COMPETITION COMMISSION

# Judicial review of competition decisions under EC law
## by Mario Siragusa[1]

Ladies and Gentlemen,

Let me start by saying that it is a great pleasure to be here with you, and a great honor to have been chosen by the Competition Commission among tonight's speakers. The task I was assigned is to take on the subject of judicial review of competition decisions at the EC level.

This theme is currently undergoing a very lively debate with respect to the area of merger control. In fact, the way in which the CFI has applied the standards of proof and judicial review in merger decisions has lead to substantial reforms of the Commission's internal procedures. Therefore, in my general discussion of the main rules governing judicial review in the EC, I will devote more attention to these two hot topics.

Of course, to keep within the time I was assigned, I will simply make some points and be available for discussion later.

## 1. Type of actions available

In competition cases, judicial review may be triggered by actions for failure to act, actions for annulment, actions for reform of fines issued by the Commission or actions for damages. The actions for annulment and (to a lesser extent) for reform of fines are the only actions that actually challenge the validity of formal decisions.

However, actions for damages against the Commission are gaining foothold as a form of judicial review in the area of merger control. Currently, two such actions are pending before the CFI (*My Travel/Commission*, T-212/03, which follows the *Airtours* judgment; and *Schneider/Commission*, T-351/93, which follows the *Schneider/Legrand* judgment). It will be interesting to see how this area of law develops.

## 2. Locus Standi

Any individual or company that is directly and individually concerned by a competition decision may challenge its validity before the Community Courts. To fulfill the *locus standi* test, third parties must prove that the challenged act directly prejudices their competitive position (*Métropole TV*, T-528-542-543-546/93) and that their legal position is affected by the decision in a way that is 'peculiar to them' or 'differentiated from all other persons' (*Plaumann*, 25-62).

AG Jacobs has recently suggested that the Community Courts adopt a new, more straightforward test granting *locus standi* to third parties whose interests are substantially prejudiced by the decision (conclusions in *Union de Pequeños Agricoltores*, C-50/00). So far, the CFI has adopted this new test (*Jego Quéré*, T-177/01), but the ECJ has not (*Union de Pequeños Agricoltores*, C-50/00; *Jego Quéré*, C-263/02).

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However, the old test has proven to be effective so far. As of today, substantially affected third parties (for example, complainants, competitors or companies affected by remedies imposed by the Commission on their business partners) have normally obtained *locus standi*. In the recent *Babyliss* case (T-114/02), a third party was successful on the merits for the first time (the CFI annulled the Commission's phase-I decision authorizing SEB's acquisition of Moulinex, subject to conditions).

Third parties having been denied *locus standi* in merger cases include minority shareholders and employees. In *Zunis Holding*, C-480/93P, three minority shareholders of Generali (each of which had a shareholding of less than 0.5 per cent) contested the Commission's decision that Mediobanca's increased shareholding in Generali was not sufficient to confer control over Generali. The CFI and the ECJ held that the Commission's decision was not of such a nature as to affect the plaintiffs' rights as minority shareholders (the Court left open whether shareholders with larger interest may be able to establish a direct and individual concern). Employees are normally *individually* concerned, because under the ECMR they are listed among the third parties showing a 'sufficient interest' to submit their observations. However, in *Perrier*, T-96/92, the CFI held that they were not *directly* concerned, because any redundancies or changes in social benefits that could possibly arise following the merger were not an inevitable or direct consequence of the Commission's decision.

## 3. Challengeable Acts

Acts subject to challenge are those whose legal effects affect the interests of the applicants by 'bringing about a distinct change in [their] legal position' (*IBM*, 60/81). The form is unimportant: even oral statements may be challenged. In *Air France v Commission*, T-3/93, the CFI accepted as admissible an annulment action brought by Air France against an oral statement made by the Competition Commissioner's spokesman that the acquisition of Dan Air by British Airways was not notifiable under the ECMR. In fact, the CFI found that this oral statement produced distinct legal effects, such as allowing Member States to examine the concentration under their own national laws and allowing the parties to go ahead with their transaction without prior notification to the Commission. Therefore, the CFI found that the statement was actually a decision and could be appealed.

