

Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets

by

Jan Szczodrowski*

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Abstract

This article analyses the way in which standard of judicial review of the European Commission's (EC) decisions concerning oligopolistic markets was exercised by EU judiciary. In the recent years we could observe an increasing role played by the GC and the ECJ in shaping the legal framework in which mergers are assessed. In fact, the EU judiciary has not only extended the previously narrow scope of the original merger regulation but it has also contributed significantly towards increasing the legal certainty by elaborating a reliable set of legal criteria for the assessment of oligopolistic markets, which also reflected the economic theory. The EU judiciary has also very often acted as a 'filter' to the novel theories introduced in the EC

* Jan Szczodrowski, PhD candidate, Adam Mickiewicz University, Department of Law and Administrative Science, Chair of European Law; LL. M. in European legal studies (College of Europe, Bruges).

decisions. All of the aforementioned developments would not be possible without the high standard of judicial review exercised by EU courts and ‘special judicial techniques’ used by them.

Résumé

Cet article porte sur la manière dont le contrôle juridictionnel des décisions de la Commission Européenne relatives aux concentrations des entreprises sur les marchés oligopolistiques a été effectué par les juridictions européennes. Dans les dernières années, on pouvait observer l’accroissement de rôle du Tribunal et de la Cour dans le développement du cadre juridique dans lequel les concentrations sont évaluées. En réalité, la branche judiciaire de l’UE a élargi le champ d’application du règlement sur les concentrations. Ainsi, elle a également contribué considérablement à l’augmentation de la certitude juridique grâce aux développements des critères qui servent à évaluer les marchés oligopolistiques, ce qui reflète également les théories économiques. Les cours européennes ont fréquemment agi en tant qu’un ‘filtre’ des nouvelles théories qui ont été avancées par la Commission Européenne. Tous les développements en question ne seraient pas possible sans le niveau élevé de contrôle juridictionnel ainsi que ‘les techniques judiciaires spécifiques’ employées par les cours.

Classifications and key words: judicial review; merger control; mergers; oligopolies; oligopolistic markets; Poland; Polish merger control; standard of judicial review; co – coordinated effects; non – coordinated effects.

I. Introduction

Standard of judicial review is a concept which has been discussed back and forth in recent years, following a series of landmark judgments of both the European General Court (GC) and the European Court of Justice (ECJ). Although most commentators would contend that the issue of the standard of proof/standard of judicial review of merger decisions has come to the fore only with the *Airtours*¹/*Schneider*²/*Tetra Laval*³ puzzle, in fact we may trace back first ‘symptoms’ of the Court’s willingness to develop that particular issue as early as 1998, in its *Kali & Salz*⁴ judgment.

¹ T-342/99 *Airtours plc v Commission of the European Communities*, ECR [2002] II-2585.

² T-310/01 *Schneider Electric SA v Commission of the European Communities*, ECR [2002] II-4071.

³ T-5/02 *Tetra Laval BV v Commission of the European Communities*, ECR [2002] II-4381.

⁴ C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, ECR [1998] I-1375.

It is commonly observed that the overwhelming majority of EU court decisions laying out their jurisprudence pertaining to the standard of judicial control of merger decisions is related to oligopolistic markets, to which the concept of collective dominance/coordinated effects was applied, namely: *Kali & Salz*⁵, *Airtours*⁶ as well as *Sony/BMG (Impala)*⁷ litigation. Indeed oligopolistic markets have very peculiar characteristics, which has made them difficult to control under EU competition law for a long time. The tools for the effective scrutiny of the behavior of undertakings on such markets were developed incrementally. Apart from stretching the limits of the application of Articles 101 TFEU⁸ and 102 TFEU⁹, the European Commission (EC) alongside with the GC and the ECJ, were trying to overcome the apparent *lacunae* in the wording of Regulation 4064/89¹⁰, which consisted of the lack of application of the latter Regulation to variety of anticompetitive situations which may occur on oligopolistic markets. Thus, in several merger decisions¹¹ – some of which were followed GC and ECJ judgments¹² – the concept of collective dominance ('coordinated effects') was developed. It allowed mergers leading to an oligopolistic market structure to be the subject of the Commission's scrutiny.

⁵ C-68/94 and C-30/95 *SCPA and EMC v Commission (Kali & Salz)*.

⁶ T-342/99 *Airtours plc v Commission*.

⁷ T-464/04 *Independent Music Publishers and Labels Association (Impala, association internationale) v Commission of the European Communities*, ECR [2006] II-02289 (hereafter, *Impala*).

⁸ The European Commission was trying to apply Article 101(1) TFEU to parallel courses of behaviour typical for oligopolies in, *inter alia*, its *Aniline Dyes Cartel Decision*, OJ [1969] L 195/11, *Sugar Cartel Decision* COM (72) 1600. IV/26.918, OJ [1972] L 140/17 and *Woodpulp Decision* 85/202/EEC, OJ [1985] L 85/1. Although the Court of Justice seemed at first instance receptive to the Commission's arguments confirming in 48/69 *Imperial Chemical Industries Ltd. judgment (Dyestuffs)*, ECR [1972] 00619 that the term 'concerted practice' could extend also to oligopolistic interdependence, it finally refused to apply this provision of the Treaty to purely parallel behaviour in the judgment in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 i C-125/85 to C-129/85 *Ahlstrom Osakeyhtio and others v the Commission (Woodpulp)*, ECR [1994] I-00099.

⁹ Decisions of the Commission in cases: IV/M165 *Alcatel/AEG Kabel*, OJ [1992] C 6/23 and *Societa Italiana Vetro* IV/31.906, OJ [1989] L 33/44. In review of the latter decision the Court recognized the applicability of Article 102 TFEU to collective dominance T-68/89, T-77/89 and T-78/89 *Societa Italiana Vetro SpA, Fabbrica Pisana and PPG Vernante Pennitalia SpA v the Commission*, ECR [1992] II-01403.

¹⁰ Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ [1989] L 395/1.

¹¹ *Inter alia* decisions in mergers: IV/M165 *Alcatel/AEG Kabel*, OJ [1992] L 6/23, IV/M.190 *Nestle/Perrier*, OJ [1992] L 356/1, IV/M.308 – *Kali + Salz/MdK/Treuhand*, OJ [1994] L 186/38, IV/M.619 *Gencor/Lonrho*, OJ [1996] L 11/30, IV/M.1524 *Airtours/First Choice*, OJ [2000] L 93/1, M.3333 – *SONY/BMG*, OJ [2005] L 62/30.

¹² In particular: C-68/94 and C-30/95 *SCPA and EMC v Commission (Kali & Salz)*; T-342/99 *Airtours plc v Commission*; T-464/04 *Impala*.

Furthermore, some attempts were also made by the Commission to enhance the application of the 'old' Merger Regulation (Regulation 4064/89) to oligopolistic but non-coordinated markets (so-called non-collusive oligopoly)¹³. At the later stage, the GC also tried to facilitate the proof of the collective dominance existing on the oligopolistic market prior to notification of the merger¹⁴.

In parallel, in the course of judicial review of the aforementioned decisions a set of criteria for the assessment of oligopolistic markets in the context of merger control were developed by EU judiciary. Through approving, rejecting, modifying or substituting Commission's analysis, the EU courts set a comprehensive legal framework which contributed significantly to the clarification of law in this particular area of merger control.

This contribution's main focus will be to present the manner in which the judicial review of the most important of the aforementioned decisions was exercised. In particular, it will be argued that the development of a clear legal framework within which oligopolistic markets can be controlled in the context of merger control, was mainly possible thanks to pro-active, interventionist and creative role played by the EU judiciary in its exercise of judicial review. After a short introduction to the concept of judicial review in EU competition law and a presentation of the theoretical framework within which it is handled by EU Courts, the major judicial decisions in the field of merger control will be presented as examples of judicial review of EC merger decisions relating to oligopolistic markets. In a similar vein, the theoretical framework of judicial control of merger decisions in Poland will be presented. Furthermore, some recent examples of merger decisions reviewed by the Court will be discussed. Finally, an attempt will be made to assess the way in which the EU judicial branch has applied the standard of judicial review to oligopolistic markets in the context of merger control.

