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This paper examines the evolution of the use of economics in EC competition policy matters and the reforms in the use of economics that occurred in the latter part of EC Competition Commissioner Mario Monti's term (1999-2004). Under his predecessors, the use of economics had been steadily increasing for many years. The revolutionary reforms under Commissioner Monti were triggered when the Court of First Instance (CFI) voided, in quick succession, three merger prohibitions adopted by the European Commission. The CFI criticized the Commission for relying on unverified economic theories. The reforms rapidly had an impact on merger analysis at the Commission. It is unclear, however, whether the Commission will embrace the use of sound economic analysis for abuse of dominance inquiries in the absence of a clear mandate from the EC courts to do so.

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I. Introduction

EC Competition Commissioner Mario Monti appointed the first Chief Economist for the European Commission's Directorate-General for Competition (DG COMP) in 2003. This was a significant event—perhaps even a turning point—in a longer-term trend towards the use of economics in EC competition policy matters. It reflected an institutional commitment to economic analysis—the Chief Economist reports directly to the Director-General and can voice his views directly to the Competition Commissioner. It also recognized that the EC courts demand greater economic rigor from the Commission. The appointment was widely seen as a response to criticisms made of the Commission in this regard by the Court of First Instance (CFI). Two years earlier, the CFI reversed three Commission decisions to block mergers.¹ The new office of the Chief Economist was one of several responses, and not the only one involving economics, that resulted from the CFI's rebukes.

As this summary suggests, Commissioner Monti's legacy for the use of economics, the subject of this article, is not a simple story. The CFI decisions were partly a response to the increased use of economics by the Commission. They were more a complaint that the Commission had misused economic reasoning rather than a contention that the Commission had not used economic reasoning at all or had offered only formalistic approaches for its merger analyses.

The nature of those decisions further complicates matters. They all concerned mergers. Later decisions by the CFI have raised doubts about the court's commitment to economic analysis for abuse of dominance, not least in the minds of the Commission.² It is well-known in the European competition policy community that, at the end of Commissioner Monti's tenure and the beginning of Commissioner Kroes's, DG COMP is by no means dedicated to using economics—in particular, the careful analysis of competitive effects—for abuse of dominance matters.

The CFI decisions raise a related issue that needs to be addressed in discussing the past and future direction of economics in competition policy analysis. What

1 Case T-342/00, *Airtours v. Commission*, 2002 E.C.R. II-2585 [hereinafter *Airtours*], declaring void Commission Decision 2000/276/EC, *Airtours/First Choice*, 2000 O.J. (L 93) 1 [hereinafter *Airtours/First Choice*]; Case T-5/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4382 [hereinafter *Tetra Laval*], declaring void Commission Decision 2004/103/EC, *Tetra Laval/Sidel*, 2004 O.J. (L 38) 1 [hereinafter *Tetra Laval/Sidel*], appeals to the ECJ are pending as Cases C-12/03 and C-13/03, *Commission v. Tetra Laval*; Case T-310/01, *Schneider v. Commission*, 2002 E.C.R. II-4071, declaring void Commission Decision 2004/275/EC, *Schneider/Legrand*, 2004 O.J. (L 101) 34 [hereinafter *Schneider/Legrand*].

2 Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* (Sep. 30, 2003, not yet reported), upholding Commission Decision 2002/405/EC, *Michelin*, 2002 O.J. (L 143) 1; Case T-219/99, *British Airways plc v. Commission* (Dec. 17, 2003, not yet reported), upholding Commission Decision 2000/74/EC, *Virgin/British Airways*, 2000 O.J. (L 30) 1, appeal to the ECJ is pending as Case C-95/04, *British Airways v. Commission*.

sort of economic analysis will help the competition authorities reach reliable decisions? The trend towards using more economics, and more economists, which sometimes seems to be discussed as a worthwhile end in itself, is desirable only insofar as it leads to more efficient and reliable decisions by the Commission and the EC courts. Indeed, there was an abundance of economists with excellent credentials working for the Commission and the parties on the proposed merger between General Electric and Honeywell, the blocking of which was part of the controversy that led to the reforms.³ Notably, the CFI decisions complain of sloppiness in the use of economics, in particular in the use of empirical data to verify or falsify a theory, that the economic profession as well as the Commission needs to take heed of.

The Commission and the courts have increased their use of economics slowly but steadily over time. Section II describes this evolving role as a backdrop for considering Commissioner Monti's contribution. The turning point for economics happened not with his ascendancy but with the CFI voiding three decisions undertaken earlier in his term. These decisions occurred in the wake of considerable controversy over the intellectual integrity of the Commission's decision to block the *GE/Honeywell* merger. Section III discusses *Airtours* and *Tetra Laval*, the two CFI cases that speak most directly to the role of economics. Section IV considers these decisions and the interesting questions they raise about the role of economic theory and empirical methods in competition policy. Reforms quickly followed the decisions. As discussed in Section V, it is these reforms that formed the basis for Commissioner Monti's legacy regarding the use of economics. Two cases presently undecided in the courts will also shape his legacy. One is *GE/Honeywell*; the other is *Microsoft*,⁴ in which Commissioner Monti rejected a settlement in order to seek court precedents. Section VI focuses on the *Microsoft* case and in particular the use of economic evidence and the legal rules that could emerge, for better or for worse.

II. History of Economics in Merger Control

The Commission has relied increasingly on economic analysis and empirical methods for its assessment of mergers. Arguably, this development started with references to market studies prepared primarily for other purposes, such as mar-

3 Commission Decision 2004/134/EC, *General Electric/Honeywell*, 2004 O.J. (L 48) 1 [hereinafter *GE/Honeywell*], appeals to the CFI are pending as Case T-209/01, *Honeywell v. Commission* and Case T-210/01, *General Electric v. Commission*.

4 Commission Decision COMP/C-3/37.792, *Microsoft* (Mar. 24, 2004, not yet reported), appeal to the CFI is pending as Case T-201/04, *Microsoft v. Commission*. See also, Case T-201/04 R, *Microsoft v. Commission*, *Order of the President of the Court of First Instance* (Jul. 26, 2004); Case T-201/04 R, *Microsoft v. Commission*, *Order of the President of the Court of First Instance* (Dec. 22, 2004). The first author has consulted with Microsoft on this matter and appeared on behalf of Microsoft before the Commission and the CFI.

keting or strategic consulting purposes, but dedicated empirical work has been employed with rising frequency. Certainly since the mid 1990s, it seems that no major case happens without economic studies commissioned by the parties,⁵ third-party interveners,⁶ or the Commission itself.⁷ And, of course, when one party launches an economic study, the others tend to respond in kind.

