engage in balancing between legal elements.

[28]For critique on the structural merger analysis see Kaplow, L., 'The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative' (1982) 95 Harv. L. Rev., 1826-1832.

[29]Hildebrand, D., The Role of Economic Analysis in the EC Competition Rules, The Hague: Kluwer Law International, (2002), at page 106.

[30]Van den Bergh (2006), at page 400.

[31]On several instances the CFI conducted its own evaluation of the Commission's economic evidence which led the Court to different results. See generally Reeves, T. and Dodoo, N., 'Standards of Proof and Standards of Judicial Review in EC Merger Law' in 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry E. Hawk, ed.), Juris Publishing, 2006.

confirmed that '[the] Commission has a margin of discretion, but that does not mean that Community Courts should refrain from reviewing Commission's interpretation of information of an economic nature'.[32] Thus, with the Commission's limited margin of assessment as regards economic evidence, the high standards of the burden of proof and of judicial review, problems with legal certainty and stability in European merger control represent significant challenges both for the regulators and merging parties.

(C) Concept of legal presumption, its elements and functions

In an attempt to define the concept of legal presumption, it could be useful to refer to the US experience of antitrust enforcement where, unlike in the EU[33] , both federal courts and the antitrust authorities conduct a primary assessment of the facts produced by the opposing parties in the course of adversarial legal proceedings.[34] In order to facilitate the Courts' assessment of complex economic evidence, US antitrust jurisprudence developed a set of so called '*per se* rules'. The rationale of these rules was 'to avoid burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct'.[35] These *per se* rules in American antitrust practice have an empirical character and according to Hovenkamp 'are not based on the logical necessity but on accumulated observation subject to continual testing, falsification, and modification'.[36] Thus, *per se* rules allowed the US courts at certain points in the development of jurisprudence and economic thought to rule on the illegality of certain practices, which *prima facie* satisfy the conditions required by these rules without detailed examination of all relevant facts. At the other end of the spectrum of the American *per se* rules the so called 'rule of reason' approach appears; this requires the court to enter into a detailed examination of the case because *prima facie* evidence prevents it from being placed within the framework of an existing *per se* rule.[37] In the procedural context legal presumptions indicate the shift of the burden of proof from the party which has proved the existence of the *prima facie* conditions to the party that potentially could attempt to rebut the presumption with some kind of extraordinary evidence that would produce an exception from the general rule.

Using American antitrust terminology it should be noted that the legal presumptions in EC merger control which will be explored in this article probably fit neither in the category of *per se* rules nor in the rule of reason approach. There are several reasons for this qualification related to the state of development of EC merger control jurisprudence. While the movement towards more economics-based assessment of the competitive effects is a

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[32]Tetra Laval ECJ Judgment, at paragraph 39.
[33]Formally, the Community Courts have to confine their judicial review on the Commission's decisions, assessing whether Commission based its conclusions on adequate evidence and provided sufficient reasons for its operative part. In its General Electric Judgment at paragraph 60 the CFI noted that 'Community judicature's power of review is limited to verifying whether the Commission has made 'manifest error in assessment'.
[34]See generally Merger standards under U.S. antitrust laws, American Bar Association, Section of Antitrust Law (1981).
[35]J. Stevens in Jefferson Parish Hospital District No. 2 v Hyde, 468 U.S. 2, 16 n. 25, 104 S.Ct. 1551, 1560 n. 25 (1984), on remand, 764 F.2d 1139 (5th Cir. 1985) cited in Hovenkamp, H., Federal Antitrust Policy: The Law of Competition and Its Practice, St. Paul: Thomson West, 2005, at page 254.
[36]Hovenkamp (2005), at page 256.
[37]See generally Posner, R., 'The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision' (1977) 45 U. Chi. L. Rev. 1, 14-15.

relatively recent phenomenon, Community courts have not yet developed a set of strong, hard core *per se* rules applicable in the merger assessment, especially in relation to non-horizontal concentrations. A brief review of the Community jurisprudence indicates that the Community courts are still looking for acceptable legal tests that would facilitate an economic assessment of the competitive effects. Throughout this process, legal tests were changed, their elements were modified and priorities were shifted. That is why it would be more correct to state that legal presumptions researched in the present work belong to a 'grey area', positioned somewhere in between hard core presumptions and 'rule of reason' analysis.