II. Standard of judicial control – a definition and theoretical framework

The definition of the standard of judicial control (also referred to as 'standard of judicial review') in the context of EU merger control starts from a simple premise; i.e. that it encompasses the intensity of the review by EU Courts of the decisions of the European Commission. Thus, under the tenet of the standard of judicial review we should not only understand the

¹³ *Airtours* decision (IV/M.1524 *Airtours/First Choice*). This problem was ultimately solved by the new substantial test introduced in Regulation 139/2004 in Articles 2(2) and 2(3).

¹⁴ T-464/04 *Impala*.

intensity employed by the GC in its review of the decisions of the European Commission (EC) based on appeals pursuant to Article 263 TFEU¹⁵, but also the standard of the subsequent judicial control exercised by the ECJ, limited to points of law, following an appeal from the judgments of the GC¹⁶. According to predominant opinion, the initial review by the GC could be described as a *sensu stricto* judicial review, whereas the review exercised by the ECJ is an appeal on points of law only¹⁷.

In reality however, the distinction between errors of fact (which the ECJ is not entitled to review) and errors of law (which the ECJ is empowered to scrutinize) is sometimes a very fine, if not a fuzzy one. Indeed if the General Court, instead of verifying the fact-finding of the Commission, substitutes it with its own analysis, the question of fact becomes a question of law and thus becomes subject to ECJ's scrutiny¹⁸. Put simply: failure by the GC to properly apply the rules on evidence raises question(s) of law, which ultimately become subject to ECJ review¹⁹.

The Treaty on the Functioning of the European Union (TFEU) indicates the following four grounds for review: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; or misuse of powers. In practice however, only some of these grounds are used in the context of EU competition law.

The Court of Justice has summarized the grounds for review as follows: 'Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been

¹⁵ According to Article 256(1) TFEU: 'The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court [...] and those reserved in the Statute for the Court of Justice'.

¹⁶ Following the same Article 256 TFEU: 'Decisions given by the General Court [...] under this paragraph. may be subject to a right of appeal to the Court of Justice on points of law only...?'

¹⁷ T. Reeves, N. Dodoo, 'Standard of Proof and Standards of Judicial Review in European Commission Merger Law' (2006) 29 *Fordham International Law Journal* 1056; in a similar vein: B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1(1) *European Competition Journal* 11; M. Nicholson, S. Cardell, B. McKenna, 'The Scope of Review of Merger Decisions under Community Law' (2005) 1(1) *European Competition Journal* 125-126. See Opinion of Advocate General Tizzano in Case 12/03 P *Tetra Laval*.

¹⁸ T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1060.

¹⁹ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions After the Impala Saga: Time for Policy Choices?' (2009) *The Antitrust Review – Global Competition Review* 22.

complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers²⁰.

Consequently, the following grounds for review in competition law cases have been distilled by academic commentators: procedural irregularities, errors of substantive law, and errors of assessment²¹. Other authors have referred to errors of law, errors of fact, and errors of appreciation²², which seems to follow closer the language used by the Court. Last but not least, an alternative demarcation was offered by Hubert Legal, who distinguished between judicial control of the external legality i.e. potential violations of rules of competence and procedure, and the internal legality, i.e. potential violation of substantive rules of law or if a rule is placed higher in the hierarchy of norms²³.

It is beyond any doubt that the questions of law²⁴ will be subject to full court control. As far the questions of fact are concerned²⁵, the GC will be entitled to review the accuracy and correctness of the EC findings. With respect to the errors of assessment, the scope of the Court's review will be severely limited and qualified in several respects²⁶. In fact, the Court will be limited in its scrutiny only to situations of a manifest error of assessment, which is the least onerous and the lowest standard of review employed in administrative law²⁷. The reason for these constraints is a constitutional one: the judiciary branch shall not interfere too much with the activities of the administrative branch²⁸. What is problematic, however, is where to draw a clear distinction between pure fact-finding and the legal interpretation of these facts²⁹. In the case of

²⁰ C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, ECR [2004] I-123, Para. 279.

²¹ M. Nicholson, S. Cardell, B. McKenna, B., 'The Scope of Review of Merger Decisions...', p. 124. In a similar vein: D. Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective', (2003) 40(4) *Common Market Law Review* 850 discusses: procedural propriety, factual and legal correctness and merits of a particular case.

²² T. Reeves, N. Dodoo, 'Standard of Proof...', pp. 1056–1057.

²³ H. Legal, 'Standards of proof and standards of judicial review in EU competition law', [in:] B. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute 2006*, vol. 32, p. 2.

²⁴ 'It is the Courts' prerogative to Interpret Community Law [...]. As regards matters of law, the Community courts exercise full jurisdictional control': B. Vesterdorf, 'Standard of Proof in Merger Cases...', pp. 12–13.

²⁵ B. Vesterdorf, 'Standard of Proof...', p. 15 observes: 'Control of facts by the CFI is intensive and, again, in this field there is no room for discretion on the part of the Commission'. However the aforementioned author equally notes the difficulties related to drawing a proper distinction between assessment of facts and the conclusions drawn from these facts – see more below.

²⁶ H. Legal, 'Standards of proof...', p. 4.

²⁷ D. Bailey, 'Standard of Proof in EC Merger Proceedings...', pp. 852–853.

²⁸ H. Legal, 'Standards of proof...', p. 4.

²⁹ B. Vesterdorf, 'Standard of Proof...', pp. 14–15; the aforementioned author notes that 'a distinction exists between facts, and assessment of facts [...]. It is a distinction that is not

the former, the Commission should enjoy, at least potentially, a wide margin of discretion and the EU courts are, in principle, precluded from interfering with the Commission's margin of appreciation³⁰. This issue was specifically addressed in the *Airtours* judgment³¹ and will be further discussed below.

As far as the judicial control of errors of assessment is concerned, Court's approach towards the complex economic assessment in the prospective analysis of mergers was first expressed in the landmark *Kali & Salz* judgment³²: 'The basic provision of the [Merger] regulation, in particular Article 2 thereof, confers on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentration, must take account of the discretionary margin implicit on the provisions of an economic nature which form part of the rules on concentrations'³³.

This view was later confirmed in a number of judgments³⁴. It is therefore beyond any doubt that the Commission enjoys a wide margin of discretion in its prospective economic assessment and that the EU judicature will not, in principle, question its analyses. However, the scope of the potential intervention by the Courts is not clear³⁵. The Court of Justice's statement in *Tetra Laval* shed some new light in this respect: 'Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it....'³⁶.

On one hand, the Court seems to recognize the wide discretion enjoyed by the Commission. On the other, however, it allows, within the framework of

always easy to make... [...] Whenever an issue involves complex assessment which may lead two reasonable persons disagree [...] we are not in the realm of pure fact but in the realm of appreciation of fact'. For a more categorical approach to the impossibility to distinguish between facts and assessment of facts: T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1058.

³⁰ T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1060.

³¹ T – 342/99 *Airtours*.

³² The Court was addressing the issue of error of appraisal (assessment).

³³ C-68/94 and 30/95 *Kali & Salz*, paras. 223–224.

³⁴ *Inter alia*: T-102/96 *Gencor v Commission*, T-221/1995 *Endemol*, T-342/99 *Airtours*, C-12/03 P *Tetra Laval*, T-444/06 *Sony/BMG*.

³⁵ M. Nicholson, S. Cardell, B. McKenna, B., 'The Scope of Review of Merger Decisions...', p. 131.

³⁶ C-12/03 P *Commission v Tetra Laval BV*, ECR [2005] I-987, para. 39.

the review of facts, for verification of the assessment (interpretation) thereof³⁷. Where the European Commission enjoys a true freedom is in its choice of the economic methodology, provided that the latter will be instrumental in building its case³⁸.

