Judicial review of merger control

Room for improvement?

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Table of Contents

Úrdráttur

Dómstólar Evrópusambandsins gera nú ríkari kröfur hvað varðar sönnunarbirgði í samrunaákvörðunum Framkvæmdarstjórnarinnar en áður. Sönnunarbrigðin var jókst með aukinni nákvæmni í endurskoðun dómstóla á samrunaákvörðunum framkvæmdastjórnarinnar. Ákveðnar takmarkanir eru þó á endurskoðun dómstóla á samrunaákvörðun framkvæmdarstjórnarinnar. Upplýsingar og sönnunargögn sem dómstólinn þarf að endurskoða til að skera úr um lögmæti ákvörðunar framkvæmdastjórnarinnar eru oftar en ekki af efnahagslegum toga. Þá getur stefnandi mótað endurskoðun dómstólsins á hinni umdeildu ákvörðun með stefnu sinni. Þó ákveðin hraðleið hafi verið kynnt til sögunar til að hraða málsmeðferð við endurskoðun dómstóla á samrunaákvörðum, þá er sú leið þeim takmörkunum háð að kröfugerð stefnanda verður að vera eins stutt og mögulegt er sem og hraðleiðin stendur að öllu jöfnu samrunaaðilunum ekki til boða til að áfrýja ákvörðun sem banna samruna á þeim grundvelli að hann sé andstæður hinum sameiginlega innri markaði Evrópusambandsins. Af þessu leiðir að það má enn bæta endurskoðun dómstóla á samrunaákvörðunum framkvæmdarstjórnarinnar. Möguleikinn á því að setja á stofn sérdómstól fyrir samkeppnismál verður því skoðaður ásamt því að heimila dómstólum Evrópusambandsins að skera úr um lögmæti samrunaákvarðana með því að endurskoða staðreyndir málsins *ex officio*. Þessir möguleikar verða skoðaðir með hliðsjón af því hvernig ferlið er fyrir endurskoðun dómstóla á samrunaákvörðunum í Þýskalandi.

Abstract

The Courts of the European Union have raised the standard of proof in merger decisions through intensified scope of review. There are however some limits in the current procedure for judicial review. Given the very economic nature of merger control, it can be difficult for the Courts of the European Union to review information and evidence of economic nature to determine the legality of the contested decision. Further the appellant is able to shape the review of the contested decisions through its application. Although the fast track procedure was introduced to speed up the procedure for judicial review of merger control, there are limitations to the procedure such as the number of pleas must be limited and it is not an available remedy for the undertakings concerned by the concentration wishing to seek annulment of a decision declaring a concentration incompatible with the internal market. This demonstrates that there is still room for improvement in the procedure for judicial review of merger decisions. To this end, the possibilities of setting up a separate judicature for competition cases as well as granting the Courts of the European Union the right to review facts of a contested decision *ex officio* will be explored in the light of the procedure for judicial review of merger decision in Germany.

1. Introduction

The aim of merger control is to prevent concentrations that may significantly impede effective competition within the relevant market from being implemented. Accordingly, the Commission must appraise whether concentrations with community dimension can be declared compatible with the internal market or whether they should be prohibited. The Commission´s appraisal entails a thorough economic analysis of the possible anti-competitive effect that a concentration may have on the relevant market. Based on the outcome of that analysis the Commission will adopt decisions to either clear or prohibit the concentrations. Decisions adopted by the Commission must be substantiated by evidence supporting the conclusion of it. Given the fact that the decisions have binding effects, they are subject to judicial review. Despite the very economic nature of merger control the General Court and the Court of Justice (hereinafter collectively referred to as "Courts of the European Union") will not avail themselves from reviewing the Commissions interpretation of information of economic nature substantiating the contested decisions. There are however certain limitations to the current procedure for judicial review of merger control. The system as it stands today is not very effective due to the fact that the review exercised by the courts is limited to the parts of the decisions under dispute and although judicial review entails an examination on how the Commission has interpreted information of economic nature, the courts may lack the required economic knowledge to carry out such a review. Further, although the fast track procedure was introduced to enhance the efficiency in judicial review of merger control there are limitations to that procedure. The aim of this thesis is therefore to firstly to identify and examine the limitations of judicial review in the field of merger control and further explore possibilities of making the procedure more effective.

For the purpose of understanding what role merger control plays in enforcement of competition law within the internal market, the first chapter will provide the reader with a brief overview of the objectives of the competition policy of the European Union and outline the economic justification for the merger control. The reader will also be presented with a outline of the scheme of merger control in European Union where it will be explained what type of concentrations must be notified to the Commission for appraisal and how the Commission carries out such an analysis. Finally the substantive test as provided for in Article 2 of the Regulation on the control of concentration No 138/2004 (hereinafter referred to as

"Merger Regulation") will be explained in detail.[1] Based on its assessment under the substantive test the Commission either clears or prohibits mergers. The substantive test entails a certain economic analysis of the relevant market and further impact that a concentration may have both the structure and behaviour on the market. Given the market of appreciation that the Commission enjoys when carrying out this assessment, the outcome of it is often contested and thus decisions adopted by the Commission appealed.

The process of judicial review of merger decisions is the subject of the second chapter. The first part of the chapter deals with the procedural possibilities for the undertakings concerned by the concentration and further third parties that are directly and individually concerned by the decisions to bring an action for annulment before the General Court. The Courts of the European Union have raised the standard of proof through intensified scope of review of decisions adopted under the Merger Regulation. These concepts will therefore be examined in the light of the relevant case law. The main emphasis of the chapter will be on how intensely the Courts of the European Union have carried out judicial review of the legality of contested decisions and how the courts themselves set their own standard of review. The last part of the chapter explains the so-called fast track procedure before the General Court and the limitations of that system.

The last chapter will outline the limitations of the current procedure of judicial review of merger control as previously set out. The second half of the chapter looks into possible ways to rendering the procedure for judicial review more effective. The possibility of granting the General Court the right to carry out examination of the facts *ex officio* will be taken into consideration since the appellant has the ability to shape the case under appeal to best serve his interests. The possibilities of setting up a separate judicature for competition cases will also be explored as well as altering the function of the Advisory Committee.

[1] OJ L 24, 29/01/2004, p. 1-22. Council Regulation (EC) NO 139/2004 of 20 January 2004 on the control of concentration between undertakings.

2. The scheme of European Merger Control

Merger control plays an important role in the competition policy of the European Union and in the creation and function of the internal market. This chapter will first provide the reader with a brief overview of the competition policy as it is stands today and an outline of the economic justification of merger control. This will be followed with an explanation of procedure carried out by the Commission in accordance with the Merger Regulation when assessing a notified concentration. The main emphasis of this chapter will be on the substantive test, which is the parameter used by the Commission in its economic analysis of concentrations.

2.1 Competition policy of the European Union

Supremacy of capitalism over communism and vice versa was an ongoing debate throughout the twentieth century.[2] Some nations believed that liberalised markets would control themselves through the forces of the market whereas others saw the benefits of managing the economy through state intervention. However at the end of the 1990s, there was a great shift towards privatisation and liberalisation of markets in Europe as markets were then viewed as *"a process of competition"*.[3]

Competition is defined as rivalry for supremacy. Put into commercial perspective, competition refers to the fight between undertakings for market share. Competition creates pressure on undertakings to perform to their best abilities, both in terms of price and quality. Thus the aim of competition law is maximisation of consumer welfare through protection of competition.[4] The purpose of competition law is, however, not the creation of competition but rather construction of conditions that facilitate economic welfare, i.e. the outcome of competition.[5] Competition policy of the European Union has been defined to have:

> *"[...] as its central economic goal the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological changes, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resources deployment follows market success in meeting consumers demand at the lowers possible cost".*[6]

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[2] One might argue that this debate is still ongoing to some extent.
[3] Wish, Richard, *Competition Law 6th edn.* New York 2009, p. 3. See further to this effect: Vallindas, George, "New Directions in EC Competition Policy: The case of merger control". *European Law Journal* 2006 (5), p. 637-638.
[4] Wish, *Competition Law,* p. 1-2.
[5] D.G. Goyder, J.Goyder and A. Albors-Llorens, *Goyder´s EC Competition Law.* New York 2009, p. 10.
[6] Kekelekis, Mihalis, *EC Merger Control Regulation: Rights of Defence,* Alphen aan den Rijn 2006, p. 3.

Further, the Commission has defined the objects of the European Union competition policy to be the following:

> *"The first objective of competition policy is the maintenance of competitive markets. Competition policy serves as an instrument to encourage industrial efficiency, the optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment. In order for the Community to be competitive on worldwide markets, it needs a competitive home market. [...]*
>
> *The second is the single market objective. An internal market is an essential condition for the development of an efficient and competitive industry. As the Community has progressively broken down government-erected trade barriers between Member States, companies operating in what they had regarded as 'their' national markets were, and are for the first time, exposed to competitors able to compete on a level playing field. There are two possible reactions to this: either to seek to compete on merit, looking to expand into other territories and benefit from the opportunities offered by a single market, or to erect private barriers to trade — to retrench and act defensively — in the hope of preventing market penetration. The Commission has used its competition policy as an active tool to prevent this [...]. The aim is to prevent anticompetitive practices from undermining the single market's achievement".*[7]

As demonstrated by this definition the competition policy of the European Union is to a large extent affected by an alternative motive to economic welfare, which is the creation of the internal market.[8] Although the Commission does not make an express reference to consumer welfare in its definition, maintenance of competitive markets means creating the conditions for economic welfare where the playing field of competitors is levelled. Thus the underlying assumption of the European Union competition policy is that undertakings with market power can harm consumer welfare in various ways, such as by colluding or abusing market power within the relevant market.[9] As for the interplay between consumer policy and competition policy, the Commission has stated that both policies lie at the heart of the European Union and further that both policies seek to maximize consumer welfare, although they pursue the objective from different ends. Consumer policy governs the relationship between consumers and undertakings whereas competition policy aims to ensure that undertakings maintain effective competition amongst each other and act free from one another. Thus competition policy only governs the behaviour of undertakings in the relevant market in terms of commercial policy and not commercial practises towards consumers.[10]

Thus, protection of consumer welfare serves as guiding principle for the Commission in its enforcement of the competition policy. The underlying assumption is that consumers

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[7] European Commission, "XXIXth Report on Competition Policy 1999", 15. December 2010. Available at www.ec.europa.eu/competition, p. 9 cf. Jones, Allison and Sufrin, Suffrin, *EC Competition Law: Text, Cases and Materials 3rd edn.* New York2009, p. 43.

[8] It has been pointed out that the creation of an internal market is build on the theory of economic integration cf. Vallindas, George, "New Directions in EC Competition Policy: The case of merger control", p. 638.

[9] Whish, *Competition Law*, p. 1.

[10] European Commission, "Global forum on Competition, The interface between competition and consumer policy", 15. December 2010. Available at www.oecd.org, p.1.

will be harmed by anti-competitive behaviour and thus it is the Commission´s obligation to prevent and correct anti-competitive behaviour within the internal market through enforcement of Articles 101 and 102 cf. 105 of the Treaty on the functioning of the European Union (hereinafter referred to as "TFEU") and the Merger Regulation.[11]

2.1.1 The objectives and economic justification of merger control

Economic theory is the building block of the European competition policy today. This has not always been the case. In fact European competition law developed in a very formalistic way from the beginning.[12] This formalistic development continued until the mid 1990s, when the Commission started placing greater value on economic analysis. What is considered to mark the beginning of this change both in terms of legal and cultural ideology of the Commission, is the publication of the *Green Paper on Vertical Restraints in EC Competition Policy.*[13] This document was the first serious attempt by the Commission to incorporate economic analysis into the competition law of the European Union. Previous lack of *"economic sophistication"* of the Commission and the Courts of the European Union can be explained both from a legal and an institutional perspective. From a legal point of view it should noted that the majority of the member states are civil law countries. This means that their legislation to a large extent is codified and there is therefore not much need or respect for economic analysis of law. In the absence of codified legislation, in common law jurisdictions, it is up to the relevant court to decide each case based facts, taking into consideration the legal precedents available. The benefit of this system is that the courts in common law countries can more easily follow developments in economic theory unlike judges in civil law countries where the focus is more on literal interpretation of statues. The shift towards economic analysis can also be explained by the fact that originally the staff of the Director General responsible for competition largely consisted of lawyers who argued cases based on their legal knowledge. With an increased number of economists working for the Commission the arguments have became more economical in nature.[14]

Taking into consideration that economic theory is the foundation of the European competition policy as it stands today, one must understand the effect that competition has on

[11] Article 101 of the TFEU prohibits all agreements, decions by associations of undertakings and further concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the internal market and Article 102 of the TFEU prohibits abuse of a dominant position within the internal market.
[12] Wish, *Competition Law*, p. 2.
[13] COM (96) 721 final., from 22. January 1997
[14] Monti, Giorgio, *EC Competition Law* Cambridge 2007, p. 80-81.

economical performance of undertakings. The benefits of competition are lower prices, high quality products, more choices and greater efficiency. The assumption is that in perfect competition consumer welfare is maximised.[15] As for mergers it should be mentioned that most cause no harm to competition but rather increase efficiency. The question then arises whether there is a real need for merger control. Merger control not only prevents future competition law infringement but moreover its aim is to maintain a competitive structure of a relevant market. This follows from the fact that merger control is carried out *ex ante* rather than *ex post* where consumers have already been harmed by the anti-competitive behaviour. The purpose of merger control is therefore to ensure that a market structure following a concentration will not create the incentive and/or capability for the merged entity to exercise market power in a way that will be harmful to consumer welfare.[16]

The structure of a given market affects the behaviour of all competitors operating within that market and the behaviour of the competitors will subsequently affect the performance of the market.[17] Market performance is assessed on the basis of one of the three following criteria, consumer welfare, total welfare and efficiency. Although consumer welfare forms the basis of the competition policy of the European Union, the Commission has been criticised for using it as the sole parameter for measuring the effects of a proposed concentration as it fails to take account possible benefits arising from the efficiency of the merged entity and hence the welfare of other stakeholders such as shareholders and employees. In this respect, it has been argued that merger control should be carried out with the object of assessing what the effect would be on total welfare since individuals are in fact consumers and producers at the same time. Such an evaluation would give a more holistic view on the possible anti-competitive effect that the proposed concentration will may on a relevant market.[18]

2.2 The Merger Regulation

There are no provisions on the control of concentration in the TFEU and it has been so since the entry into force of the Treaty of Rome.[19] The Commission was thus originally left with a