What matters is whether the act is actually capable of affecting the applicant's interests. For instance, a statement of objections cannot be challenged, because it is just a preliminary phase in a procedure leading to a formal decision (*IBM*, 60/81). For the same reason, the applicant cannot challenge reasoning that is outside the operative part of Commission decisions.

In *Coca Cola*, T-125/97 and T-127/97, the CFI did not allow Coca Cola to challenge a finding of dominance in a decision approving Coca Cola's acquisition of its UK bottler, because such finding had no influence on the conclusions reached. This case is not devoid of controversy, however, since in practice a finding of dominance may actually prejudice the company that is found to be dominant. The *Coca Cola* case may be compared to *Lagardère/Canal+*, T-251/00, where the CFI maintained that the Commission's finding on the ancillary nature of contractual restrictions may be challenged, as it brings about a distinct change in the applicants' legal position. In the *Coca Cola* case, the CFI held that the Commission's finding of dominance could not affect *Coca Cola*'s interests because in any future proceedings the Commission must define the relevant market again and make a fresh analysis of the conditions of competition therein. On the other hand, in *Lagardère/Canal+*

the Commission's finding that the contractual restrictions were actually ancillary to the concentration had the effect of including these restrictions within the subject matter of the Commission's decision under the ECMR, thus excluding the applicability of other regulations (such as Regulation 17/62) and enhancing legal certainty for the parties to the concentration.

## 4. Timing

The timing of judicial review has been most controversial in the area of merger control. In this area, time is of the essence because of the fast-evolving pace of the market. Previously, judicial review of merger decisions took too long and final judgments came about when the envisaged transactions could no longer be implemented (or no longer made economic sense). In *Kali und Salz* (C-68/94), the ECJ annulled the Commission's decision authorizing a concentration with remedies four years later. The *Airtours* judgment (T-342/99) came about almost three years after the Commission decision. This delay deprived the parties of substantial interest in seeking relief in court.

As a result, in 2001 the CFI introduced a fast-track procedure (art. 76a of the CFI Rules of Procedure), favoring oral vs written proceedings. The fast-track procedure has proven to be particularly suitable for review of merger control, although it is not automatically available to applicants (for example, in *Ineos Phenol*, T-103/02, the CFI denied fast track because the issues at stake were too complicated).

In the three major fast-track cases leading to annulment of Commission decisions, it took only one year (or slightly longer) for the CFI to issue its judgment (*Schneider/Legrand,* T-310/01; *Tetra-Laval,* T-5/02; *Babyliss*, T-114/02). In fact, the fast-track procedure may not take much longer than the time required for the Commission investigations (for instance, in *Schneider/Legrand* the Commission investigation lasted eight months and the procedure before the CFI took slightly longer than ten months).

Whether this timing is satisfactory depends very much on the facts of the case (for example, in *Schneider/Legrand* the CFI concurred with the Commission that the concentration raised concerns in the French market, so the parties were not able to go through with the transaction anyway). Nevertheless, the fast-track procedure appears so far to be a considerable improvement overall.

## 5. Interim measures

Interim measures are almost invariably sought, but seldom granted. Successful applications should prove the existence of (i) a solid *prima facie* case and (ii) risk of serious and irreparable harm to the applicant that, in the balance of interests, outweighs any harm that would result from the suspension of the decision. In practice, this is quite a difficult case to prove. Interim measures are most likely to be granted when they are required to suspend divestiture orders or controversial remedies, whose suspension is not likely to give rise to significant competitive harm. For instance, in the IMS case (C-418/01) the CFI suspended the Commission's interim order obliging IMS to grant licenses to third parties for use of IMS' copyright-protected brick structure.