Last but not least, it should be noted that in spite of all the aforementioned divergences, most academics today would agree that the scope of judicial review in merger cases is intricately linked with the standard of proof. In fact, in the light of the most recent jurisprudence³⁹ it is argued that whatever the Commission is able to prove, the GC should be entitled to verify⁴⁰. Furthermore, the stricter the standard of judicial review is, the higher the standard of proof that is applied (i.e. more convincing and compelling evidence is required from the European Commission)⁴¹.

III. Standard of judicial review in EU jurisprudence on mergers in oligopolistic markets

In the light of the foregoing considerations, the practical application of the standard of judicial review relating to merger decisions concerned with oligopolistic markets will now be discussed. For this purpose three cases scrutinized by EU judiciary will be analysed: *Kali & Salz*, *Airtours* as well as *Sony/BMG (Impala)*.

1. *Kali & Salz*: errors of fact and errors of law in its early form

The *Kali & Salz* litigation was initiated by the decision of the Commission⁴² conditionally authorising a merger between Kali & Salz and Mitteldeutsche Kali AG (MdK). The Commission found that the merger would result in the creation of a dominant duopoly composed of the merged entity (Kali&Salz/MdK) and of Société Commerciale des Potasses et de l'Azote (SCPA), and

³⁷ H. Legal, 'Standards of proof...', p. 7.

³⁸ H. Legal, 'Standards of proof...', pp. 7–8.

³⁹ C-12/03 P *Tetra Laval*.

⁴⁰ H. Legal, 'Standards of proof...', pp. 5–6.

⁴¹ D. Bailey, 'Standard of Proof in EC Merger Proceedings...', p. 850. T. Reeves, N. Dodoo, 'Standard of Proof...', pp. 1037–1038 claim that: '... the more rigorous the standard of review, the more likely it is that the standard of proof will be high as well [...] the level of sophistication and accuracy which the Commission must reach [...] needs to be such as to ensure that its decisions will withstand the Courts' scrutiny.'

⁴² Decision of the European Commission No. 94/449/EC from 14 December 1993 in case IV/M.308 – *Kali + Salz/MdK/Treuhand*, OJ [1994] L 186/38.

therefore made its authorising decision subject to compliance with certain conditions. The decision was appealed⁴³ by a third party. The judgment of the ECJ⁴⁴ became one of the milestones of EU competition law for several reasons. Not only did the Court confirm for the first time the applicability of Regulation 4064/89 to collective dominance⁴⁵, but it also affirmed the existence of the ‘failing company defence’ in EU competition law, and developed the criteria for the assessment of the existence of the former and the latter. Thus, while deciding on the points of law, the Court had no hesitation in upholding two completely new concepts introduced by the European Commission. Firstly, in relation to the ‘failing company defence’, the Court recognized the EC’s freedom to invoke new concepts and determine the criteria used in their application. Where the Court was ready to intervene, however, was in instances where the new concepts and the criteria introduced by the Commission were not capable of satisfying the basic *legal* criterion for declaring the concentration compatible with the market *i.e.* absence of the possibility that a concentration might be a cause of the deterioration in the competitive structure of the market⁴⁶. Secondly, as far the applicability of the concept of collective dominance in the context of merger control is concerned, the Court undertook a very expansive, teleological interpretation of Regulation 4064/89, in particular with reference to the latter instrument’s purpose and general structure⁴⁷.

It can therefore be observed that in its review of the alleged errors of law, the Court can and sometimes will interpret the existing legal framework in a very proactive way. In the case in question the Court, reacting to an argument put forward by one of the parties⁴⁸, extended *inter alia* the scope of application of Regulation 4064/89 to include collective dominant position⁴⁹. This development was particularly welcome in the academic world, as it put an end to a long period of uncertainty in this area⁵⁰.

⁴³ The case was dealt with by the Court of Justice due to the presence of the MS as interveners.

⁴⁴ C-68/94 i C-30/95 *Kali & Salz*.

⁴⁵ C-68/94 i C-30/95 *Kali & Salz*, paras. 152–178.

⁴⁶ C-68/94 i C-30/95 *Kali & Salz*, para. 112.

⁴⁷ In particular C-68/94 i C-30/95 *Kali & Salz* paras. 167-168.

⁴⁸ In this case it was the European Commission who introduced new concepts in EU merger control.

⁴⁹ M. Nicholson, S. Cardell, B. McKenna, ‘The Scope of Review of Merger Decisions...’, p. 128.

⁵⁰ J. Venit, ‘Two Steps Forward and No Steps Back: Economic Analysis and Oligopolistic Dominance After Kali & Salz’ (1998) 35(5) *Common Market Law Review* 1104–1105; M. Garcia Perez, ‘Collective Dominance Under the Merger Regulation’ (1998) 23(5) *European Law Review* 477; S. Stroux, ‘Is EC Oligopoly Control Outgrowing Its Infancy?’ (2000) 23(3) *World*

Notwithstanding the progress made in relation to the assessment of errors of law, the Court also laid down and significantly clarified its own standards of judicial review of alleged errors of assessment, in particular, in relation to complex economic analyses⁵¹. As previously mentioned⁵² the ECJ for the first time declared its position on the scope of Commission's discretion in carrying on a complex, economic analysis. It said that 'Review by the Community judicature, of the exercise of [Commission's] discretion [...] must take account of the discretionary margin implicit on the provisions of an economic nature which form part of the rules on concentrations'⁵³.

Having said that, the ECJ went on to review the Commission's analysis of the concentration and its effects on the market, to the extent to which they could affect the economic assessment of the concentration⁵⁴. In this connection, it observed *inter alia* that the market shares did not point conclusively to the existence of a collective dominance⁵⁵. Furthermore, the Court called into question the correctness of the assessment of the 'structural links'⁵⁶, the existence of which was, according to the Commission, a prerequisite for the existence of a collective dominant position. At the same time, while asserting that the concentration would indeed strengthen Kali & Salz's industrial capacity⁵⁷, the Court criticized the Commission's assertions concerning falling demand which could, in this particular sector, lead to intensive competition⁵⁸. Lastly, it was observed that the Commission did not sufficiently take into

Competition 30–31; B. Etter, 'The Assessment of Mergers in the EC under the Concept of Collective Dominance' (2000) 23(3) *Journal of World Competition* 107.

⁵¹ T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1060.

⁵² See point II of this paper.

⁵³ C-68/94 and C-30/95 *Kali & Salz*, para. 224.

⁵⁴ C-68/94 and C-30/95 *Kali & Salz*, para. 226.

⁵⁵ The Commission found that the market shares were 37% and 23% (together 60%), which of itself was not sufficient for a duopoly to automatically enjoy a collective dominant position on the market.

⁵⁶ The concept of 'structural links' itself was highly contested in this case. It was not clear whether the existence of such links was necessary at all for a collective dominance to exist; in fact, the Court analyzed the existence of 'structural links' only because it was required to do so by the parties (inter partes principle). In its earlier *obiter dictum* statement in para. 221 the Court said: 'In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, 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'.

⁵⁷ C-68/94 and C-30/95 *Kali & Salz*, para. 236.

⁵⁸ C-68/94 and C-30/95 *Kali & Salz*, para. 238. Normally, declining demand is a factor which would encourage companies to cooperate with each other.

account the degree of competitive pressure which rivals could exert on the alleged collectively dominant entity⁵⁹.

The aforementioned analysis demonstrates and confirms that, as it was best formulated by Vesterdorf, the Commission's discretion is not completely unfettered. In reality 'Where the evidence, which the CFI [GC] must scrutinise closely, does not reasonably support the conclusions drawn from it, the CFI [GC] must find that the Commission has committed a manifest error of appreciation'⁶⁰.

It is apparent from the preceding analysis that the Court will not turn a deaf ear to economic arguments: in fact all it seemed to be doing in *Kali & Salz* was to take more into account the underlying economic theory⁶¹.