[15] Wish, *Competition Law*, p. 4.
[16] Furse, Mark, *The Law of Merger Control in the EC and UK*. Portland 2007, p. 24. cf. Wish, *Competition Law*, p. 807..
[17] Lindsay, Alister and Berridge, Alison, *The EC Merger Regulation: Substantive Issues.* London 2009, p. 11.
[18] Study prepared for the European Commission by Lear, "Ex-post review of merger control decisions", 16. December 2010. Available at www.ec.europa.eu/competition, p. 23.
[19] Varona, Edurne; Galarzas, Andrés; Cresopo, Jaime and Alonso, Juan, *Merger Control in the European Union – Law, Economics and Practise.* New York 2005, p. 1. It should be noted that Treaty establishing the European Coal and Steel Community that later served as basis for the European Economic Community and thus the

certain legislative gape when enforcing the competition policy of the European Union as the competition provisions in the TFEU turned out to be insufficient grounds to tackle all competition issues arising from concentrations.[20] To close this legislative gap, the Council adopted Regulation (EEC) No 4064/89 on the control of concentrations between undertakings in 1989 (hereinafter referred to as "Regulation No 4064/89").[21] Regulation No 4064/89 was the first fully developed framework for merger control in the European Union and it had essentially two functions; (i) firstly to assess, remedy and prevent concentrations with anti-competitive affect within the internal market and (ii) secondly to provide and procedural and substantive framework for the control of concentrations.[22] A revised version of the regulation was adopted in 2004, i.e. Council Regulation No 139/2004 on the control of concentration. The revised Merger Regulation introduced not only changes to the allocation of jurisdiction of merger control between the Commission and the national competition authorities but also changes to the criteria for substantive assessment of a proposed concentration.[23]

As stated in recital 8 of the Merger Regulation, the provisions of the regulation should apply to *"significant structural changes"* which will impact markets beyond national borders. This is further elaborated on in recital 9 of the Merger Regulation where it is stated that the scope of application of the regulation should be defined by the geographical area of activity of the undertakings concerned but limited by quantitative thresholds to ensure that concentrations with community dimension are covered by the regulation. Thus the scope of application is defined in Article 1(1) of the Merger Regulation, as to apply to all concentrations with a community dimension. The concept of concentration is defined Article 3(1) of the Merger Regulation, as to arise when a change of control on a lasting basis results from: (a) a merger of two or more undertakings previously independent or parts thereof or (b) acquisition by one or more persons controlling minimum one undertaking, or one or more undertaking gain direct or indirect control of the whole or parts of one or more other

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European Union as it stands today contained a provisions on the control of concentration. Subject to the provisions all transactions leading to concentration either directly or indirectly should be submitted for prior authorization cf. Article 66(1) of the Treaty establishing the European Coal and Steel Community. See further: Steiner, Josephine, Woods, Lorna, Twigg-Flesner, Christian, *EU Law 9th edn,* p.3.and Faull, Jonathan, Nikpay, Ali, *The EC law of competition 2nd edn.* Oxford 2007, p. 423.

[20] See to this effect Case C-6/72 *Europemballage Corporation and Continental Can Compnay Inc. vs. Commission of the European Communities* [1973] ECR 215, where it became clear that Article 102 of the TFEU could only be applied to situations where one of the undertakings concerned by the concentration would hold a dominant position in the relevant market prior to the transaction. Likewise, in Joined Cases 142 and 156/84 *BAT and R. J. Reynolds v. Commission and Phillips Morris Communities* [1987] ECR 4487, the Court of Justice recognised that agreements leading to concentrations could in principle be caught by Article 101 of the TFEU.

[21] OJ L 395, 30/12/1989, p. 1-12. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[22] Faull and Nikpay, *The EC law of competition 2nd edn,* p. 423.

[23] *Ibid*, p. 426.

undertakings through purchase of shares or assets. Therefore, only a concentration where the change of control occurs on a lasting basis falls under the scope of Article 3(1) of the Merger Regulation cf. paragraph 7 of the Consolidated Jurisdiction Notice under Council Regulation (EC) No 139/2004 on the control of concentration between undertakings in 2008 (hereinafter referred to as "Jurisdictional Notice").[24]

The concept of *"community dimension"* is defined in Article 1(2) of the Merger Regulation as to exist when: (i) the combined aggregate worldwide turnover of all the undertakings concerned by the concentration is more that €5000 million and (ii) the aggregate community-wide turnover of each of at least two of the undertakings concerned by the concentration is more than €250 million. However, an undertaking earning more than 2/3 of its aggregate community-wide turnover within one member state of the European Union is exempted from the Merger Regulation. Although a concentration of undertakings does not meet the thresholds defined in Article 1(2) of the Merger Regulation it may however have community dimension cf. Article 1(3) where: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than €2500 million (ii) in each of at least three member states, the combined aggregate turnover of all the undertakings concerned is more than €100 million (iii) in each of at least three member states included for the purpose of point (ii), the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million and (iv) the aggregate community-wide turnover each of at least two of the undertakings concerned is more than €100 million, unless each of the undertaking concerned achieves more than 2/3 of its aggregate Community-wide turnover within one and the same member state.

A concentration thus has community dimension within the meaning of the Merger Regulation, if two or more previously independent undertakings merge or where change of control occurs on a lasting basis and the turnover of the undertakings concerned by the concentration exceeds the thresholds listed in Articles 1(2) or 1(3) of the regulation.

2.2.1 Procedure

Article 4(1) of the Merger Regulation states that all concentrations with community dimension must be notified prior to their implementation. Such a notification must be made following conclusions of an agreement to that effect, announcement of a public bid or

[24] OJ C 95, 16/04/2004, p. 1-48. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. The Commission adopted the notice to better enable undertakings to identify whether their operation is covered by the Merger Regulation.

acquisition of a controlling interest. If the undertakings concerned by the concentration can demonstrate that an agreement has been concluded in good faith or a public bid has been made and that the intention to make such a bid has been announced publicly, a notification may also be made to the Commission in accordance with second indent of Article 4(1) of the Merger Regulation. The undertakings concerned by the concentration or those acquiring joint control are jointly responsible for the notification to the Commission pursuant to Article 4(2) of the Merger Regulation. Once a concentration has been notified to the Commission which deems it to have community dimension, the facts of the notification will be published in accordance with Article 4(3) of the Merger Regulation.

The Commission must carry out an immediate examination of the concentration once having been notified of the concentration according to Article 6(1) of the Merger Regulation. This is often referred to as Phase I investigation, in which the Commission verifies the information provided in the notification, gathers further documents and information based on its powers set out in Articles 11 and 13 of the Merger Regulation.[25] Moreover, the Commission must conduct a thorough investigation of the markets which the proposed concentration might have anti-competitive effect on. Such an investigation is based on the information gathered from the undertakings concerned, consumers and competitors.[26] According to Article 11(1) of the Merger Regulation, the Commission may by a simple request or a decision which is then binding according to Article 288(4) of the TFEU, request all information which it deems necessary to carry out its assessment under Article 2 of the Merger Regulation. Further, the Commission may interview any natural or legal persons who consent to being interviewed for the purpose of collecting information relating to the subject matter of the investigation cf. Article 11(7) of the Merger Regulation. Paragraphs 1 and 7 of Article 11 of the Merger Regulation complement each other as the correctness and whether the information presented care complete can be verified with an interview. To this respect it should be further noted that the Commission is permitted to conduct an inspection of any premises, land or means of transport of the undertakings concerned as well as examine books and records related to the business in accordance with Article 13 of the Merger Regulation. Information and documents presented with the notification as well as all information gathered by during investigation of the notified concentration form the basis of the Commissions appraisal and further as evidence of the legality of the decisions adopted by the Commission.

[25] Faull and Nikpay, *The EC law of competition 2nd edn*, p. 547.
[26] *Ibid.* p, 547.

Thus, the importance of the Commission making use of its investigation powers set out in Articles 11 and 13 of the Merger Regulation must be stressed.

The Commission has only 25 working days to carry out an investigation of a proposed concentration cf. Article 10(1) of the Merger Regulation. This timeframe is very tight given the amount of work that the Commission must complete within it. This period can however be prolong for additional 10 working days if the undertaking concerned proposes certain remedies as provided for in Article 6(2) cf. Article 10(1) of the Merger Regulation, to remove serious doubts that the Commission may have in relation to the merger as notified. At the end of Phase I, the Commission must adopt a decision pursuant to Article 6 of the Merger Regulation which provides for three different types of decisions. First of all the Commission can conclude that a notified merger may in fact not fall under the scope of application of the regulation according to Article 6(1)(a) of the Merger Regulation. Secondly, a notified concentration with community dimension may be declared compatible with the internal market and thus cleared based on Article 6(1)(b) of the Merger Regulation. Thirdly, if the notified concentration has community dimension and raises serious doubts on whether it can be declared compatible with the internal market the Commission must initiate proceedings in accordance with Article 6(1)(c) of the Merger Regulation. These proceedings are a so-called Phase II investigation, where a detailed investigation on the possible anti-competitive effects of the notified merger is carried out. The Commission has the same powers available as in Phase I to carry out the necessary investigation but a Phase II investigation involves a more rigours use of those powers. The undertakings concerned by the concentration thus often have to hire external experts e.g. lawyers and economists to be able to provide the Commission with the proper information in a swift manner.[27] A concentration can only be declared incompatible with the internal market at the end of the thorough investigation carried out during Phase II. As provided for in Article 10(3) of the Merger Regulation the Commission has 90 working days to complete a Phase II investigation and at the end of that period the Commission must adopt a final decision on the basis of Article 8 of the regulation. However before a decisions is adopted pursuant to Article 8(1) to (6) of the Merger Regulation, an Advisory Committee must be consulted according to Article 19(3) of the regulation. The Advisory Committee consists of representatives from the competent authorities of the member states and at least one of the representatives must be competent in matters of restrictive practices and dominant positions cf. Article 19(4) of the Merger Regulation. The consultation

[27] Faull and Nikpay, *The EC law of competition 2nd edn*, p. 556-557.

takes place in a joint meeting chaired by the Commission. Members of the Advisory Committee receive a summary of the case, indication of the most important documents and a preliminary draft of the decisions to be taken along with the invitation to attend a meeting which takes place within 10 days from such an invitation cf. Article 19(5) of the Merger Regulation. The Advisory Committee must deliver an opinion on the Commissions draft decisions and if necessary by taking a vote. The opinion is delivered in writing and the Commission must take the utmost account of the opinion and further must make known the opinion of the committee to the undertakings concerned by the concentration according to Article 19(6) of the Merger Regulation. Once the Commission has adopted a decision pursuant Article 8(1) to 8(6) of the Merger Regulation, it must publish it in the Official Journal of the European Union cf. Article 20(1) of the regulation. Clearance decisions adopted pursuant to Article 6 of the Merger Regulation must only be notified to the undertakings concerned cf. Article 6(5) of the Merger Regulation.

2.2.2 Substantive test

Concentrations with community dimension are subject to the appraisal of the Commission according to Article 2(1) of the Merger Regulation. As provided for in Article 2 of the Merger Regulation, the very aim of merger control is the prevention of concentrations that have the potential to significantly impede effective competition within the internal market. In the absence of a legal definition of what constitutes a significant impediment to effective competition, the Commission must conduct a market forecast when assessing whether the concentration will significantly impede effective competition within the relevant market. Such a market forecast entails a certain speculations on future developments in both the structure of and the dynamics of, the market to properly analyse the effect of the transaction. This assessment carried out in line with the guidance set out in Article 2 of the Merger Regulation.[28] The test set out in Article 2 of the Merger Regulation is often referred to as the substantive test or the SIEC Test, in this thesis it will be referred to as the substantive test.

As provided for in Article 2(1)(a) of the Merger Regulation, the Commission when making the appraisal of the concentration shall take into the account the need to maintain and develop effective competition within the internal market having regard to the structure of all the markets concerned. Furthermore as stated in Article 2(1)(b) of the Merger Regulation, the Commission must take into consideration:

[28] Riesenkampff, Alexander and Lehr, Stefan, *Kartellrecht – Europäisches und Deutsches Recht Kommentar* München 2009, p. 1299 and Faull and Nikpay, *The EC law of competition 2nd edn*, p. 468.

> *"the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interest of their intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers´ advantage and does not form an obstacle to competition".*

The substantive test is set out in Articles 2(2) and 2(3) of the Merger Regulation. According to Article 2(2) of the Merger Regulation:

> *"A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market".*

If however a concentration would significantly impede effective competition, the Commission must declare it incompatible with the internal market according to Article 2(3) cf. Article 8(3) of the Merger Regulation.

The Commission has issued guidelines on the assessment of concentrations. The guidelines along with the substantive test form the basis of the Commission more economic approach to merger control. The aim of the guidelines is to help the undertakings concerned by a concentration to better identify the possible anti-competitive effect that might result from the transaction. Further, the guidelines should better enable the Commission to assess whether a concentration may significantly impede effective competition, i.e. the possible impact it may have on consumer welfare by listing the economic factors to be taken into consideration when carrying out such an assessment.[29] To explain how the Commission assess a concentration under Article 2 of the Merger Regulation, it is necessary to give a brief overview of the guidelines. There are two set of guidelines: one relating to horizontal concentrations; the other relating to non-horizontal concentrations. Horizontal concentrations are when the undertakings concerned by the concentration are actual or potential competitors in the same relevant market.[30] Non-horizontal concentrations are defined as concentrations where the undertakings concerned are active in different markets.[31]

The Commissions assessment of horizontal concentrations under the Horizontal Guidelines entails a two step procedure, where the first step entails the definition of the relevant product and geographical market in accordance with the Commission Notice on the

[29] Maier-Rigaud, Frank and Parplies, Kay, "EU Merger Control Five Years After The Introduction Of The SIEC Test: What Explains the Drop in Enforcement Activity?". *European Competition Law Review* 2009 (11), p. 565 cf. European Commission, "Report on Competition Policy 2004 Vol. 1", 15. March 2011. Available at www.ec.europa.eu/competition, p. 74-75. and

[30] OJ C 31, 05/03/2004, p. 15-18. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 5.