Competition policy concerns the effect of business or national practices on markets. It is not surprising then that the competition authorities and courts have turned to economics, the academic discipline that studies markets, for its insight and learning. They have relied especially on industrial organization, the area of economics that studies the interaction among firms and the structure of industries.⁸

Of course, competition policy cannot be based on economics alone. The rule of law is a pillar of the constitutional system: it makes the enforcement of competition policy predictable and allows economic actors to adapt their behavior. Economics, nevertheless, can help significantly. First, economic concepts and theories can help give meaning to established legal principles. Second, economic thinking can influence the design of new competition laws and rules implementing those laws.⁹ Third, these economic theories can be used to identify the conditions under which particular legal principles apply and the evidence that is relevant for deciding whether those conditions are met in the case at hand.

The development of some of the key legal principles in the assessment of mergers highlights each of these roles.

5 See, e.g., Commission Decision 92/553/EEC, *Nestlé/Perrier*, 1992 O.J. (L 356) 1 [hereinafter *Nestlé/Perrier*], at paras. 77 et seq.; Commission Decision 94/893/EC, *Procter & Gamble/NP Schickedanz II*, 1994 O.J. (L 354) 32 [hereinafter *Procter & Gamble/Schickedanz*], at paras. 54 et seq.; Commission Decision IV/M.582, *Orkla/Volvo*, 1996 O.J. (L 66) 17, at para. 75; Commission Decision 97/26/EC, *Gencor/Lonrho*, 1997 O.J. (L 11) 30 [hereinafter *Gencor/Lonrho*], at para. 59; Commission Decision 96/435/EC, *Kimberly-Clark/Scott Paper*, 1996 O.J. (L 183) 1, at paras. 172 et seq.; *Airtours/First Choice*, *supra* note 1, at paras. 155 et seq.; Commission Decision 2001/403/EC, *Volvo/Scania*, 2001 O.J. (L 143) 74 [hereinafter *Volvo/Scania*], at paras. 35 et seq.; Commission Decision 2002/156/EC, *SCA/Metsä Tissue*, 2002 O.J. (L 57) 1, at para. 37; *Schneider/Legrand*, *supra* note 1, at paras. 169 et seq., 493 et seq., 518 et seq.; Commission Decision 2003/667/EC, *Carnival/P&O Princess*, 2003 O.J. (L 248) 1 [hereinafter *Carnival/P&O Princess*], at paras. 35 et seq., 60 et seq., 79; Commission Decision 2004/271/EC, *Verbund/EnergieAllianz*, 2004 O.J. (L 92) 91, at paras. 74 et seq.

6 *Procter & Gamble/Schickedanz*, *supra* note 5, at paras. 54 et seq.; Commission Decision 97/816/EC, *Boeing/McDonnell Douglas*, 1997 O.J. (L 336) 16 [hereinafter *Boeing/McDonnell Douglas*], at para. 58.

7 *Volvo/Scania*, *supra* note 5, at paras. 72 et seq.

8 For leading textbooks in this field, see DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* (4th ed. 2004); JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (1988).

9 David S. Evans, *How Can Economists Help Courts Design Competition Rules? An EU and U.S. Perspective*, *WORLD COMPETITION* (forthcoming Mar. 2005).

A. DEVELOPMENT OF MARKET DEFINITION

In some cases the use of economic theories to give meaning to legal principles has been accompanied by more rigorous and relevant empirical testing of whether the principle applies to the case. This is apparent in the area of market definition.¹⁰

1. The Concept

The notion of “market” had always been perceived as a crucial concept in EC competition law. The early Commission and court decisions, in particular the leading cases on Article 82 of the EC Treaty (Article 82), showed considerable effort to define the relevant market.¹¹ Until relatively recently, though, the methodology tended to focus on the interchangeability of products based on their price, characteristics, and intended use.

Shortly after the entry into force of the 1989 Merger Regulation¹² the Commission still relied on the “price, product characteristics, and intended use” test,¹³ but rather quickly, significant changes in the Commission’s practice occurred. The Commission adopted a more sophisticated view of demand-side substitution that began focusing more on the extent to which consumers would switch away from the product in question if price rose as a result of the exercise

10 Market definition, though, provides a good example of the occasionally tense relationship between economics and competition policy. Although economics provides useful tools for defining markets for the purpose of competition analysis, economics as a discipline has never found it necessary or useful to draw sharp boundaries around products and call them markets. It views product substitution as a continuum.

11 See Joined Cases 6/73 and 7/73, *Commercial Solvents v. Commission*, 1974 E.C.R. 223 [hereinafter *Commercial Solvents*], at para. 15, upholding Commission Decision 72/457/EEC, *Zoja/CSC-ICI*, 1972 O.J. (L 299) 51, at para. B (refusal to supply); Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207 [hereinafter *United Brands*], at paras. 22 et seq., declaring void, but upholding on market definition, Commission Decision 76/353/EEC, *Chiquita*, 1976 O.J. (L 95) 1, at para. II.A.2 (excessive pricing and price discrimination); Case 85/76, *Hoffman-LaRoche v. Commission*, 1979 E.C.R. 461, at para. 28, upholding Commission Decision 76/642/EEC, *Vitamins*, 1976 O.J. (L 223) 27, at para. 20 (loyalty rebates); Case C-62/86, *AKZO v. Commission*, 1991 E.C.R. I-3359, at para. 52, upholding Commission Decision 85/609/EEC, *ECS/AKZO*, 1985 O.J. (L 374) 1, at para. 64 (predatory pricing).

12 Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, 1989 O.J. (L 395) 1 [hereinafter *Merger Regulation*], later amended by Council Regulation 1310/97/EC, 1997 O.J. (L 180) 1, Corrigendum in 1998 O.J. (L 40) 17.

13 See Commission’s *Form CO*, Annex to Commission Regulation 2367/90/EEC on the Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, 1990 O.J. (L 219) 5, at § 5. For individual decisions, see, e.g., Commission Decision IV/M.9, *Fiat Geotech/Ford New Holland*, at para. 11; Commission Decision IV/M.113, *Courtaulds/SNIA*, at paras. 13 et seq.

of market power.¹⁴ Indeed, in *Nestlé/Perrier*,¹⁵ the Commission adopted a test that is similar to the hypothetical monopoly test.

