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EU Merger Control and the Compatibility Test Revisited

EU merger policy is shaped and driven by the EU Merger Control Regulation (MCR). An essential element of this is the compatibility test, which determines whether a merger with a Community Dimension significantly impedes competition, and therefore the merger's compatibility with the common market. This article assesses two recent changes to the compatibility test, the 2004 MCR's rewording of the test and the new foreseeable dominance variant as made law by the Court of First Instance and the European Court of Justice.

The supranational nature of EU merger policy makes it an important agent of European integration at the EU level. EU merger policy is shaped and driven by the EU Merger Control Regulation (MCR). Arguably, the two key cornerstones of the MCR, and hence the effectiveness of EU merger policy, are the architecture of separate jurisdictional zones and the compatibility test. This paper focuses upon the latter. Given the new 2004 MCR[1] and the 2005 European Court of Justice ruling in the Tetra Laval concentration case,[2] it is timely to revisit the subject.[3]

The architecture of separate jurisdictional zones, in line with the principle of subsidiarity, aims to guarantee that the European Commission alone vets proposed mergers with a Community competition interest, while concentrations lacking this interest come under the jurisdiction of the relevant member state. The history of the MCR is one of trying to get this architecture to work optimally in practice. The Commission has attempted to improve the architecture's operational effectiveness, including the introduction of the new pre-notification corrective mechanism in the 2004 MCR,[4] which Davison has appraised.[5]

Ensuring the optimal allocation of cases in line with the architecture of separate jurisdictional zones is fundamental to the current working of the MCR, but in itself it is not sufficient to guarantee the effectiveness of EU merger policy, namely, the protection of competition at the Community level. Under the architecture, Community interest is decided by the Community Dimension test (CD), for it determines whether a proposed merger is vetted by the Commission or at member state level. Yet the CD test gives no real indication if the merger in question has a competition concern, or if the competition concern is at the member state or Community level. Hence the need for an effects-based test to assess if a concentration with a CD does in fact significantly impede competition at the Community level. The MCR has such a test, the compatibility test, expressed in Article 2. By determining whether a merger with a CD significantly impedes competition, and therefore the merger's compatibility with the common market, the compatibility test is key to protecting competition at the EU level. Moreover, as the Commission applies the compatibility test to all mergers with a CD, this helps establish a regulatory level playing field for business, and therefore buttresses the Single Market. In seeking to protect effective competition, the compatibility test is therefore necessarily integrationist at the Community level.

The paper is an assessment of the two recent changes to the compatibility test, the 2004 MCR's rewording of the test[6] and the new foreseeable dominance variant as made law by the Court of First Instance (CFI)[7] and the European Court of Justice (ECJ). The change to the nature and scope of the test result-

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[1] Council Regulation (EC) No. 139/2004 of January 2004 on the control of concentrations between undertakings.

[2] Case C-12/03 P, judgment of 15 February 2005.

[3] Leigh M. Davison: EU Merger Control and the compatibility test: a review of recent developments, in: Liverpool Law Review, Vol. 25, No. 3, 2004, pp. 195-220.

[4] Council Regulation (EC) No. 139/2004, op. cit., Article 4.

[5] Leigh M. Davison: The New EC Merger Control Regulation: Guaranteeing the Effectiveness of the Architecture of Separate Jurisdictional Zones?, in: INTERECONOMICS, Vol. 40, No. 3, 2005, pp. 148-157.

[6] Council Regulation (EC) No. 139/2004, op. cit., Article 2.

[7] Case T-5/02 Tetra Laval BV v Commission [2002] ECR II-4381.

ing from its rewording in the 2004 MCR is examined first. Specifically, it is revealed that the rewording of the compatibility test has dropped the dominance condition, although dominance leading to a reduction in competition is still covered by the test. This has resolved the apparently inconsistent legal rulings as to whether dominance was a mandatory condition of the test. This change means that the scope of the test has widened so that it can now include a concentration where, although dominance is not present, it nonetheless leads (through uncoordinated unilateral effects) to the impeding of effective competition. This brings the compatibility test more into line with the substantial lessening of competition test used by a number of other competition regulators.

Simultaneous but separate to the discussions leading to the rewording of the compatibility test was the creation and legal approval of a new variant of the dominance test, subsequently termed future or foreseeable dominance. Using the Commission's pioneering work in the Tetra Laval/Sidel conglomerate concentration decision,[8] the paper explains the notion of foreseeable dominance and its determination in practice, including the importance of abusive leveraging. A supportive Community judiciary duly sanctioned these. In fact, the Community courts went further, for they made law a new future abusive conduct approach to dominance, which stands in sharp contrast to the established market structure approach used in traditional dominance decisions.[9] The paper contends that this reverses the apparent causality of the traditional dominance test. For in the future abusive conduct approach, anti-competitive behaviour directly leads to dominance, while the traditional view sees dominance itself as making it rational to behave in an anti-competitive way. This new approach also raised the issue of the appropriateness of behavioural remedies to forestall the anticipated abusive behaviour by the merged entity. The Commission, in principle, however, had rejected behavioural remedies.[10]