[31] OJ C 265, 18/10/2008, p. 6-25. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 2.

definition of relevant market and the second steps involves an economic analysis of the possible effect that a concentration may have on the relevant market.[32] Further as stated in paragraph 12 of the Horizontal Guidelines:

> *"in order to assess the foreseeable impact of a merger on the relevant markets, the Commission analyses its possible anti-competitive effects on the relevant countervailing factors such as buyer power, the extent of entry barriers and possible efficiencies put forward by the parties. In exceptional circumstances, the Commission considers whether the conditions for a failing firm defence are met".*[33]

The Commission thus takes these factors into consideration when analysing the proposed concentration in accordance with Article 2 of the Merger Regulation. Market share of the undertakings concerned by the concentration and the competitors active on the relevant market as well as the concentration of the market provide the Commission with valuable information on the structure of the relevant market cf. paragraph 14 of the Horizontal Guidelines. As for the assessment of the proposed concentration at horizontal level the Commission recognizes in general two ways in which a merger can significantly impede effective competition, i.e. (i) by eliminating competitive constraints without reaching the level of coordinated behaviour (non-coordinated effects) or (ii) if the merger enhances the likely hood of coordinated behaviour by changing the nature of competition within the relevant market or simply makes the coordination more effective and easier (coordinated effects) cf. paragraph 22 of the Horizontal Guidelines.[34]

Non-horizontal concentrations are defined as concentrations where the undertakings concerned are active in different markets and are assess under the Non-Horizontal Guidelines. There are two different types of non-horizontal mergers, i.e. vertical mergers involving companies operating at different levels of the supply chain and conglomerate concentrations which is defined is a merger between firms that are neither in a horizontal nor vertical relationship.[35] The Commission considers non-horizontal mergers to be less likely to significantly impede effective competition than horizontal mergers due to fact that they do not eliminate direct competition cf. paragraphs 11-12 of the Non-Horizontal Guidelines. However

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[32] This two step approach to the appraisal of a concentration is set out in paragraph 10 of the Horizontal Guidelines. Further information on the definition of the relevant market can be found in OJ C 372, 09/12/1997, p. 5-13. Commissions Notice on the definition of relevant market for the purpose of Community competition law. In this respect it should be noted that the market definition in merger control follows the praxis of Article 102 of the TFEU cf. Riesenkampff and Lehr, *Kartellrecht Europäches und Deutsches Recht,* p. 1287.

[33] See paragraphs 89-91 in the Horizontal Guidelines.

[34] The Commission sets out in detail how both non-coordinated and coordinated effects can be harmful to competition in paragraphs 24-63 of the Horizontal Guidelines. When appraising a concentration the Commission takes accounts of factors such as countervailing buyer power and further where a merger may be justified on the grounds that it leads to enhanced efficiency.

[35] Paragraphs 1-5 in the Non-Horizontal Guidelines.

non-horizontal mergers just like horizontal once can bring about both non-coordinated effects and coordinated effects. Non-coordinated affects arise when the merger leads to a certain foreclosure within a market. The coordinated effects that can rise from non-horizontal mergers are the same as those that can rise from horizontal mergers, i.e. that the merger increases the chances of coordinated behaviour by changing the nature of competition within the relevant market or simply makes the coordination easier or more efficient.[36]

The principles set out in the Horizontal and Non-Horizontal Guidelines can however only serve as an indicator as to whether concentrations may significantly impede effective competition. The crucial element for this assessment is the definition of the relevant market and further the economic analysis of the proposed transaction. To this respect the Court of Justice has stated:

> *"A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted".*[37]

In essence this means that Commission must not only try to foresee the effect that a concentration may have on competition but further try to predict what the conditions of competition would be in the absence of it. The Court of Justice as listed the essential factors which the Commission mast take into consideration when examining a proposed concentration to be *"the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand"*.[38]

When looking into the case law on judicial review of merger control, one must keep in mind that substantive test as it is set out in the current Merger Regulation is somewhat different from the dominance test set out in Article 2(3) of Regulation No 4064/89. In order to follow the case law that I am going to analyze later which concerns the dominance test it is useful to present the old test. The original dominance test was twofold; whereby mergers would be prohibited if they would (a) create or strengthen a dominant position which would lead to (b) impediment of completion within the internal market of the European Union.[39]

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[36] Paragraphs 18-19 in the Non-Horizontal Guidelines.
[37] Case C-12/03 P *Commission v. Tetra Laval BC* [2005] ECR I-987, paragraph 42 and Case T-210/01 *General Electic v. Commission*, 2005] ECR II-5575, paragraph 64.
[38] Case C-12/03, *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 25.
[39] Chalmers, Damian; Hadjiemmanuil, Christos; Monti, Giorgio and Tomkins, Adam, *European Union Law* Cambridge 2006, p. 1089.

When assessing whether a concentration would create or strengthen a dominant position, the Commission relied on the definition of dominance as establish by the Court of Justice:[40]

> *"Dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers".*[41]

and further:

> *"Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will be develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".*[42]

Although the notion of dominance was and still was essentially a legal definition made by the Court of Justice, one must not disregard the economic factors of it when assessing the effect that a concentration might have on competition. Thus essential question is and was whether a merger would increase market power of the undertaking concerned to such an extent that it would gain the ability to act *"to an appreciable extent independently of their competitors, customers and ultimately of consumers".*[43] Whether an undertaking can behave independently to an "*appreciable extent"* can be measured on the basis of the price elasticity of other competitions, i.e. an undertaking enjoying sufficient market power is able to raise prices above competition level and thus the prices set by its competitors becomes inelastic.[44] In its procedure the Commission quickly adopted the approach that once dominance had been established there was a presumption of impediment of competition on the relevant market.[45]

The Commission however realised that there were certain gaps under the dominance test which might lead to mergers being approved despite being a threat to competition. The dominance test was thus amended and renamed the substantive test with entry into force of the Merger Regulation cf. Article 2(2) and 2(3) of the regulation. This development was fully in line with the increased focus on economic analysis in competition enforcement of the Commission. As stated in the Commission Annual report from 2003: "*The aim of the Commission's proposed reform was to ensure that the substantive test in the merger regulation would cover effectively all anticompetitive mergers while at the same time*

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[40] Faull and Nikpay, *The EC law of competition 2nd edn*, p. 469.
[41] Case C-27/76 *United Brands Company and United Brands Continental BV v. Commission* [1978] ECR 207, paragraph 65.
[42] Case C-285/76 Hoffman-La Roche And Co AG vs. Commission [1979] ECR 461, paragraph 39.
[43] Faull and Nikpay, *The EC law of competition 2nd edn*, p. 469 and Röller, Lars-Henrik and De La Mano, Migueal, "The Impact of the New Substantive Test". *European Law Journal* 2006 (1), p. 11-12.
[44] Röller and De La Mano, "The Impact of the New Substantive Test", p. 11-12.
[45] Chalmers et. al., *European Union Law*, p. 1089.

ensuring continued legal certainty".[46] The Commission thus considered it necessary to clear the scope of the dominance test and thereby closing the gaps of it rather than adopting a completely new test for assessing mergers due to the fact that *"adopting an altogether new test might jeopardise the preservation of the precedent built up under the regulation, including the case-law developed by the Courts over the years, thereby reducing legal certainty"*.[47] The gap under the dominance test came from the possible competition threats in the absence of a transaction creating or strengthening a dominant position of a single undertaking. The Commission has in essence identified two types of economic effects of concentrations that can harm competition even in the absence of a single firm holding a dominant position. The first one being coordinated effect or tactic coordination, which means that the legal entity created by the concentration would enjoy a joint or collective dominance with another undertaking already active in the relevant market. The Commission deals with such a situation under the *"collective dominance"* doctrine set out in the *Airtours case*.[48] The Court of Justice provided the Commission with further guidance in the *Impala case* on how to assess whether the concentration would lead to a collective dominant position.[49] The Commission must accordingly use prospective analysis of the relevant market to assess whether the concentration will lead to a situation where effective competition would be significantly impeded by the undertakings concerned by the concentration and one or more other undertakings as due to the structure of market they would be able to adopt a common policy on the market where profit would be derived from the collective economic strength without competitors or consumers being able to react effectively.[50] The second type is when the market concentration is so high that competition between undertakings has no effect on the market despite none of the market plays holding a dominant position in the market.[51]

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[46] European Commission, "XXXIIIrd Report on Competition Policy 2003", 4. April 2011. Available at www.ec.europa.eu/competition, p. 67.
[47] *Ibid*, p. 67.
[48] COMP/M.3216. See further: Interim Report for DG Competition by IDEI, "
The Economics of Unilateral Effect". 24 March 2011. Available at www.ec.europa.eu/competition, p. 3.
The General Court set out the three cumulative conditions for finding collective dominance in the case T-342/99 *Airtours v. Commission* [2002] ECR I-1365, paragraph 62 to be the following (i) 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 to the same policy; (ii) the situation of tactic coordination must be sustainable over time, meaning that there must be an incentive not to depart from the common policy on the market and (iii) the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.
[49] Case C-413/06 P, Bertelsmann and Sony Corporation of America v. Impala [2008] ECR I-4951.
[50] *Ibid*, paragraph 120.
[51] Final Report for DG Competition by IDEI, "The Economics of Tactic Collusion". 24 March 2011. Available at www.ec.europa.eu/competition, p. 4. For further information see Röller and De La Mano, "The Impact of the New Substantive Test".

The degree of changes brought about to the substantive test in the recast of the Merger Regulation cannot be considered substantial. It has been argued that Articles 2(2) and 2(3) of the Merger Regulation have simply reversed the previous substantive test, making the essential question whether a proposed concentration is likely to substantially impede effective competition and which is most common when the concentration leads to the creation or strengthening of a dominant position.[52] It has further been pointed out that the substantive test was not meant to *"fundamentally change the process and scope of EU merger control"*, where a reference is made to Articles 2(2) and 2(3) and recital 26 of the current Merger Regulation as it states that the main criterion for deciding whether or not concentrations are compatible with the internal markets is the creation or strengthening of a dominant position like before. This argument is further substantiated with a direct reference to recital 25 of the Merger Regulation where it states:

> *"the notion of significant impediment to effective completion in Articles 2(2) and 2(3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentrations resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned".*[53]

The Commission addresses the relationship between the new and the old test in the Horizontal Guidelines. To this respect the Commission stated that when appraising a concentration it must *"take into account any significant impediment to effective competition likely to be caused by a concentration. The creation or the strengthening of dominant position is a primary form of such competitive harm"* cf. paragraph 2 of the Horizontal Guidelines. This indicates that the dominance test as set out in Regulation No 4064/89 forms the basis of the current substantive test where its scope has been extended to cover anti-competitive effects which are caused by a concentration but not creating or strengthening dominance. Further as provided for in paragraph 4 of the Horizontal Guidelines the Commission sets out that the:

> *"creation or strengthening of dominant position has been the most common basis for finding that a concentration would result in a significant impediment to effective competition"* and thus *"it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance."*

Taking all of this into consideration it is clear that the new substantive test is a rephrasing of the dominance test, where the economic analysis of the Commission should be somewhat wider in scope. This can be substantiated by the fact that although the creation or

[52] Chalmers et. al., *European Union Law*, p. 1090.
[53] Faull and Nikpay, *The EC law of competition 2nd edn*, p. 473.

strengthening of dominance plays a leading role in such an analysis it is no longer the sole parameter forming the basis of the Commission's decision.

Given the novelty of the substantive test there is very little case law on it. Of the three decisions adopted by the Commission pursuant to Article 8(3) of the Merger Regulation since 2004, only one decision has been appealed to the General Court.[54] In addition that that a clearance decisions adopted by the Commission assessed under the substantive test was appealed to the General Court for review.[55] Thus it is difficult to draw hard conclusions whether and then to what extent the substantive test has affected the economic analysis carried out by the Commission.

Ryanair´s takeover of AerLingus was prohibited in 2007 on the grounds that it was likely to significantly impede effective competition. The Commission was very through in its economic analysis and took factors such market share, business models of the undertakings concerned, pricing strategy, and barriers to entry and further the competitive advantage of business locations into consideration. Based on these factors the Commission concluded that the concentration would eliminate actual competition between the undertakings concerned by the concentration where their flight routs overlapped which might result in price increases to the detriment of consumers. Where there was no overlap in flight routes, the Commission reached the conclusion that since the undertakings concerned by the concentration would not add those flight routs to their business model it would lead to elimination of possible competition and thus create or strengthen the dominant position of the undertakings concerned in the relevant markets and thereby significantly impede effective competition.[56] Upon appeal the General Court thoroughly examined the pleas presented by Ryanair with regards to the legality of the decision adopted but ruled that the decision was valid since the Commission had carefully set out basis for its decisions and explained in detail why the concentration would significantly impede effective competition.[57] The General Court undertook similarly detailed economic analysis of the parts of the Commissions decisions under appeal.[58]

[54] Maier-Rigaud and Parplies, "EU Merger Control Five Years After The Introduction Of The SIEC Test: What Explains the Drop in Enforcement Activity?", 566-567. The article makes a reference to COMP/M.33400 and COMP/M.4439. Further to that the Commission prohibited the merger between Olympus and Aegean Airlines in January 2011 (COMP/M.5830)
[55] Case T-151/05 *NVV v. Commission* [2009] ECR II-1219.
[56] COMP/M.4439
[57] Case T-342/07 *Ryanair Holdings plc. v. Commission*, not yet reported.
[58] Case T-151/05 *NVV v. Commission* [2009] ECR II-1219.

What is noticeable in these judgements compared to the *Tetra Laval case*, which will be examined in detail later, is the fact that the concept of dominance no longer forms the sole basis of the Commissions appraisal and subsequently the review of the General Court.[59] As stated before, one can thus argue that the Commission enjoys a greater leeway in its economic analysis under the substantive test than the dominance test. This is evident from the *Tetra Laval case,* where the General Court annulled the Commissions decisions on the grounds that it had failed to demonstrate that a conglomerate concentration might lead to a possible creation or strengthening of dominant position in a market linked to the relevant market. This judgement is an example of how difficult it was to demonstrate anti-competitive effects of a concentration in the absence of a creation or strengthening of a dominant position. In its assessment of the concentration the Commission noted that as merged entity held a dominant position in the relevant market it could use that position to acquire dominance in another market although not immediately after the transaction but over time as a result of the behaviour of the merged entity. The General Court accepted that in principle this could be grounds for prohibiting a concentration and stressed the importance of taking into consideration possible anti-competitive effect in the long run but the Commission had failed to provide sufficient evidence to support that assessment.[60] This is an interesting statement made by the General Court due to the fact that appraisal of the concentration was made under the dominance test and not the substantive test. In its approach the General Court thus disregarded the normal procedure under the dominance test which was that if a concentration would not result in the creation or strengthening of a dominant position there was no need to examine the impact it would have on effective competition and rather followed the approach of the substantive test.[61]

[59] Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381.
[60] *Ibid*, paragraphs 148-152.
[61] *Ibid*, paragraph 120.