According to the CFI, the fast track procedure should act as an alternative to interim measures. However, in some instances, interim measures may be necessary even where the CFI has granted use of the fast track procedure. For instance, both in *Schneider/Legrand* and

*Tetra Laval* the parties sought suspension of divestiture orders issued by the Commission pending the fast track procedure. The applications for interim relief were withdrawn only after the Commission agreed to postpone the deadlines for the divestiture.

## 6. Standard of proof

Under the ECMR, there appears to be no clear standard of proof. As is well known, in merger cases the Commission is usually called on to predict future facts, based on proven historical facts and economic theory. Its final decisions rest on predictions that certain events will or will not take place. However, the ECMR does not specify the required degree of likelihood for the Commission's predictions (for example, 51 per cent vs 80 per cent, if numbers mean anything). The problem lies with genuinely doubtful cases. In other words, when the Commission is persuaded that there is, for example, a 50 to 59 per cent likelihood that the transaction will significantly impede competition in the common market, should it prohibit or authorize it?

In *Tetra Laval*, the CFI held the Commission to a very high standard of proof: it required the Commission's predictions as to the parties' future behavior to be proven 'in all likelihood', by 'convincing evidence'. Moreover, the CFI maintained that where the Commission prohibits a conglomerate merger, it is required to undertake a 'particularly close' examination to establish an adverse effect on competition. In addition, if the Commission predicts that the merger will give rise to a dominant position as a result of future behavior by the merging parties, its analysis of the future post-transaction situation must be 'particularly plausible'. This test seems to require certainly more than a 59 per cent likelihood of negative effects on competition.

According to the Commission, however, this standard of proof is 'disproportionate' (Commission Press Release of December 20, 2002) and so it appealed the *Tetra Laval* judgment to the ECJ. AG Tizzano, in its conclusions of May 25, 2004, suggested that doubtful cases should not be prohibited and that the Commission's predictions should be 'very probabl[e]' to warrant a prohibition decision.

Although the standard of proof suggested by AG Tizzano is less stringent than 'in all likelihood', it also seems to amount to a degree of likelihood of more than 59 per cent. In fact, according to AG Tizzano, by providing that mergers are authorized if the Commission does not adopt a formal decision within the required deadlines the ECMR clearly favors market freedom over excessive regulation. Therefore, when in doubt, the Commission ought rather to permit a potentially anti-competitive merger, than prohibit a potentially innocuous merger.

My opinion is that requiring the Commission to prove its assessments 'in all likelihood' is a perhaps too high standard of proof, because there is an inherent degree of uncertainty in all statements as to future facts. I also think, though, that a reasonably stricter standard of proof may be beneficial in at least two ways: (i) by raising the Commission's level of attention as to the proof of historical facts; and (ii) by acting as a brake on the Commission's willingness to use new economic theories, not sufficiently supported by empirical data, to prohibit a merger. In fact, it is also important to emphasize that the likelihood of the Commission's predictions as to future facts may in turn be affected by errors in the proof of historical facts and/or by the use of illogical or unproven economic theories.

In *Airtours*, for example, the starting point of the analysis that lead the CFI to annul the Commission decision was the acknowledgement that the Commission had completely misrepresented the pattern of past competition in the market for short-haul foreign package holidays. I note in passing that the burden of proof for historical facts should be considerably higher than that for predictions (albeit deducing the existence of unproven historical facts from proven facts may certainly imply a judgment of likelihood), because it does not involve complex economic assessments but simply the proper application of evidence rules.