In its 1997 Notice on the Definition of the Relevant Market,¹⁶ the Commission embraced the “small but significant non-transitory increase in prices” (SSNIP) test as the analytical weapon of choice for market definition. The SSNIP test operates in practice to include products that provide competitive constraints. In many ways, although not in all, the Notice on the Relevant Market was based on the same economic principles that were used in the U.S. Horizontal Merger Guidelines.¹⁷

The Commission’s move was courageous at the time, given that the European Court of Justice (ECJ) had frequently and explicitly relied on the “price, product characteristics, and intended use” approach. But the economic approach has seeped into the jurisprudence. In *Airtours*, the CFI implicitly accepted the methodology by referring to the “significance of the margin” for market-definition purposes as “the number of customers prepared to react to a price increase in short-haul package holidays by purchasing a long-haul package holiday, as compared to the total number of customers who habitually purchase a short-haul package holiday.”¹⁸ Indeed, the notion that what matters is the behavior of customers “at the margin”—rather than on average—is a critical economic insight and one that is not intuitive to many people.

2. Use of Evidence

Precision in the economic definition of the relevant market gives the parties and the Commission a way to identify exactly what empirical evidence is relevant for deciding tricky cases. Over time, the Commission began to resort to empirical methods more frequently, for example to determine demand elasticities, which

14 Commission Decision 91/535/EEC, *Tetra Pak/Alfa-Laval*, 1991 O.J. (L 290) 35, at para. 2.1(iv).

15 *Nestlé/Perrier*, *supra* note 5, at paras. 1, 13, 16.

16 Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5, at para. 15.

17 See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued 1992, revised 1997, at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html, at §§ 1.1-1.3. The Horizontal Merger Guidelines also use the SSNIP test. The Guidelines refer to supply-side substitution and demand-side substitution but treat enterprises that could potentially enter the market (under certain conditions) as market participants. See, on the other hand, *id.* at para. 24, according to which potential competition is not taken into account when defining the market.

18 *Airtours*, *supra* note 1, at para. 32.

are directly informative about consumers' willingness to switch in response to changes in price.¹⁹

B. THE SUBSTANTIVE TEST FOR MERGERS

Economics has played an even broader role in the substantive test for mergers. Economic thinking has for a long time influenced the way that the Commission and the Courts have interpreted the substantive legal test for mergers. More recently, economic theory has also played a key role in the reformulation of what the legal test should be. Finally, these economic theories have successfully provided a framework for identifying and interpreting evidence relevant to making an assessment of whether the test has been met.

1. The Test

Until recently, the substantive test for a merger was based on whether or not it created or strengthened a dominant position. According to the 1989 Merger Regulation, "A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market."²⁰ To make this operational, the Commission initially transferred the ECJ's definition of dominance from the cases under Article 82 into the 1989 Merger Regulation.²¹ In particular, in *United Brands*, the ECJ had defined dominance as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately the consumers."²² Economists have always found this definition, at best, incomplete. Strictly speaking, not even a monopolist behaves independently of its customers but faces a demand curve that limits what it can profitably charge. That is, of course, why monopolists do not charge more than they do.

In hindsight, *United Brands* seems like a step backwards for merger control. The 1951 Treaty establishing the European Coal and Steel Community contained an article on merger control where the test read: "The High Authority shall grant the

19 Empirical techniques were heavily relied upon in *Nestlé/Perrier*, *supra* note 5; Commission Decision 98/602/EC, *Guinness/GrandMetropolitan*, 1998 O.J. (L 288) 24; *Volvo/Scania*, *supra* note 5; *Carnival/P&O Princess*, *supra* note 5; Commission Decision COMP/M.3191 *Philip Morris/Papastratos* [hereinafter *Philip Morris/Papastratos*]; Commission Decision 2004/322/EC, *General Electric/Instrumentarium*, 2004 O.J. (L 109) 1 [hereinafter *General Electric/Instrumentarium*].

20 *Merger Regulation*, *supra* note 12, at art. 2(2).

21 See, e. g., Commission Decision 91/619/EEC, *Aerospatiale-Alenia/de Havilland*, 1991 O.J. (L 334) 42, at paras. 51 et seq.

22 *United Brands*, *supra* note 11, at para. 65.

authorisation...if it finds that the proposed transaction will not give to the persons or undertakings concerned the power...to control prices, to control or restrict distribution or to hinder effective competition....”²³ That earlier test, particularly its reference to a merger giving control over prices, seems closer to the economic theory that a merger may reduce the competitive constraints on the parties, increase their market power, and thereby allow them to raise prices.

After the interlude with *United Brands*, the Commission finally reverted to the notion that mergers that created dominant positions were those that created a company with power over price. This reliance on economic concepts to underpin the substantive legal test was reinforced when a new test was adopted in January 2004, that is, whether a merger significantly impedes effective competition. This new test, and its relationship to economics, is discussed in more detail in Section V.B.

2. Use of Evidence

The Commission’s use of evidence has been consistent with its growing reliance on the economic theory that mergers can lead to higher prices if they lead to a sufficient reduction in the competitive constraints on the parties. Rather early, it resorted to techniques directly identifying the competitive restraints on the merged entity. In *Boeing/McDonnell-Douglas* and *Price Waterhouse/Coopers & Lybrand*, bidding studies were used to identify the parties’ closest competitors.²⁴ In *Volvo/Renault*,²⁵ the effects of a price increase for one product served as an indication that another product was not a close substitute. A customer survey served a similar purpose in *Carnival Corporation/P&O Princess*.²⁶

In some cases, the Commission has considered evidence that tests the underlying economic theory even more directly. The Commission discussed a merger simulation model in *Volvo/Scania*, which estimated the likely effect of the proposed merger on prices. In that case, the Commission ultimately did not rely on the model because the technique was novel and the study controversial.²⁷ However, in *Philip Morris/Papastratos*,²⁸ the Commission explicitly relied on a merger simulation model predicting there would be no price increase when it cleared the transaction at the first phase.

23 Treaty Establishing the European Coal and Steel Community, at art. 66.

24 *Boeing/McDonnell Douglas*, *supra* note 6, at para. 58; Commission Decision 1999/152/EC, *Price Waterhouse/Coopers & Lybrand*, 1999 O.J. (L 50) 27, at paras. 87 et seq.