Therefore, a deeper analysis, an attempt to systematize these presumptions and evaluate their economic and legal background, as well as their possible implications for the merger assessment process, constitute the primary objectives of the present work. While presumptions could be discovered and developed in relation to various aspects of merger assessment, the narrow scope of the present discussion will confine the analysis to three specific topics. The first substantive section will focus on the role of legal presumptions in assessing theories of competitive harm based on leverage of market power in the context of conglomerate mergers using the examples of *General Electric* and *Tetra Laval* cases. The analysis will compare modern economic theories of leverage tests and legal tests applied by the Commission and the Community Courts in establishing the likelihood of leveraging practices such as bundling, tying, and price discrimination among others. The second substantive section deals with a more technical question: it attempts to assess the role of legal standards related to the quality and nature of economic evidence which can be considered 'convincing' under the current burden of proof standard. Finally, the third substantive section will address a particular aspect in the assessment of the future conduct of the merged entity – illegality of conduct under EC Competition Law and possibility of *ex post* prosecution as a deterrent factor.

2. Legal presumptions for the substantive assessment

(A) General presumption in favour of non-horizontal concentrations?

All the above mentioned elements and functions of the legal presumptions can be illustratively demonstrated using the example of the CFI's review of the Commission's prohibition decision in *Tetra Laval*. Summarily, in that case the Commission attempted to prove that Tetra would leverage its dominant position on the carton market into the growing PET market by capturing switching customers and offering them the package of PET products and services of Sidel. Traditionally, the Commission based its theory primarily on structural arguments, specifically in respect of Tetra's dominance and the rapid growth of the PET market which was caused by increasing substitution between the two kinds of packaging materials. On the 'incentive' part of the legal test the Commission was not very elucidating and it was penalized by the CFI, which dismissed the theory of competitive harm based on the leverage of market power.

Although under both the old and new ECMRs the substantive test for merger assessment was the same for all kinds of mergers, the Court ruled that, because vertical and conglomerate mergers are generally neutral and their effects are usually neutral or even beneficial for the consumers, there should be a higher level of proof of the opposite[38] and the mere strengthening effect does not in itself suffice to prohibit the transaction.[39] The CFI criticized the Commission's decision as lacking 'convincing evidence' that 'contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating conclusions drawn from it'.[40]

Applying the concept of legal presumptions to this ruling, one could observe that the general presumption in favour of non-horizontal concentrations increases the burden of proof on the Commission up to the 'convincing evidence' standard, where the Commission's arguments would serve as a rebuttal to that presumption. The existence of this general presumption can be traced to the Non-Horizontal Guidelines: 'Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers' because 'vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market'.[42] Similarly, the CFI's reference to the benefit to consumers was reflected in the Commission's acknowledgement that 'vertical and conglomerate mergers provide substantial scope for efficiencies'.[43]

When assessing the possibility of creating general presumptions in favour of non-horizontal mergers in light of consistency with economic theory, one would find enormous support coming primarily from the traditional Chicago School based on the premise that vertical mergers are largely concerned with efficiency and therefore should be allowed: 'Antitrust's concern with vertical mergers is mistaken. Vertical mergers are means of efficiency, not injuring competition…the law against vertical merger is merely a law against the creation of efficiency'.[44] This approach was also reflected in the US antitrust enforcement and non-horizontal mergers were almost never challenged.[45] Nevertheless, it is doubtful that the Commission or Community courts would adhere to such a resolute presumption. In his opinion, Advocate General Tizzano advised the Court that the substantive test laid down in the ECMR is of 'perfectly symmetrical nature' and therefore the CFI cannot establish different standards of proof for different kinds of mergers.[46] In its judgment, the CFI acknowledged the possibility for the Commission to challenge non-horizontal mergers if the 'incentive' part of the legal test could be proved to the requisite standard. The Non-Horizontal Guidelines also contain a diversified arsenal of the competitive harm theories that can materialize if it would be profitable for the merging undertakings.[47]

