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## Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement

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This paper sets out personal reflections on the role of the judiciary within a primarily administrative system of enforcement of the competition laws. The paper first goes through a short description of the basic features of the EC system of competition law enforcement; second, it addresses the role of the Community Courts in judicially reviewing the European Commission's decisions; third, it provides an overview (including statistical information) on the functioning of the current system; and fourth, it offers certain ideas for potential future changes and improvements to the system of judicial review.

The author is President of the Court of First Instance of the European Communities. The views expressed herein are entirely personal, do not necessarily reflect those of his colleagues, and do not have any bearing on any pending cases before the Court. The paper endeavors to set out his reflections on the law as it stands on July 1, 2005. This paper is based on a speech given at the UCL Annual Antitrust Forum Conference in London on May 3, 2005 and, subsequently, with minor revisions, at the Studienvereinigung Kartellrecht International Forum on EC Competition Law in Brussels on August 4, 2005. The author would like to thank Kyriakos Fountoukakos, référendaire in the author's chambers, for his assistance with the preparation of this paper.

## I. Introduction

The topic of this paper may appear, at first glance, wide in scope and perhaps academic but, in my view, it could not be more topical or relevant to the everyday enforcement of competition law.

The recent reform of EC competition law with the adoption of Regulation 1/2003<sup>1</sup> in antitrust and Regulation 139/2004<sup>2</sup> in the field of mergers has reopened a debate on the role of competition law in general, and the merits of different systems of enforcement of the competition laws (administrative v. prosecutorial systems, decentralized v. centralized systems, and so forth).

Regulation 1/2003 has led to a radical reform by decentralizing the system of enforcement of the antitrust laws, giving greater powers not only to the European Commission and National Competition Authorities, but also to national courts.

The reform of the Merger Regulation, while less radical, was preceded by a wide-ranging debate, launched by the Commission's Green Paper on merger reform,<sup>3</sup> on the due process aspects of the EC system of merger control and the respective merits of an administrative-based system of enforcement compared to a judicial-based system, such as that of the United States.

Finally, recent litigation in the field of mergers has brought, perhaps for the first time so explicitly, the role of judicial review in competition law to the foreground and even within the realms of the mainstream press. The recent judgment by the European Court of Justice (ECJ) in the *Tetra Laval* case<sup>4</sup> dealt precisely with this issue: What is the role of judicial review in matters of competition law and, in particular in that case, merger law?

This paper attempts to address those issues, focusing in particular on the role of the judiciary within a primarily administrative system of enforcement of the

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1 Council Regulation (EC) No. 1/2003 of Dec. 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 [hereinafter Regulation 1/2003].

2 Council Regulation (EC) No. 139/2004 of Jan. 20, 2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) 1 [hereinafter Merger Regulation or ECMR].

3 Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(2001) 745/6, Dec. 11, 2001, at <http://europa.eu.int/comm/competition/mergers/review/> [hereinafter Green Paper].

4 Case C-12/03 P, *Tetra Laval v. Commission*, Judgment of the European Court of Justice of Feb. 15, 2005, not yet published in the ECR [hereinafter *Tetra Laval*].

competition laws.<sup>5</sup> The paper first goes through a short description of the basic features of the EC system of competition law enforcement; second, it addresses the role of the Community Courts—the ECJ and Court of First Instance (CFI)—in judicially reviewing the Commission’s decisions; third, it provides an overview (including statistical information) on the functioning of the current system; and fourth, it offers certain ideas for potential future changes and improvements to the system of judicial review.

## II. Basic Features of the EC System of Competition Enforcement

Competition is not a minor part of the EC legal order. Quite the contrary, a system of undistorted competition is part and parcel of the EC internal market.

Article 3(g) of the EC Treaty makes “a system ensuring that competition in the internal market is not distorted” one of the main areas of competence of the European Community. Such a system is important in order to achieve one of the main objectives of the European Community as set out in Article 2 EC, namely “a high degree of competitiveness and convergence of economic performance.” The importance of competition is also outlined in the Constitutional Treaty which stipulates that “the Union shall offer its citizens... an internal market where competition is free and undistorted.”<sup>6</sup>

With regard to antitrust law, the main provisions are of course contained in the EC Treaty in the form of Articles 81 and 82 EC, which respectively prohibit restrictive agreements and abuses of a dominant position. The basic rules concerning the enforcement of those provisions are currently found in Regulation