3. Judicial review of merger decisions

Given the very economic nature of the assessment carried out under Article 2 of the Merger Regulation it is clear that the margin of appreciation enjoyed by the Commission must be subject to scrutiny of those affected by the decisions. Thus, the purpose of this chapter is to outline the procedural possibilities of bringing an action against the Commission for annulment of contested decisions. The main emphasis of this chapter will be on the scope of review exercised by the Courts of the European Union in the light of the relevant case law both in terms of how the application shapes the review and further how the courts have raised the standard of proof through intensified scope of review. Finally, the possibility of having a case heard under the fast track procedure will be examined.

3.1 Judicial review

The respective roles of the Commission and the Court of Justice of the European Union are set out in the Treaty on the European Union (hereinafter referred to as "TEU"). As stated in Article 17 of the TEU, the Commission "*shall ensure the application of the Treaties and of measures adopted by the institutions"*. It is however the task of the Courts of the European Union to ensure that the law is observed according to Article 19 of the TEU. The General Court and the Court of Justice commonly make up the Court of Justice of the European Union cf. Article 251 of the TFEU. The General Court serves as court of first instance according to Article 256 of the TFEU cf. Titel IV of Protocol 2 to the TFEU on the Statue of the Court of Justice of the European Union. Judgments of the General Court can only be appealed on points of law to the Court of Justice as stated in Article 256(1) of the TFEU. The General Court therefore has exclusive jurisdiction when it comes to finding of facts and assessing them. The Court of Justice may however review the legal characterisation of the facts and the legal conclusions drawn from them.[62]

According to Article 21(1) of the Merger Regulation, the Commission has the sole jurisdiction to adopt decisions pursuant to the regulation but these decisions are subject to judicial review of the Courts of the European Union. The Merger Regulation is however silent when it comes to the appeal procedure.[63] Like other decisions adopted by the Commission appeals of merger decisions are subject to the provisions of the TFEU as other acts adopted by

[62] Case C-413/06 P, Bertelsmann and Sony Corporation of America v. Impala [2008] ECR I-495, paragraph 32.
[63] Varona et. al., *Merger Control in the European Union – Law, Economics and Practise*, 436.

the institutions of the European Union.[64] Thus merger decisions are subject to review by the General Court under Article 263 of the TFEU and possibly the Court of Justice if the judgement of the General Court is appealed on points of law cf. Article 256(1) of the TFEU. The procedure under Article 263 of the TFEU is sometimes referred to as "restricted review" due to the fact that the case is not reheard in full by the judges on the court of appeal.[65] In their review the General Court will *"distinguish between the review of the law, the review of the facts and the review of the application of the law to the facts which may involve a complex assessment"*.[66] The General Court will start by examining whether the Commission has analysed all of the relevant evidence. Based on this analysis the court is able to assess whether the Commission has in its review of the evidence understood and correctly stated the material facts in its decisions.[67] As worded by the Advocate General Tizzano in his Opinion in the *Tetra Laval case*:

> *"with regard to the findings of fact, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusion drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained"*.[68]

Accordingly, the General Court must determine whether the evidence presented provide a sufficient legal grounds for the decisions adopted by the Commission.[69] The relevant court must also evaluate whether the Commission has applied the relevant legal criteria correctly.[70]

3.2 Action for annulment under Article 263 TFEU

Action for an annulment of acts adopted by the institutions of the European Union can be brought before the Court of Justice pursuant to Article 263 of the TFEU. The first paragraph of the article reads:

> *"The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations*

[64] Valcke, Anthony and Francisco, Todorov, "Judicial Review of Merger Control in the European Union". *Antitrust Bulletin* 2006 (2), p. 346.
[65] Ratliff, John, "Judicial review in EC Competition cases before the European courts: Avoiding double renvoi". In Claus-Dieter Ehlermann and Mel Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Case.* Forthcoming Hart Publishing 2011. Available at www.eui.eu, p. 1-3.
[66] Schweitzer, Heike, "The European Competition Law Enforcement System and the Evolution of Judicial Review". In Claus-Dieter Ehlermann and Mel Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Case.* Forthcoming Hart Publishing 2011. Available at www.eui.eu, p. 12.
[67] Chalmers et. al., *European Union Law*, p. 1088.
[68] Case C-12/03, *Commission* v *Tetra Laval* [2005] ECR I-987, Opinion of Advocate General Tizzano delivered on 25 May 2005, paragraph 86.
[69] Chalmers et. al., *European Union Law*, p. 1088.
[70] Vesterdorf, Bo, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law enforcement". *Competition Policy International*, 2005 (2), p. 12.

and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties".

Thus it is for the Courts of the European Union to review the legality of acts adopted by the Commission which produce legal effects vis-á-vis third parties. The Court of Justice has defined the concept of "*legal effect*" to arise when a measure is "*binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in is legal position*".[71] Merger decisions adopted by the Commission are legally binding in its entirety for the addressees of the decisions cf. Article 288(4) of the TFEU and can thus be subject to judicial review of the Courts of the European Union. It should however be noted that only *final* decisions of the Commission are subject to judicial review and not preliminary measures made during the investigation or the assessment phase of a notified concentration, with the exception of decisions where the Commission has requested disclosure of confidential information and/or business secrets.[72] Thus decisions adopted by the Commission pursuant to Articles 6 and 8 of the Merger Regulation are subject to judicial review. This includes decisions declaring proposed concentrations compatible with the internal market, clearance decisions subject to remedies, prohibition of mergers and decisions revoking clearance of a merger. Furthermore, interim decisions adopted under Article 8(5) of the Merger Regulation are also subject to judicial review.[73]

3.2.1 Locus standi

Article 263 of the TFEU lists those who have a standing to bring an action for annulment before the General Court under the article. Those have *locus standi* pursuant to the article can be defined into two categories, i.e. privileged applicants and non-privileged applicants. Applicants that are entitled to challenge any legally binding act under Article 263 of the TFEU are categorized as privileged applicants. Member States of the European Union, European Parliament, European Council and the Commission are all privileged applicants and can accordingly challenge decisions adopted by the Commission under the Merger Regulation.

[71] Case C-60/81, *IBM v. Commission* [1981] ECR 2639 and Türk, Alexander, *Judicial Review in EU Law.* Northampton 2009, p. 12.
[72] Case C-60/81 *International Business Machines Corporations v. Commission* [1981] ECR 2639 and Case C-53/83 *Akzo Chemie et al. v. Commission* [1986] ECR 1965.
[73] Case C-729/79 *Camera Care Ltd. V. Commission* [1980] ECR 119 and Case T-235/95 *Anthony Goldstein v. Commission* [1998] ECR II-523.

Non-privileged applicants are however those who have a limited entitlement to challenge an act. Natural and legal persons are non-privileged applicants and thus only have *locus standi* under Article 263(4) of the TFEU if the act is addressed to the applicant or if it is of direct and individual concern to the applicant.[74] When an applicant is the addressee of an act there is no question on whether he has standing in an action under Article 263 of the TFEU. If the applicant is however not an addressee it can be difficult to establish whether he has standing on the basis of being *"directly and individually concerned"*. The Court of Justices has established the *Plaumann formula* explaining when natural and legal persons are individually concerned:

> *"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decisions affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the persons addressed.[...]".*[75]

Demonstrating that these requirements are fulfilled can be difficult.[76] Further, for an action for annulment brought by a natural or legal person to be admissible the applicant must have an interest in having the contested decision annulled. According to settled case law, the interest must be vested and presented at the date which the action is brought. Such an interest exists only if the action for annulment is likely to produce an advantage for the applicant if it is successful.[77]

In the field of merger control, the right to seek an annulment of a clearance decisions adopted by the Commission can be of crucial importance for third parties, i.e. those who are not addressees of a decision. Competitors of the undertakings concerned by the concentrations may e.g. have interest in seeking annulment of a decision due to the possible anti-competitive affect that the concentration may have on the relevant market. Other third parties, such as consumers may also have an interest in seeking annulment of a decision adopted by the Commission pursuant to the Merger Regulation. In the *easyJet v. Commission case,* the General Court set out the criteria as to when a third party is directly and individually concerned by a decisions adopted by the Commission pursuant to the Merger Regulation.[78] In its judgment the court concluded that if a concentration brings about an immediate change in the state of the relevant market, competitors active in that market are directly concerned.[79] As

[74] Steiner et al. *EU Law,* p. 251.
[75] Case C-25/62 *Plaumann v. Commission* [1963] ECR 95.
[76] Brown, Neville and Kennedy, Tom, *The Court of Justice of the European Communities 5ed.* London 2000, p. 148 cf. Craig, Paul and Búrca, Gráinne, *EU Law: Text, Cases and Materials.* New York 2008, p. 513.
[77] Case T-177/04 *easyJet Airline v. Commission* [2006] ECR II-193, paragraph 40.
[78] *Ibid.*
[79] *Ibid*, paragraph 32.

for the requirement of being individually concerned the court cited the *Plaumann formula.* In the context of merger control, the court stated that when assessing whether the conditions set out in the *Plaumann formula* are met would depend on two factors: (i) whether the third party, i.e. someone who is not an addressee of the decisions has participated in the administrative procedure carried out under the Merger Regulation and (ii) the effect that the concentration will have on the market position. The court stated in this respect that a mere participation in administrative procedure would fulfil the requirement of being individually concerned.[80] As for the change in market position, the court recognised that a main competitor of the merged entity would be affected by a change of the conditions of the relevant market and thus be individually concerned.[81] In this respect it should be noted that the appellant identified the undertakings concerned in the written pleadings as its main competitors on certain flight routs including e.g. Paris-London, Amsterdam-London and Paris-Marseilles, where each flight route between a point of origin and point of destination had been defined as a separate market.[82] The appellant was a budget airline whereas the undertakings concerned by the concentration were commercial airlines and thus targeted different consumer groups. This raises the question of whether then all competitors active within the relevant market are "main competitors" and thus directly concerned. In general, competitors are considered to be directly and individually concerned by a merger decisions. However the structure of the market, number of competitors active in the market and the respective markets share must be taken into consideration when determining whether a competitor is individually and directly concerned.[83] Finally it should be noted that when one and the same action is brought by a number of applicants and is admissible to one of those applicants, there is no need to consider whether the other applicants are entitled to bring proceedings. The General Court recently accepted that this principle applies in the context of merger control as well.[84]

[80] Case T-177/04 *easyJet Airline v. Commission* [2006] ECR II-193. Although active participation in the administrative proceedings may not be sufficient to demonstrate that an appellant should have standing as it he is individually and directly concerned, it is one of the factors taken into consideration by the General Court cf. Case T-158/00 *ARD v. Commission* [2003] ECR II-3825, paragraph 76.
[81] *Ibid*, paragraphs 30-49.
[82] *Ibid*, paragraph 56.
[83] Valcke and Francisco, "Judicial Review of Merger Control in the European Union", p. 358.
[84] Case T-151/05 *NVV v. Commission* [2009] ECR II-1219, paragraph 45.

3.2.2 Grounds for appeal

According to Article 263(2) of the TFEU, there are four grounds for appeal: (i) lack of competences; (ii) infringement of an essential procedural requirement; (iii) infringement of the TFEU or of any rule of law relating to its application and (iv) misuse of powers.

Lack of competence serves as a ground for appeal when the Commission has stepped outside its authority granted to it in the TFEU or secondary legislation.[85] In its findings the Court of Justice has granted the Commission a certain leeway when it comes to carrying out its work under the Merger Regulation by interpreting the notion of "lack of competence" narrowly. The Court of Justice has thus e.g. ruled that even though a decision by the Commission to revoke a previous decision did not have a clear legal basis in the Merger Regulation it was still deemed to fall within the competence of the Commission.[86] Further the Court of Justice has held, given the objective of the Merger Regulation, that the Commission does not lack competence to review transactions carried out outside the European Union if they are liable to significantly impeded effective competition within the internal market.[87]

Procedural defects also serve as grounds for appeal of merger decisions provided that the defect is essential, meaning that the defect has affected the outcome of the decisions adopted by the Commission.[88] In general, procedural defects can be categorised into two categories, i.e. insufficient reasoning for a decision and violations of procedural rights of parties. As for insufficient reasoning for a decisions it should be noted that the institutions of the European Union are under a legal obligation to state the reasons forming the basis of their decisions cf. Article 296 of the TFEU (ex Article 253 of the EC Treaty).[89] When it comes to merger decisions the General Court has stated:

> *"It is clear from settled case-law that the statement of reasons required by Article [296 of the TFEU] must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article [296 of the TFEU] must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question".*[90]

[85] Valcke and Francisco, "Judicial Review of Merger Control in the European Union", p. 364.
[86] Case T-251/00 *Lagardere and Canal+SA v. Commission* [2000] ECR II-4825.
[87] Case T-102/96 *Gencor v. Commission* [1999] ECR II-753.
[88] Case T-209/01 *Honeywell v. Commission* [2005] ECR II-5527.
[89] Valcke and Francisco, "Judicial Review of Merger Control in the European Union", p. 365-367.
[90] Case C-413/06 P, Bertelsmann and Sony Corporation of America v. Impala [2008] ECR I-4951, paragraph 166. The Court in its ruling makes a reference to the following case law: Case C-367/95 P *Commission* v

It is therefore clear that the Commission must in a clear and explicit manner state the reasons for its decisions after assessing the possible anti-competitive effects that a concentration may bring about. The wording and reasoning of the decision must further enable the addressee to evaluate whether the Commission has erred in its assessment and thus the legality of the decision. As stated above not only manifest error in assessment of a concentration can lead to annulment of the Commission decision pursuant to Article 264 of the TFEU but also forgoing procedural rights of the undertaking concerned and third parties as provided for in the Merger Regulation. To this effect the General Court has stated that decisions will only be deemed unlawful where procedural rights are *"sufficiently substantial and it had a harmful effect on the legal and factual situation of the party alleging a procedural irregularity"*.[91] The Court of Justice thus ruled that a failure to set out in the statement of objections material facts or arguments which are later used in the reasoning in a merger prohibition decision can be considered a procedural irregularity.[92] Article 18(3) of the Merger Regulation states that the Commission *"shall base its decision only on objections on which the parties have been able to submit their observations"*. Thus by excluding material facts and/or arguments in the statement of objections is considered to be an infringement of the party´s right of defence and hence a procedural irregularity.[93]

In the context of merger control an action for annulment on the basis of misuse of power is rare. Action for annulment under Article 263 of the TFEU on the grounds of infringement of the TFEU or any rule of law relating to its application is however more common. This serves as a basis for a review of Commission decision on its merits. Merger decisions will however usually be annulled on the grounds that the Commission has erred in its assessment of the possible anti-competitive effects of a concentration by failing to provide sufficient evidence in that respect. Upon appeal the General Court must therefore determine whether the Commission has gotten the material facts right and further carried out the assessment of the concentration in proper manners, i.e. substantive test in accordance with Article 2 of the Merger Regulation. Ultimately the question is whether or not the Commission

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Sytraval and Brink's France [1998] ECR I-1719, paragraph 63; Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66; and Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 79). See further to this effect: Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", p. 13.