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[38]Tetra Laval CFI Judgment, paragraphs 153-155.
[39]Id., paragraphs 334-336.
[40]Tetra Laval ECJ Judgment, paragraph 39.
[41]Non-Horizontal Guidelines, at paragraph 11.
[42]Id., at paragraph 12.
[43]Id., at paragraph 13.
[44]Bork, R., The Antitrust Paradox: A Policy at War with Itself, 1978, at page 234.
[45]US antitrust enforcement was very receptive to these ideas and the last Non-Horizontal Guidelines released in 1984 contain only very limited theories of competitive harm.
[46]Opinion of Advocate General Tizzano in case C 12/03 P Commission v Tetra Laval, at paragraphs 73-75.
[47]These in a large degree reflect the views expressed in Church, J., Impact of Vertical and Conglomerate Mergers (2004), available at
<http://ec.europa.eu/comm/competition/mergers/others/merger_impact.pdf?bcsi_scan_129F6A3CDB83467E=0&bcsi_scan_filename=merger_impact.pdf>.

(B) Anticompetitive practices: incentive equals profits?

In assessing the potential effects of non-horizontal mergers the Commission faced the most problems in proving the likelihood of certain foreclosure practices being adopted by merging parties. In its *General Electric* judgment the CFI explained that 'incentive' implies that it is in the commercial interests of an undertaking to engage in the exclusionary practices and that these interests can be established by showing that the profits of the merging undertakings would outweigh potential costs of such practices.[48]

In that case the Commission assumed that GE's dominance on the aircraft jet engine market and Honeywell's dominance on the engine starters market were alone sufficient to infer that it would be in the commercial interests of the merged entity to disrupt the supply of engine starters to competitors in order to strengthen its existing dominance. The CFI considered 'persuasive' the fact that revenues potentially obtained from selling engine starters to competitors were significantly lower than the profits the merged entity would gain by expanding its basis on the markets for jet aircrafts.[49] However, the Commission's overall theory of bundling of avionics and non-avionics products was dismissed by the Court precisely due to the lack of a cost-benefit analysis.

Thus, by equalizing incentives with profits the CFI confirmed an underlying concept of the profit-maximizing undertakings which is deeply rooted in classical economic theory and previously marginalized under traditional structural assessment of the relevant market. Certainly, the behaviour of the undertakings is influenced by a variety of factors and this one is purely economic and the core function of the undertakings' operation. By clearly emphasizing the need to establish incentives in terms of profits the Court strengthened the foundations of the effects-based merger assessment, which was subsequently reflected in the Non-Horizontal Guidelines.[50]

Therefore, one could wonder whether by emphasizing the importance of commercial interests and profitability the CFI created a legal presumption which would shift the burden of proof on the undertakings once the profitability of the conduct would be established by the Commission. Even if the above question is answered in the positive, the significance of such a presumption can be undermined because profits are not the only factor relevant to incentives for future conduct. As it will be discussed in detail in the following sections, the CFI has requested that the Commission, in assessing incentives, should take into account other factors such as illegality of conduct and its deterrent effect on the undertaking.

3. Legal presumptions for economic evidence

(A) Source of evidence: merging undertakings and third parties

In the preceding section of this paper the analysis evolved around the interrelationship and consistency between legal presumptions and economic theories related to the substantive assessment of the proposed concentrations. In the present section we shall

[48]See General Electric CFI Judgment, paragraphs 338-339 and 444-462.
[49]Id., paragraphs 298-299.
[50]Every theory of competitive harm is tested through the ability-incentive-impact framework and incentives are expressed in terms of profits. See Non-Horizontal Guidelines, paragraphs 39-44, 67-70 and 104-108.

address a more technical question: what kind of evidence is capable of proving requisite elements of the legal tests applied to various theories of competitive harm. This question will be dealt with in a narrow manner on the example of the *Impala* case.

The judgment of the CFI in *Impala* represents a very specific combination of factual and procedural elements. For the purposes of the present discussion, being focused on the role of legal presumptions under the 'convincing evidence' standard applied by the Community courts, it should be emphasized that the *Impala* judgment was rendered under a very unusual procedural situation, which affects the applicability of the respective findings and conclusions to merger assessment in general. Initially, the Commission raised objections against the merger between two recorded music giants Sony and Bertelsmann based on the suspicion of the creation of collective dominance on the relevant market.[51] Concluding its Phase II investigation, the Commission decided that a prohibition decision would not meet the high standard of proof for cases of collective dominance as established by the CFI in Airtours[52] and it chose to clear the proposed concentration. The CFI, when faced by the appeal lodged by Impala, seemed to have realized that its *Airtours* test for collective dominance applied under the 'convincing evidence' requirement might lead to the situation where the merger would be cleared despite the presence of elements characteristic of collective dominance, such as long term alignment of prices.[53] In an attempt to avoid potential under-enforcement of the collective dominance cases the Court significantly relaxed the test for establishing collective dominance. As a result, the Commission appeared in an unusual and somewhat paradoxical position where it had to find 'convincing evidence' that there was no 'convincing evidence' which would allow blocking the merger on the grounds of collective dominance.