The paper argues that the rewording of the compatibility test in the 2004 MCR may make the need for foreseeable dominance in Tetra Laval conglomerate type concentrations redundant. Arguably, the Commission could determine that such a case met the uncoordinated unilateral effects requirement, with the anticipated future abusive conduct satisfying the mandatory significant impediment of competition condition. The paper concludes that foreseeable dominance and future abusive conduct are problematic, as they require the Commission not just to predict the immediate but the near or foreseeable future, where the chains of cause and effect are difficult to discern and difficult to establish with certainty. Of course, the existing Article 82 EC could vet such abusive behaviour, when it arose, and its ex-post nature would help guarantee legal certainty.

Rewording the Compatibility Test

The compatibility test is at the very heart of merger control at the EU level, for, on competition grounds, it determines if a merger with a Community interest is compatible or incompatible with the common market. If compatible, the merger will go ahead; if incompatible, the merger can be prohibited. The original compatibility test formed Article 2(2) and (3) of the 1989 MCR, and the MCR's amendment in 1997 did not alter the wording of the test.[11] For incompatibility, the test stipulated that the proposed concentration must create or strengthen a dominant position because of which effective competition would be significantly impeded in the common market or in a substantial part of it. The express wording of the test appears to require dominance as a mandatory condition for incompatibility. This led to the concern that the test lacks the scope to vet mergers where a significant impeding of competition could result from the merger, even though dominance was not present, whereas the alternative substantial lessening of competition (SLC) approach was not so constrained. Moreover, the legal rulings as to whether or not incompatibility required dominance were not consistent. Therefore, the 2004 MCR presented the perfect opportunity to clarify these matters.

The process that eventually led to the 2004 rewording of the compatibility test formally started with the Commission's 2001 Green Paper on the review of the Merger Control Regulation.[12] This review included the evaluation of the original compatibility test relative to the SLC test used by the US and several other competition authorities. Indeed, it led to the question, should

[8] Commission Decision of 30/10/2001, Case No. Comp/M. 2416 – Tetra Laval/Sidel.

[9] Case T-102/96 Gencor Ltd v Commission [1999] ECR II-753, paragraph 106.

[10] Commission Decision of 30/10/2001, Case No. Comp/M. 2416, op. cit., paragraph 431.

[11] Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings.

[12] Commission of the European Communities: Green paper on the Review of Council Regulation (EEC) No. 4064/89, Brussels, 11.12.2001 COM (2001) 745/6 final, paragraphs 159-169.

EU merger control adopt the SLC test? On procedural grounds, this would move toward a global standard and therefore bring certain benefits. For merging parties, it would increase certainty, as the parties would face the same test whichever and however many competition regulators they notified with. For regulators, a standard test should make cooperation in a case of mutual interest easier. Moreover, it provides the platform and incentive to progress the work from the test itself to the analytical toolkit used in making the competition determination.

On substantive grounds, however, the Commission saw many similarities between the compatibility test and the SLC approach. Both have the concept of market power at their heart and both employ it to gauge the anti-competition effects of a merger. The Commission also stated that where both it and another regulator employing the SLC test had vetted the same merger, there had been a significant degree of convergence in the approach to merger analysis.[13] The very public divergence between the EU and the US over the attempted takeover of Honeywell by GE, with the EU prohibiting the merger and the US sanctioning it subject to certain conditions, may appear to suggest otherwise. In fact, it does not: the divergent outcome in the case did not arise from substantive differences in the two tests but from interpretational and analytical differences on the part of the two regulators.[14]

Yet an important substantive difference was that the original compatibility test had a dominance requirement, but this was not true of the SLC approach. That is, incompatibility specifically required dominance to be created or strengthened – be it single firm dominance, via tacit coordination, or through economic links between firms – leading to a reduction in effective competition. The apparent outcome is that the scope of the test is constrained relative to that of the SLC approach. More precisely, the dominance condition precludes the compatibility test from assessing possible uncoordinated unilateral effects in an oligopolistic market where dominance is not present. Potentially, such non-collusive behaviour could undermine effective competition. The usual illustration concerns a merger of the second and third largest firms in a market, with the merged entity remaining smaller than the market leader. This removal of a competitor increases the market power of the remaining firms, allowing them unilaterally to raise price. Clearly, the compatibility test must be able to assess these effects, with or without the presence of dominance, enhancing the test's ability to protect effective competition in the common market, and bringing it more in line with the SLC approach.