25 Commission Decision COMP/M.1980, *Volvo/Renault V.I.*, at para. 34.

26 *Carnival/P&O Princess*, *supra* note 5, at paras. 136 et seq.

27 *Volvo/Scania*, *supra* note 5, at paras. 72 et seq.

28 *Philip Morris/Papastratos*, *supra* note 19, at para 32.

C. COLLECTIVE DOMINANCE

The development of the case law on joint dominance²⁹ is an instructive example of how economic theory crept into an existing legal concept and how the courts gradually modified their case law in order to bring existing rules into line with economic theory. In this case, however, the economic theory was not reflected in a sufficiently clear framework for empirical analysis, as the CFI's reversal in *Airtours* made clear.

1. The Concept

The concept has its roots in Article 82. Given its clear wording, it was uncontested that Article 82 would apply to situations of collective dominance. Apart from situations where enterprises are collectively dominant through affiliation,³⁰ joint dominance could also exist where independent enterprises aligned their behavior by an explicit agreement.³¹ Arguably, Article 82 could also have applied to tacit collusion, because all the ECJ required was that the enterprises were "linked in such a way that they adopt the same conduct on the market."³² The issue, however, was never resolved.

In very early decisions under the 1989 Merger Regulation, the Commission only briefly addressed joint dominance.³³ The first noteworthy case was *Nestlé/Perrier*, where the Commission insisted on remedies because it would otherwise have found joint dominance.³⁴ Further cases followed, including *Kali+Salz/MdK/Treuhand*³⁵ and *Gencor/Lonrho*, which was the first prohibition decision based on collective dominance.

29 EC case law regarding collective dominance, including *Airtours* and the developments thereafter, has recently been reviewed by Simon Bishop & Andrea Lofaro, *A Legal and Economic Consensus? The Theory and Practice of Coordinated Effects in EC Merger Control*, 49 ANTITRUST BULL. 195 (2004).

30 See *Commercial Solvents*, *supra* note 11, at paras. 36 et seq.

31 Joined Cases T-24/93 et al., *Compagnie Maritime Belge Transports SA et al. v. Commission*, 1996 E.C.R. II-1201, at paras. 59 et seq., upholding Commission Decision IV/32.450, *French-West African Ship-Owners' Committee*, 1992 O.J. (L 134) 1, at paras. 55 et seq.

32 Case C-393/92, *Almelo et al. v. Energiebedrijf Ijsselmij*, 1994 E.C.R. I-1477, at para. 42.

33 See, e. g., Commission Decision IV/M.12, *Varta/Bosch*, at para. 32; Commission Decision IV/M.165, *Alcatel/AEG Kabel*, at paras. 20 et seq.; Commission Decision IV/M.202, *Thorn EMI/Virgin Music*, at para. 21.

34 *Nestlé/Perrier*, *supra* note 5, at para. 131.

35 Commission Decision IV/M.308, *Kali+Salz/MdK/Treuhand*, 1994 O.J. (L 186) 38 [hereinafter *Kali+Salz/MdK/Treuhand*], at para. 62; Commission Decision IV/M.358, *Pilkington-Techint/SIV*, at paras. 61 et seq.; Commission Decision IV/M.315, *Mannesmann/Vallourec/Iiva*, at paras. 127 et seq.

Since 1998, the development of joint-dominance case law was to a major extent driven by the courts, because in that year the ECJ rendered its decision on *Kali+Salz/MdK/Treuhand* and ruled on joint dominance in merger control for the first time.³⁶ The ECJ confirmed that the 1989 Merger Regulation was applicable to joint dominance. It defined joint dominance as a situation where several enterprises, “in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers”³⁷—a definition that could hardly deny its roots in *United Brands*.

In *Gencor*,³⁸ the CFI gave the definition of joint dominance from *Kali+Salz*, a slightly different twist, which with the benefit of hindsight, may be seen as a first move towards an assessment of dominance based on the possible effect of a merger on prices. The CFI held that the relationship between enterprises giving rise to joint dominance could also be:

“[a] relationship of interdependence existing between the [enterprises] to a tight oligopoly within which... those [enterprises] are in a position to anticipate one another’s behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices.”³⁹

This definition comes close to the economic concept of tacit collusion. It relies on the observation that members of an oligopoly can benefit from pursuing a common policy that maximizes joint profits. It ignores, however, a basic result of modern economic theory—individual participants to a tacitly collusive agreement have strong incentives to cheat. Their adherence to the common policy can only be ensured in situations where it is possible and rational for others to punish them if they do.

It was not until the CFI’s decision in *Airtours* that the legal concept of collective dominance was finally given a full economic interpretation:

36 Joined Cases C-68/94 and C-30/95, *France et al. v. Commission*, 1998 E.C.R. I-1375 [hereinafter *Kali+Salz*], at paras. 165 et seq., 221, 226 et seq., declaring void *Kali+Salz/MdK/Treuhand*.

37 *Id.* at para. 221.

38 Case T-102/96, *Gencor v. Commission*, 1999 E.C.R. II-753, at para. 163, declaring void *Gencor/Lonrho*.

39 *Id.* at para. 276.

“As the applicant has argued and the Commission has accepted in its pleadings, three conditions are necessary for a finding of collective dominance as defined: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy...; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market...; third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardize the results expected from the common policy.”⁴⁰

2. Use of Evidence

The CFI decision that established the economic interpretation of collective dominance also reaffirmed the vital importance of using evidence to test whether a particular theory, the likelihood of collective dominance in this case, was a concern in the case at hand. In *Airtours*, the CFI pointed to a number of flaws in the Commission’s empirical analysis, as we discuss in the next section.⁴¹

III. Transformation of the Application of Economic Theory in Merger Cases by the CFI

Although the reliance on economic concepts had been steadily increasing, *Airtours* and *Tetra Laval* brought to light fundamental weaknesses in the way that economics was used in EC competition policy. In both cases, the CFI found that the Commission had failed to use appropriate evidence to test its economic theories.

A. AIRTOURS

On June 6, 2002, the CFI voided the Commission’s *Airtours/First Choice* prohibition, a decision that had been completed mainly under Commissioner Van Miert and issued less than one week after Commissioner Monti took office.