One of the key technical characteristics of the economic evidence provided by the Commission in support of its findings in merger assessment is the source from which particular evidence was obtained. It is a matter of investigatory practice employed by the Commission to obtain necessary evidence from the merging parties themselves and from third parties with links to the relevant market – competitors or consumers. The CFI's attitude towards the credibility of different kinds of evidence can produce problematic effects on the Commission's performance in merger investigations.

One of the key arguments in Commission's reasoning was the absence of sufficient transparency on the market due to the opaque nature of the campaign discounts which can vary in numerous combinations depending on the size of the order, the type of the

[51]For discussion of the Commission's statement of objections in the Sony/BMG case see Volcker S. & O'Daly C., 'The Court of First Instance's Impala Judgment: A Judicial Counter-Reformation in EU Merger Control' (2006) E.C.L.R. 27(11): 589-596.

[52]The conditions for establishing collective dominance are: (1) the market must be sufficiently transparent for the undertakings which co-ordinate their conduct to be able to monitor sufficiently whether the rules of co-ordination are being observed; (2) there must be a deterrent mechanism in the event of a deviation from those rules; and (3) the reactions of competitors outside the oligopoly must not be able to jeopardize the results expected from the co-ordination: Airtours Judgment, at paragraph 68.

[53]'Close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances'. Impala Judgment, at paragraph 253.

customer, the nature of the campaign, the genre of the music, and the level of marketing achieved by the retailer among others.[54] According to the Commission various combinations of these factors would cause a vast increase in the number of combinations of rules potentially applicable to campaign discounts alone.[55] The Commission came to this conclusion by examining solely the data on campaign discounts presented by the merging parties. As a result, when invited by the Court to demonstrate the value of the campaign discounts as a percentage of total sales of each of the five major market players the Commission was unable to provide this data.[56] The CFI dismissed the credibility and sufficiency of this kind of evidence stating that although 'the procedure for the control of concentrations does indeed rely to a large extent on trust, [the Commission] cannot go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration'. [57]

Naturally, the merging parties are interested in the outcome of the process and the Commission should not fall victim to an 'information capture' on the part of the parties. Thus, the Commission should conduct its own independent investigation. However, a closer examination of the Commission's arguments that were supported by the evidence obtained from the merging parties raises certain doubts as to the resolute nature of the Court's conclusion. Using the data obtained from the merging parties, the Commission intended to support its argument that campaign discounts depend on the combination of certain factors which increase their diversity and make them more difficult to monitor. Thus, if the campaign discounts were dependant on numerous external factors -that have no link to the company that makes these discounts, what added value will be produced for merger assessment if the Commission collected and calculated campaign discounts for all the five major market players as was suggested by the Court?

The above mentioned example is not the only instance in which the CFI discredited the information obtained from the merging parties. In support of its conclusion regarding the impossibility of establishing an effective monitoring mechanism that would allow five major market players to control the level of prices the Commission relied upon the data presented by the merging parties. This data indicated that the combinations of prices published to dealers (PPDs) 'corresponding to their respective top 20 albums frequently changed considerably from one quarter to another and that the unpredictability of success obliged each major to monitor the PPDs of more than 80 albums'.[58] The CFI found this evidence unclear and unreliable. The Court considered 'surprising' the possibility that PPDs were able to increase from quarter to quarter in such high proportions as submitted by the parties.[59] In addition, the CFI stated that the number of albums, which according to the Commission had to be monitored, 'does not seem to be so high as to render the exercise impossible or even particularly onerous or costly'.[60]

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[54]Impala Judgment, at paragraph 95.
[55]Id., at paragraphs 148, 149.
[56]Id., at paragraph 448.
[57]Id., at paragraph 415. Also, compare: 'As regards, more specifically, campaign discounts, the Commission refers essentially to two of its annexes to support its theory that campaign discounts are opaque because of their extreme complexity and their importance. However, it is apparent that the tables in those annexes, which concern only the discounts granted by Sony and BMG for a single year and were drawn up entirely by those undertakings, cannot be considered sufficiently relevant and reliable'. Id., at paragraph 422.
[58]Id., at paragraph 344.
[59]Id., at paragraph 345.
[60]Id., at paragraph 346.