However, the matter was not as clear-cut as the above suggests. For European merger law was not consistent on whether dominance was a mandatory condition of the compatibility test. In other words, the rulings of the CFI and the ECJ on the compatibility test did not provide a consistent and legally certain rule as to whether the test can accommodate the stated uncoordinated unilateral effects without the need for dominance. In Air France v Commission (1994), the CFI judged that the Commission is bound to declare a merger compatible with the common market if both the dominance and significantly impede competition conditions of the test are not met.[15] Significantly, the court further added, that if a dominant position was not created or strengthened, the merger must be authorised without the need to examine the effects of the merger on effective competition.[16] By extension, a merger with possible unilateral effects but failing the dominance condition must therefore be compatible with the common market. Without the presence of dominance, the significance of these possible unilateral effects on effective competition is not legally recognised.

Yet on this issue of the scope of the compatibility test, the ECJ in its 1998 Kali & Salz ruling appeared to adopt a teleological interpretation. The court held that the MCR is founded on the premise that a system of undistorted competition is essential for the achievement of the Single Market.[17] Therefore, the MCR must apply "to all concentrations with a Community dimension in so far as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition…"[18] This can be interpreted as necessitating an assessment of any uncoordinated unilateral effects as far as they distort competition, irrespective of whether dominance is created or strengthened by the merger.

[13] Ibid., paragraph 162.

[14] Leigh M. Davison: The GE/Honeywell Merger Controversy and the Path to Analytical Convergence in International Merger Assessment: A Critical Commentary, in: Liverpool Law Review, Vol. 24, Nos. 1-2, 2002, pp. 89-107.

[15] Case T-2/93 Air France v Commission [1994] ECR II-323, paragraph 79.

[16] Ibid., paragraph 79.

[17] Joined Cases C-68/94 and C-30/95 France and Others v Commission ("Kali & Salz") [1998] ECR I-1375, paragraph 169.

[18] Ibid., paragraph 170.

One way forward, concerning uncoordinated unilateral effects and the scope of the compatibility test, was to do nothing other than wait for the Community courts to rule on the matter. This would leave a period of legal uncertainty until the court eventually made its ruling, whenever that would be, and it ran the risk of the court deciding against unilateral uncoordinated effects, unless dominance was also present. However, the construction of the 2004 MCR gave the Commission the window to act and make legally certain that the stated non-collusive behaviour, with or without the presence of dominance, fell within the scope of the compatibility test, thereby enhancing the ability of the test to protect effective competition. The Commission did so act.

Recital 25 of the 2004 MCR ended the legal uncertainty surrounding uncoordinated unilateral effects and compatibility, for any merger with a CD that significantly impedes effective competition shall be declared incompatible with the common market. Therefore, any concentration with a CD but lacking dominance can be deemed incompatible if it fails the mandatory impede effective competition condition. This is too broad an interpretation, however, for the same recital specifically adds that the notion of significantly impeding effective competition will only apply, where dominance is not present, to the anti-competitive effects of a concentration resulting from the uncoordinated unilateral behaviour of undertakings on the relevant market. Yet no such limitation is present in the express wording of the 2004 MCR compatibility test.

For incompatibility, the original wording of the test required that a concentration create or strengthen a dominant position which results in effective competition being significantly impeded, with causality apparently running from dominance to significantly impeding competition, and with both notions appearing mandatory. This has changed with the reworded compatibility test of the 2004 MCR. It reads:

"A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."[19]

Therefore the significantly impede effective competition is the mandatory requirement, but this is no longer so with dominance, if it ever was. This gives the test the scope to vet unilateral uncoordinated effects that impede competition without the need for dominance. Although dominance is not mandatory, the test recognises that the creation or strengthening of a dominant position can impede effective competition and therefore such a concentration falls within its scope. Hence, the extended scope of the compatibility test, bringing it closer to the SLC approach, will enhance its ability to protect effective competition and thereby safeguard the Single Market. Moreover, by retaining dominance as a cause of impeding effective competition, the existing Commission decisions and legal precedents retain their currency, providing guidance and fostering legal certainty. This was intentional on the part of the Commission.

The second major development to the compatibility test also extends its operational scope, and it again relates to the dominance condition, but this time the change arose not from the new MCR but a Commission concentration decision. Specifically, it concerns a new variant of the dominance requirement, which became termed future or foreseeable dominance.

Foreseeable Dominance and the Compatibility Test

The new foreseeable dominance variant of the compatibility test was pioneered and driven by the Commission in its Tetra Laval/Sidel concentration prohibition and thereafter made law by the CFI and ECJ, with member states being little more than marginalised bystanders. The appeal ruling by the ECJ in 2005 appears to have concluded the process of legally establishing the new variant and its determination.

The Commission decision and the subsequent rulings by the Community courts are important not only because they delineate how foreseeable dominance differs from the traditional interpretation of the dominance condition, and thereby provide an insight into the determination of the new variant via leveraging, but also because they established as law the new future abusive conduct approach to foreseeable dominance. It stands in sharp contrast to the existing market structure approach. The former sees future abusive conduct driving future dominance whereas the latter sees the structural change resulting from the merger as immediately creating or strengthening dominance and making anti-competitive effects likely.