2. *Airtours*

Another example of the way the standard of judicial review is applied in practice is the judgment of the GC in *Airtours*⁶². This case started with the European Commission decision⁶³ prohibiting a merger between two British tour operators. The Commission alleged that the concentration would result in a collective dominance of three companies. It based its findings, *inter alia*, on factors such as: very high aggregated market share, high level of transparency of the market, slow demand growth, product homogeneity, high barriers of entry, and a similar cost structure of the main tour operators. Furthermore, the Commission discovered that there were structural links between the undertakings and alleged that they favoured the existence of a collective dominance⁶⁴. The Commission also made an attempt to address the issue of non-coordinated effects of mergers on oligopolistic markets, by asserting that the merger would make it rational for oligopolists to adapt themselves to market conditions by acting *individually* in ways which could substantially reduce competition⁶⁵.

The Commission's decision was appealed on several grounds. Two particular grounds of review invoked by the applicants are of interest for the purpose of

⁵⁹ C-68/94 and C-30/95 *Kali & Salz*, para. 248.

⁶⁰ B. Vesterdorf, 'Standard of Proof...', p. 18.

⁶¹ Which does not mean the Court was completely correct: in fact it was vehemently criticised for its approach towards the conditions of the collective dominance, in particular the requirement of 'correlative factors' as a precondition for a finding of a collective entity does not seem to be fully in line with the economic theory of tacit collusion.

⁶² T-342/99 *Airtours*.

⁶³ Decision IV/M.1524 *Airtours/First Choice*, OJ [2000] L 93/1.

⁶⁴ Decision IV/M.1524 *Airtours/First Choice*, paras. 87–127.

⁶⁵ Decision IV/M.1524 *Airtours/First Choice*, para. 54.

this analysis. This was firstly an alleged error of law through infringement of Article 2 of the Regulation, Article 296 TFEU (duty to state reasons)⁶⁶, and the principle of legal certainty. The alleged error of law consisted in application of a new and incorrect definition of collective dominance in the assessment of the case. The second interesting plea was that the finding that the transaction created a collective dominant position infringed Article 2 of the Regulation⁶⁷. Not surprisingly, the Court refused to deal with the first of the aforementioned pleas on the ground that it was not concerned with the way in which the law was applied to the facts at stake⁶⁸. In fact the allegedly wrongful definition of the collective dominance was contained in the introductory part of the Commission's decision, 'merely sketch[ing] the broad outlines of its findings on the effects of the merger'⁶⁹. The Court was ready to intervene, however, in relation to the second of the aforementioned pleas, which was predominantly concerned with an alleged error of assessment, which consisted of not proving to the requisite legal standard that the outcome of the transaction at stake would be the creation of collective dominant position⁷⁰. This alleged error allowed the Court to undertake a detailed review of the accuracy and relevance of the Commission's fact-finding and evaluation processes. In its scrutiny, the Court took into account both legal and economic principles applicable to collective dominance in oligopolistic markets⁷¹.

Interestingly enough, before embarking on its analysis of the merits of the plea alleging error of assessment, the Court, in an extensive obiter dictum, first identified the applicable legal principles⁷² and only subsequently analyzed the application of that law to the facts in issue. The GC has established three conditions, the existence of which is necessary for a successful finding of a collective dominant position. These are essentially: sufficient transparency of the market, which allows firms to monitor each other's behaviour; existence of a deterrent mechanism; and independence of the oligopolists from other (smaller and potential) competitors, clients and consumers' reactions⁷³. Through the application of what could be called a specific judicial technique⁷⁴, the Court in practice significantly clarified and perhaps even revisited its

⁶⁶ Previously Article 253 of the EC Treaty.

⁶⁷ Together with infringement of Article 296 TFEU.

⁶⁸ T-342/99 *Airtours*, para. 53.

⁶⁹ T-342/99 *Airtours*, para. 51.

⁷⁰ T-342/99 *Airtours*, para. 55.

⁷¹ M. Nicholson, S. Cardell, B. McKenna, 'The Scope of Review of Merger Decisions...', p. 142.

⁷² Which are predominantly based on the economic theory of tacit collusion.

⁷³ T-342/99 *Airtours*, para. 62.

⁷⁴ M. Nicholson, S. Cardell, B. McKenna, 'The Scope of Review of Merger Decisions...', p. 140.

previous case-law⁷⁵. Furthermore, the judicial steps taken by the General Court in its obiter dictum contained in the *Airtours* judgment were meant to introduce more economic principles to the legal framework for assessment of collective dominance in the context of merger control⁷⁶. The latter approach clearly demonstrates that, as far as the interpretation of law is concerned, the Court exercises full jurisdictional control⁷⁷. What is the more, it also shows that while exercising judicial control of the Commission's assessment, the GC will not hesitate to lay down new legal principles and assess the Commission's actions in their light.

When reviewing the merits of the plea alleging error of assessment, the GC looked in the first instance at the Commission's analysis of the competition prior to the notification⁷⁸. It observed that, in the absence of proof to the contrary, it was assumed that there was a healthy competition on the market prior to the planned merger, and the sole circumstance of cautious capacity planning was not sufficient to conclude that 'there was already a tendency to collective dominance in the industry'⁷⁹. The Court also concluded that the EC overestimated the level of horizontal and vertical integration⁸⁰. The aforementioned errors, and the fact that the market shares of the main tour operators were volatile in the past⁸¹, allowed the Court to conclude that the Commission wrongfully assessed the competition on the market prior to the merger⁸².

⁷⁵ In particular in para. 276 of the judgment in case T-102/96 *Gencor* the Court has for the first time in the history said that: 'there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly [...]. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others (...)'.

⁷⁶ This evolution in the case-law was widely acknowledged in the academic world: A. Nikpay, F. Houwen, 'Tour de Force or a Little Local Turbulence? A Heretical View on the *Airtours* Judgment' (2003) 24(5) *European Competition Law Review* 197; H. Haupt, 'Collective Dominance Under Article 82 E.C. and E.C. Merger Control in the light of the *Airtours* Judgment' (2002) 23(9) *European Competition Law Review* 443-444; R. O'Donoghue, C. Feddersen, 'Case T-342/99, *Airtours* plc v. Commission, Judgment of the Court of First Instance of 6 June 2002, nyr.' (2002) 39(5) *Common Market Law Review* 1176; J. Langer, 'The *Airtours* Judgment: A Welcome Lecture on Oligopolies, Economics and Joint Dominance' (2003) 10 *Columbia Journal of European Law* 110; I. Kokkoris, *Merger Control in Europe. The Gap in the ECMR and National Merger Legislation*, Routledge 2011, pp. 24-25.

⁷⁷ B. Vesterdorf, 'Standard of Proof...', p. 15.

⁷⁸ According to the economic theory, the risk of tacit coordination is higher if there is proof of a cooperation in the past and if the market players are integrated (interdependent).

⁷⁹ T-342/99 *Airtours*, para. 92.

⁸⁰ T-342/99 *Airtours*, para. 108.

⁸¹ Volatility of market shares can indeed constitute a proof that the companies were competing intensively one with another.

⁸² T-342/99 *Airtours*, para. 120.

Secondly, the Court reviewed the Commission's analysis of demand (in particular its growth and volatility) and the transparency of the market. In this context, the GC accused the Commission of not having taken into account all the data which was at its disposal. In relation to a special study to which the Commission referred, the Court observed that 'it is apparent from a cursory examination of that document that the Commission's reading of it was inaccurate. [...] [T]he Commission construed that document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding that the rate of market growth was moderate in the 1990s and would continue to be so'⁸³.