Airtours/First Choice concerned the proposed merger of two major UK holiday tour operators. The Commission found that the relevant market was for short-haul package holidays. The merging parties had the third and fourth largest

⁴⁰ *Airtours*, *supra* note 1, at para 62.

⁴¹ *Id.* at paras. 79 et seq.

shares of that market. They would have commanded a 32 percent market share after the merger and, together with two other operators, would have had a combined market share of more than 80 percent. The Commission prohibited the merger on the grounds that it would lead to the joint dominance of those three operators.

1. CFI Decision

Airtours and the Commission agreed that there were three such necessary conditions for the appearance of joint dominance: (i) transparency of the market enabling the oligopolists to monitor deviations from the common strategy; (ii) deterrents ensuring that no oligopolist had an incentive to depart; and, (iii) actual and potential competitors as well as customers must be unable to jeopardize the common strategy.⁴² These conditions are consistent with modern economic theory of oligopoly behavior.⁴³

The CFI focused on whether the evidence established that these necessary conditions were met. It found that the degree of market transparency the Commission had seen did not exist, mainly because the oligopolists' decisions about next year's capacity were not simple adjustments of the current year's capacity, but rather the aggregate effect of a complex—and difficult to monitor—set of decisions on individual tour offers.⁴⁴ The CFI decided that the alleged deterrents would not be effective because oligopolists, after having detected deviations from the common strategy, could not increase their capacity quickly enough and maintain a quality that effectively matched their peers' products.⁴⁵ Finally, the CFI noted that other tour operators, albeit perhaps unable to compete with the oligopolists on an equal footing, were nevertheless able to increase their combined capacity to an extent that made the oligopolists' common strategy unprofitable, because price-sensitive consumers took advantage of such opportunities.⁴⁶ In the end, the CFI concluded that not one of the three necessary conditions was satisfied.

42 *Id.* at para. 62. Strictly speaking, these are the conditions for the *sustainability* of tacit collusion. The oligopolists must also be able to reach an understanding as to what a common strategy could be. See Commission Notice on Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings, 2004 O.J. (C 31) 5, at para. 44; Commission Decision COMP/M.3333, Sony/BMG (Jul. 19, 2004, not yet reported) [hereinafter *Sony/BMG*], at para. 68.

43 See, e.g., MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 139-49, 271-73 (2004).

44 *Airtours*, *supra* note 1, at paras. 148 et seq., in particular, paras. 165 et seq.

45 *Id.* at paras. 183 et seq.

46 *Id.* at paras. 208 et seq.

2. Application of Economic Theory in *Airtours*

If there was a common understanding of what was required to prove collective dominance, then what went wrong in the Commission's analysis? The CFI noted that the Commission's decision was inconsistent in that (a) two conclusions were based on different and contradictory factual assertions;⁴⁷ and, (b) two mutually exclusive conclusions were based on the same fact.⁴⁸ Similarly, the CFI concluded that it was inappropriate for the Commission to

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base a conclusion on a fact when the conclusion does not necessarily follow from the fact and the fact also allows an alternative conclusion.⁴⁹ The fundamental problem was a failure in logic and evidence.

While investigating whether competitors could challenge the oligopolists' common strategy, the Commission had investigated barriers to entry or expansion and come to the conclusion that an individual existing competitor would not be able to "compete effectively" with the oligopolists.⁵⁰ The CFI noted that the Commission should have investigated whether all existing competitors com-

combined would have been able to increase their capacity to an extent as to offset the capacity reduction by the oligopolists, regardless of their individual ability to compete on an equal footing.⁵¹ Similarly, the CFI did not accept the Commission's argument that the common shareholders of the oligopolists would have had a disciplinary effect on the latter's behavior. The CFI argued that the Commission would have had to show that those institutional investors jointly controlled the oligopolists or that they were at least involved in the management of the oligopolists.⁵² Thus, if the Commission advances a certain theory of the behavior of the

47 *Id.* at para. 132, referring to *Airtours/First Choice*, *supra* note 1, at paras. 92, 93, where the Commission first states that "[d]emand growth for the next two years is expected to be close to zero" and then recognizes that "the market [...] is likely to continue to grow."

48 *See id.* at paras. 105 et seq., referring to *Airtours/First Choice*, *supra* note 1, at paras. 132 and 138. The CFI notes that vertical integration cannot at the same time be an indication of collective dominance and a condition for effective competition.

49 *See id.* at paras. 85 et seq., according to which a "cautious approach to capacity" cannot be used as an indication for a "tendency towards collective dominance", if it can also be an indication of a competitive market. *See also*, Roger D. Blair & Jill Boylston Herndon, *The Implications of Daubert for Economic Evidence in Antitrust Cases*, 57 WASH. & LEE L. REV. 801 (2000), at 821 et seq., according to which collusion may not be inferred from parallel behavior, if the latter could also be the result of independent action.

50 *Airtours/First Choice*, *supra* note 1, at paras. 115 et seq.

51 *Airtours*, *supra* note 1, at paras. 213, 214.

52 *Id.* at para. 91, referring to *Airtours/First Choice*, *supra* note 1, at para. 137.

enterprises concerned, it must at the same time present the full set of conditions for the application of that theory—and then provide evidence for all of them.

The Commission believed that stable demand would facilitate collective dominance.⁵³ The CFI did not address this as a theory, but criticized the Commission over another point. When assessing whether the demand for package holidays had grown recently, the Commission had not taken into account the market volume and the rate of demand growth in the two years preceding the notification, even though such figures had been made available.⁵⁴ Thus, when testing a theory for its applicability (i.e. when testing whether a condition for the application of a certain economic theory is given), the Commission should not base its decision on a selection of data only—thereby discarding other data that, on their face, seem as relevant—at least not without providing a reason for the selection (which may be the unreliability of certain data).

B. TETRA LAVAL

On October 25, 2002, not long after *Airtours*, the CFI declared the decision in *Tetra Laval/Sidel* void. Tetra Laval had already been the subject of several Commission and court decisions due to its dominant position on the aseptic carton packaging equipment markets.⁵⁵ The Commission prohibited the acquisition of Sidel, a leading manufacturer of polyethylene terephthalate (PET) packaging equipment, by Tetra Laval, mainly because the merged entity could have leveraged its dominant position in certain carton packaging markets into the adjacent markets for PET packaging equipment that include low- and high-capacity stretch blow molding machines, barrier technologies, aseptic and non-aseptic PET filling machines, PET preforms, plastic bottle closure systems, and auxiliary services.⁵⁶

1. CFI Decision

The CFI found that the merged entity could, in theory, leverage its dominant position in the aseptic carton markets into adjacent markets.⁵⁷ It continued, however, that the merged entity would only have an incentive to engage in

53 *Airtours/First Choice*, *supra* note 1, at para. 87.