Therefore, the traditional dominance condition requires the concentration to immediately create or strengthen a dominant position. With foreseeable dominance, as its name suggests, dominance is not immediate but will result in the foreseeable or near fu-

[19] Council Regulation (EC) No. 139/2004, op. cit., Article 2(3).

ture. The Commission illustration as to how foreseeable dominance can arise requires a concentration that concerns companies operating in related neighbouring markets: one company is already dominant in its market and the other holds a leading position in the neighbouring market. What is required is that this places the merged entity in such a position as to give it the power and incentive to leverage its position in the dominant market to achieve dominance in the market where it has a leading position in the foreseeable future. The Commission declared that the above would have arisen if it had approved Tetra Laval's takeover of its rival (Sidel) in 2001.[20] The Commission prohibited this conglomerate merger. The Tetra Laval/Sidel decision therefore provides a detailed insight into Commission thinking regarding why and how foreseeable dominance can arise.

Specifically, the Tetra Laval/Sidel decision is a guide to the web of factors, and the relative importance of their links, used to make the foreseeable dominance determination. Of course, as economic circumstances can differ from case to case, the importance attached to specific factors and their links may vary. Legally this is not an issue, for the CFI has granted the Commission a certain discretionary margin, especially with respect to assessments of an economic nature.[21] Yet, even allowing for this discretion, the Commission's determination of foreseeable dominance in Tetra Laval/Sidel – and hence its interpretation of the factors and links used to make the determination – was guided by the market structure approach to dominance. Yet in trying to keep to the structural approach, it unwittingly set the foundation for the new abusive conduct approach to foreseeable dominance.

A key factor in the Commission's determination of foreseeable dominance is whether the merger leads to the removal of a major rival, eliminating a significant source of competitive restraint. Yet, it is not just a question of elimination but also of absorption. Absorption of the rival can increase the absolute economic power of the new entity, bringing with it advantages and opportunities as well as strengthened market positions, that, cumulatively, give it the power and incentive to seek foreseeable dominance. For example, relative to the remaining competitors, absorption may provide the merged entity with an enhanced or unassailable product range across related markets, a technological lead guaranteed by an unmatchable research and development (R&D) capability, and an unequalled customer base and sales force. In other words, the Commission gauges the enhanced economic power of the merged entity relative to the ability of the remaining rivals to act as a competitive constraint and the countervailing power of customers. The Commission undertook such an assessment when determining foreseeable dominance in its Tetra Laval/Sidel decision.

Specifically, the absorption of the rival should leave the merged entity with dominance in one market and a leading position in a related, and preferably converging market. This market positioning and strength is critical, as foreseeable dominance arises from the merged entity leveraging its dominance in one market to turn its leading position in the related market to one of dominance in the future. The Commission contended that such market positions would have arisen if Tetra Laval and Sidel had merged. The Commission concluded that Tetra Laval already held a dominant position in aseptic carton packaging machines and aseptic cartons for non-chilled products like ultra heat-treated milk and fruit juices,[22] whilst Sidel held a leading but not dominant position in the neighbouring market of manufacturing polyethylene terephthalate (PET) plastic packaging equipment, particularly in the stretch blow moulding (SBM) machines used for packaging "sensitive" products, namely fruit juices, liquid dairy products, fruit flavoured beverages and iced teas.[23]

The Commission further determined that PET/SBM was becoming an important, growing alternative, as well as complementary, packaging to carton in this sensitive product market.[24] In other words, the carton and SBM sensitive liquid markets will further converge with a growing number of common customers. In this way, Sidel's absorption by Tetra Laval went beyond the elimination of a growing competitor; Sidel's absorption would give the merged entity the market positioning, strength, and via leveraging, the incentive to dominate this converging market. That is, to use its dominance in carton to turn its leading position in SBM for sensitive products into one of dominance in the foreseeable future.

Further, the assessment of a range of other factors reinforced the Commission in its position that a merged Tetra Laval/Sidel had the power and incentive

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[20] Commission Decision of 30/10/2001, Case No. Comp/M. 2416, op. cit., paragraphs 328-330.

[21] Joined Cases C-68/94 and C-30/95 France and Others v Commission, op. cit., paragraphs 223-224.

[22] Commission Decision of 30/10/2001, Case No. Comp/M.2416, op. cit., paragraph 216.

[23] Ibid., paragraph 328.