[91] Case T-290/94 *Kaysersberg v. Commission* [1997] ECR II-2137, paragraph 88. In the ruling the Commission failed to honour the period of notice of convening in accordance with Article 19 of the Merger Regulation. See further to this effect: Valcke and Francisco, "Judicial Review of Merger Control in the European Union", p. 368.

[92] Case C-440/07 *Commission v. Schneider Electric* [2009] ECR I-6413.

[93] *Ibid.*

has provided sufficient evidence that a merger will significantly impede effect competition within the relevant market. Given the margin of appreciation that the Commission enjoys when carrying out an economic analysis of the proposed concentration, it can be difficult to proof that the Commission has erred in its assessment of the concentration.[94] The level of discretion enjoyed by the Commission depends on whether the legal question is new or has been settled before. In this respect the Commission enjoys a greater discretion its assessment of economic matters such as defining the relevant market. However, if the Commission is applying an economic theory which has either not be applied before or rarely it will be subject to more scrutiny under judicial review.[95]

3.3 Scope of review

The term "scope of review" is generally used for the process of ascertaining whether an administrative body and/or a court of lower instance has committed an error when adopting a decision or adjudicating a dispute.[96] Thus scope of review in the field of merger control refers to how intensely the General Court will scrutinise the works of the Commission when reviewing the legality of the decisions adopted by the Commission under the Merger Regulation and subsequently the Court of Justice in its review of points of law. In this meaning the term is very much related to another term used when describing the intensity of review, namely "standard of proof". This term is generally held to refer to a pre-determined threshold which must be met for a point of facts to have been proven, i.e. the objective is to establish a benchmark in terms of evidence.[97] Standard of proof and the scope of review are entwined concepts as the more intense the review is the higher the standard or proof becomes.[98] The term "scope of review" is also used to refer to the fact that the outer limits of a review of a case is set by the applicant, in the sense that the Courts of the European Union will limit its review to the points, raised by the application.

3.3.1 Scope of review as the framework set by the application for review

As previously stated, judicial review of merger decisions under Article 263 of the TFEU is limited to the parts of the decisions under dispute and necessary for review of the lawfulness of a decision. The General Court will thus limits its review to the grounds of the appeal as set

[94] Valcke and Francisco, "Judicial Review of Merger Control in the European Union", p. 369-370.
[95] *Ibid*, p. 372.
[96] Vesterdorf, Bo, "Standard of proof in Merger Cases". *European Competition Journal* 2005(1), p. 6-7.
[97] *Ibid*. p. 6-7.
[98] Revers, Tony and Dodoo, Ninette, "Standard of proof and standards of judicial review in European Commission merger law". *Fordham International Law Journal* 2006, p. 1038.

out by the appellant, which is a well known procedural approach in civil law countries. The appellant thus has full power when it comes to deciding which substantive matters shall be subject to review of the General Court.[99] One can argue that the appellant can in fact shape the case under judicial review to his advantage and thus set the stage when it comes to review by the Courts of the European Union. This applies regardless of whether the applicant is one of the undertakings concerned by the concentration or a competitor that may have standing to bring an application under Article 263 of the TFEU. The appeal will always be tailored to the subject matter under review as set out by the applicant. Accordingly, if e.g. one of the undertakings concerned by the concentration would contest to the definition of the relevant market it would only draw attention to the facts supporting its plea in the application. The defendant would correspondingly try to demonstrate that the applicant's plea was based on a failure to take into account all of the relevant facts and/or a wrong assessment of the facts. The General Court will then need to assess whether the parts of the contested decisions dealing with market definition should be annulled nor not. This assessment is then carried out solely on the basis of the facts presented by the applicant and defendant and not the entire decisions which would give a more holistic view of the dispute and thus possible facts that the neither the applicant nor the defendant have brought up.

3.3.2 Scope of review as intensity of review and the standard of proof

Standard of proof in the field of merger control is a type of "*balance of probabilities"* as indicated by Advocate General Kokott in her Opinion in the *Impala case*, as the Commission must conduct an ex ante assessment of the proposed concentration.[100] Article 2 of the Merger Regulation sets out the framework for the appraisal of concentrations and the General Court has repeatedly recognized that the Commission enjoys certain discretion when carrying out the economic analysis necessary to determine whether or not a concentration may significantly impede effective competition.[101] In its review the General Court has respectively applied the *manifest error test* under which the facts of the case and the application of law are under strict scrutiny of the court. The Commission is however left with a margin of

[99] Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", p. 12.
[100] Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, Opinion of Advocate General Kokott, paragraph 205.
[101] See to this effect e.g. Joined Cases C-68/94 and C-30/95 *Kali & Salz v Commission* [1998] ECR I-1375, paragraphs 223-224; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 165, and Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 106 and further case T-374/00 *Verband der freien Rohrwerke eV and others v. Commission* [2003] ECR II-2275.

appreciation when it comes to economic analysis as the court will refrain from a detailed review in that respect. Under the manifest error test, a decisions adopted by the Commission will thus be annulled only if it has conducted a manifest error in its assessment as set out in the *Kali & Salz case* in the context of merger control.[102] The *Kali & Salz case* was the first major substantive appeal to the General Court of a Commission´s decision adopted under the Merger Regulation and thus worth examining as it laid the ground for the case law that followed.[103] The case concerned possible creation of a collective dominant position following a concentration. The Commission after having appraised the concentration concluded that the undertakings concerned by the concentration would enjoy a collective dominant position with a French undertaking in the community wide market for agricultural potash. The Commission derived this from the fact that the merged entity would control the market for potash in Germany following the concentration in addition to hold 23% of the market share in the community wide market for potash. Collectively the merged entity and the French undertaking would thus hold 60% of the market share in the community wide market for potash. Further there was an existing strong commercial relationship between the merged entity and the French undertaking where the latter handled distribution of potash for the former in France. The undertakings concerned by the concentration thus offered to enter into certain commitments to ensure that the concentration would not lead to the creation of a collective dominant position. Subject to compliance with the commitments the Commission declared the concentration compatible with the internal market. The decisions was appealed by the French Government on the grounds that the concept of a collective dominant position fell outside the scope of the Merger Regulation and should thus be subject to appraisal of the competent national authorities. The Court of Justice dismissed this in its judgment and stated that it followed from the provisions of the Merger Regulation that not only would the creation or strengthening of a single firms dominance be caught by the regulation but also a collective dominant position. As to the scope of review, the Court of Justice stated that it was inherent in the Merger Regulation that the Commission should enjoy certain discretion in its appraisal of concentrations, in particular with respect to assessment of economic nature. Accordingly, when reviewing the legality of contested decisions the Courts of the European Union would need to take that discretion into account. After having laid down this general principle for scope of review in the context of merger control, the Court of Justice concluded that in this

[102] Joined Cases C-68/94 and C-30/95 *Kali & Salz v Commission* [1998] ECR I-1375, paragraphs 223-224. See further Faull and Nikpay, *The EC law of competition 2nd edn*, p. 588.
[103] D.G. Goyder, et. al., *Goyder´s EC Competition Law*, p. 457.

particular case the Commissions analysis of the concentration and the possible anti-competitive effects arising from it was flawed and thus affected the economic assessment of the concentration.[104] Rather than examining whether the Commission had erred in its economic analysis, the Court assessed whether the Commission had misapplied the concept of a collective dominant position to the concentration in question. In this respect the Court concluded that the structural links between the undertakings concerned by the concentration and the French undertaking were not as strong as the Commission had concluded and further that the Commission had failed to demonstrate that the merged entity and the French undertaking would not be facing effective competition.

In my opinion, the Court of Justice was not able to properly assess the possible anti-competitive effects of the concentration as it took too much of a formalistic legal approach when appraising whether the conditions for finding a collective dominant position had been fulfilled. Rather than assessing whether the Commission had erred in its economic analysis, the court based its conclusions on a pure legal analysis of whether the evidence presented by the applicant were more convincing than the defendant.[105] The *Kali & Salz case* set the ground for judicial review of merger decisions and further for annulment of merger decisions. The General Court subsequently annulled three merger decisions in the year of 2002 alone.[106] One of these judgements was the *Tetra Laval case* were the court elaborated on the appropriate scope of review for assessing the legality of a merger decision.[107]

Given the impact that the *Tetra Laval case* has had on judicial review in the field of merger control, it is worth examining in detail.[108] In October 2001, the Commission prohibited a merger between Tetra Laval BV and Sidel SA.[109] To understand the possible anti-competitive conglomerate effect of the concentration one must look into the facts of the case. Tetra Laval belonged to a group of undertakings that enjoyed a worldwide dominant position in the market for carton drinks packaging. Sidel on the other hand was an undertaking specialised in so-called barrier technology and further a leading manufacturer of equipment designed to make polyethylene terephthalate (PET) drinks packaging, i.e. a type of plastic bottles. Based on the fact that the choice of packaging for liquid food was dependent

[104] Joined Cases C-68/94 and C-30/95 *Kali & Salz v Commission* [1998] ECR I-1375, paragraphs 223-224.
[105] *Ibid*, paragraphs 226-227.
[106] Case T-342/99 *Airtours PLC v. Commission* [2002] ECR II-2585; Case T-310/01 *Schneider Electric SA v. Commission* [2002] ECR II-4071 and Case T-5/02 *Tetra-Laval BV v. Commission* [2002] ECR II-4381.
[107] Case T-5/02 *Tetra-Laval BV v. Commission* [2002] ECR II-438; Case C-12/03 P, *Commission* v *Tetra Laval* [2006] ECR II-1931.
[108] Case C-12/03 P, *Commission* v *Tetra Laval* [2006] ECR II-1931.
[109] COMP/M. 2416

on factors such as characteristic of the product and the packaging material, the Commission concluded that PET packaging and cartoon packaging were two distinct product markets. The Commission based its assessment predominantly on the fact that PET plastic bottles were not suitable packaging for sensitive liquid food products such as milk and fruit juices as they were not to come in contact with light or oxygen. Research however indicted that by using barrier technology the PET plastic bottles could be made suitable for packaging of sensitive food products and thus that there was a certain connection between the two markets. The Commission prohibited the concentration on the grounds that it would strengthen Tetra Laval's dominant position on the cartoon packaging market through elimination of potential competition from indirect competitors active on the PET plastic bottle market. Moreover, the Commission concluded that the merged entity would go from being in a leading position in the market for PET packaging production equipment to become dominant, by using its dominant position in the cartoon packaging market to convince its customers who were switching from cartoon packaging to PET packaging to purchase their equipment from the merged entity.

Tetra Laval filed an action for annulment of the decision under Article 263 of the TFEU to the General Court.[110] The court annulled the decision on the grounds that the Commission had committed a manifest error in its assessment of the notified concentration. In the court's view the Commission failed to demonstrate that Tetra Laval would be able to strengthen its dominant position in the market for cartoon packaging through elimination of potential competitors active on a different market. Further, that the Commission had overestimated the potential growth in the PET packaging market and thus the creation of a dominant position in that particular market.

The Commission appealed the judgement of the General Court in *Tetral Laval case* to the Court of Justice on the grounds that the court had departed from its normal test of manifest error assessment to a test requiring "*convincing*" evidence.[111] Thus the Commission claimed that the General Court had departed from the principles set out in the *Kali & Salz case* both in terms of nature of judicial review and further the standard of proof.[112] In its judgement, the Court of Justice recognized the margin of appreciation enjoyed by the Commission when assessing information of economic nature, in particular when applying the dominance test (now substantive test) of the Merger Regulation as set out in the *Kali & Salz case*. Further the

[110] Case T-5/02 *Tetra-Laval BV v. Commission* [2002] ECR II-438.
[111] Case C-12/03 P, *Commission* v *Tetra Laval* [2006] ECR II-1931, paragraph 19.
[112] *Ibid*, paragraph 25 where the Commission made reference to manifest error test as set out in paragraphs 223-224 in Joined Cases C-68/94 and C-30/95 *Kali & Salz v Commission* [1998] ECR I-1375.

court stated that the Courts of the European Union should the discretion into consideration when reviewing the legality of contested decisions. The Court of Justice then elaborated on the principles set out in *Kali & Salz case*:

> *„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. [...]".*[113]

Thus when exercising judicial review, it is for the Courts of the European Union to establish whether the evidence presented are factually accurate, reliable and consistent. Further, in its review the court must establish whether or not the Commission has taken into consideration all the relevant information for carrying out the analysis of the concentration and last but not least whether the evidence substantiate the conclusions drawn from them. The Court of Justice however rejected the notion that the need to provide "convincing evidence" had raised the standard of proof but rather *"drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument"*.[114] The Court of Justice however recognised the implications of providing convincing evidence in the field of merger control. As pointed out by the court, merger control does not entail a review of existing information and documents but rather a *"prediction of events which are more or less likely to occur in future if a decisions prohibiting the planned concentration or laying down the conditions for it is not adopted"*.[115] The Court thus stressed the importance of carrying out the prospective analysis necessary in merger control consisting of an "*examination on how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition*" with great care.[116] The court also pointed out that for a prospective analysis to serve as evidence substantiating the decision adopted by the Commission; it must include the examination of various chains of causes and effects to ascertain which would be plausible.[117] After having established these general principles applicable to judicial review in merger control, the Court of Justice stated that in the particular case at hand the General Court had not exceed its power

[113] Case C-12/03 P, *Commission* v *Tetra Laval* [2006] ECR II-1931, paragraph 39.
[114] *Ibid*, paragraph 41. It has been argued that with this approach the Court of Justice does not take a pragmatic approach to standard of proof and scope of review but rather link the two together under the concept of "quality of evidence" cf. Revers and Dodoo, "Standard of proof and standards of judicial review in European Commission merger law", p. 1061-1062.
[115] Case C-12/03 P, *Commission* v *Tetra Laval* [2006] ECR II-1931, paragraph 42.
[116] *Ibid*, paragraphs 42-43.
[117] *Ibid*, paragraph 43.

of judicial review by carrying out an re-examination of the potential growth of the PET packaging market as such an assessment was a simple summary of facts from the Commissions decisions.[118] Further, the Court of Justice accepted the conclusion of the General Court that the Commission had failed to provide convincing evidence to this respect.