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5 While, after decentralization, the role of national judges will undoubtedly increase, the focus of the present paper will be on the role of the Community Courts, and, in particular, that of the CFI, over which I have the great privilege of presiding, in reviewing the Commission’s decisions in the field of competition. This paper does not, therefore, focus on the preliminary rulings function of the ECJ under Article 234 EC, which concerns application of EC law to national competition litigation. It should, however, be noted that, in the context of national enforcement of the competition rules, the case law of the Community Courts and, in particular, the ECJ’s preliminary rulings function will continue to play an important role. Indeed, it is expected that national courts, faced with increased litigation on Articles 81 and 82, will feel obliged to refer questions to the ECJ under Article 234 EC so that the Court can guide them by providing an authoritative legal interpretation of those provisions and, hence, ensure the uniform application of those rules throughout the European Community.

6 Article I-3(2) of the Constitutional Treaty. See *a/so* Article I-13 of the Constitutional Treaty where competition figures among the few areas where the Union has exclusive competence.

1/2003 and the Implementing Regulation.<sup>7</sup> For mergers, Regulation 139/2004 and the Merger Implementing Regulation<sup>8</sup> provide a specific instrument of control.

Under Regulation 1/2003 and, in the field of mergers, under the Merger Regulation, the Commission enjoys wide-ranging powers of investigation and enforcement, including powers to compel undertakings to provide it with information, to conduct dawn raids, to seal premises, and to adopt final decisions putting an end to infringements, imposing fines, or, in the mergers field, prohibiting or even undoing a merger transaction.

## A. AN ADMINISTRATIVE SYSTEM OF COMPETITION LAW ENFORCEMENT: INTERNAL CHECKS AND BALANCES

It is evident from this short description of the EC system of competition law enforcement that both in the field of antitrust as well as in merger control, the Commission has significant powers not only to review and investigate anticompetitive conduct or mergers but also to conclude this investigation by adopting final, binding decisions and to impose fines.

Those powers of the administration in the field of competition have caused a number of commentators to criticize the system for allowing the Commission to be both investigator and decision maker, a criticism that became particularly prominent in the recent debate on the reform of the Merger Regulation.<sup>9</sup> In this respect, it is perhaps worth noting at the outset that a concentration of investigative, prosecutorial, and decision-making powers in the hands of a single body is not an unusual feature of administrative systems, including competition enforcement systems. Its acceptability is, however, subject to the important proviso that the administration's decisions are taken in full respect of due process and are subject to effective checks and balances, in particular, subject to effective judicial review by an independent tribunal.

IT IS PERHAPS WORTH NOTING AT THE OUTSET THAT A CONCENTRATION OF INVESTIGATIVE, PROSECUTORIAL, AND DECISION-MAKING POWERS IN THE HANDS OF A SINGLE BODY IS NOT AN UNUSUAL FEATURE OF ADMINISTRATIVE SYSTEMS, INCLUDING COMPETITION ENFORCEMENT SYSTEMS.

7 Commission Regulation (EC) No. 773/2004 of Apr. 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 23) 18 [hereinafter Implementing Regulation].

8 Commission Regulation (EC) No. 802/2004 of Apr. 7, 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L 133) 1 [hereinafter Merger Implementing Regulation].

9 See Submissions received on the Green Paper on the review of Council Regulation (EEC) No. 4064/89, at <http://europa.eu.int/comm/competition/mergers/review/comments.html>.

The EC system of competition law enforcement contains such due process features and checks and balances of two different types: internal checks and balances applicable to the Commission's own administrative procedure which apply before a final administrative decision is reached and external checks and balances in the form of judicial review by the Community Courts.

A full enumeration of the various due process features of the administrative system is beyond the scope of this paper which focuses on judicial review.<sup>10</sup> It suffices to note that important due process rights include the requirement for the Commission to always address its objections in writing, the right of the parties to have access to the Commission's file, the right to respond in writing and orally, and the right to participate in a hearing chaired by an independent Hearing Officer.<sup>11</sup> With regard to internal checks and balances, it should be noted that the Commission's own internal processes provide that draft decisions are scrutinized by a variety of bodies within the Commission, but outside the primary investigative service, the Competition Directorate General (DG COMP),<sup>12</sup> including the Commission's Legal Service, the Hearing Officer, and associated services in the form of other Directorates General, such as the Directorate General for Enterprise and Industry and the Directorate General for Economic and Financial Affairs. The Advisory Committee (composed of representatives of the competent authorities of the Member States) provides an important consultative function in the process. Finally, it should be noted that decisions on important matters, such as fining decisions or merger prohibition decisions, are taken by the full College of Commissioners and not just the Commissioner for Competition.