[24] Ibid., paragraph 337.

to achieve foreseeable dominance in the SBM market for sensitive products. The Commission, for example, examined technological lead, research and development, product range, price discrimination, customer base, size of sales force, and customer countervailing power. In relation to customer base, the Commission asserted that the merged entity would have a unique advantage over its PET rivals who lacked a presence in the carton market: this was because the merged entity's dominance in the carton market enabled it to know which customers were considering switching to PET, enabling it to capture such customers.[25] This would compensate it for any loss on the carton side and keep rivals at bay. The Commission believed this was made the more likely because of the merged entity's clear technological lead in the PET market: Sidel being viewed as a pioneer in the SBM market.[26] Moreover, the Commission asserted that the merged entity would be able to offer a far greater range of products, offering an unparalleled and comprehensive range of SBM machines.[27]

The Commission also concluded that no rival could match the merged entity's expertise in the field of aseptic filling and that this would constitute a high barrier to entry for competitors and new entrants.[28] In the related subject of R&D, the Commission determined that no competitor would equal the merged entity's capability, thereby ensuring its lead over rivals.[29] Similarly, the merged entity would have an unassailable position in terms of sales and service support. Furthermore, the Commission found that the financial strength of the merged entity was much greater than that of its nearest rival, having a turnover nearly ten times as great.[30] Therefore, the Commission concluded that the remaining rivals would not act as an effective competitive constraint on the merged entity; the Commission also contended that buyers lacked any significant countervailing power.[31]

Given the above, the Commission determined that the post-merger market structure gave Tetra-Laval/Sidel the incentive and power to leverage its dominant position in the carton market to turn its leading position in the SBM market to one of dominance in the foreseeable future; and that this was likely to enhance the merged entity's position and have anti-competitive effects on the SBM market.[32] Yet, if the Commission analysis is correct – that the merged entity would have an unassailable position in terms of market strength, technological expertise, R&D, customer base and so on – it had no need to engage in anti-competitive behaviour. It had the strength and incentive to compete vigorously, legitimately, to achieve foreseeable dominance in the stated market, if that was its intended goal. In such circumstances, anti-competitive behaviour cannot simply be assumed; that is, such behaviour cannot automatically be assumed to be economically rational on the part of the merged entity.

We have seen that leveraging is integral to achieving both foreseeable dominance and the anti-competitive effects. In fact, anti-competitive behaviour in the form of price discrimination is a key element of the leveraging process, as seen in the Tetra Laval/Sidel decision. Specifically, the Commission saw the opportunity for abusive behaviour arising where customers considered switching from carton to PET. This behaviour would arise out of the merged entity's extensive customer base in carton, for it gave it a unique knowledge of those carton customers considering switching, fully or partially, to PET. The Commission contended that by having the knowledge of which customers intended to switch fully, the merged entity could "impose on them timely and bespoke solutions…"[33] The Commission believed that the merged entity had the ability to use pressure or incentives, like predatory pricing or price wars and loyalty rebates, to ensure that carton customers purchased its PET equipment.[34] The Commission argued that customers with a long-term carton contract with Tetra Laval/Sidel, but considering a partial switch to PET, were particularly vulnerable. For these customers could be offered a renewed contract allowing them to switch part of their production to PET, subject to the PET equipment being supplied by the merged entity alone. Overall, the Commission thought that this abusive behaviour would lead to competitors becoming marginalised,[35] enabling the merged entity to dominate the PET equipment market.

This use of abusive behaviour by the Commission was controversial on two grounds: in terms of causality and in relation to the market structure approach.

[25] Ibid., paragraph 363.

[26] Ibid., paragraph 376.

[27] Ibid., paragraph 378.

[28] Ibid., paragraph 383.

[29] Ibid., paragraphs 385-386.

[30] Ibid., paragraph 387.

[31] Ibid., paragraph 388.

[32] Ibid., paragraph 389.

[33] Ibid., paragraph 363.

[34] Ibid., paragraph 364.

[35] Ibid., paragraph 369.

The Commission's assessment in Tetra Laval/Sidel sees abusive leveraging behaviour by the merged entity causing future dominance. Arguably, this reverses the causality of the original compatibility test, where dominance makes it rational to impede competition. This reversal of causality in the Commission decision was radical but also of questionable legality. Equally radical is the interpretation that the Commission, by using abuse in such a way, had created an alternative to the market structure approach to compatibility. For in the SBM market the merger would not lead to a market structure that immediately created dominance resulting in anti-competitive behaviour – in fact, the immediate structural change would be minor. Instead, it would be abusive behaviour, through leveraging, that caused future structural change in the form of foreseeable dominance.[36] Therefore, in addition to the established market structure approach, the Commission in its Tetra Laval/Sidel decision unintentionally created a new abusive conduct approach that would apply in certain conglomerate cases. The Commission would duly contest this interpretation before the Community courts.

Before the CFI and ECJ

On a number of grounds, Tetra Laval appealed against the Commission's decision prohibiting the company's takeover of Sidel, with the CFI ruling on the matter on 25 October 2002. Thereafter, the Commission put forward a number of pleas as to why the CFI ruling erred in law. The ECJ gave its judgment on 15 February 2005. The two rulings were critical to deciding the legality of foreseeable dominance, its determination in practice, and the new abusive behaviour approach. This new approach also raised the issue of the acceptability of behavioural remedies offered by a merging entity to prevent future abusive leveraging. The Commission, in principle, however, had rejected the use of behavioural remedies, preferring structural concessions from a concentration. Of course, the very need for foreseeable dominance and the new abusive behaviour approach is questioned by the existence of Article 82 EC, an article specifically designed to vet alleged abuses of a dominant position.