54 *Airtours*, *supra* note 1, at para. 131.

55 Case T-51/89, *Tetra Pak Rausing SA v. Commission*, 1990 E.C.R. II-309, upholding Commission Decision IV/31.043, *Tetra Pak I* (BTG Licence), 1988 O.J. (L 272) 27; Case C-333/94, *Tetra Pak International SA v. Commission*, 1996 E.C.R. I-5951, upholding Case T-83/91, *Tetra Pak International SA v. Commission*, 1994 E.C.R. II-755, in turn upholding Commission Decision IV/31.043, *Tetra Pak II*, 1992 O.J. (L 72) 1.

56 *Tetra Laval/Sidel*, *supra* note 1, at paras. 262, 331. The Commission had also identified certain horizontal and vertical issues, but we will not deal with these as they were not in the foreground of the Commission's decision and the subsequent CFI judgment.

57 *Tetra Laval*, *supra* note 1, at paras. 192 et seq.

leveraging its position in the carton packaging market into the PET markets if the latter grew substantially. This would give rise to a significant overlap in customers in the carton and customers in the PET packaging markets, an overlap that at the time of the Commission's decision did not exist. For the market in question, the CFI found that the Commission had not proved the level of growth of the PET packaging market on which it based its decision. The court acknowledged that some growth would occur and considered it necessary to investigate how the merged entity could eventually leverage market power.⁵⁸

The CFI held that conduct that would "at least probably" infringe Article 82 should not be taken into account, unless the Commission had investigated whether Article 82 would not prevent the merged entity from engaging in such behavior (which in turn requires an analysis of, among other factors, the likelihood of detection). As the Commission had not made such an investigation, any conduct violating Article 82 could not be taken into account as a possible means of leveraging market power. As a consequence, the CFI assumed that the merged entity could not resort to tying, bundling, loyalty rebates, or predatory pricing. Thus, the merged entity's possibilities for leveraging its dominant position were "quite limited."⁵⁹

The CFI then turned to an analysis of the individual markets adjacent to carton packaging. In all cases, it found that leveraging of the merged entity's dominant position in the carton markets would not lead to a dominant position in the adjacent markets because the merged entity's market share would have clearly been too low; or there was effective competition on the adjacent market; or several competitors were currently researching to develop the "winning technology"; or other competitors to the merged entity had their specific competitive advantages, too, including a leading position in other adjacent markets or could match a bundled offer; or, finally, other competitors could not be foreclosed because they served market segments in which the merged entity was not active.⁶⁰

2. Application of Economic Theory in *Tetra Laval*

The CFI did not reject outright the theory that market power could be leveraged into another market. That is consistent with modern economics, which recognizes that under some circumstances firms may have the ability and incentive to leverage market power.⁶¹ The CFI restricts itself to saying that the Commission

58 *Id.* at paras. 201 et seq.

59 *Id.* at paras. 159 et seq., 217 et seq.

60 *Id.* at paras. 229 et seq., 241 et seq., 273, 281, 289, 293.

61 Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, in *HANDBOOK OF INDUSTRIAL ORGANIZATION III* (Mark Armstrong & Rob Porter, eds., forthcoming); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. (forthcoming Winter 2005), at § II.B.

had failed to set out an exhaustive list of conditions for anticompetitive leveraging and to prove that these conditions were satisfied.⁶² For example, the CFI opined that leveraging would not occur if competitors were able to offer the same product range and could match any offer the merged entity may make. Furthermore, foreclosure could not occur if the overlap of carton customers and PET packaging customers (i.e. the range of customers that could potentially be affected by leveraging) was not large enough to allow competitors to remain in the market. Thus, the applicable economic theory contains two conditions for successful leveraging: the absence of competitors with equal product range and a sufficiently large overlap. Without proof that these conditions hold, it is not possible to conclude that a dominant firm has the ability and incentive to engage in profitable anticompetitive leveraging.

IV. Lessons for the Use of Economics

By the time the trilogy of CFI decisions came down, and in the wake of the Commission's controversial prohibition of the *GE/Honeywell* transaction, the problem faced by the Commission was hardly a lack of economics or economists in its orbit. The Commission's Merger Task Force seemed to be feasting on economic theories of the ills that could flow from various market structures. Rather, as the CFI made clear, the Commission got into difficulty either because it did not validate the theories it relied on or because it sought to defend its theories with the inconsistent and sometimes illogical treatment of facts. This was not a problem created by Commissioner Monti.

Indeed, the economics profession shares some responsibility for the tendency to draw sweeping conclusions based on economic theory alone. Like many sciences, there is a division of labor in economics between those who postulate theories and those who test them against data. The process of empirical validation is more complex in economics, because economists are seldom able to do controlled experiments and must frequently settle for making inferences from complex, real-world data for which it is difficult to disentangle cause and effect. There is, not surprisingly, a long lag between the time that theories are presented and the time, if ever, that their consistency with available data is tested.

Industrial organization, the branch of economics that deals with competition policy issues, is particularly beset with these problems.⁶³ Two successive strands of industrial organization research in the last fifty years illustrate the difficulty. From the early 1950s through the early 1980s, the field was dominated by the "structure-conduct-performance" model that led to a vast amount of empirical

62 Christian Ahlborn, David S. Evans & A. Jorge Padilla, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 ANTITRUST BULL. 287 (2004), at 300.

63 By contrast, financial economics has made great progress both theoretically and empirically.

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research concerning the relationships among market shares (“structure”), prices (“conduct”), and profits (“performance”). Years of inconclusive empirical results were eventually seen as largely irrelevant because they could not distinguish between cause and effect and, more generally, were not based on well-specified theories. This was followed by the development of formal mathematical models of firm and industry behavior, often based on modern game theory. While these models tended to reflect the richness of market experiences, they were also difficult to validate empirically. Slow progress is now being made on that front.⁶⁴

Another practical aspect of these theories is also noteworthy. The theories begin with particular assumptions and then demonstrate that certain competitive results can occur under certain conditions. Whether the theory is relevant in a particular matter requires faith that the assumptions are roughly accurate so that the theory can provide an approximate representation of reality. Unfortunately, assumptions are often hidden or obscured in the presentation of the theory, posing a challenge for consumers of these theories who lack either the time or skills to delve into the workings of the models. Moreover, whether the theory predicts an anticompetitive outcome, given the other assumptions of the model, often depends on parameters of the mathematical model or on various other conditions.