## B. EXTERNAL CHECKS AND BALANCES: JUDICIAL REVIEW

Despite those internal checks and balances in the administrative system of competition law enforcement, the system would remain inherently unfair if there were no possibilities for the companies concerned to seek review of the Commission's decisions by an independent external body.

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10 For a discussion of the due process features of the administrative procedure, see E. Paulis, *Checks and Balances in the EU Antitrust Enforcement System*, in *FORDHAM U. SCH. OF L., INT'L ANTITRUST L. & POL'Y* (B. Hawke ed., 2002), at 381.

11 See Commission Decision 2001/462/EC (ECSC) of May 23, 2001 on the terms of reference of hearing officers in certain competition proceedings, 2001 O.J. (L 162) 21.

12 It is also worth noting here that DG COMP has announced a number of internal measures that also act as checks and balances in its own processes. These include the so-called Peer Review Panels which are composed of experienced officials and are entrusted with the task of scrutinizing the preliminary conclusions and findings of the case team at key stages of the procedure. See Speech by M. Monti (at the time, EC Competition Commissioner), *A reformed competition policy: achievements and challenges for the future*, Center for European Reform, Brussels, Oct. 28, 2004, available at [http://europa.eu.int/comm/competition/speeches/index\\_2004.html](http://europa.eu.int/comm/competition/speeches/index_2004.html).

Indeed, while the internal checks and balances built into the system provide important rights of defense and are designed to improve the Commission's own decision-making process, they remain internal. No amount of such internal checks and balances can provide the same amount of scrutiny as comprehensive review by an independent, external body.

In this respect, it is important to recall that the European Court of Human Rights has held that decision-making powers can be entrusted to administrative authorities as long as they are subject to effective judicial review by an independent and impartial tribunal.<sup>13</sup> Judicial review is therefore a crucial element of the EC system of competition law enforcement for the compatibility of the system with the notion of a "fair trial" as enshrined in Article 6 of the European Convention of Human Rights.<sup>14</sup> It is through judicial review that the administration's decisions are subject to control by an independent external tribunal where necessary.

The remainder of the paper focuses on the role of the Community Courts in ensuring that judicial review is a meaningful check on the administration's actions in the field of competition. It addresses the following questions: Is judicial review by the CFI and ECJ effective? Does it constitute an appropriate system of checks and balances on the Commission's powers? Can the system be improved and how?

## III. The Role of the Community Courts

### A. COMPETENCE OF THE COMMUNITY COURTS

The Community Courts' jurisdiction to review the legality of the Commission's decisions in the field of competition derives directly from the Community's founding document, the EC Treaty.

Article 230 of the EC Treaty gives the Community Courts competence to review the legality of acts adopted by the institutions, including the Commission. It allows any natural or legal person to seek the annulment of a Commission decision which is addressed to that person or is of direct and individual concern to it. In other words aggrieved persons can appeal the Commission's decisions before the CFI and then, on grounds of law only, to the ECJ.

The grounds for annulment are limited and are those stipulated in Article 230 EC, namely "lack of competence, infringement of an essential procedural

<sup>13</sup> See, e.g., *A/73, Ozturk v. Germany*, Judgment of the European Court of Human Rights (ECtHR) of Feb. 21, 1984.

<sup>14</sup> Article 6(1) ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

requirement, infringement of [the] Treaty or of any rule of law relating to its application, or misuse of powers.”

THE SYSTEM ENVISAGES A SORT OF INSTITUTIONAL BALANCE. THE COMMISSION AND THE COURTS SHOULD FOCUS ON THEIR RESPECTIVE PRIMARY FUNCTIONS: COMPETITION POLICY AND ENFORCEMENT ON THE ONE HAND, JUDICIAL REVIEW ON THE OTHER.

Article 229 enables the grant of unlimited jurisdiction to the courts in the determination of penalties. This has been granted in both the antitrust field, in Article 31 of Regulation 1/2003, and the merger field in Article 16 ECMR.

The Community Courts’ case law has sufficiently clarified which acts of the Commission can be challenged and who is entitled to bring such challenges. A detailed analysis of those conditions is beyond the scope of the present paper. Suffice it to say that the case law has

effectively extended the scope of judicial review in the field of competition both *ratione materiae* (which acts can be attacked) and *ratione personae* (who can attack). All decisions producing binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position are acts which may be the subject of an action for annulment under Article 230 EC.<sup>15</sup>

The system of judicial review is therefore comprehensive in that it allows for the review of all of the Commission’s decisions producing legal effects. Is it also effective?