Thus, the question arises whether the Court's suspicious attitude to the evidence obtained from the merging parties should be attached to the specific conditions of the case or whether it reflects a more general approach that disfavours this kind of evidence. The second scenario would warrant further improvements of the Commission's investigatory practices. According to Volcker, 'experience shows that unlike the merging parties who are typically willing to comply with any data request in order expedite clearance; third parties have little incentive to provide complete and reliable data sets on a timely basis. They will be particularly reluctant to do so in a situation where the Commission is investigating coordinated effects concerns, as any finding in this respect may limit their own ability to participate in further industry consolidation'.[61]

The CFI's apparent insistence on obtaining reliable data from third parties also warrants taking a closer look at the way in which the Court assessed such data in the *Impala* case. Later in the judgment the Court provides its own understanding of the wording of the responses to the questionnaires addressed to the recorded music retailers. Notably, the Court's interpretation of the wording of these responses diverges from that of the Commission's.[62] Apparently, the evidence obtained from third parties is not guaranteed to be accepted due to the possibility of diverging appreciation of the same evidence by the Court.

(B) Past conduct versus future conduct

Continuing the discussion on the way legal presumptions can influence the Commission's investigatory practices we shall now address another issue disputed in the *Impala* case. One of the necessary elements of the collusion mechanism according to the *Airtours* test is the existence of the effective deterrence mechanism that would allow participating companies to punish the competitor who deviates from the common pricing policy and thus deter him from such deviations. In the *Impala* case the Commission had to produce 'convincing evidence' that would demonstrate to the Court the absence of the credible deterrence and retaliation mechanism.

Five major companies on the market for recorded music were connected to each other through a series of compilation joint ventures (JVs) and initially, in its statement of objections, the Commission suggested that exclusion from these JVs might constitute an effective deterrent mechanism against deviations from the alleged common pricing policy.[63] However, following its Phase II investigation the Commission dropped these allegations for two reasons: firstly, it could not find any evidence suggesting this mechanism had been used in the past, and secondly, because excluding from a compilation a deviating member could in fact sacrifice any additional profits that might accrue from a compilation featuring the deviator's artists.[64]

The CFI discarded this evidence primarily because it was past-oriented. The Court emphasized that the *Airtours* test does not require the Commission to demonstrate that the retaliation mechanism was actually used to punish the deviator; it is sufficient to prove the

[61]Volcker & O'Daly (2006), at page 596.
[62]Impala Judgment, at paragraph 385.
[63]Id., at paragraph 467.
[64]Id., at paragraphs 164, 165.

mere existence of a credible mechanism that was capable of punishing non-compliance when it occurs.[65] The Court agreed with the applicant that 'the most effective deterrent is that which has not been used'.[66] The most critical points, however, came later when the Court concluded that 'as the assessment of the risk of the creation of a collective dominant position is not, by definition, based on the existence of a prior common policy, the criterion relating to the absence of retaliatory measures in the past is wholly irrelevant'.[67] Certainly this treatment of the evidence of past conduct cannot be elevated to the level of legal presumption, which disfavours the use of this kind of evidence in merger assessment. This, again, is due to the particular circumstances of the specific case.

Nevertheless, there are several problems with this negative attitude towards the admissibility of the evidence of past conduct. Firstly, it should be stated that economic theory does not provide a uniform list of requirements that would support the definite finding of tacit collusion. On this point economic science displays expressed 'theoretical heterogeneity' under which tacit collusion could be found using a variety of complex econometric models.[68] Summarizing various criteria used in these economic models Ordover has concluded that 'evidence of past or present coordination, although not sufficient alone for the proving coordination, can be used to defend the 'mechanism' of coordination'.[69] Nevertheless, a strong presumption against the admissibility of evidence relating to past conduct is not consistent with economic theory and it also operates to significantly limit the Commission's evidentiary support.