As for the impact of illogical or unproven economic theories, a clear example comes from *Babyliss*. There, the Commission's prediction that the transaction would not result in a dominant position in the countries not covered by the commitments, rested in part on the so-called 'range effect' theory. This theory applies to companies selling a wide range of products to the same retailers or wholesalers. According to the Commission, where a company has a strong market position only for some of a range of products which it sells to the same retailers or wholesalers, it cannot be dominant over these products, provided they account only for a small part of the company's total turnover (ie, no more than 10 per cent). In fact, according to the Commission, if the company were to raise its prices for the products in which it has a strong market position, the retailers/wholesalers would penalize the company by buying from it fewer products for which it has a weak market position. Therefore, the company would not stand to gain from raising the price of its 'strong' products, because *ex hypothesis* they account only for a small part of the company's total turnover.

However, when questioned by the CFI as to the economic principles underlying this theory, the Commission admitted that it had no economic study available on the subject. Worse, the Commission provided no credible explanation as to why the retailers would have to side with the consumers, rather than with the merging entity raising prices. Worse still, in many countries (belonging to different geographical markets), the Commission had not even proven that the merging company's turnover from the 'strong' products was no more than 10 per cent of the company's total turnover.

As a final point, the language chosen by the CFI seems to imply that the Commission bears the burden of convincing the CFI of its theories (thus echoing the US model, where public agencies must build up a convincing case to win in courts). However, I would not take the CFI's judgment as a clear departure from the established standard of review of the Community Courts (Community Courts have no jurisdiction on the merits of the Commission's case, but are only required to review the legality of the Commission's decision: I will come to that in a few seconds). Rather, the judgment in *Tetra Laval* appears to signal to the Commission that it ought to pay closer attention to the facts at hand, when venturing into the application of innovative or not clearly established economic theories.

## 7. Standard of review

In actions for annulment, Community Courts are bound to review the 'legality' of EU institutions' decisions (Article 230 EC) and do not have full jurisdiction on the merits of a case. In a nutshell, the judge ought not to give an independent appraisal of the facts underlying a Commission decision, but rather to go on a quest, guided by the plaintiff, for errors committed by the Commission in its decision. Only if the Commission committed an error may the judge annul the decision, regardless of whether it shares the Commission's

view. Furthermore, if the judge quashes a decision, it is always for the Commission to issue a second, more appropriate decision, if warranted.

The EC model draws heavily from the French model of *recours pour excès de pouvoir*, which underlies a rigid division of powers between the administration and the judiciary. Indeed, according to well-settled case law (for example, *Aalborg Portland*, C-204/00; *Kali und Salz*, C-68/94), competition law confers on the Commission a margin of discretion, particularly with respect to assessments of an economic nature. The Community Courts are only to curb (not to usurp) such discretion, through an effective judicial review and development of the law.

Judicial review by Community Courts is much more intense with respect to Commission decisions imposing fines. There, Community Courts have unlimited jurisdiction on the merits (Article 229 EC) and pursuant to Article 31 of the Modernization regulation may cancel, reduce or even increase fines. With respect to fines, Community Courts may change the Commission's decisions simply because they have a different view. This stricter standard of judicial review seems justified in light of the need to ensure a higher protection of the rights of the parties, in matters that may lead to the imposition of administrative sanctions.

It could be said, therefore, that the EC model of judicial review revolves around the cornerstone of 'error'. Error is the switch that allows Community Courts to alter the Commission's characterization of a case. However, the effectiveness of this system depends very much upon the degree of self-restraint (or pro-activity) exercised by the judges in their quest for errors. In fact, unlike in the US, EC (and national) judges are not asked to make up their own mind on the facts of a case. As a result, they may end up paying too much deference to the Commission's (or to the national competition authority's) reasoning, refusing to quash wrong decisions to the detriment of aggrieved parties.

On the other hand, the EC model of judicial review provides plenty of tools with which to curb possible misuses of the Commission's discretion. First, according to well-settled case law (for example, *Aalborg Portland*, C-204/00), the Commission enjoys little or no discretion when it comes to compliance with procedural rules, as well as with the obligation to adequately state reasons and prove the facts of a case (which includes the proper assessment of evidence).