## B. THE COURTS’ ROLE IS ONE OF REVIEW OF LEGALITY, NOT RE-EXAMINATION ON THE MERITS

The first thing to bear in mind when looking at the role of the Community Courts in the EC system of competition enforcement is that their role is one of restricted and not full jurisdiction (except, as noted earlier, in the case of decisions imposing fines). It is judicial review and not re-examination of a case on the merits.

This stems from the basic foundations of the EC system of competition law enforcement. As noted earlier, the EC system is an administrative system of competition enforcement. The Commission has been entrusted with the general task of ensuring that “the provisions of [the] Treaty and the measures taken by the institutions pursuant thereto are applied” as stated in Article 211 EC. In the field of competition, the Council, through the adoption of Regulations 1/2003 and the Merger Regulation, has granted the administration, in the form of the Commission, and not the Courts, the power to adopt decisions at first instance.

15 This is established in the case law of the Community Courts. See, e.g., Case T-125/97, *Coca-Cola v. Commission*, 2000 E.C.R. II-1733, at para. 77 and the previous case law cited therein.



The Community Courts' role is to ensure that "in the interpretation and application of [the] Treaty the law is observed" (Article 220 EC). In the field of competition, the Community Courts can achieve this primarily through their competence to review the legality of the Commission's decisions under Article 230 EC (as well as, in respect of fines, under Article 229 EC).

As a result, the system envisages a sort of institutional balance. The Commission and the Courts should focus on their respective primary functions: competition policy and enforcement on the one hand, judicial review on the other. It is a simple, but fundamentally important, premise which is enshrined in the EC Treaty itself.

This is settled case law and it is a fundamental principle of the institutional balance provided for in the Treaty. The principle is aptly captured in the following two quotations: one from the CFI's judgment in the *PVC* case and one from the recent Opinion of Advocate General Tizzano in *Tetra Laval*. In the words of the CFI in the *PVC* judgment:

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"The extent of the Commission's obligations in the field of competition law must be considered in the light of [ex] Article 89(1) of the Treaty, which constitutes the specific expression in this area of the general supervisory role conferred on the Commission by [ex] Article 155 of the Treaty.

The supervisory role conferred upon the Commission in competition matters includes the duty to investigate and penalise individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles..."<sup>16</sup>

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Given this established role, AG Tizzano recently emphasized that:

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"The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not [...] allow the judicature to go further, and [...] to enter

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16 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *LVM v. Commission*, Judgment of the European Court of First Instance of Apr. 20, 1999, 1999 E.C.R. II-931 [hereinafter *PVC*], at paras. 148–49.

into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution."<sup>17</sup>

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### C. CONTROL BY THE COURTS IS CLOSE, COMPREHENSIVE, AND EFFECTIVE

In light of this respect for institutional balance the Community Courts have traditionally afforded the Commission a margin of discretion when reviewing its assessment of complex economic matters.

The classic formulation of this standard of judicial review, the so-called "manifest error standard," is well-established in the competition field, both in antitrust and mergers.

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"Examination by the Community judicature of the *complex economic assessments* made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers" (emphasis added).<sup>18</sup>

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The intensity of control varies depending on whether the Courts are reviewing, on the one hand, the correctness of facts or the correct application of the law (full control) and, on the other, the correctness of the Commission's appreciation of complex economic matters (restrained control).

This distinction between control of law, facts, and appreciation of economic matters is an important one, albeit not always an easy one to make.

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17 Case C-12/03 P, *Tetra Laval v. Commission*, AG Opinion, at para. 89.

18 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v. Commission*, not yet published in the ECR, at para. 279. To the same effect, see Case 42/84, *Remia and Others v. Commission*, 1985 E.C.R. 2545, at para. 34 and Joined Cases 142/84 and 156/84, *BAT and Reynolds v. Commission*, 1987 E.C.R. 4487, at para. 62.

## 1. Law

With regard to matters of law, the Community Courts exercise full jurisdictional control. After all, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>19</sup>

Indeed, it is for the Community Courts to provide the definitive interpretation of EC law, be it Treaty provisions such as Articles 81 and 82 EC or secondary legal provisions such as those contained in Regulation 1/2003 or the Merger Regulation. This is applicable to both procedural and substantive legal provisions. The Community Courts interpret the law and then check whether the Commission has applied the correct legal principles in the case under examination. There is thus no margin of appreciation left to the Commission as to what are the legal criteria to apply.