Consequently, the GC concluded that with respect to characteristics of demand the Commission 'was not entitled to conclude that market development was characterised by low growth'⁸⁴. It is not difficult to observe in this statement that the Court has actually carried out its own assessment of the data available to the Commission. This points out once again how difficult is the precise delimitation between the review of the alleged errors of assessment and review of errors of fact⁸⁵. In relation to the assessment of the transparency of the market, the GC again disagreed with the Commission, this time on the ground that the data collected was insufficient to prove conclusively that there was indeed a high level of market transparency⁸⁶. Due to the variety of services offered and a very complex process of planning, the competitors were not able to monitor the developments of each other's capacity. What is interesting in this context is that the Court not only again carried out its own investigation, but this time did so by distributing a special detailed questionnaire to the applicant, and it was on the basis of its response that it was able to conclude that the Commission's assessment of market transparency was wrongful. Again, the re-examination of facts undertaken by the Court in order to check the viability of the economic assessment, makes the Court's review of the assessment a borderline one between assessment of error of fact and error of assessment⁸⁷.

Thirdly, the GC looked at the deterrent mechanism identified by the Commission. It observed, *inter alia*, that the Commission was not required to prove that there was a specific retaliation mechanism, but rather it would be sufficient if it could demonstrate the mere existence of deterrents which prevented oligopolists from departing from a common course of conduct. In this context, the GC concluded that in view of the characteristics of the

⁸³ T-342/99 *Airtours*, para. 130.

⁸⁴ T-342/99 *Airtours*, para. 133.

⁸⁵ B. Vesterdorf, 'Standard of Proof...', pp. 16–17.

⁸⁶ T-342/99 *Airtours*, para. 180.

⁸⁷ In fact, the analysis which the Court undertook was carried on in relation to a plea on alleged error of assessment.

relevant market and the way it operated, the deterrents which the Commission identified were not capable of being used in practice⁸⁸.

Finally, the Court reviewed the Commission's assessment of the likely reaction of smaller and potential competitors, as well as consumers. As with the previously discussed alleged errors, it first of all laid down its legal principles and only after looked at what the Commission actually did. As far as the reaction of smaller competitors is concerned, the GC observed that it was not necessary to establish whether small competitors could become sufficiently big to compete effectively with the members of the alleged oligopoly. The Commission should have rather established whether hundreds of small operators, taken as a whole, could respond effectively to the behaviour of oligopolists⁸⁹. The Court also concluded that the potential entry onto the market of new entities was completely underestimated by the Commission⁹⁰. And finally, as far as the reaction of consumers was concerned the GC opined that the Commission did not sufficiently take it into account. In the Court's view, the Commission was not expected to assess in this context the existence of significant buyer power, but rather it should have looked at whether they would be able to react to a price rise instigated by the members of the alleged oligopoly⁹¹.

In conclusion, the Court observed that 'The Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators'⁹².

The Court's language in the above excerpt demonstrates a certain 'cruelty' in its quashing of the Commission's decision. Indeed, the brutality of the GC's language attracted attention among academics⁹³ and was, in itself, a novelty. It was also argued that the amount of criticism directed by the GC against an

⁸⁸ T-342/99 *Airtours*, para. 207. The very fact that the deterrent mechanism identified by the Commission was based on capacity was questioned in the academic world; R. O'Donoghue, C. Feddersen, 'Case T-342/99...' 1178.

⁸⁹ T-342/99 *Airtours*, para. 213.

⁹⁰ T-342/99 *Airtours*, para. 260.

⁹¹ T-342/99 *Airtours*, para. 275.

⁹² T-342/99 *Airtours*, para. 294.

⁹³ T. Skoczny, 'Wyrok Sądu Pierwszej Instancji z dnia 6 czerwca 2002 r. w sprawie T-42/99 *Airtours* plc. przeciwko Komisji Wspólnot Europejskich', [in:] A. Jurkowska, T. Skoczny (eds.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964-2004*, Warszawa 2007, p. 439. In a similar vein: H. Haupt, 'Collective Dominance...', p. 441; S. Stroux, 'Collective dominance under the Merger Regulation: a serious evidentiary reprimand for the Commission'(2002) 27(6) *European Law Review* 736; A. Nikpay and F. Houwen, 'Tour de Force...' 196-197.

assessment of an economic nature carried on by the Commission constituted one of the sources of the subsequent internal reform of the European Commission (including introduction of the post of Chief Economist)⁹⁴.

In the end, it is also worth stressing that in its judicial review of the *Airtours* decision, the GC remained silent on one particular point: the unilateral effects of merger, the existence of which was suggested by the Commission⁹⁵. In fact, the Court seemed to focus more on the conditions for establishing collective dominance and completely ignored the criticism addressed at what seemed to be the Commission's attempt to enlarge the scope of application of Regulation 4064/89 to non-coordinated effects of mergers on oligopolistic markets⁹⁶. The Courts silence on this issue was capable of varying interpretations, as it neither excluded the application of merger regulation to non-collusive oligopoly nor confirmed it. It may be surmised that the Court might have intended to leave that issue to the EU legislator⁹⁷. Again, it demonstrates that the way the judicial review is carried on, impacts the development of law. The Court's give and take approach is clearly guided by the complexity of oligopolistic markets. However, it has to have limits. By its omissions, the GC might be willing to put a brake to too expansionist interpretation of the 'old' merger regulation. The latter approach may be further motivated by the Court's unwillingness to diminish legally certainty that would have otherwise resulted from an expansion in the scope of application of the merger regulation.

3. *Sony/BMG – Impala*

The most recent example the EU judiciary's attitude towards the standard of judicial review in the context of mergers in oligopolistic markets can be found in *Sony/BMG* judgment⁹⁸ of the GC and the *Impala* decision of the ECJ⁹⁹. In

⁹⁴ T. Skoczny, 'Wyrok Sądu Pierwszej Instancji...', p. 444; H. Haupt, 'Collective Dominance...', p. 444.

⁹⁵ Decision IV/M.1524 *Airtours/First Choice*, para. 51.

⁹⁶ The so-called 'non-collusive oligopoly gap', the existence of which was observed in a number of comments. Its recognition ultimately led to the amendment of Regulation 4064/89, introduction of the SIEC test and recital 25 of Regulation 139/2004, which specifically addresses the issue of non-coordinated effects of mergers.

⁹⁷ This approach turned out very quickly to be assessed as the correct one. The *Airtours* judgment was rendered on the 6 of February 2002 and the Regulation 139/2004 was adopted some 18 months later, i.e. 20 January 2004, which, as for EU practice, is certainly not a long period.

⁹⁸ T-464/04 *Independent Music Publishers and Labels Association (Impala, association internationale) against The European Commission*, ECR [2006] II-02289.

⁹⁹ C-413/06 P *Bertelsmann AG i Sony Corporation of America against Independent Music Publishers and Labels Association (Impala)*, ECR [2008] I-04951.

particular the latter will be of great interest for the purposes of this analysis, since the ECJ has not only pronounced itself on the standard of judicial review in general, but also laid down the principles of its own review of GC judicial decisions.

3.1 The judgment of the General Court

The case was initiated by the Commission's decision authorising the creation of a joint venture between Sony and Bertelsmann (Sony BMG)¹⁰⁰. It was opposed by Impala, an association of independent music production companies, who appealed to the GC. The Court reviewed, in particular, what it considered to be the necessary elements for the existence of a collective dominant position. In this respect, it looked, inter alia, at market transparency and concluded that the Commission's assessment was vitiated by manifest error. In particular, its analysis of campaign discounts (the existence and opacity of which could have meant indeed that the market was not transparent) turned out to be 'imprecise, unsupported, and indeed contradicted by other observations in the Decision'¹⁰¹. Consequently, the evidence submitted by the Commission was not 'sufficiently reliable, relevant or cogent to establish the opacity of campaign discounts'¹⁰² and therefore the Court concluded that 'the Commission did not examine or, at the very least, did not establish to the requisite legal standard the relevance of campaign discounts . . .'¹⁰³.

As far as the retaliatory mechanism was concerned, the GC again concluded that the Commission erred in its assessment. In this connection, it observed that it would be sufficient for the Commission to prove – following *Airtours* – the mere existence of effective deterrent mechanisms¹⁰⁴. It was therefore not necessary to demonstrate that the retaliatory mechanism existed, but was not used. According to the GC, if such a proof was to be accepted, it would also be required to demonstrate that there was a deviation from the common course of conduct, which was not followed by retaliatory measures¹⁰⁵.