The Commission's margin of discretion lies mostly in the appraisal of facts, when it involves complex economic assessments. However, even in this case judicial review may be exercised to ensure that the Commission's reasoning is logical, coherent and proportionate. This leaves plenty of room for intervention of the Community Courts in correcting mistakes. For instance, the application of a test of logic to the Commission's reasoning allows the Community Courts to check the credibility of the scientific foundations of the Commission decisions. This can be seen by a comparison of the CFI's rulings in *Tetra Laval* (where it upheld the theory of leveraging supported by the Commission) and in *Babyliss* (where it rejected the theory of the range-effect, for lack of solid scientific foundations and logical flaws).

Another fertile area where lawyers usually love to draw the attention of Community Courts is coherence. For instance, based on the logical principal of non-contradiction, as well as on the principle *patere legem quem fecisti*, the CFI quashed the Commission decision in *Schneider/Legrand*. In fact, the Commission had based its dominance findings on the existence of national geographic markets. However, when assessing the transaction, the

Commission had based its arguments on general transnational considerations that were not proven at a national level. For instance, the Commission found that the merging entity would be dominant because its range of products was 'unrivalled' throughout the EEA as a whole and did not assess the range of products that the merging entity would actually offer on each of the national markets affected by the transaction. The examples of contradictory statements by the Commission in decisions annulled by the CFI are many.

Finally, it should not be forgotten that the Commission's margin of discretion is continuously narrowed down in many ways, by case law and rules that the Commission imposes on itself through notices, guidelines and strings of precedents. The establishment of clear rules from individual cases makes 'errors' more transparent.

What about the limits judicial review encounters vis-à-vis the Commission's discretion? In *Tetra Laval*, the Commission maintains that the CFI has 'exceeded its role, which is to review the administrative decision of the Commission for clear errors of fact or reasoning, and not to substitute its view of the case for that of the Commission' (Commission Press Release of December 20, 2002). AG Tizzano agrees in part with the Commission. Thus, it may be useful to look at that case for an example of what the Community Courts cannot do when exercising judicial review.

In *Tetra Laval*, the CFI criticized the Commission's forecast that the LDP (liquid dairy products) segments of the PET market would experience major growth for the period 2000-2005. The CFI said that 'growth estimates adopted by the Commission [...] are not *really very convincing*' (§ 212). Yet, we learn from AG Tizzano that the Commission had looked at several independent market studies and had taken a more conservative approach than were warranted by its market investigation.

On the other hand, not only is the CFI's language unusual, but also, as AG Tizzano notes, the CFI misconstrued one of the independent market studies and did not even mention the market investigation run by the Commission. Indeed, in such a case, it would seem that the CFI has not been looking for errors in the Commission's reasoning, but rather substituting its own point of view (and errors) to that of the Commission. This seems all the more so, if one takes into consideration that the CFI does not deny that the LDP segment will grow; it only contends that the increase will be 'less shar[p] than that forecast by the Commission'! The ECJ will certainly shed some light on this point.

## 8. Conclusions

The EC system of judicial review is different from the US model (which is not one of judicial review, but rather of public prosecution). In the aftermath of the *GE Honeywell* decision (currently appealed to the CFI), great criticisms were made of the EC system of merger control. Mostly, the criticisms attacked the too wide and unfettered discretion enjoyed by the Commission in applying economic theories that favored competitors, rather than efficiency. However, Community Courts have tried to provide a swift response, by building upon the considerable degree of flexibility embedded in the EC judicial review model.

In this respect, the introduction of the fast-track procedure has considerably reduced the timing of judicial review, improving its effectiveness. Furthermore, the string of CFI annulments of Commission decisions sent clear signals, which lead to major reforms aimed at improving the checks and balances in the Commission's decision making. The intensity of such signals may have lead the CFI at times to trespass the limits of its judicial review, by

stepping into the Commission's shoes. Perhaps, however, the ECJ will have a chance to say something on this issue in its forthcoming *Tetra Laval* judgment.