In my opinion, although the Court of Justice did not accept the argument that it had raised the standard of proof, it becomes clear by comparing the review exercise by the Court of Justice in the *Kali & Salz case* and in the *Tetra Laval case* that the scope of review as set out in the latter case is more intense and thus has raised the standard of proof. This comes from the fact that it no longer is sufficient to provide more convincing argument than the opponent. For an appeal to be successful, the applicant must provide evidence substantiating its plea that the Commission has erred in its economic analysis as the General Court will engage in an in-depth examination of the evidence presented by the Commission.[119]

In the case law following the *Tetra Laval case,* the General Court was not consistent in its review. In some cases the General Court followed the manifest error test whereas in others the court applied the standard of review as set out in the *Tetra Laval case*.[120] The General Court for example applied the manifest error test in the e*asyJet v. Commission case.* The court stated that review by the judicature of the European Union of complex economic assessment exercised by the Commission under the discretion inherent in merger control, should be *"limited to ensuring compliance with the rules governing procedure and the statement of reasons, as well as substantive accuracy of the facts and the absence of manifest error of assessment or misuse of powers".*[121] The *easyJet v. Commission case* also indicated that the General Court would apply the manifest error test when reviewing clearance decisions rather than the more intense review set out by the Court of Justice in *the Tetra Laval case.* The Court of Justice however demonstrated in the *Impala case,* another fundamental judgement in the field of judicial review of merger control that the same standard of review and respectively proof applies to clearance decisions as in prohibition decisions.

The *Impala case* is worth examining into detail both in terms of the intensity of review carried out by the Courts of the European Union and further the usage of evidence.[122] Sony and Bertelmann AG notified the Commission of their intention to set up a joint venture to

[118] Case C-12/03 P, *Commission* v *Tetra Laval* [2006] ECR II-1931, paragraph 46; Case T-5/02 *Tetra-Laval BV v. Commission* [2002] ECR II-438, paragraphs 210-211.
[119] This view is also shared by legal literature see to this effect e.g. Faull and Nikpay, *The EC law of competition 2nd edn*, p. 591.
[120] Faull and Nikpay, *The EC law of competition 2nd edn*, p. 588-590.
[121] Case T-177/04 *easyJet Airline v. Commission* [2006] ECR II-193, paragraph 44.
[122] Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Impala* [2008] ECR I-4951.

merge their global recorded music business in 2004. After having concluded a preliminary investigation in Phase I, the Commission found that the proposed concentration raised serious doubts about the compatibility with the internal market and thus initiated Phase II proceedings. The Commission thus sent the undertakings concerned a statement of objections as provided for in Article 18(3) of the Merger Regulation. In the statement of objections, the Commission concluded that the joint venture was incompatible with the internal market as the result of it would be that the merged entity would hold a collective dominant position along with other competitors active in the record music market and the whole shale market for online music. After having conducted a hearing pursuant to Article 18(1) of the Merger Regulation, the Commission reversed its finding from the one set out in the statement of objections and concluded that there was insufficient evidence on the possible anti-competitive effect resulting from the concentration and thus cleared it.[123]

Impala, an international association of independent music producers, after having participated in the hearing appealed the clearance decisions to the General Court for annulment.[124] In its review of the legality of the contested decisions the General Court used the test for collective dominance as set out in the *Airtour case* as a basis for its assessment.[125] The General Court annulled the clearance decisions on the basis that the Commission had failed to demonstrated, to the required legal standard, in its conclusion that the concentration neither created nor strengthened a collective dominant position on the relevant market. The court concluded that the Commission had committed a manifest error in its assessment of whether or not there was a pre-existing collective dominant position in the relevant market. To this respect the court stated that the Commission had failed to demonstrate why promotional discounts would reduce the transparency in the market to the level it excluded the possibility of a pre-existing collective dominant position and further that the absence of evidence would not provide sufficient grounds for such a finding. The court further noted that evidence used by the Commission were incomplete and did not include all the relevant data and thus not capable of supporting the conclusions drawn from them. As for the creation of a collective dominant position the General Court criticised the Commission for having only made few superficial and purely formal comments to that effect and thus failed to carry out the prospective analysis required. What is noticeable in this judgement is how thoroughly the General Court reviews the evidence substantiating the Commissions decisions. The court goes

[123] COMP/M.3333.
[124] Case T-464/04 *Impala v. Commission* [2008] ECR II-2289.
[125] Case T-342/99 *Airtours v. Commission* [2000] ECR I-1365.

as far as carrying out its own analysis of whether the findings in the Commissions decisions would fulfil the test of collective dominance as set out in the *Airtours case.*

Sony and Bertelsmann AG appealed the judgement of the General Court to the Court of Justice that set it aside on the grounds that the court had committed a number of errors of law.[126] Firstly, the Court of Justice stated that statement of objections is preparatory document that are subject to change throughout the appraisal of the concentration. The Commission is therefore under no obligation to explain any deviations from it in its decisions but rather must base its decision on factors emerging from the whole administrative procedure. Thus the Court of Justice ruled that the General Court had erred in law by treating certain elements in the statement of objections as being established. Secondly, the Court of Justices concluded that the General Court had committed an error law when requiring that the Commission would engage in further market research after having issued the statement of objections given the time constrains of the investigation procedure and moreover that all information obtained in the statement of objection form a part of the Commission's investigation. The Court of Justice further ruled that confidential information first being presented at the hearing cannot be regarded as have been disclosed in good time since then the undertakings concerned are deprived of their right to raise objections and present their comments on the evidence presented. The Commission must disregard such information and cannot rely on it in its decisions. Thirdly, the Court of Justice concluded that the General Court had committed an error of law as in its review as it misconstrued the relevant legal criteria applying to a creation or strengthening of collective dominance by failing to take account of tactic coordination when reviewing the transparency in the market.[127] The Court of Justice also established that the same standard of proof applies to a clearance of a concentration as declaring it incompatible with the internal market. The Court derived this conclusion from that fact that there were no indications in the Merger Regulation that a different standard of proof should be applied to clearance of a concentration than a prohibition. Merger control rather required a prospective analysis examining how a concentration might alter the factors determining the state of competition on a given market. Such an analysis should include various chains of causes and effects with the view of ascertaining which of them was the most likely. The court further stressed the importance of decisions being supported by a sufficiently cogent and consisted body of evidence and pointed out the essential function of evidence which was to convincingly establish the merits of the decisions adopted. As to inadequate reasoning, the

[126] Case C-12/03, *Commission* v *Tetra Laval* [2006] ECR II-1931.
[127] This will be examined in detail in the next chapter.

Court of Justice ruled that the General Court had wrongly found that the Commission had provided insufficient reasoning as the court was able to follow the reasoning in its review and further it provide sufficient grounds for an appeal of the case. Finally, Sony and Bertelmann AG claimed that the General Court had exceeded its role when it comes to judicial review by substituting its own assessment for the one carried out by the Commission without proving the existence of manifest error of assessment vitiating the contested decisions and further without asking for a report from an economic export to be obtained. The Court of Justice stated that the Commission enjoyed a margin of assessment with regards to economic matters and that the review of the Community judicature of a Commission decisions in the context of merger control would be *"confined to ascertain that the facts have been accurately stated and that there are no manifest error of assessment"*.[128] The court further stated that although the General Court does not have to substitute its own economic assessment for that of the Commission that it does not mean that the court must refrain from reviewing the Commissions interpretation of economic nature. To this respect the Court of Justice referred to the test set out in the *Tetra Laval case* and stated that it was for the community judicature to 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"*. The Court of Justice in the *Impala case* thus concluded that the General Court had acted in conformity with these principles when carrying out an in-depth examination of the evidence underlying the contested decisions but deemed it unnecessary to adjudicate whether the General Court had substituted its own economic assessment for that of the Commission. This judgement raises questions on the ability of the General Court to review information of economic nature. The General Court based its review on a legal criteria that it applied incorrectly by failing to look at the bigger picture in its economic assessment of the evidence presented. Further, although the Court of Justice did not recognise that the Commission was right in its assessment it concluded that the General Court had erred in law in many ways when carrying out its review of the Commissions decisions including assessment of evidence of economic nature.

Following the *Impala case,* it is established case law that the scope of judicial review as set out in *Tetra Laval case* should be applied rather than the more lax manifest error

[128] The Court of Justice recited Joined Cases C-68/94 and C-30/95 *Kali & Salz v Commission* [1998] ECR I-1375, paragraphs 223-224 and Case C-12/03 P *Commission* v *Tetra Laval* [2006] ECR II-1931, paragraph 38.

assessment as set out in *Kali & Salz case*, although the former is based on the latter.[129] Thus in its newest judgement in the field of mergers the General Court made a reference to the legal standard set out in *Tetra Laval judgement* as the appropriate standard of review. Respectively, its latest judgement the *Ryanair case* in the field of judicial review of merger control the General Court recited the scope of review as set out in paragraph 39 of the *Tetra Laval case*.[130] Further, the General Court set out the standard of proof which Commission must meet in order to declare a concentration incompatible with the internal market according to Article 2(3) of the Merger Regulation. The court stated that it was for the Commission to prove: "*that the implementation of the notified concentration would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.*"[131] Accordingly, the Commission would need to examine "*how the notified concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition*".[132]

3.4 Fast track procedure

The General Court was set up in 1989 to ease some of the burden off the Court of Justice due to ever increasing case load. Thus the General Court has jurisdiction to review amongst other competition decisions adopted by the Commission as they are very facts based and therefore time consuming. Appeals on the point of law are on the other hand subject to review by the Courts of Justice according to Article 256(1) of the TFEU.[133]

To meet to demands of the business community an expedited procedure was introduced by the General Court in 2001 for judicial review of decisions adopted by the Commission under the Merger Regulation amongst other. At the time the average duration of a proceeding before the General Court took around 20 months.[134] The expedited procedure or the "fast track" procedure as it is often referred to as is provided for in Article 76(a) in the Rules of Procedure of the General Court. As stated in the article:

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[129] T-151/05 *NVV v. Commission* [2009] ECR II-1219, paragraph 54 where the General Court makes an express reference to Case C-12/03 P *Commission* v *Tetra Laval* [2006] ECR II-1931, paragraph 39 and further case T-48/04 *Qualecomm Wireless Business Solutions v. Commission* [2009] ECR II-2029, paragraph 92.
[130] Case T-342/07, *Ryanair Holdings plc. v. Commission*, not yet reported, paragraph 30.
[131] *Ibid*, paragraph 26.
[132] *Ibid*, paragraph 27.
[133] Ratliff, "Judicial review in EC Competition cases before the European courts: Avoiding double renvoi", p. 2.
[134] Fountoukakos, Kyriakos, "Judicial review of merger control: The CFI´s expedited procedure". *Competition Policy Newsletter* 2002 (3), p. 8.

> *"The General Court may, on application by the applicant or the defendant, after hearing the other parties and the Advocate General, decide, having regard to the particular urgency and the circumstances of the case, to adjudicate under an expedited procedure".*

Thus it is for the General Court to decide whether a case can be adjudicated under the expedited procedure and to this effect the court enjoys certain discretion. The court will take into consideration the "*urgency*" and "*circumstance of the case"* when determining whether a case should to be adjudicated under the fast track procedure. The urgency requirement must be such as to not be served by interim measures. Further the General Court will take into account the complexity of the case and the number of pleadings lodged.[135]

Originally it was expected that the fast-track procedure would be available and equally beneficial for both the undertaking concerned appealing a prohibition decision as well as third parties contesting a clearance decision.[136] The General Court has however taken the approach that clearance decisions fulfil the *"urgency"* requirements whereas decisions declaring concentrations incompatible with the internal market are not considered as pressing.[137] This is a somewhat logical approach taken by the General Court taking into consideration that Article 7 of the Merger Regulation states that a merger subject to approval of the Commission cannot be implemented until it has been cleared.

It was originally estimated that it would take the General Court less than 12 months to review the legality of a contested decisions, i.e. that the court would render a judgement within that time limit.[138] The *Tetra Laval case* and *Schneider case* were the first cases tried under the fast track procedure. It took the General Court nine months to adjudicate Tetra Laval's appeal of the Commissions decisions and ten months for Schneider's appeal.[139] In contrast it took the General Court close to three years to review the legality of the contested decisions in the *Ryanair case.*[140] Likewise in the *Impala case,* the applicant appealed the Commissions decisions in December 2004 which was followed by written pleadings and subsequently a hearing in September 2005. The General Court did however not deliver its judgment until July 2006 almost a year after the hearing. Thus it is clear that the General Court has been able to keep within the time limit originally set. It should however been noted

[135] Fountoukakos, Kyriakos, "Judicial review of merger control: The CFI´s expedited procedure". *Competition Policy Newsletter* 2002 (3), p. 9-10.
[136] *Ibid,* p. 9.
[137] Bay, Matteo; Calzado Javier and Weitbrecht, Andreas, "Judicial review of mergers in the EU and the "fast-track" procedure". *The European Antitrust Review* 2006 p. 39. cf. Fountoukakos, "Judicial review of merger control: The CFI´s expedited procedure", p. 9.
[138] Fountoukakos, "Judicial review of merger control: The CFI´s expedited procedure", p. 8.
[139] Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381 and Case C-440/07 *Commission v. Schneider Electric* [2009] ECR I-6413.
[140] Case T-342/99 *Airtours v. Commission* [2002] ECR I-1365

that despite the increase in requests for fast-track procedure in the period from 2005-2009, the General Court has only grants such a request in around 1/3 of the cases.[141] The General Court is however more likely to grant such a request when the contested decisions regards mergers.[142]

There are further certain constraints of the expedited procedures such as the fact that written pleadings must be limited to what is stated in the application itself and the defence. Oral hearings thus have a greater weight than written pleadings in a fast track procedure. It should also be mentioned that pleadings are only delivered once and likewise there is only one chance to lodge a statement when intervening.[143] Moreover given that merger decisions are often quite lengthy and detailed it can be challenging to draft an application for an appeal. One must thus choose carefully the points for review which form the grounds for appeal. Therefore it might be advisable to reduce the number of pleas to the extent necessary to bring across a stronger and more coherent case during the oral proceedings. Finally one must keep in mind that oral pleadings are only delivered once and thus there is no opportunity for the appellant to respond to the oral pleadings delivered by defendant.[144]

[141] There are statistical information available on the homepage of the Court of Justice on the number of requests made for a hearing under the fast track procedure and further in how many instances the General Court has granted such a request. The information are available on www.curia.europa.eu. In 2005 there were 12 requests made for a fast-track procedure and the General Court granted such a request for six cases. In 2006 there were ten requests made but the General Court only granted four requests. In 2007 the number of requests rose to 17 but the court only granted such hearing in four instances. In 2008, 15 requests were lodge and the General Court only granted such a request in six cases. Finally in 2009 a total number of 22 requests were brought for fast-track procedure. The General Court however only granted such a request in three cases.