Last but not least, the General Court examined the assessment of the risk of creation of a collective dominant position¹⁰⁶ as a result of the concentration. In

¹⁰⁰ Commission Decision 2005/188/EC of 19 July 2004 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No. Comp/M.3333 — *Sony/BMG*), OJ [2004] L 62/30.

¹⁰¹ T-464/04 *Impala*, para. 320.

¹⁰² T-464/04 *Impala*, para. 320.

¹⁰³ T-464/04 *Impala*, para. 449.

¹⁰⁴ T-464/04 *Impala*, para. 466.

¹⁰⁵ T-464/04 *Impala*, para. 469.

¹⁰⁶ As opposed to the assessment of the risks of strengthening the existing collective dominant position, which was the main preoccupation of the Commission.

this connection, the Court observed that the analysis was ‘superficial, indeed purely formal’ and could not ‘satisfy the Commission’s obligation to carry out a prospective analysis and to examine carefully circumstances which [...] may prove relevant for the purposes of assessing the effects of the concentration on competition’¹⁰⁷.

The Court nevertheless carried out its own analysis of transparency and retaliatory measures. It concluded that the Commission’s observations relating to the transparency of the market did not support the analysis, according to which the concentration was not likely to create a collective dominant position¹⁰⁸. As far as the latter factor (retaliatory measures) was concerned, the GC opined that the Commission made an error in using evidence relating to a lack of retaliatory measures in the past¹⁰⁹.

The careful and diligent scrutiny of the assessment contained in Commission’s decision described above demonstrates that the General Court took very seriously the standard of judicial review set by the ECJ in the *Tetra Laval* judgment¹¹⁰. The ECJ did indeed recommend to EU courts not to refrain from reviewing the Commission’s interpretations of an economic nature. According to the ECJ ‘Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex analysis and whether it is capable of substantiating the conclusions drawn from it’¹¹¹.

The preceding excerpt and the GC’s attitude in both *Airtours* and *Sony/BMG* demonstrates that the Court will maintain a very high standard of judicial review, and that in spite of its limited nature in relation to economic assessments, it will not hesitate to scrutinize the viability and logical implications of the economic theories chosen by the Commission.

3.2 The judgment of the ECJ

In its review of the GC’s decision, the ECJ made a number of interesting observations. Most importantly, drawing inspiration from the judgment in *Tetra Laval*, the ECJ repeated that while the GC must not substitute its own economic assessment for that of the Commission, this does not mean that it must refrain from reviewing the Commission’s interpretation of information

¹⁰⁷ T-464/04 *Impala*, para. 528.

¹⁰⁸ T-464/04 *Impala*, para. 533.

¹⁰⁹ T-464/04 *Impala*, para. 539.

¹¹⁰ C-12/03 P *Tetra Laval*.

¹¹¹ C-12/03 P *Tetra Laval*, para. 39.

of an economic nature¹¹². Furthermore, it reiterated its earlier requirements imposed on the GC regarding assessment of the accuracy, reliability and consistency of the evidence, as well as its capability of substantiating the conclusions drawn from it¹¹³. In the light of foregoing, the ECJ concluded that in carrying on an 'in-depth examination of the evidence underlying the contested decision when considering the arguments raised before it', the GC 'acted in conformity with the requirements of the case-law'¹¹⁴. The ECJ therefore confirmed not only that the GC was allowed, but perhaps even obliged, to perform its own analysis of the facts and the evidence in order to verify whether the Commission had not exceeded the limits of the margin of discretion conferred on it¹¹⁵.

Finally, it is worth stressing that the Court of Justice also confirmed its wide prerogatives in relation to its judicial control of the GC's activity. While recognizing that appeals to the ECJ can rely on points of law only and that the ECJ thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the GC accepted in support of those facts¹¹⁶, it also stressed that the 'question of whether the [GC] applied the correct legal standard when examining the evidence is a question of law, which is amenable, as such, to judicial review on appeal'¹¹⁷. According to this statement, the Court of Justice is therefore entitled to review the legal characterisation of facts made by the GC as well as the legal conclusions it drew there from¹¹⁸.

It is clear from the foregoing discussion that, as was previously observed, the distinction between questions of facts and questions of law is not an easy one to make, in particular when a complex economic analysis is at stake¹¹⁹. Notwithstanding this difficulty, the ECJ's stance in *Impala* suggests that there is still a wide scope for its strict control of the GC assessment. The latter organ's failure to correctly apply rules of evidence applicable during the administrative as well as judicial proceedings will therefore be reviewable by the ECJ¹²⁰. Last

¹¹² T. Skoczny, 'Glosa do wyroku w sprawie C-413/06 P Bertelsmann AG i Sony Corporation of America (sprawa Impala II)', [in:] A. Jurkowska-Gomułka (ed.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004-2009*, Warszawa 2010, p. 151.

¹¹³ C-413/06 P *Impala*, para. 145.

¹¹⁴ C-413/06 P *Impala*, para. 146.

¹¹⁵ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...', p. 22.

¹¹⁶ C-413/06 P *Impala*, para. 29.

¹¹⁷ C-413/06 P *Impala*, para. 117.

¹¹⁸ This is what should be understood by the term 'correct legal standard'; C-413/06 P *Impala*, para. 29.

¹¹⁹ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...', p. 22.

¹²⁰ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...', p. 22.

but not least, as Ruiz Calzado and Barbier De La Serre put it: the ECJ's attitude suggests that it reserves to itself the right to remain 'the final arbiter of EC law in spite of the spectacular rise of the [GC] on the competition law scene'¹²¹. Indeed, this argument seems to be a very strong one in light of what the ECJ actually did in its *Impala* ruling, which includes, *inter alia*, assessing the *Airtours* conditions in the light of its own understanding of economic theory of oligopoly¹²², and essentially upholding them; as well as rejecting implicitly¹²³ the 'indirect test' for collective dominance existing before the merger, formulated by the GC¹²⁴. Again, these developments could be considered as a confirmation of EU judiciary's (in this case the ECJ) active role in shaping the approach towards oligopolistic markets in the context of merger control. On one hand, the confirmation of *Airtours* criteria as a basic framework for the assessment of collective dominance certainly contributed towards increasing of legal certainty. On the other hand, the ECJ's firm refusal to uphold the 'indirect test' for market transparency proposed by the GC could be seen as its unwillingness to relax certain well established legal criteria and in broader perspective, it could also mean its reluctance to decrease legal certainty¹²⁵.

¹²¹ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...' p. 23.

¹²² C-413/06 P *Impala*, paras. 119-124.

¹²³ In para. 251 of the *Sony/BMG* judgment, the GC said that the *Airtours* conditions 'may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position'. The Court observed in para. 128 of the *Impala* Judgment that this new, indirect test 'constitutes a general statement which reflects the Court of First Instance's liberty of assessment of different items of evidence'.

¹²⁴ The view that the 'indirect test' was rejected could be supported by the fact that the Court of Justice referred to it very briefly in *obiter dictum*, and in the operative part of the judgment it applied 'classical' *Airtours* test for the existence of collective dominance. The view that the 'indirect test' was implicitly rejected was shared by, *inter alia*: T. Kaseberg, 'Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)*, Judgment of the Court of Justice (Grand Chamber) of 10 July 2008, nyr.' (2009) 46(1) *Common Market Law Review* 260; J. Golding, 'The *Impala* case: a quiet conclusion but a lasting legacy' (2010) 47(7) *European Competition Law Review* 261-267; T. Skoczny, 'Głosa do wyroku w sprawie C – 413/06 P...', p. 154; B. Van Rompuy, 'The Standard of Proof in EC Merger Control. Conclusions from the Sony BMG Saga', IES Working Paper 4/2008, p. 17.