First, with regard to procedure, the Community Courts have consistently held that respect of the rights of defense is a fundamental right of EC law, which must be respected in any contentious administrative procedure, even in the absence of specific provisions in the legislation.<sup>20</sup> The Community Courts have scrutinized the Commission’s actions particularly closely with respect to observance of the procedural rules and the parties’ rights of defense.<sup>21</sup>

Second, in matters of substance, the Community Courts have dealt with an enormous variety of issues and have established legal criteria applicable to many different aspects of economic conduct, including concerted practices, oligopolistic behavior, vertical restraints, and abusive behavior in the form of exclusionary conduct such as predatory pricing, refusals to supply, and leveraging. Whenever the Courts are faced with a new issue, they have to interpret the law and establish criteria which will guide the Commission and companies in their future conduct.

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19 See *Marbury v. Madison*, Opinion of Chief Justice Marshall, Judgment of the U.S. Supreme Court, 5 U.S. 137, 1803.

20 As noted earlier, both Regulation 1/2003 and the Merger Regulation do contain specific provisions on rights of defense during the administrative procedure such as the right to be heard and the right of access to the file. For mergers, see Article 18 of the Merger Regulation and Articles 11–18 of the Merger Implementing Regulation. For antitrust, see Articles 27–28 of Regulation 1/2003 and Articles 10–16 of the Implementing Regulation.

21 There is a plethora of case law on procedural rights in the field of antitrust and mergers. As an example of the Court’s close scrutiny of observance of procedural rights for antitrust, see, e.g., Case T-236/01, *Tokai Carbon and others v. Commission*, Judgment of Apr., 29, 2004, not yet published in the ECR, and, for mergers, see, e.g., Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071.

## 2. Facts

Control of primary facts by the CFI is intensive, with no room for discretion on the part of the Commission. This is inherent in the nature of a control of the accuracy of facts—either a fact is correct or it is not.<sup>22</sup>

In his Opinion in *Tetra Laval*, AG Tizzano acknowledged this intensity of the control of facts by the CFI as being correct. He stated:

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“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 conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained.”<sup>23</sup>

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In this respect, it is important to recall that the CFI was created in part because there was the need for a court of first instance to review comprehensively and rigorously the factually complex decisions that the Commission adopts in the field of competition.

As Advocate General Cosmas aptly noted, in the *Masterfoods* case, judicial review in the field of competition, deals with decisions involving:

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“complex technical and economic assessments which, if they are to be correct, require exhaustive review of the substance by a specialised judicial authority. In order to meet that need ... the Community legislature on constitutional matters was led to set up the Court of First Instance. By its systematic hearing of actions for the annulment of Commission decisions ... that Court has succeeded in deepening and strengthening judicial review of

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22 What is a fact and what falls within an appreciation of facts is, however, not always easy to discern. The issue must be decided on a case-by-case basis depending on the precise context. It seems to me, however, that whenever an issue involves a complex assessment which may lead two reasonable persons to disagree as to the conclusion to be drawn, we are not in the realm of pure fact, but in the realm of appreciation of facts.

23 Case C-12/03 P, *Tetra Laval v. Commission*, AG Opinion, at para. 86.

those decisions, thus contributing to the improvement of the Community system for the provision of judicial protection.”<sup>24</sup>

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The CFI has been deeply aware of this role from the very first cases it dealt with. In *Italian Flat Glass*, the Court stated that “it is incumbent on it ... to check meticulously the nature and import of the evidence taken into consideration by the Commission in the decision” (emphasis added).<sup>25</sup> In the *Polypropelene* cartel case of the early 1990s, acting as Advocate General for the purposes of the case, I emphasized that:

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“[I]t is clear from the preamble of the Council’s decision of 4 October 1988 [setting up the CFI] that the very creation of the Court of First Instance, as a court of both first and last instance for the examination of facts in cases before it, is an invitation to undertake an intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound (emphasis added).”<sup>26</sup>

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It is now widely acknowledged that the CFI has more than adequately performed this role of scrutinizing the accuracy of the facts in the Commission’s decisions closely. This close scrutiny of factual elements underpinning the Commission’s competition decisions is more than evident in cases such as the CFI’s merger judgments in *Airtours v. Commission*,<sup>27</sup> *Schneider Electric v. Commission*,<sup>28</sup> *Tetra Laval v. Commission*,<sup>29</sup> and *BaByliss v. Commission*,<sup>30</sup> and the

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24 Case C-344/98, *Masterfoods and HB v. Commission* [hereinafter *Masterfoods*], 2000 E.C.R. I-11369, at para. 54.