[142] Calzado, Javier and Barbier de La Serre, Eric, "Judicial Review of Merger Control Decisions After the *Impala* Saga: Time for Policy Choices?". *The European Antitrust Review* 2009, p. 24.

[143] Varona et. al., *Merger Control in the European Union – Law, Economics and Practise, p.* 451.

[144] Bay et al., "Judicial review of mergers in the EU and the "fast-track" procedure", p. 39 cf. Fountoukakos, "Judicial review of merger control: The CFI´s expedited procedure", p. 10.

4. Deficiencies in the current procedure of judicial review and how to improve it

No system goes without a flaw. The Court of Justice has diligently exercised its obligations under the TFEU by carrying out judicial review of merger decisions and thereby raised the standard of proof through intensified scope of review. However, decisions adopted by the Commission pursuant to the Merger Regulation are not subject to full review by the Courts of the European Union and further the procedure for judicial review could be made more effective. The aim of this chapter is thus to answer the underlying question of the thesis of whether it is possible to make judicial review of merger control more effective. To answer that question the first part of this chapter will analyse the limitations of the current system for judicial review in the light of the case law examined in the previous chapter. The second part of the chapter will provide for possible solutions.

4.1 Limitations under the current system of judicial review of merger decisions

It is the role of the Courts of the European Union to review the legality of decisions adopted by the Commission under the Merger Regulation cf. Article 263 of the TFEU. Accordingly, the procedure for judicial review of merger control must be as effective and efficient as possible so that the undertakings concerned and third parties affected by it can make adequate use of their legal rights.

As set out in the *Tetra Laval case,* it is for the General Court when reviewing the legality of a decisions adopted under the Merger Regulation to establish whether the evidence presented are factually accurate, reliable and consistent. Further the court must assess whether the evidence contains all the relevant information which must be taken into consideration when the possible anti-competitive effect of the concentration is appraised. Last but not least, the court must establish whether the evidence are capable of substantiating the decisions adopted by the Commission. Although this sounds like a reasonable procedure for judicial review of administrative decisions it may cause problems in the field of merger control. Appraisal of concentrations does not entail a review of past behaviour but rather a prospective analysis of whether a concentration may alter the conditions of the relevant market to the level that it significantly impedes effective competition. This specific nature of merger control makes it difficult to establish a clear standard of proof as to when concentrations should be declared compatible with the internal market and when they should be prohibited. For the Commission to clear a concentration incompatible with the internal market it must prove that implementation of the concentration would not significantly impede effective competition within the internal market. Likewise, for the Commission to prohibit a concentration it must

prove that implementation of the concentration would significantly impede effective competition within the internal market. In order to prove what effect the concentration will have on the internal market the Commission must examine how the notified concentration might alter the factors determining the state of competition on a given market. Whether a concentration may significantly impede effective competition depends on the structure of the relevant market. Accordingly, the Commission must assess how the concentration may affect the structure and the behaviour of the competitors on the relevant market. Such an analysis is very fact based and varies from one concentration to the other. Further the Commission must carry out a serious of economic analysis on the possible anti-competitive effect rising from the concentration and subsequently adopt a detailed decisions setting out the economical arguments substantiating it. Thus, the appraisal of a concentration is not a pure legal question in its nature. This appraisal and the evidence supporting it are however subject to judicial review as previously stated and that is where the problem begins. The economic analysis of the Commission is carried out by a number of economists. Thus in order to assess the economic evidence set forth by the Commission the judges in the General Court need to understand the economic argument set out in the decisions. In my opinion, the *Impala case* is a good example of how difficult it can be for the General Court to assess evidence of economic nature as well as the Commission´s economic analysis of a concentration.[145] In its judgment the General Court concluded that the Commission had failed to demonstrate to the requisite legal standard that there was a not a pre-existing collective dominant position that would be strengthened with the concentration. The Commission had concluded in its decisions that a series of promotional discounts offered in the whole sale market for music reduced transparency in the market therefore there was no evidence to a pre-existing collective dominant position. To understand the analysis of the General Court and further the review by the Court of Justice of that analysis, one must recall the conditions for finding collective dominant position as set out in the *Airtours case,* which must cumulative be met*:* (i) 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 to the same policy; (ii) the situation of tactic coordination must be sustainable over time, meaning that there must be an incentive not to depart from the common policy on the market and (iii) the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the

[145] Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Impala* [2008] ECR I-4951.

results expected from the common policy.[146] In its review of the Commissions decisions, the General Court stated the conditions for finding a collective dominant position came from a theoretical analysis and thus in appropriate circumstance these conditions might derive from indirect evidence indicating the presence of a collective dominance. This would be the case in situations where prices had been aligned and kept above competitive level for a long period of time together with other factors typical of collective dominance. This behaviour would suffice to demonstrate the existence of collective dominance even in the absence of market transparency as it would be presumed in such circumstance. The court then applied these conditions to the concentration in question and maintained that the prices of discs had been aligned and kept above competitive level for a period of six years despite decline in demand. This indicated that there was pre-existing collective dominant position and the court derived this conclusion from the alleged common pricing policy and thus there was no need to establish whether the market was transparent.[147] The Court of Justice concluded that the General Court had committed an error of law by misconstruing the legal test for establishing a collective dominant position by failing to use the hypothetical tactic coordination as a basis for such an assessment.[148] In my view it is questionable how the General Court applied test for finding a collective dominant position as it demonstrates the lack of required economic understanding necessary to carry out judicial review of evidence of economic nature. The General Court stated that there was no need to demonstrated transparency in the market to find the existence of a collective dominant position as the undertakings allegedly holding a collective dominant position had adopted a common policy. If competitors behave in parallel manner in a market that is not transparent that indicates that they are colluding and that would be a violation of Article 101 of the TFEU. The concept of collective dominance was however developed by the Commission in order to tackle anti-competitive behaviour where the transparency of a market enables competitors to behave in parallel manner and thereby derive benefits from their collective market power without ever entering into an agreement.[149] This type of market structure is often referred to as oligopolistic market, which is a market dominated by few competitors. There is little incentive to compete in terms of prices in such markets as the transparency in the market enables competitors to quickly match any price reduction or increase. The theory is therefore that in an oligopolistic market rivals are

[146] Case T-342/99 *Airtours PLC v. Commission* [2002] ECR II-2585, paragraph 62.
[147] Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Impala* [2008] ECR I-4951, paragraph 104.
[148] *Ibid, paragraph* 126,
[149] Wish, *Competition Law,* p. 544.

interdependent: meaning they have a heightened awareness of each other presence and are bound to match the business strategy of their competitors.[150] In essence this means that the transparency in the market enables the competitors adopt a common commercial policy without communicating. The Court of Justice confirmed this understating by stating that hypothetical coordination should serve as a basis when assessing whether transparency in market would enable competitors to reach a common understanding in terms of coordination and/or allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to.[151]

Not only can it be difficult for the General Court to establish the legality of the decisions adopted by reviewing information of economic nature but further the General Court must also establish whether the evidence are factually accurate, reliable and consistent. In this respect is should be noted that review of merger decisions pursuant to Article 263 of the TFEU is limited to the parts of the decisions under dispute and necessary for review of the lawfulness of a decision. As stated before, an appellant bringing an action for annulment under Article 263 of the TFEU is thus in the position of being able to shape the case under review. The appellant will accordingly form his application to best serve his interest. One must also keep in mind that when the legality of a contested decision is under review, the General Court will neither rehear the case in full nor examine issues, not raised, on its own initiative. The court will thus base its review of the legality of the Commissions decisions on the facts presented by the applicant, defendant and those contained in the contested decisions under review. Further keeping in mind that merger control requires a prospective analysis as set out in the *Tetra Laval case* which entails a prediction of events which are more or less likely to occur in the future if a decisions prohibiting the concentration and an examination and how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. This prospective analysis is based on the facts that the Commission has gather during its appraisal of the concentration. These facts include e.g. information on the structure of the relevant market, number of active competitors on it, market share of the competitors and barriers to enter the market. Thus in order to review the legality of the contested decisions the General Court must review the facts which the Commission uses to substantiate its conclusion, i.e. the evidence. Thus in my opinion, to verify whether the

[150] Wish, *Competition Law*, p. 546.
[151] Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Impala* [2008] ECR I-495, paragraphs 125-126.

evidence are factually accurate can be difficult without being able to being able to ascertain the facts of the decisions *ex officio,* meaning that the General Court would not be limited in its review to the parts of the contested decisions. This limited review can cause problems as became clear in the *Impala case* where the court recognised discrepancies in the information obtained by the Commission during the appraisal of the concentration. Without being able to appraise the facts of the case *ex office* the General Court used the statement of objections as benchmark to established whether the facts which the Commission used to substantiate its decisions were complete and consistent. The Court of Justice however concluded that the General Court had committed error in law by treating information in the statement of objections as established. Thus it is clear that without the ability to engage in review of all the facts of a contested decision on its own the review of the General Court is limited by and to the application of the appellant. This renders judicial review of merger control somewhat ineffective at the legality of the contested decision is reviewed in abstract rather than the court being able to gain a holistic view of all the facts and evidence substantiating the contested decisions.

It is also clear that it is a time consuming process for the General Court to review the legality of a contest decisions. Although the General Court has introduced a solution for a faster procedure there are limitations to the procedure. First of all it is at the discretion of the General Court whether a case adjudicated under the fact track procedure or not. Secondly, the General Court has taken the approach that almost only clearance decisions fulfil the urgency requirement as set out in Article 76(a) in the Rules of Procedure of the General Court. Keeping in mind that only applicants or defendants can apply for such a procedure, the fast track procedure is not really an option that is available for the undertakings concerned by the concentration. This also creates a certain legal uncertainty for the undertakings concerned by the concentration when a concentration has been cleared. This is due the fact that the fast track procedure is more attractive for competitors and other third parties who are individually and directly concerned by the decisions and thus making it more easy for them to seek annulment of the contested decisions.[152] Further, the review under the fast track procedure is even more limited than in normal proceedings before the General Court since the written pleadings must be limited what is in the application and the defence. This renders judicial review of merger decisions even more ineffective than under the normal procedure. Under the fast track procedure the General Court is only reviewing a very limited part of the contested

[152] Calzado et al., "Judicial Review of Merger Control Decisions After the *Impala* Saga: Time for Policy Choices?", p. 24.

decisions and may thus not get a complete picture of the contested decisions and the evidence supporting it. This can make review of merger decisions difficult given how dependent the appraisal of the concentration is on facts.

Taking all of this into consideration, i.e. the fact that review of legality of decisions adopted by the Commission is limited in nature both due to the fact that it requires review of information of economic nature and that the applicant shapes the case under appeal and further the limitations of the fast track procedure it is clear that there is still room for improvement in the procedure for juridical review of merger control. The question thus remains how the procedure can be made more effective. Possible solutions as further explained below would be to grant the General Court the right to examine the facts of the contested decisions *ex officio* and set up a separate judicature for competition cases.

4.2 Full review of the legality of contested decisions

Given the fact that Germany was one of the first nations in Europe to adopt national legislation on merger control and that there is a strong tradition in the legal system for judicial review due to historical reasons,[153] it is appropriate to seek inspiration on how it is possible to enhance the effectiveness of judicial review by providing for full review of merger decisions.

Administrative decisions adopted by the German Competition Authority (d. *Bundeskartellamt*, hereinafter referred to as "Bundeskartellamt") are subject to judicial review of the Higher Regional Court in Düsseldorf (d. *Oberlandesgericht Düsseldorf*, hereinafter referred to as "OLG Düsseldorf") cf. § 63 of the Act Against Restraints of Competition (d. *Gesetz gegen Wettbewerbsbeschränkungen*, hereinafter referred to as "GWB"). Although an appeal of a merger decision is subject to review of a civil court and not an administrative court, the rules of procedure follow mainly the principals of administrative procedural law and not the Code on Civil Procedure (d. *Zivilprozessordnung*) like in normal proceedings.[154] Decisions adopted by the Bundeskartellamt are subject to full review of the OLG Düsseldorf according to § 71 GWB, which is an unusually broad jurisdiction for review of administrative decisions in Germany. This means that the court will review whether the facts substantiating the decision adopted by the Bundeskartellamt are correct and complete, interpretation of the law and further whether the law have been applied correctly to the facts. What is particular about the procedure of judicial review in Germany is the fact that it is the courts responsibility

[153] Cini, Michelle and McGowan, Lee, *Competition Policy in the European Union.* Eastbourn 1998, p. 116-120.
[154] Immenga, Ulrich, and Mestmäcker, Ernst-Joachim, *Wettbewerbsrecht – Kommentar zu Detuschen Kartellrecht* ,Munchen 2007, p. 1062.

to ascertain the facts of the case *ex officio* cf. § 70(1) GWB (d. *das Beschwerdegericht erforscht den Sachverhalt von Amts wegen*).[155] Further, as set out in § 63(1) GWB, an appeal can be based on new facts or evidence (*die Beschwerde [...] kann auch auf neue Tatsachen und Beweismittel gestützt werden*). Thus the OLG Düsseldorf is able to review new facts presented with the appeal that have not been considered by the Bundeskartellamt before. This does however not mean that the OLG Düsseldorf can start a completely new investigation. [156]

The question is of what relevance this is for judicial review of decisions adopted by the Commission? The General Court will limits its review under Article 264 of the TFEU to the parts of decisions under dispute and thus necessary for review of the lawfulness of the decisions. Accordingly the General Court cannot adopt a new decision on the merits of a case. The court can thus only annul a decision either in whole or in part and subsequently send it to the Commission for re-examination according to Article 266 of the TFEU. When the concentration is then reviewed by the Commission it must be re-examined in the light of the current market conditions according to Article 10(5) of the Merger Regulation. This procedure is hence very inefficient as conditions of the market may have changed substantially and that calls for complete re-examination of the relevant market. Further, one must also keep in mind that the contested decisions are the central focus of the General Courts review and thus the parties disputing over the legality of the decisions will not present further evidence such as export reports etc. This rises from the fact that the primary focus is on the oral hearing.[157]

Sending a concentration back to the Commission following an annulment of decisions does not serve the interest of the undertakings concerned by the concentration nor the Commission. Thus, allowing for new facts and evidence to be presented when decisions are under review to support the underlying information of the decision in addition to grant the General Court the authority to review the facts of the decisions *ex officio* could enhance the effectiveness of judicial review of merger control. In order to keep this system as efficient as possible the appellant and the defendant should only be allowed to present further information and evidence supporting or contesting to what what has been set out in the Commissions decisions. Granting the General Court the right to assess the facts at its discretion would provide the court with a complete view of the legality of the decisions rather than limiting its

[155] Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", p. 32.
[156] Riesenkampff and Lehr, *Kartellrecht – Europäsices und Deutsches Recht Kommentar,* p. 1299, p. 2451 and Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", p. 33
[157] Vesterdorf, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law enforcement", p. 21.

review to the parts strictly necessary. These changes would render judicial review more effective as it might reduce the number of referrals the Commission. Although full review provides for effective judicial review the drawback is that such a process might not be very efficient given how time consuming the process of reviewing facts is.