Apart from its inconsistency with economic theory, the negative approach towards admissibility of evidence of past conduct could cause confusion in the overall legal assessment of the likelihood of creating collective dominance. It should be noted that the Court initially suspected the existence of collective dominance on the basis of the alignment of prices during an extended period of time, which by its nature is evidence of past conduct and of the structure of the market. Industrial organization economics do not provide very clear guidance as to the extent of volatility and lack of correlation that is consistent with competition as opposed to some form of coordination. According to the economic theories summarized by Ordover, co-movements of different prices within a 'narrow' range can be entirely consistent with either competition or some sort of coordination.[70] Thus, it will be also problematic to justify the Court's approach, which rejected the evidence of past behaviour in determining the existence of the retaliation mechanism but readily admitted the same kind of evidence to presume the existence of price coordination.

4. Taking into account illegality of future conduct

(A) Illegality and its deterrent effect: from Tetra Laval to General Electric

Illegality of future conduct and fear of detection stood alongside numerous other factors that the Commission had to take into account in assessing the likelihood that the respective conduct would be adopted by the merging entities. However, the Commission and the

[65]Id., at paragraph 465.
[66]Id., at paragraph 466.
[67]Id., at paragraph 537.
[68]See generally Tirole J., The Theory of Industrial Organization, Cambridge: The MIT Press, 2003, 239-262.
[69]Ordover, J., 'Coordinated Effects in Merger Analysis: An Introduction' (2007) Colum. Bus. L. Rev, 425.
[70]Id., at paragraph 428.

Community Courts appeared to be in disagreement regarding the role that these factors should play in the context of merger assessment. This section shall address the roots of the disagreement and its potential implications for the merger investigations.

The issue of illegality of future conduct was first addressed by the CFI in the *Tetra Laval* judgment. According to the Commission, Tetra would be able to leverage its dominance on the carton market to the PET market and capture those customers that would transfer from carton to PET packaging by supplying them with PET materials and equipment manufactured by Sidel.[71] In order to achieve this 'channel effect', that would capture future PET customers on this rapidly growing market and therefore create another dominant position, Tetra would have to engage in certain commercial practices such as predatory pricing, price wars and granting loyalty rebates.[72] In reviewing the Commission's forecast regarding the likelihood of Tetra engaging in this practice the CFI noted that according to the established case law a dominant undertaking is under an obligation to modify its conduct so as not to impair effective competition on the relevant market, regardless of whether the Commission has adopted a decision to that effect.[73] Moreover, Tetra's dominant position on the aseptic carton market had already been recognized in the preceding Article 82 judgment and Tetra was under specific obligations to refrain from certain practices in the future.[74]

In the CFI's view, the combination of these circumstances significantly diminished the likelihood of the adoption of abusive practices, which should have been taken into account in the Commission's analysis. In response, the Commission stated that 'the fact that a type of conduct may constitute an independent infringement of Article 82 EC does not preclude that conduct from being taken into account in the Commission's assessment of all forms of leveraging made possible by a merger transaction'.[75]

In an attempt to comprehend the substance of this disagreement between the CFI and the Commission one could conclude that the Court was merely urging the Commission to prove its conduct-based arguments up to the requisite 'convincing evidence' standard, especially in the present case where illegality, fear of detection, previous undertakings and behavioural commitments offered by Tetra constituted important factors that would significantly affect the likelihood of future abusive conduct alleged by the Commission. Under this interpretation, it would appear that the Commission refused to consider such factors as a matter of principle while the Court was calling for a balanced assessment that would take all relevant factors into account. This understanding of the disagreement is supported by the CFI's explanation that illegality of future conduct can be taken into account by comparing it with the incentives, i.e. the commercial interests of the company to engage in the illegal anticompetitive practices. Thus, according to the CFI, the Commission has to measure the degree in which the financial incentives encouraging abusive behaviour will be eliminated or reduced as a result of detection and prosecution.[76] The CFI also ruled that in order to produce such measurement, the Commission must

[71]Tetra Laval Decision, at paragraphs 345, 365.
[72]Tetra Laval CFI Judgment, at paragraph 156.
[73]Id., at paragraph 157.
[74]Case T-51/89 Tetra Pak v Commission (1990) ECR II-309.
[75]Tetra Laval CFI Judgment, at paragraph 158.
[76]Id., at paragraph 159.

consider 'to what extent those incentives will be diminished owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue'. [77]