Prior to *Airtours* and *Tetra Laval*, the Commission seemed to be developing a tendency to treat economic theories that indicated that something *could* happen as if they indicated that something *would* happen. The CFI wisely warned the Commission, in effect, that it needed to go back to the basics of scientific methodology and empirically validate, in a logical way, the theories that it sought to rely on.

Commissioner Monti and DG COMP responded to that challenge, at least in the case of mergers.

64 James C. Cooper, Luke M. Froeb, Dan O’Brien & Michael G. Vita, *Vertical Antitrust as a Problem of Inference* (Nov. 8, 2004) (on file with authors).

V. Accelerated Modernization under Commissioner Monti

Many developments during Commissioner Monti's tenure, both in the application of EC competition rules as well as in policy design, had roots with his predecessor, Karel Van Miert. In contrast, Commissioner Monti's legacy for the use of economics comes from his responses to the mid-term crisis caused by the *GE/Honeywell* controversy, followed by the trilogy of defeats at the CFI.

Certainly, the application of economic theory in EC competition policy could not go on after *Airtours* and *Tetra Laval* as before. This must have been the perception of Commissioner Monti within DG COMP as well. From early actions after *Airtours*, Commissioner Monti and DG COMP, headed by Philip Lowe, distinguished between two types of available measures: the substantive analysis of mergers and the decision-making process.⁶⁵ Other articles in this volume address these reforms in detail, so we focus on the two that are most relevant for economics: the appointment of a Chief Economist and a new test for merger assessment.

A. THE COMMISSION'S CHIEF ECONOMIST

In the summer of 2001, Commissioner Monti was still of the opinion that the existing internal procedural framework, including the "inter-service consultation" with other Directorate-Generals, would ensure "enough economics."⁶⁶ After *Airtours* and *Tetra Laval*, however, it had become obvious that this practice was not sufficient. In fall 2002, the Commission announced it would create the position of a Chief Economist,⁶⁷ and in July 2003, Lars-Hendrik Röller, Professor of Economics at Humboldt University in Berlin, was appointed the Commission's first Chief Economist.⁶⁸ Notably, in response to the CFI's criticisms, Röller's main area of expertise is empirical work—testing theories rather than conceiving them.

The Commission has introduced certain institutional safeguards to ensure the independence of the Chief Economist's Office. The Chief Economist reports

65 Mario Monti, *EU Competition Policy*, Fordham Annual Conference on International Antitrust Law and Policy, New York (Oct. 31, 2002); Mario Monti, *Merger Control in the European Union: A Radical Reform*, European Commission/IBA Conference on EU Merger Control, Brussels (Nov. 7, 2002); Philip Lowe, *Future Directions for EU Competition Policy*, Center for European Policy Studies, Brussels (Oct. 11, 2002).

66 See Mario Monti, *The Future for Competition Policy in the European Union*, Merchant Taylor's Hall, London (Jul. 9, 2001): "[...] the opinion of other services of the Commission, including the Legal Service and the Economic and Financial Directorate, which respectively ensure the consistency of the decisions with legal precedents and rules and with economic principles."

67 See Monti, *EU Competition Policy*, *supra* note 65; Monti, *A Radical Reform*, *supra* note 65.

68 See Press Release IP/03/1027, European Commission, *Commission Appoints Chief Competition Economist* (Jul. 16, 2003).

directly to the Director-General for Competition. The Chief Economist's Office is involved in investigations throughout DG COMP, and the Chief Economist and his staff have already assisted case teams on numerous matters.⁶⁹ The Chief Economist provides an independent voice on investigations and other matters, such as the drafting of guidelines, for the Director-General and the Commissioner. Job security is not an issue likely to get in the way of independence since the position has a three-year nonrenewable term.

Although the establishment of the Chief Economist's Office is an important development, its ultimate effect remains to be seen. Part of this depends on what Professor Röller and his successors accomplish during their tenure and the extent to which they help guide the Commission, and those who submit evidence before it, to focus on empirical verification of hypotheses rather than competing theoretical musings. Cases such as *General Electric/Amersham*⁷⁰, *General Electric/Instrumentarium*, and *Sony/BMG* provide some case for optimism on the merger front. The other part, however, depends on resource commitments. The Commission has approximately 500 antitrust enforcement staff; the Chief Economist's Office has 10 economists, several of whom came from existing DG COMP staff and few of whom have training in empirical methods.⁷¹ By contrast, the U.S. Department of Justice's Antitrust Division and the U.S. Federal Trade Commission have a combined antitrust enforcement staff of roughly 1,000 people, including well over 100 economists.⁷² Given that the EC and U.S. economies are of similar size and most significant mergers are noticed in both jurisdictions, the Chief Economist's Office at DG COMP would appear to be rather understaffed.

B. A NEW TEST FOR THE ASSESSMENT OF MERGERS

In January 2004, after years of debate that started with the Commission's 2001 Green Paper⁷³ on merger control, the EC finally introduced a new test for merg-

69 See A Discussion with Professor Lars-Hendrik Röller, International Antitrust Law Committee of the American Bar Association Section of International Law & Practice (Mar. 17, 2004), available at http://www.abanet.org/intlaw/divisions/regulation/intl_antitrust/abarollerreport.pdf.

70 Commission Decision 2004/103/EC, *General Electric/Amersham*, 2004 O.J. (C 74) 5.

71 Press Release IP/03/1027, *supra* note 68; Organisation for Economic Co-operation and Development, *The Optimal Design of a Competition Agency: United States* (2003), at 8, 9, available at <http://www.oecd.org/dataoecd/57/60/2486425.pdf>.

72 Organisation for Economic Co-operation and Development, *The Optimal Design of a Competition Agency*, *supra* note 71; Organisation for Economic Co-operation and Development, *United States: Competition Law and Policy in 1999-2000* (2000), at 7, 8, available at <http://www.oecd.org/dataoecd/53/15/2406946.pdf>.