4.3 Separate judicature for competition cases

Time is of essence in large transactions such as those falling under the scope of the Merger Regulation. It is therefore a challenge to find the balance between making judicial review efficient without jeopardising the quality of review. Given the very economic nature of merger decisions, the limited scope of review and further the limitations of the fast track procedure, one wonders whether it would be optimal to set up separate court or a separate chamber within the Court of Justice that has a sole jurisdiction to hear competition cases?[158]

The idea of separating judicial review of competition cases from other cases subject to review by the General Court and Court of Justice is not a new one.[159] However to assess whether that would be a viable option it is appropriate to take into considerations legal systems where such a separation exists. Germany is a good example. As previously stated decisions adopted by the Bundeskartellamt are subject to review by the OLG Düsseldorf cf. § 63 GWB. This is due to the simple fact that the Bundeskartellamt is located in the city of Bonn which falls under the jurisdiction of the OLG Düsseldorf according to § 63(4) GWB.[160] This essentially means that all appeals of merger decisions are heard by the same court. Although appeals are subject to judicial review of the OLG Düsseldorf, the case is not heard by the ordinary judges of the court but rather a special Cartel Division (d. *Kartellsenat*, hereinafter referred to as "Kartellsenat") established in accordance with § 91 GWB, stating that the Kartellsenat shall decide upon all legal matters assigned to them pursuant to § 63(4) GWB which again states that the OLG Düsseldorf shall have exclusive jurisdiction to hear appeals of decisions adopted by the Bundeskartellamt. Should a judgment of the OLG Düsseldorf be appealed to Federal Court of Justice (d. Bundesgerichtshof, hereinafter referred to as "BHG") it is also heard by a Kartellsenat pursuant to § 94 GWB. Thus at all instances

[158] Vesterdorf, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law enforcement", p. 21 and Dawes, Anthony and Peci, Konstandin, "Sorry, But There´s Nothing WE Can Do to Help: Schneider II and the Extra-contractual Liability of the European Commission in Merger Cases". *European Competition Law Review* 2008 (3), p. 159.

[159] House of Lords European Union Committee 15th Report of Session 2006, "An EU Competition Court", 4 May 2011. Available at http://www.parliament.uk.

[160] Schmidt, Karsten, „Wirtschaftsverwaltungsrecht vor den Kartellsenat – die Praxis zu §§ 63 ff. GWB als Beitrag zum Verwaltungsrecthsschutz im Wirtschaftsrecht". In *Staat, Wirtschaft, Finanzverfassung – Festchrift für Peter Selmer zum 70. Geburtstag*. Berlin 2004, p. 502.

the legality of a decisions adopted by the Bundeskartellamt pursuant to the GWB is heard by a specialised Kartellsenat. The legitimacy of the Kartellsenat was disputed when it was first introduced as it raised concerns as to whether it was consistent with the principle of separation of powers as set out in the German Constitution (d. *Grundgesetz*). This unconventional procedure was however chosen for the judicial review of competition cases due to the complex nature of competition law and further to ensure consistency in the application of the GWB (d. *der Einheit der Rechtsordnung*).[161]

This demonstrates that there may not be need to set up a separate court. It may be suitable to set up a separate chamber in the General Court for the review of competitions decisions adopted by the Commission. In my opinion, the benefit of setting up a separate chamber for competition cases rather than a separate court is that then the resources of General Court would also serve that chamber. Having such a specialised chamber for competition cases would create the need for judges with both knowledge and experience in dealing with matters of economic nature. The supporting staff of the competition chamber should also have experience in competition law and/or economics. The judges of the competition court or chamber would also fairly quickly adopt expert knowledge in the field of competition law and as result the proceedings would be become more efficient. Further, taking into consideration that the competition chamber would not be burdened by other cases it should be able to adjudicate cases in a swift manner. This system should lead to enhanced quality of review as the expert knowledge in the field of competition law grows and subsequently reduce the time that it takes the chamber to adjudicate and thus making judicial review a more effective and efficient procedure.

Although the proceedings before a competition chamber may be more effective and efficient than judicial review of merger control as it stands today there is still the possibility of a decisions being annulled meaning that the case is sent to square one so to say. Thus, in my opinion an another alternative worth looking into is whether it may be optimal to alter the function of the Advisory Committee. Rather than having the Advisory Committee providing its opinions on the concentration under appraisal of the Commission, it could be given a more formal and permanent role. The Advisory Committee could serve as an appeal board of administrative nature where the undertakings concerned by the concentration and third parties being directly and individually concerned could appeal a decision adopted by the Commission. Taking into consideration the fact that the Advisory Committee is provided for

[161] Schmidt, Karsten, „Wirtschaftsverwaltungsrecht vor den Kartellsenat – die Praxis zu §§ 63 ff. GWB als Beitrag zum Verwaltungsrecthsschutz im Wirtschaftsrecht“, p. 503.

in the Merger Regulation other decisions that those adopted pursuant to the regulation would not be heard by the committee. This can be justified by the fact that other decisions adopted by the Commission than those under the Merger Regulation are primarily decisions when one or more undertakings have infringed Articles 101 and 102 of the TFEU, meaning they concern past anti-competitive behaviour. The commercial interests at stake in merger control justify this differentiation as undertakings having violated Article 101 and 102 of the TFEU have done harm to consumers on the market whereas a concentration may increase competition on the relevant market to the benefits of consumers. The procedure before the Advisory Committee should not take a long time given the fact that the committee only hears appeals of merger decisions. The effectiveness of a review process by the Advisory Committee could be ensured by setting the committee up with either lawyers with economic knowledge or having both lawyers and economies on it. Although a review by the Advisory Committee would be an good option as the legality of the decision adopted by the Commission could be adjudicated quickly, the right to judicial review by an impartial and independent court is still a fundamental right ensured to the undertakings concerned by the concentration and third parties that have may have standing under Article 263 of the TFEU. Therefore it should be permitted to appeal a decisions adopted by the Advisory Committee to the General Court.

5. Conclusions

Merger control plays an integral part in the competition policy of the European Union. Through enforcement of the Merger Regulation, the Commission aims to prevent consumers from being harmed by possible anti-competitive effects that a concentration may have on the relevant market. Although most mergers have no effect on competition, one must recall that merger control not only prevents possible future infringement of competition law but also aims at maintaining a competitive structure of the relevant market so that the incentive to collude or abuse market power to the detriment of consumers is minimized. Accordingly mergers with community dimension must be notified to the Commission for appraisal. A concentration has community dimension if two or more previously independent undertakings merge or there is a lasting change in control. Further the combined aggregate worldwide turnover of all the undertakings concerned by the concentration must be more than €5000 million and (ii) the aggregate community-wide turnover of each of at least two of the undertakings concerned by the concentration is more than €250 million. Concentrations are appraised under the substantive test to determine whether they will significantly impede effective competition within the internal market if implemented and thus whether they are compatible with the internal market. In this respect the Commission must engage in an extensive investigation on the possible anti-competitive effect that the concentration may have. First, the Commission must define the relevant market which serves as a basis for further examination on how the notified concentration might alter the factors determining the state of competition on the relevant market. The Commission bears the burden of proof when it comes to establishing whether a concentration may significantly impede effective competition. Given the economic nature of merger control it is difficult to set a clear standard of proof for when a concentration should be prohibited or cleared. Thus, the Commission must engage in a prospective analysis examining the effect of the concentration. Based on the outcome of the Commissions appraisal, the concentration is either declared incompatible with the internal market and thus prohibited or declared compatible with the internal market and hence cleared.

The Court of Justice has on numerous occasions recognized that the Commission enjoys certain margin of appreciation in its appraisal of concentrations under the substantive test. This discretion gives rise to the undertakings concerned by the concentration contesting to the concentration. Given the fact that decisions adopted by the Commission under the Merger Regulation are binding, the undertakings concerned by the concentration can appeal the decisions for annulment to the General Court under Article 263 of the TFEU. Third parties

who are not addresses of the decisions can bring an action under Article 263(4) of the TFEU if they can demonstrate that they are directly and individually concerned by the contested decision and that they have an interest in having the decision annulled. It is the role of the General Court to review the legality of the contested decision upon appeal. The General Court must thus establish whether the evidence presented are factually accurate, reliable and consistent. Further the court must assess whether the evidence contain all the relevant information which must be taken into consideration when the possible anti-competitive effect of the concentration is appraised. Last but not least, the court must establish whether the evidence are capable of substantiating the decisions adopted by the Commission. It follows from the case law of the Court of Justice that the court does not take a very formalistic approach to standard of proof and scope of review but rather focuses its assessment on the evidence supporting the contested decisions. However by comparing the scope of review in the *Kali & Salz case* and *Tetra Laval case* it is clear that the Court of Justice has raised the standard of proof in merger control by reviewing the economic analysis carried out by the Commission rather than solely assessing from a pure legal point of view whether the applicant or defendant has provided more convincing evidence. The scope of review as set out in the *Tetra Laval case* is now the standard which the General Court will apply when reviewing the legality of the contested decisions.

There are some limitations to the current procedure for judicial review that should be noted. Although the General court will not avail itself from reviewing evidence of economic nature it became clear in the *Impala case* that this is not an easy task. The evidence substantiating the decisions adopted by the Commission are based on economic analysis of the possible anti-competitive effect that a concentration may have. The General Court thus in the *Impala case* misconstrued the legal test for finding a collective dominant position by trying to analysis the economic evidence by approaching it from a legal point of view and thereby failing to take account of the economic theory behind the concept. Another implication of the current procedure for judicial review of merger control is the fact that the General Court does not conduct full review of the contested decisions. The General Court will neither rehear the case nor will it examine issues on its own initiate that have not been raised by the appellant or defendant. Thus, the appellant is in the position of being able to shape the case by his application to best serve his interest. Although, the introduction of the fast track procedure was an attempt to enhance the effectiveness of judicial review of merger control it is clear that that the procedure has some drawbacks. The review exercised under the fast track procedure is even more limited than in a normal judicial review as the number of pleas must

be minimal. Further, the fast track procedure although originally intended for the benefit of both the undertakings concerned by the concentration and the third parties directly and individually concerned by the contested decisions, it is not available remedy for undertakings concerned by the concentration wishing to seek annulment of a decision declaring a concentration incompatible with the internal market.

The question then remains whether there is room for improvement in judicial review of merger control. Looking at the procedure for judicial review in Germany it is clear that judicial review of merger control can be made more effective.

First of all, by enabling the General Court to examine the facts of the contested decisions *ex officio* and further provide for the possibility of new evidence being presented before the General Court would enhance effectiveness of the judicial review of merger control. This would provide the General Court with a more holistic view of the contested decisions and further it might reduce the number of contested decisions sent back to the Commission for re-examination. Economic analysis carried out by the Commission under the substantive test primarily relies on the facts of the relevant market. The Commission is unable to predict what possible anti-competitive effect the concentration may have on the relevant market without thoroughly examining the structure and competitive conditions of the market. Likewise, for the General Court to properly exercise its obligations under the TFEU it must be able to review all the facts of the contested decisions. This extensive scope of review is however time-consuming and it would call for a change in the TFEU which brings us to the next suggestion.

The effectiveness of judicial review of merger control would be greatly enhanced by setting up a separate adjudicator for competition cases. This distinction is a known procedure in Germany, where a specialised Kartellsenat hears all appeals of decisions adopted by the Bundeskartellamt. Although the introduction of the Kartellsenat raised some concerns in regards to the separation of power, this was the procedure chosen by the German legislator due to the complex economic nature of competition law. Further, this procedure was introduced to ensure harmonised application of competition cases. The procedure in Germany demonstrates that the specific nature of competition law calls for special knowledge that not all lawyers have. To understand how a legal concept in competition law should be applied one must understand the economic theory behind the concept. Thus by setting up a separate court or chamber in the General Court that has the sole jurisdiction to hear competition it would enhance both the efficiency and effectiveness of judicial review of merger control. This comes from the fact that the judges having a seat in the separate courts or the competition

chamber would over time gain deeper understanding on how economic theory forms the basis of competition law. The judges would also better understand how competition law should be applied to anti-competitive behaviour. Through increased understanding of competition law and knowledge of economic theory the procedure for judicial review would ultimately take less time. Although it would be ideal to set up a separate adjudicator for competition cases it would call for changes in the TFEU and would raise political issues as to appointment of judges etc.

Thus, building on the idea of setting up a separate body to review the legality of contested decisions adopted by the Commission under the Merger Regulation, brings us to the third option which is to alter the role of the Advisory Committee. Today, as the name indicates the Advisory Committee is a mere advisory body although the Commission must take into account the opinion of the committee. The Advisory Committee could therefore be given a more formal role as an appeal board of administrative nature. The independence of the committee would have to be ensured as it is not a court but an administrative body. The fact that the Advisory Committee is not a court however provides for a greater leeway when it comes to appointing members to sit in the committee. Accordingly, the Advisory Committee could be set up by experts on competition law and/or economics which would provide for a more detailed review on the legality of a contested decision. This comes from the fact that the Advisory Committee would not have problems of reviewing information of economic nature. The scope of review would thus in all likelihood be greater than exercised by the courts today. The specialised knowledge enjoyed by the members of the Advisory Committee would also reduce the time that it takes to review the legality of a contested decision. The drawback of this procedure is the fact that the Advisory Committee is an administrative body and this not an independent and impartial court. From a legislative point of view altering the role of the Advisory Committee would not acquire a change in the TFEU but rather the Merger Regulation.

It follows from all of the above, that there are several ways in which the effectiveness of judicial review of merger control can be enhanced and thus the procedure in whole. What the optimal solution is depends on the objective pursued. The most radical change would be to introduce a separate competition court whereas granting the General Court the right to review the facts of the contested decisions *ex officio* is less dramatic although it would call for change in the TFEU. The quickest way would however be to alter the function of the Administrative Committee.

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