Overwhelmingly, the CFI was supportive of the use of foreseeable dominance by the Commission in its Tetra Laval/Sidel conglomerate merger decision. The CFI ruled that if the Commission's prospective analysis led it to conclude that a dominant position would, in all likelihood, be created or strengthened in the near future and would lead to effective competition being significantly impeded, it must prohibit the merger.[37] It added that any other interpretation of the compatibility test would not give the Commission the power to exercise control over these conglomerate mergers.[38] By extension, conglomerate mergers must therefore fall within the remit of the MCR and hence the compatibility test. Thus, foreseeable dominance was legally sanctioned and the court had clarified the position of conglomerate mergers in relation to the scope of the MCR.

The CFI's example of how future or foreseeable dominance might arise repeated and therefore accepted the one advanced by the Commission in Tetra Laval/Sidel, thereby legally accepting the role leveraging plays in creating foreseeable dominance.[39] In other words, the Commission must be able to vet a conglomerate concentration where one party holds a dominant position on one market and another party has a leading position on a neighbouring, converging market. For this may give the merged entity the means and incentive to use its existing dominant position as a lever to gain dominance in the neighbouring market in the foreseeable future and impede competition.

The CFI's ruling in Tetra Laval went beyond the legal approval of foreseeable dominance and leveraging, for the court made lawful the future abusive conduct approach, much to the Commission's consternation. The CFI made a point of distinguishing between the market structure approach and the new abusive conduct approach, and hence when they would legally apply in relation to conglomerate type mergers.[40] The former would apply when the conglomerate effects of the merger immediately changed the conditions of competition on the neighbouring market, resulting in dominance on that market due to the dominant position already held on the first market. The latter would apply when a conglomerate merger does not immediately create a dominant position on the neighbouring market, but the future behaviour or conduct of the new entity will lead to foreseeable dominance in that market. The latter case seems to reflect the Commission's assessment in its Tetra Laval/Sidel decision – the merged entity using its dominance in the aseptic carton market to behave abusively to turn its leading position in the PET market to one of dominance in the foreseeable fu-

[36] Ibid., paragraphs 364-366.

[37] Case T-5/02 Tetra Laval BV v Commission, op. cit., paragraph 153.

[38] Ibid., paragraphs 150-152.

[39] Ibid., paragraph 151.

[40] Ibid., paragraph 154.

ture. The Commission, however, saw it differently, with the ECJ having the final say on the matter.

Before the ECJ, the Commission argued that the CFI's sanctioning of the future conduct approach for certain conglomerate mergers was inconsistent with the market structure approach made law by the CFI in its earlier Gencor ruling.[41] Therefore, the CFI in its Tetra Laval ruling had erred in law, as it had no justification for drawing this distinction. The ECJ rejected the plea. By way of recognising the CFI's distinction, the ECJ noted that in Gencor the merged entity would have the immediate effect of creating a dominant duopoly. Yet, concerning the PET market in Tetra Laval/Sidel, the alteration to the market structure would be slight – it would be abusive leveraging that led to foreseeable dominance. Therefore, the ECJ concluded that the Gencor ruling did not provide the CFI with "useful inferences"[42] when making the PET market determination.

This raises an important question: does the abusive behaviour requirement of the new conduct approach mean that the Commission must consider and assess behavioural remedies as well as structural ones offered by the merging entity? For a behavioural obligation on the part of the merging entity is one feasible method of preventing the future abusive behaviour that otherwise might lead to foreseeable dominance. In Tetra Laval/ Sidel, the merging entity had offered both. Specifically it offered to hold Sidel structurally separate from Tetra Laval and make no joint offering of Tetra Pak carton and SBM machines.[43] Tetra Laval also reiterated its pre-existing obligation resulting from the Article 82 EC Tetra Pak 2 decision that, concerning carton, it would not engage in predatory or discriminatory prices and would not give any customer any form of product discount or more favourable payment conditions, unless justified by an objective consideration.[44]

The Commission declared that, in principle, it would not accept the behavioural commitments offered by Tetra Laval. It pointedly stated that such behavioural promises stood in contrast to its policy on remedies and to the purpose of the MCR. This was because behavioural commitments were not suitable to restore conditions of effective competition on a permanent basis, since they did not address the permanent change in the market structure created by the merger.[45] This reflects the market structure approach but not the abusive conduct approach seen in Tetra Laval. In the latter approach, behavioural commitments may be highly effective in forestalling future abusive behaviour and therefore maintaining effective competition, although the Commission has argued that such remedies are extremely difficult if not impossible to monitor effectively. Such an obligation, however, was acceptable to the Commission in Tetra Pak 2, albeit it an Article 82 EC complaint.