25 Joined Cases T-68/89, T-77/89 and T-78/89, *SIV v. Commission*, 1992 E.C.R. II-1403, at para. 95.

26 Case T-7/89, *Hercules v. Commission*, 1991 E.C.R. II-1711.

27 Case T-342/99, *Airtours plc v. Commission*, 2002 E.C.R. II-2585 [hereinafter *Airtours*].

28 Case T-310/01, *Schneider Electric SA v. Commission*, 2002 E.C.R. II-4071 [hereinafter *Schneider*].

29 Case T-5/02, *Tetra Laval BV v. Commission*, 2002 E.C.R. II-4381 [hereinafter *Tetra Laval*].

30 Case T-114/02, *BaByliss SA v. Commission*, 2003 E.C.R. II-1279 [hereinafter *BaByliss*].

CFI's antitrust judgments in, for example, *Bayer*,<sup>31</sup> *Volkswagen*,<sup>32</sup> *General Motors and Opel v. Commission*,<sup>33</sup> *JCB v. Commission*,<sup>34</sup> and the *German Banks* case,<sup>35</sup> which resulted in annulment of the Commission's decisions. In all of those cases, the CFI did not shy away from examining closely, and without restraint, whether the Commission had gotten the core, material facts right.<sup>36</sup>

IN CONTRAST TO THIS CLOSE CONTROL OF LAW AND FACTS, THE COURTS' REVIEW OF THE COMPLEX ECONOMIC ASSESSMENT THAT THE COMMISSION INEVITABLY PERFORMS IN THE FIELD OF COMPETITION, IS NECESSARILY MORE RESTRAINED BUT REMAINS, IN MY VIEW, EFFECTIVE.

### 3. Appreciation of Complex Economic Matters: Restrained But Still Effective Control

In contrast to this close control of law and facts, the Courts' review of the complex economic assessment that the Commission inevitably performs in the field of competition, is necessarily more restrained but remains, in my view, effective.

It is worth repeating here the classic formulation of the manifest error standard that the Community Courts apply whenever reviewing the Commission's complex economic assessments. In the mergers area the standard has been re-confirmed recently by the ECJ in *Tetra Laval* where the ECJ confirmed that it remains the correct test to be applied.

Adjudicating on the Commission's appeal which had criticized the CFI for applying an incorrect judicial review standard, the Court held that:

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“[T]he Court of First Instance correctly set out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as

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31 Case T-41/96, *Bayer v. Commission*, Judgment of Oct. 26, 2000, 2000 E.C.R. II-3383.

32 Case T-208/01, *Volkswagen v. Commission*, Judgment of Dec. 3, 2003, not yet published in the ECR.

33 Case T-368/00, *General Motors Nederland and Opel Nederland v. Commission*, 2003 E.C.R. II-4491.

34 Case T-67/01, *JCB v. Commission*, Judgment of Jan. 13, 2004, not yet published in the ECR.

35 Case T-44/02, *Dresdner Bank v. Commission*, Judgment of Oct. 14, 2004, not yet published in the ECR.

36 The judgments cited in this paragraph resulted in (total or partial) annulment of the Commission's decisions in question. Even though the reasoning for the annulment in each of those judgments differs, from procedural requirements to incorrect interpretation of the law to insufficient evidence, they all show that the CFI examines the contents of the file for accuracy very closely.

laid down in the judgment in *Kali & Salz*. In paragraphs 223 and 224 of that judgment, the Court stated that the basic provisions of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations.”<sup>37</sup>

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Despite this limited, judicial-review-type role in matters of complex economic appreciation, the exercise of control by the Community Courts of the Commission’s actions in the competition field has been extremely effective.

As the Court of Justice noted in the recent *Tetra Laval* judgment, the fact that the Commission has a margin of discretion with regard to economic matters:

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“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*” (emphasis added).<sup>38</sup>

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The Court’s dicta are not, in my view, radical or revolutionary. I think everybody, including the Commission, agrees that, under the established standard of judicial review, the evidence must be reliable and accurate and the reasoning consistent. Indeed, in the *Tetra Laval* judgment the ECJ summarizes the Commission’s arguments in its appeal as follows:

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<sup>37</sup> *Tetra Laval*, *supra* note 4, at para. 38.