However, further analysis of the CFI's reasoning raises doubts as to whether such an assessment, even if its immense complexity and uncertainty could somehow be overcome by the Commission, is capable of leading to the conclusion that abusive conduct is likely to occur despite its illegality. In its *Tetra Laval* judgment the CFI suggested that 'although it cannot be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers'.[78] It might appear from this statement that the CFI first created a presumption in favour of the compliance with EC Competition Law by the merging parties and then nevertheless required the Commission to examine all possibilities. Subsequently, the CFI strengthened this presumption by stating that in examining whether the Commission supported its leveraging theory with 'convincing evidence' it is necessary to 'take account only of conduct which would, at least probably, not be illegal'. [79]

In its appeal of the CFI judgment to the ECJ, the Commission objected to the CFI's approach in respect of the assessment of illegality of future conduct and fear of detection as possible deterrents. The Commission argued that requiring such an assessment will present virtually insuperable legal and practical obstacles, because deterrent effect depends upon the strictness of the policy and its enforcement in each Member State, which will be very difficult to assess in accordance with the very high burden of proof established by the CFI. The ECJ aligned with the Commission and ruled that 'the CFI had erred in law in rejecting the Commission's conclusions (…) on the sole ground that the Commission had, when assessing the likelihood that such conduct might be adopted, failed to take account of the unlawfulness of that conduct and, consequently of the likelihood of its detection, of action by the competent authorities, both at Community and national level, and of the financial penalties which might ensue'.[80] In other words, the ECJ did not reject the issue of illegality as a relevant factor, it just emphasized that this factor cannot be assessed according to the standard established by the CFI.

The CFI continued this approach in its *General Electric* judgment. In its *GE/Honeywell* decision the Commission suggested that the merged entity would engage in certain conduct on the engine starters market with a view to weakening its competitors on this market, resulting in the strengthening of their dominant position on the market for large commercial aircraft engines. The alleged conduct would manifest itself in interrupting the supply of engine starters to competitors, refusals to sell them and continuous price increases. Following the *Tetra Laval* precedent, the CFI noted once again that the Commission failed to conduct an assessment of the effects of the potential illegality of this conduct because a

[77]Id., at paragraph 159.
[78]Id., at paragraph 159.
[79]Id., at paragraph 162.
[80]Tetra Laval ECJ Judgment, at paragraph 78.
[81]GE/Honeywell Judgment, at paragraph 305.

refusal to sell to competitors by a dominant undertaking, according the settled case law[82], in itself constitutes an abuse of a dominant position.[83]

What should be noted in the *General Electric* case is that the CFI introduced even more controversy through its recommended cost-benefit analysis of illegality by holding that in its assessment the Commission can 'limit itself…to a summary analysis based on the evidence available to it'.[84] This interpretation of the Commission's duties in this regard is obviously different from the 'convincing evidence' that Commission had to bring in *Tetra Laval* in order to challenge the Court's presumption of the merged entity's compliance with competition law. Apparently, the CFI has elected to follow a middle road between its *Tetra Laval* approach and its dismissal by the ECJ. This explained by the Court's understanding of the inherent difficulty of such analysis and its willingness to award the Commission with reasonable chances of presenting 'convincing evidence' in support of its arguments. The judgment does not provide the Commission with clearer guidance regarding such assessment: 'it is not for the Court to substitute its own appraisal for that of the Commission, by seeking to establish what the latter would have decided if it had taken into account the deterrent effect of Article 82 EC'.[85]

(B) Law or economics?

The fundamental problem with the approach taken by the Community Courts lies in that fact the test for assessing the deterrence effect of illegality proposed by the CFI in its *Tetra Laval* judgment is based not on economic theory but rather on legal presumptions that are inconsistent with economic models. The CFI departs from the strong presumption that a merging entity will not engage in practices that violate EC competition law. This presumption is purely legal and it cannot be supported by the economic theories because from the economic perspective the conduct of a firm is driven by profit-maximization, and the possibility to violate the law in order to achieve higher gains is also assessed from this perspective. In other words, from an economic perspective the firm will violate the law as long as it is profitable to do so.