On appeal, the issue of the appropriateness of behavioural remedies came before the ECJ. It ruled that, with respect to the consideration of behavioural remedies offered by Tetra Laval, the CFI was correct in declaring that the Commission had to take account of them when assessing foreseeable dominance.[46] Therefore, in such conglomerate cases, the consideration of behavioural remedies offered by the merging party is now a legal requirement on the part of the Commission. Is this also true in the case of horizontal and vertical mergers, namely, must the Commission consider behavioural remedies or commitments if offered? Arguably, the ECJ ruling in Tetra Laval does make this a requirement. In interpreting the CFI's comments on remedies in the earlier Gencor case,[47] which concerned a horizontal merger, the ECJ judged that it was not apparent that the CFI had ruled out the consideration of behavioural remedies, as claimed by the Commission. On the contrary, the CFI's principle that commitments must enable the Commission to conclude that the concentration would not create or strengthen a dominant position within the meaning of the compatibility test meant that the categorisation of a commitment as behavioural or structural was immaterial.[48] Therefore, the possibility that behavioural remedies may be able to prevent the impeding of effective competition cannot be ruled out.

Subsequent to the ECJ Tetra Laval ruling, Götz Drauz, the deputy director of the Commission's Competition Directorate, accepted that the ECJ now required the Commission to undertake a thorough assessment of any remedy offered, behavioural or structural.[49] However, Drauz appears intent on not accepting

[41] Case C-12/03 P, judgment, op. cit., paragraph 60.

[42] Ibid., paragraph 84.

[43] Commission Decision of 30/10/2001, Case No. Comp/M.2416, op. cit., paragraphs 417-419.

[44] Ibid., paragraph 420.

[45] Ibid., paragraphs 429-431.

[46] Case C-12/03 P, judgment, op. cit., paragraph 85.

[47] Case T-102/96 Gencor Ltd v Commission, op. cit., paragraphs 318-319.

[48] Case C-12/03 P, judgment, op. cit., paragraph 86.

[49] Götz Drauz: Conglomerate and vertical mergers in the light of the Tetra Judgement, in: Competition Policy Newsletter, No. 2, Summer, 2005, p. 38.

behavioural obligations in relation to future conduct on the part of the merged entity as a suitable remedy.[50] In practice, the Commission would achieve this end by requiring remedies to fulfil certain conditions. For example, a future conduct obligation would have difficulty in meeting the condition that the remedy must be self-policing, avoiding the need for continued monitoring by the Commission.[51] Such a remedy would also be unacceptable because the Commission could not intervene in a timely way, that is, intervention could only happen after the merged entity had breached its future conduct promise.[52] The Drauz position clearly goes against the spirit of the ECJ's ruling, and it may be legally questionable. Moreover, it outlaws a remedy that potentially could be highly effective in preventing future abusive conduct – that is, the significant impeding of competition in Tetra Laval type cases.

Of course, foreseeable dominance, the future abusive conduct approach and the appropriateness of behavioural remedies in such merger cases would not have arisen if the Commission had simply relied on Article 82 EC, which prohibits the abuse of a dominant position. Indeed, the CFI noted that the Commission did not deny that the claimed future leveraging conduct by Tetra Laval/Sidel into the PET market could constitute abuse of its pre-existing dominant position in the aseptic carton market. The Commission, however, asserted that the fact that conduct may constitute an infringement of Article 82 EC does not preclude it from taking account of such conduct when determining leveraging in a foreseeable dominance merger.[53] The underlying philosophy being that prevention of anti-competitive behaviour is better than having to regulate abuse after it has already happened. The court was supportive of the Commission's stance.

However, this preventative approach is not risk free. The risk attached to the approach concerns the accuracy of the Commission's prospective assessment in a compatibility decision, for it has to determine the future likelihood or probability of events happening if the concentration were approved. This risk is even greater with conglomerate cases like Tetra Laval/Sidel, for the Commission is not determining immediate changes but near future ones, namely, the likelihood of foreseeable dominance and future abusive conduct that brings it about. This is very different from assessing an event that has already taken place, for which evidence is readily available. This the ECJ understood when ruling in the Tetra Laval concentration case. In general, therefore, the ECJ requires that the Commission's prospective analysis, particularly in relation to the concentrations alteration of the factors determining the state of competition, and hence the impact on effective competition, must envisage the various chains of cause and effect to ascertain which is most likely.[54] Although in a Tetra Laval/Sidel type concentration, owing to the lengthy period of time in the future as well as the leveraging necessary to cause the impediment to effective competition, the ECJ realised that "the chains of cause and effect are dimly discernible, uncertain and difficult to establish".[55]

Hence, for incompatibility in such a case, the ECJ could not require a "beyond reasonable doubt" legal standard but instead decided in favour of a weaker plausibility standard. It ruled that the Commission must produce evidence such that if the merger were not prohibited, "the economic development envisaged … would be plausible."[56] The plausible envisaged development presumably refers to future abusive behaviour leading to foreseeable dominance. Interestingly, this future crystal-ball gazing could lead to plausibility clash, with the Commission's incompatibility plausibility clashing with the merged entity's pro-compatibility plausibility – the Community courts having the near impossible task of determining which of the two competing plausibilities is most plausible.