<sup>38</sup> *Id.* at para. 39.

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“The Commission concludes from the principles referred to in *Kali & Salz* and from the review carried out by the Court in that case that it is required to examine the relevant market closely, weigh up all the relevant factors, and base its assessment on evidence which is factually accurate, is not clearly insignificant and is capable of substantiating the conclusions drawn from it and that it must reach its conclusions on the basis of consistent reasoning.”<sup>39</sup>

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Still, it is submitted that the ECJ’s judgment contains a message which could be interpreted as a slight tightening of the “manifest error” test. The ECJ’s judgment indicates that, when reviewing the legality of the Commission’s decisions, the CFI must also check whether “*all the information*” (emphasis added) which must be taken into account is included in the Commission’s evidence and whether it is capable “of *substantiating the conclusions* drawn from it” (emphasis added). Thus, the CFI would need to check whether other factors not mentioned by the Commission, or mentioned but to which the Commission did not pay proper attention, should be taken into account and whether there are other obvious elements which should be taken into account for a proper assessment. The CFI would also then need to check whether all those factors lead logically and plausibly to the conclusion reached by the Commission.

The Commission certainly enjoys a certain margin of discretion when evaluating complex evidence, but where the CFI finds, after close scrutiny, that the evidence submitted is not up to the requisite legal standard it has a duty to say so and, if the errors found amount to an overall manifest error of appreciation, it has a duty to annul the Commission’s decision.

## IV. The Functioning of the Current System of Judicial Review

A review of the work of the Community Courts in reviewing the Commission’s competition decisions reveals, in my view, that the Courts have exercised their judicial review function effectively. Nonetheless, it also reveals certain shortcomings in the current system that lead to thoughts for improvements to the system.

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<sup>39</sup> *Id.* at para. 26.



## A. STATISTICS<sup>40</sup>

In total, 2,228 cases involving application of the competition rules (antitrust, mergers and state aid) have been lodged before the Community Courts since the beginning. Approximately 30 percent of those cases were lodged before the Courts in the last five years.

Since the CFI's birth in 1989, 1,168 competition cases (including state aid cases) have been introduced before the CFI. At the end of 2004, there were 140 competition cases (excluding state aid) and 219 state aid cases pending before the CFI. The total number of pending competition cases (excluding state aid) constituted approximately 12 percent of the total pending caseload of the CFI. If state aid cases are added, the total percentage is approximately 30 percent. Since 1989, the CFI has delivered over 100 judgments, in the field of competition, in which it annulled partially, or totally, the Commission's decision.

These annulments of a number of the Commission's decisions over the years cannot, in my view, be taken as a sign that the Commission is not doing its job properly, but rather that our system of judicial review is highly effective and does not permit the Commission to be judge and jury—contrary to frequent criticism to this effect. Annulments of the administration's decisions are an inherent feature of a system of judicial review and the Commission is certainly not the sole regulator to have recently lost cases before a judiciary.<sup>41</sup>

## B. CERTAIN POSSIBLE SHORTCOMINGS OF THE CURRENT SYSTEM OF JUDICIAL REVIEW

While the EC system, an administrative system of competition enforcement coupled with judicial review by the Community Courts, works effectively in that it contains adequate due process features, produces a majority of decisions that withstand scrutiny and enables annulments in the fewer cases where such action is warranted, it, like any other system, has scope for improvement.

40 For further statistical information, see European Court of First Instance, 2004 Annual Report, available at <http://curia.eu.int/en/instit/presentationfr/rapport/stat/st04tr.pdf>.