¹²⁵ In fact it was argued that the acceptance of the 'indirect test' could mean that the burden of proof for the existence of the collective dominant position prior to the merger, was reversed. See more: M. Będkowski-Koziół, 'Głosa do wyroku Sądu Pierwszej Instancji z 13.7.2006 r. w sprawie T-464/04 *IMPALA v. Komisja*, O.J. 2006 Nr C 224 z 16.9.2006 r., p. 35' (2006) 4 *Kwartalnik Prawa Publicznego* 238. In a similar vein: I. Kokkoris, 'Assessment of Mergers Inducing Coordinated Effects in the Presence of Explicit Collusion' (2008) 31(4) *World Competition* 499-522.

IV. Polish perspective

In the context of competition law proceedings, the specificity of the Polish judicial system makes it on one hand very easy for the courts to develop some new criteria for the assessment of mergers in oligopolistic markets and relatively difficult to use those criteria in subsequent case law of both the competition authority (the President of the Office of Competition and Consumers Protection; hereafter, UOKiK) and the competition courts on the other.

Indeed, the position of the Polish Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumenta*; hereafter, SOKiK) occupies in Polish judicial system makes it relatively easy for that judicial body to develop its own criteria for the assessment of mergers on oligopolistic markets¹²⁶. This might be so notably due to the fact that the procedure in front of that Court, which is initiated by an appeal from the administrative decision of the UOKiK President is adversarial in its nature¹²⁷. The parties to the proceeding are allowed to use any new evidence or legal theories they judge instrumental for defending their case in front of the Court. This means that the Court is not bound by findings of the competition authority in the administrative procedure. Of course, the latter organ – as one of the parties to the proceedings – can submit evidence and legal interpretation used in the course of the administrative procedure in front of it, but the Court is expected to decide the case freely on the basis of both parties' submissions, and its own assessment thereof. The only limitation is the scope of the appeal – the Court should not be in principle allowed to go beyond it. In practical terms this does not exclude the Court from changing the legal qualification of the alleged infringement¹²⁸ as long as this change is based on the facts and circumstances proved by the parties to the proceedings¹²⁹. Another consequence of the adversarial nature of the proceedings in front of SOKiK is that the Court will never be allowed to extend the scope of the alleged anti-competitive behaviour. However, nothing will prevent the Courts adjudicating on appeal from the UOKiK President decision from limiting the scope of

¹²⁶ Within the limits laid down in Article 21(3) of the Regulation 139/2004.

¹²⁷ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1810.

¹²⁸ Judgment of the Supreme Court of 18 February 2010, III SK 28/09. For more see: A. Jurkowska-Gomułka, 'Polish Antitrust Legislation and Case Law Review 2010' (2011) 4(5) *YARS* 174–175. A. Jurkowska-Gomułka, 'Polish Antitrust Legislation...', p. 1812.

¹²⁹ *Inter alia* judgments of the Supreme Court: of 20 July 2007, I CSK 144/07; of 19 January 2000, II CKN 686/98; of 9 November 2004, IV CK 194/04; of 6 December 2006, IV CSK 269/06, of 12 January 2007, IV CSK 286/06.

this alleged anticompetitive behaviour of undertaking¹³⁰. Furthermore, the Court ‘cannot limit itself to pointing out the incorrectness of the decision, but it is entitled, if this is justified by facts and law, to eliminate mistakes in that decision’¹³¹. The scope of the Court’s review should not be limited to the potential errors which the UOKiK President’s decision may contain. In fact, the Court is entitled to decide the case on its merits¹³². The scope of review is therefore not limited to the control of legality of the administrative proceedings in front of the UOKiK President, because – as it was previously observed – it is for the Court to apply the relevant norm of national law, on the basis of the factual background which includes its own assessment of all the factual elements required by that norm¹³³.

As a result of the proceedings, the Court of Competition and Consumer Protection can uphold the decision, modify it or annul it. In case the decision of the competition authority is modified (in part or in its entirety), the Court will in fact substitute the UOKiK President’s decision (or parts of it) with its own judgment¹³⁴.

This brings us to the second problem, i.e. the fact that the UOKiK President is not bound by the court’s judgment. In fact, in case the decision is being annulled (in part or in its entirety)¹³⁵, the case is not formally sent back to the President of UOKiK¹³⁶. It is true that after the annulment, administrative procedure can be initiated again by the competition authority¹³⁷. It is however entirely within its discretion to do so¹³⁸. This means in turn, that the UOKiK President is not bound in any way by the assessment of facts and interpretation of law made by the Court. In fact, the latter and the former are limited only to the particular case adjudicated by that court and cannot produce any legal effects for anybody but to that court¹³⁹. It implies that it will be entirely within the UOKiK President’s discretion to use that interpretation¹⁴⁰. In a similar

¹³⁰ Judgment of the Supreme Court of 18 February 2010, III SK 28/09.

¹³¹ Judgment of the Supreme Court of 18 February 2010, III SK 28/09, see in particular the judgment of the Court of Appeal in Warsaw of 21 September 2006, VI ACa 142/06, LEX no. 272753. For more see: A. Jurkowska-Gomułka, ‘Polish Antitrust Legislation and Case Law Review 2010’ (2011) 4(5) *YARS* 174–175.

¹³² T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1812.

¹³³ Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*.

¹³⁴ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1829.

¹³⁵ M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 1*, Warszawa 2011, p. 1089.

¹³⁶ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1828–1829.

¹³⁷ M. Manowska (ed.), *Kodeks postępowania cywilnego...*, p. 1090.

¹³⁸ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1829.

¹³⁹ Or any other court adjudicating particular case (i.e. the Court of Appeal).

¹⁴⁰ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1829.

vein, it is left to the competition authority's and court's discretion to apply earlier interpretation of law in their future decisions and judgments. In other words no matter how good the interpretation of the existing law in a given case would be, there is neither a guarantee that it will be applied by the UOKiK President in the case at stake (in case of annulment of the decision and its subsequent re-examination), nor that it will be used in future cases. The situation might be only slightly different with respect to the case law of the Polish Supreme Court, which enjoys special authority and esteem in the Polish judicial system.

Having set the theoretical framework, let us have a look at the way the standard of judicial review of merger decisions concerning oligopolistic markets is exercised in practice. In this connection, the *Cogifer/Koltram* merger decision of the UOKiK President¹⁴¹ as well as the subsequent judgment of SOKiK in which the Court upheld this decision in its entirety¹⁴² could be very instrumental. It is probably one of the first (if not the first) cases in which UOKiK President's decision concerning a merger on oligopolistic market, was reviewed by the Court¹⁴³.

In its decision, the competition authority blocked a merger between Cogifer and Koltram – two out of three companies active on the Polish market for the production of railroad switches (and the aftermarket consisting of spare parts). In its decision, the competition authority established *inter alia* that the merging parties would have held together a substantial share in the market, significantly exceeding 40%¹⁴⁴. The UOKiK President has furthermore established on the basis of the HHI and in particular its delta increase, that in case the concentration is approved, the market will be a highly concentrated one. The fourth market player – VAE's market share was marginal and – according to the UOKiK President – there were no genuine chances that it will increase in near future – mainly due to high legal barriers¹⁴⁵. In this context, the UOKiK President alleged the existence of two possible scenarios of the situation on the market following the merger. On one hand it claimed that there was a risk of non – coordinated effects, in particular due to elimination of the third operator (KZN Biezanów), being the only real competitor to

¹⁴¹ Decision of the UOKiK President of 8 October 2009, DKK-67/09.

¹⁴² Judgment of Warsaw District Court – the Court of Competition and Consumer Protection of 5 April 2011, XVII AmA 213/09.

¹⁴³ The importance of this case was stressed notably by E. Stawicki, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010.

¹⁴⁴ Decision DKK-67/09, para. 113.