Such a compatibility decision would be unsatisfactory and lacking in credibility precisely because it derives from chains of cause and effect that are hardly discernible, uncertain and difficult to establish. A way forward would be to abandon the foreseeable dominance approach to compatibility and simply catch abuse under Article 82 EC. The downside of this solution is that Article 82 EC is ex-post, operating after the alleged abuse has taken place. On the other hand, this does mean that real evidence should be available which makes the chains of cause and effect more discernible, more certain and easier to establish. The requisite legal standard would therefore be stronger than mere plausibility. Thus, the question arises, will the Commission, which pioneered foreseeable dominance and argued for it before the Community courts, be prepared to abandon this new variant of the compatibility

[50] Ibid., pp. 38-39.

[51] Ibid., p. 39.

[52] Ibid., p 39.

[53] Case T-5/02 Tetra Laval BV v Commission, op. cit., paragraph 158.

[54] Case C-12/03 P, judgment, op. cit., paragraph 43.

[55] Ibid., paragraph 44.

[56] Ibid., paragraph 44.

test? (Of course, the Community courts would still apply this piece of law in a relevant merger case.)

Conclusion

The rewording of the compatibility test in the 2004 MCR is a positive development. It has resolved the legal debate as to whether dominance is a mandatory condition by expressly declaring that the only mandatory condition for incompatibility with the common market is that the concentration significantly impedes effective competition. This therefore extends the scope of the test to vet mergers where dominance is not present but a significant reduction of competition is still possible – the uncoordinated unilateral effects scenario. Of course, the test still covers the creation or strengthening of a dominant position leading to a significant reduction in effective competition, hence previous Commission decisions and the established case law will continue to provide guidance and certainty. This extension of scope, bringing it more in line with the SLC approach, enhances the test's ability to protect effective competition and the level playing field for business, and thereby buttresses the Single Market.

Running parallel to, but separate from, the discussions leading to the rewording of the compatibility test was the Commission's successful pioneering of the new foreseeable dominance variant of the compatibility test, as made law by the Community courts in their Tetra Laval rulings. Essentially, this involves a conglomerate concentration leveraging its dominance in one market to turn its leading position in a related and converging market into one of dominance in the foreseeable future – this is a radical departure from the orthodoxy of immediate dominance. It is also radical in that it rejects the established market structure approach for one based on future abusive conduct in such cases. The market structure approach required structural change to immediately create or strengthen dominance whilst the new approach sees future behaviour, in the form of abusive leveraging, leading to future structural change in the form of foreseeable dominance.

This reveals an important difference between traditional dominance and foreseeable dominance concerning causality. In fact, there appears to be a reversal of causality. The traditional requirement saw a change in market structure immediately creating or strengthening dominance that leads to anti-competitive effects, whereas the new condition saw the anti-competitive effects (illegal abusive behaviour) causing foreseeable dominance. This is clearly the case in the Commission's Tetra Laval/Sidel decision.

Yet this reversal of causality linked to the 2004 reworded compatibility test could sound the death knell of foreseeable dominance; remembering that under the reworded test dominance is not a mandatory condition. Therefore, in the stated conglomerate type cases, the merger may satisfy the new unilateral uncoordinated effects scenario with the future abusive leveraging behaviour being sufficient to meet the mandatory significantly impedes effective competition requirement. The ability to demonstrate foreseeable dominance is therefore no longer relevant. Arguably, this fits with the Commission's assessment in the Tetra Laval/Sidel decision, for the concentration gave the new entity the power and incentive to act unilaterally in the SBM market to improve its leading but not dominant market share. To this end, the Commission saw the merged entity engaging in future abusive leveraging behaviour, leading to the marginalisation of rivals.

The major problem with future abusive behaviour and future or foreseeable dominance is their near future requirement. Accurately predicting the immediate future is difficult, but to do so for the near future is far harder, as the chains of cause and effect are dimly discernible, uncertain and difficult to establish. This was the view of the ECJ. These very weaknesses in the chains of cause and effect constrain the Commission's ability to determine effectively the plausibility of whether a Tetra Laval/Sidel conglomerate type merger would lead to future abusive behaviour and foreseeable dominance. This reduced accuracy of the Commission's most plausible outcome could lessen the validity of any resultant incompatibility decision, or make it much harder to reach in the first place. It also means that the Commission's most plausible outcome is more susceptible to challenge, with the merged entity constructing and arguing for a plausible outcome that rules out an incompatibility decision.

One way to avoid the weaknesses inherent with foreseeable dominance is for the Commission no longer to use it. This sounds drastic but if a merged conglomerate entity engaged in abusive behaviour in the near future – akin to Tetra Laval/Sidel using its pre-existing dominant position in the carton market to act abusively in the neighbouring SBM market – then it would breach Article 82 EC. The ex-post nature of the Article is its strength, providing real evidence that makes the chains of cause and effect more transparent and more certain, and thereby facilitating a stronger and more credible legal standard.