73 Green Paper on the Review of Council Regulation 4064/89, COM(2001) 745/6 final, at <http://europa.eu.int/comm/competition/mergers/review/>, at paras. 159 et seq.

ers—mergers that “significantly impede effective competition” (SIEC) will be prohibited.⁷⁴ While the debate about the differences between dominance, substantial lessening of competition (SLC), and SIEC was still waging, the Commission itself seemed to have a clear interpretation of the SIEC test. The Commission shall prohibit “all anti-competitive mergers resulting in higher prices, less choice or innovation.”⁷⁵ This effects-based approach is the one advocated by economists. It moves the analysis away from the mechanical measure of market shares towards the use of economic analysis—both theory and empirics—to assess the likely consequences of mergers.

It remains to be seen whether Commissioner Monti’s reforms will have an impact on the application of Articles 81 and 82 by the Commission.

VI. Microsoft

The institutional reforms pushed through by Commissioner Monti are likely to form an enduring part of his legacy. But looking back, two other cases during his term (and presently on appeal) will shape his legacy as well. Of course, many cases decided during his term could be affirmed or voided, but the decision to prohibit the *GE/Honeywell* merger, despite its approval by the U.S. authorities, and the decision to reject a settlement of the *Microsoft* case in favor of seeking a court precedent, are the ones that will almost surely be linked to Commissioner Monti.⁷⁶ The *Microsoft* case is particularly uncertain and important because the reforms, to date, have been driven by concerns from the CFI that the Commission was not meeting its obligations to test its theories with data in merger cases. It remains to be seen whether the courts will insist on a similar obligation in Article 82 cases such as *Microsoft*.

LOOKING BACK, TWO OTHER CASES DURING HIS TERM WILL SHAPE HIS LEGACY AS WELL. THE DECISION TO PROHIBIT THE *GE/HONEYWELL* MERGER, DESPITE ITS APPROVAL BY THE U.S. AUTHORITIES, AND THE DECISION TO REJECT A SETTLEMENT OF THE *MICROSOFT* CASE IN FAVOR OF SEEKING A COURT PRECEDENT.

The *Microsoft* matter is really two cases—one involves an alleged refusal to supply certain information and technologies in the networks of client and server computers; the other concerns the alleged tying of media player technologies to an operating system. CFI President Vesterdorf’s decision on interim measures

74 Council Regulation 139/2004/EC on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) 1, at art. 2(2) and art. (3).

75 Press Release MEMO/04/9, European Commission, New Merger Regulation—Frequently Asked Questions (Jan. 20, 2004) (emphasis in original).

76 See, e. g., *Transatlantic Spat Over Microsoft*, FIN. TIMES, Mar. 29, 2004; Mark Landler, *A Slayer of Monopolies, One Corporation at a Time*, N.Y. TIMES, Mar. 25, 2004; Press Release MEMO/04/70, European Commission, *Microsoft—Questions and Answers on Commission Decision* (Mar. 23, 2004).

highlights the key economic and legal issues at stake. On refusal to supply, the Commission argues that the “exceptional circumstances” discussed in the *IMS Health*, *Magill*, and *Volvo/Veng* decisions were illustrative but not exhaustive of possible exceptional circumstances that could lead to compulsory licensing of intellectual property.⁷⁷ President Vesterdorf notes that the issue is whether the ECJ’s conditions in *IMS Health* are “necessary or merely sufficient.”⁷⁸

On tying, the Commission agreed that Microsoft’s inclusion of a media player in its operating system was not a case of classical tying but one in which the practice, through indirect network effects, could result in the market for media players tipping to Microsoft at some date in the future. President Vesterdorf concludes:

“The present case none the less raises the complex question whether, and if so on what conditions, the Commission may rely on the probability that the market will ‘tip’ as a ground for imposing a sanction in respect of tying practised by a dominant undertaking where that conduct is not by nature likely to restrict competition, should that be the case.”⁷⁹

In both cases, an ultimate decision in favor of the Commission will expand the circumstances under which the Commission can find abuses. Likewise, a rejection of these and other positions could result in the courts voiding some or all of the Commission’s decision. Commissioner Monti’s decision to reject a settlement and instead seek legal precedence could seem either foolish or wise in the years to come, depending on how the courts ultimately rule.

The CFI’s treatment of the Commission’s tipping theory deserves particular attention in light of the current tension between the use of economics in the analysis of mergers and its use in the analysis of abuse of dominance. As with the theories relied on in *Airtours* and *Tetra Laval*, the tipping theory is based on mod-

77 Case C-418/01, *IMS Health v. NDC Health* (Apr. 29, 2004, not yet reported) [hereinafter *IMS Health*], at paras. 35 et seq.; Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission*, 1995 E.C.R. I-743, at paras. 50 et seq.; Case 238/87, *Volvo v. Veng*, 1988 E.C.R. 6211, at paras. 9 et seq. See also Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint*, 1998 E.C.R. I-7791, paras. 37 et seq., on refusal to grant access to resources other than intellectual property rights.

78 Case T-201/04 R, *Microsoft v. Commission, Order of the President of the Court of First Instance* (Dec. 22, 2004), at para. 206.

79 *Id.* at para. 400.

ern economics.⁸⁰ However, it is a theory based on a number of assumptions that would be case-specific and would need to be verified.⁸¹

VII. Conclusion

We end with three conclusions:

- (1) Commissioner Monti did little to accelerate or decelerate the trend towards more economics during the greater part of his first years in office;
- (2) Commissioner Monti was responsible for several profound reforms that have already transformed the use of economics in merger investigations. These were prompted, however, by three negative decisions by the CFI that pointed specifically to the Commission's poor use of economic analysis and evidence; and,
- (3) Commissioner Monti's impact on the use of economics in competition policy matters remains to be seen. Part of this depends on how the Chief Economist's Office evolves over time. The other part depends on how the EC courts consider some of his more controversial decisions—*GE/Honeywell* in the case of mergers and *Microsoft* in the case of abuse of dominance. ▼

80 W. Brian Arthur, *Competing Technologies and Lock-In by Historical Events*, 99 *ECON. J.* 116 (1989); David S. Evans & Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 *ANTITRUST MAG.* 36 (Spring 1996).

81 For further discussion, see Maurits Dolmans & Thomas Graf, *Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective*, 27 *WORLD COMP.* 225 (2004) for a view that is favorable towards the Commission's case and David S. Evans & A. Jorge Padilla, *Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf*, *WORLD COMP.* (forthcoming 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=596663 for a view that is favorable towards Microsoft's case.