Following this legalistic rather than economic approach, the CFI required the Commission to assess how the possibility of detection at national and Community levels, based on the actions of the respective competition authorities and courts as well as imposed sanctions, will diminish the firm's incentives to adopt anticompetitive practices. The decentralization of enforcement of EC Competition Law achieved by the adoption of the Regulation 1/2003 makes this task extremely difficult as the Commission is expected to take into account the differing degrees of regulation and effectiveness of enforcement at the level of Member States.

It follows from these considerations that it would be extremely difficult to furnish economic evidence that satisfies the requirements of the legal test established by the CFI regarding the effect of illegality on the firm's incentives to adopt anticompetitive practices. Moreover, following the discourse of *Tetra Laval* it also appears that the Commission does

[82]Joined Cases 6/83 and 7/73 Istituto Chemioterapico Italiano and Commercial Solvents v Commission (1974) ECR 223.
[83]GE/Honeywell Judgment, at paragraph 306.
[84]Id., at paragraph 304.
[85]Id., at paragraph 312.

not enjoy wide margin of assessment under the strong presumption of the Court in favour of the firm's compliance with EC Competition Law. Since economic theory does not offer sufficient guidance on this issue it is suggested that present conflicts should be discussed on the conceptual level of principles and objectives of competition law and policy.

Tetra Laval produced an important conceptual disagreement between the Commission and the Court which went beyond the practical difficulties in assessing the effect of illegality and fear of prosecution on the firm's conduct. As emphasized throughout this present section, the CFI established a strong presumption in favour of compliance with competition law by the merging entity. Similarly, the Commission took a principled position that *ex post* illegality should not prevent the Commission in addressing the problem *ex ante*. Therefore, this debate is also of conceptual nature because it refers to the functions and objectives of the enforcement of EC Competition Law. In an attempt to address this issue one has to enter the domain of competition policy, which is beyond the scope of this article. What can be concluded regarding the role of presumptions on this issue is that a strong legal presumption in favour of compliance with competition law as established by the CFI is purely legalistic and any attempts to satisfy the requirements of the cost-benefit analysis as suggested by the Court are not likely to succeed against this presumption.

5. Conclusion

The present Article was intended to be an analysis of the ongoing development process of merger assessment methodology which is moving towards a more economics-based and effects-based analysis. The legal presumptions discussed can be considered to be tendencies and potential solutions which form part of this ongoing process. They are tendencies because, in the absence of preceding jurisprudence, both the Commission and Community Courts have, on a case-by-case basis, created, defined and clarified the correct legal tests and the elements that should be taken into account when predicting potential competitive effects of notified concentrations. They are also potential solutions to the increasing complexity and sophistication of the merger assessment process described in the introductory section; this phenomenon has to be addressed by means that would allow the Community Courts to carry out judicial review of the Commission's decisions on the basis of a variety of different economic evidence.

Considering the dynamic nature of these developments, one may not be mistaken in thinking that any conclusive statements are somewhat premature. Nonetheless, at this point it should be acknowledged that legal presumptions might potentially play an important role, not only in the legal assessment of mergers and their potential impact on the enforcement policy, but also in the Commission's investigatory practices and the Courts' ability to review economic evidence in merger cases. This article discussed a variety of legal standards related to various phases and areas of merger assessment. Some of them were found useful in guiding the Commission towards more substantiated predictions of future conduct and competitive effects, others were restrictive of the Commission's ability to present available evidence and defend its case. One group of presumptions was considered to be consistent

with mainstream economic theories; a second group deviated from the canons of economic assessment and; finally, there was also a third type of presumptions, which were purely legalistic and should be somehow reconciled with the economic ones.

Regardless of this obvious divergence and apparent inconsistency in the formulation of legal presumptions by the Community courts, which should be also discounted due to the lack of previous experience, certain general remarks can be made. It is submitted that the concept of legal presumptions might be instrumental for the better understanding of the 'convincing evidence' standard and its application in the merger assessment proceedings. As can be observed in the selective case law analysis presented above, the failures of the Commission to satisfy the 'convincing evidence' standard often corresponded with its inability to rebut certain presumptions articulated by the Community Courts. This might suggest that legal presumptions could be considered as a useful tool in dealing with the complexity of merger assessment. Potentially, legal presumptions can assist policy-makers, lawyers and legal scholars in reconciling and coordinating the relationship between *ex ante* and *ex post* enforcement. The analysis of the presumption in favour of compliance due to the fear of *ex post* prosecution represents this border line where two different competition law regimes interact.