¹⁴⁵ VAE was importing railtrack switches and other related products; it had no production facilities within the Polish territory. The UOKiK President contended that it will not expand its activities mainly due to high legal barriers for expansion.

the merged entity. On the other hand, in the second scenario, the UOKiK President envisaged risks of coordinated effects of the merger. In particular it observed that the only competitor of the merged entity would be deprived of all incentives to compete aggressively with the market leader and would not therefore be able to constitute any countervailing power to Cogifer/Koltram¹⁴⁶. To substantiate its claims concerning non – coordinated effects of concentration, the competition authority pointed out *inter alia* to the cooperation agreement which one of the merging parties (Koltram) concluded with the only competitor (KZN Biezanów). The terms of this agreement made the latter undertaking's market success highly dependent on the former. There was thus a risk that this cooperation agreement would be terminated following the merger, which would in turn practically eliminate KZN Biezanów from the market¹⁴⁷. Furthermore, the UOKiK President also indicated high barriers to entry (legal, technical and economic) in support of the non – coordinated effects theory. As far as the co – ordinated effects of the merger were concerned, the competition authority indicated the aforementioned co – operation agreement as a potential source of concern. It made KZN Biezanów highly dependent on the merged entity and thus, it significantly decreased its motivation to compete on the market¹⁴⁸. In this connection, while assessing the likelihood of cooperation post – merger, the UOKiK President made a reference to 'Airtours' conditions, analyzing: the transparency of the market, the existence of an effective retaliatory mechanism as well as lack of the countervailing power on the part of competitors¹⁴⁹ and buyers¹⁵⁰.

Against this background it should be observed that the judgment of the Court of Competition and Consumer Protection upholding the decision in its entirety seems relatively succinct in its analysis of the risks of anti-competitive results of the merger. In fact, the Court has simply reiterated the UOKiK President's findings. In particular, on the basis of the submissions of the UOKiK President, it confirmed that the merging parties would indeed gain an 'excessively' high market share following the merger and that the market would be highly concentrated. Furthermore the Court pointed to the high barriers of entry and expansion for potential competitors. It also observed that, as a result of the concentration, the third market operator and the only competitor of the merged entity – KZN Biezanów – would be either forced to engage into cooperation with Cogifer/Koltram or it would have been driven out of the market. Last but not least, with respect to other elements of the

¹⁴⁶ Decision DKK-67/09, para. 116.

¹⁴⁷ Decision DKK-67/09, para. 117.

¹⁴⁸ Decision DKK-67/09, para. 121.

¹⁴⁹ Decision DKK-67/09, para. 121

¹⁵⁰ Decision DKK-67/09, para. 123.

decision contested by the applicant, the Court observed vaguely that ‘the assessment made by the UOKiK President of the collected information should be considered as correct and giving grounds to the decision at stake’¹⁵¹.

This approach of the SOKiK is fully in line with the theoretical framework as well as with the previous case – law. In fact, the Court will annul a decision of the UOKiK President only when it finds that it was adopted without an appropriate legal basis, with a manifest violation of the provisions of substantive law, in case when the addressee was incorrectly determined or if the case was already subject to an earlier decision¹⁵². All in all, the latter approach indicates that – as a matter of fact – the review exercised by Polish courts is not a very intensive one as far as the legal theories applied are concerned. In so far as the UOKiK President is heavily inspired by the guidance offered by the European Commission as well as the case – law of European courts¹⁵³, it will enjoy a fair margin of discretion and the Court’s intervention will be limited only to the most serious errors.

With respect to the particular field of decisions on mergers concerning oligopolistic markets, again it seems that the Court does not try to encroach upon the UOKiK President’s competences. The latter seems to be free to apply legal theories it finds instrumental and the Court’s review will be limited only to most obvious cases of violation of substantive law. In particular, the Court does not try to question the theories of competitive harm applied by the competition authority. It remains to be seen whether this approach will remain a good law since the aforementioned judgment is subject of an appeal to the Court of Appeals in Warsaw.

V. Conclusions

There is little doubt that both levels of EU judicial review of the European Commission’s merger decisions have contributed in several important respects to the development of EU law on mergers in oligopolistic markets.

Firstly, the extremely proactive approach of the ECJ in its early case-law on mergers in oligopolistic markets made it possible to enlarge the scope of application of Regulation 4064/89 to include collective dominant

¹⁵¹ XVII AmA 213/09.

¹⁵² T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1828.

¹⁵³ The competition authority makes a firm statement about its willingness to align its interpretation of Polish law with the one offered by the Commission and EU judiciary: see in particular decision DKK-67/09, para. 108.

position ('coordinated effects')¹⁵⁴, which was already known in the context of application of Article 102 TFEU. In a similar vein, the EU courts took a stance on the applicability of the 'old' merger regulation to non-coordinated effects of mergers¹⁵⁵, as well as on the new tools proposed by the EC to control oligopolistic markets, such as the 'indirect test' for market transparency¹⁵⁶.

Secondly, the GC and ECJ have continuously contributed – through their high standard of judicial review of Commission's decisions – to developing the legal criteria for the assessment of mergers in oligopolistic markets. In this connection, the review exercised by the EU judiciary in *Kali & Salz*, *Airtours* or *Sony/BMG (Impala)*, although formally limited, as far as errors of assessment are concerned, by the Commission's discretion with respect to assessments of an economic nature, did not fail to respond to the need for a more economic approach in merger cases. In this connection, the GC has in principle developed a whole new set of criteria for the assessment of the existence of collective dominance on the oligopolistic market following a merger¹⁵⁷. This was possible thanks to a very specific judicial technique, whereby in reviewing the Commission's assessment the Court first laid down what it considered to be legal principles, and only subsequently analyzed the European Commission's application of that law to the facts at hand.

Thirdly, in its review of the Commission's assessment the EU courts have applied a very high standard, which allows them to scrutinize carefully the analysis of the Commission. The Court did not limit itself to looking solely at the pure mechanics of assessment (i.e. application of law to the facts by the Commission), but it was ready to verify whether the evidence relied was factually accurate, reliable and consistent and whether it 'contained all the information which must be taken into account in order to assess a complex analysis and whether it is capable of substantiating the conclusions drawn from it'. This approach allowed the Court to clarify its case-law in relation to the substantive elements which are indispensable for a finding of collective dominant position on oligopolistic markets; such as market transparency, deterrent mechanism, or the reaction of other competitors, clients, and consumers.

Finally, the ECJ's case-law suggests¹⁵⁸ that it considers itself to be the final arbiter and will step in whenever it considers the GC's scrutiny of a

¹⁵⁴ In this respect: see section III.1. of this paper, notably the ECJ judgment in C-68/94 and C-30/95 *Kali & Salz*.

¹⁵⁵ Notably the GC judgment in T-342/99 *Airtours*. In this respect, see section III.2. of this paper.

¹⁵⁶ C- 413/06 P *Impala*.

¹⁵⁷ The so-called '*Airtours*' criteria are described in more detail in section III.2. of this paper.

¹⁵⁸ In particular, C-413/06 P *Impala*; see section III.3.2 of this paper.

European Commission decision to be insufficient or incorrect. Although formally limited to points of law, the ECJ will nevertheless check if the GC applied a correct legal standard, which will allow it in practice to review the legal characterisation of facts by the GC and the legal conclusions it drew from them. No matter how limited this scope of review might look in principle, the aforementioned case-law demonstrates that in practice it has allowed the ECJ to clarify several obscure issues in EU competition law. Insofar as mergers in oligopolistic markets are concerned, the Court of Justice has also significantly contributed towards confirming a well-established legal framework, as well as developing the criteria instrumental for the assessment of mergers.

Last but not least, looking at the standard of judicial review of merger decisions concerning oligopolistic markets from the Polish perspective, it should be observed that the theoretical framework gives to the Court relatively wide scope for intervention. By the same token, it could be imagined that the Polish court by taking a pro – active and interventionist stance in the exercise of judicial review, could develop its own set of criteria for the assessment of mergers on oligopolistic markets. However, the procedural limitations in subsequent application of these development as well as a scarce practical experience, point so far to the contrary direction.

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