41 The U.K. agencies, the U.S. agencies, and the German Bundeskartellamt, and no doubt, other authorities around the world, have all received their fair amount of criticism by the judiciary in their respective jurisdictions. In a speech at the Fordham Antitrust Conference of 2002, Bill Kovacic (at the time General Counsel of the U.S. Federal Trade Commission (FTC)) discussed the 2002 annulments of the European Commission's merger decisions in *Airtours*, *Schneider*, and *Tetra Laval*. He stated that the FTC had suffered much worse in the hands of U.S. courts. See Speech by William Kovacic, in *FORDHAM U. SCH. OF L., INT'L ANTITRUST L. & POL'Y* (B. Hawke ed., 2002), at 413–414. At the same conference, Dr. Joachim Bornkamm, indicated that, since 1999, the German Bundeskartellamt had lost more than 60 percent of its appeals before the Court of Appeal at Düsseldorf. See Joachim Bornkamm, *Judicial Control and Review of Antitrust Administrative Authorities*, in *FORDHAM U. SCH. OF L., INT'L ANTITRUST L. & POL'Y* (B. Hawke ed., 2002), at 370. The newly established Competition Appeals Tribunal (CAT) has not shied away from annulling the OFT's decisions in the field of mergers or antitrust. See, e.g., Case 1023/4/1/03, *IBA Health Ltd v. OFT* and Case 1018/3/3/03, *BT v. Director General for Telecommunications*.

In this section of the paper, I attempt to set out personal reflections on certain aspects of our system that may in the future be improved through changes to the rules of procedures of the Community Courts or through more fundamental changes to the structure of our judicial system.

### 1. Despite Judicial Review, Is the Commission Still Judge and Jury?

It is not an exaggeration to say that in recent years criticism against the current EC system of competition law enforcement, especially in the field of merger control, has been harsh. The responses the Commission received to its Green Paper on merger reform show how many commentators, in particular those from the Anglo-Saxon legal tradition, thought that some clearer separation of powers between investigative and decision-making powers was necessary.<sup>42</sup>

Critics of the current administrative system lament the fact that a single body, the Commission, is vested with the power to investigate, prosecute (via the Statement of Objections), and then also decide a case at first instance. It is thought that such a system is inherently flawed as it leads to so-called prosecutorial bias with the prosecutor being captured by his or her own arguments.<sup>43</sup>

THE U.S. LEGAL TRADITION  
OF COMPETITION LAW  
ENFORCEMENT THROUGH  
A SYSTEM OF DIRECT  
PROSECUTION OF CASES  
BEFORE A JUDGE APPEARS  
TO BE THE EXCEPTION  
RATHER THAN THE RULE  
IN THIS FIELD OF THE LAW.

It is important to make three comments on this aspect of the critique. First, the EC administrative system is not at all unique and falls squarely within a long legal tradition in continental Europe of entrusting a specialized administration with the power to take decisions at first instance and then subjecting those decisions to judicial review.<sup>44</sup> The overwhelming

majority of EC member states have precisely such a system for national competition law enforcement. The U.S. legal tradition of competition law enforcement through a system of direct prosecution of cases before a judge appears to be the exception rather than the rule in this field of the law.

42 For a list of responses to the Green Paper and a summary of those responses, see Submissions received on the Green Paper on the review of Council Regulation (EEC) No. 4064/89, at <http://europa.eu.int/comm/competition/mergers/review/comments.html>.

43 For an interesting analysis of those issues, see Wouter Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 *WORLD COMPETITION* 201, 224 (2004).

44 On this point, see E. Paulis, *supra* note 10, at 381 et seq.

Second, internal checks and balances go a long way toward minimizing any risk of prosecutorial bias that may exist. The recent measures adopted by DG COMP should improve its internal decision-making process further.<sup>45</sup>

Third, it is, however, clear that, in the absence of effective judicial review, the system would, indeed, be inherently flawed. Combination of important powers in a single body can only be acceptable where there is a real opportunity for effective review by another independent and impartial body.

Such effective judicial review exists as the preceding sections of the paper have attempted to explain. All decisions of the Commission producing legal effects are challengeable before the Community Courts; the CFI scrutinizes closely the Commission's case in terms of application of the law and of the accuracy of evidence produced, and also for consistent reasoning and manifest errors of appreciation.

There are, however, two aspects of the current system that may diminish the effectiveness of judicial review: the fact that the CFI lacks full jurisdiction (except in respect of fines) and that judicial review is not always timely.

## 2. Lack of Full Jurisdiction

As noted earlier, the CFI has limited jurisdiction under Article 230 EC. As the CFI noted in its early years of operation in the *Italian Flat Glass* case:

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“[Given its limited jurisdiction,] the Community court is not required to take cognizance of the entire administrative file, but only of that part of the file which is relevant to a review of the lawfulness of the contested decision.

Accordingly, the Court considers that, although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision [... and] the Court considers that it is not for itself...to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition.”<sup>46</sup>

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<sup>45</sup> See M. Monti, *supra* note 12.

<sup>46</sup> Joined Cases T-68/89, T-77/89 and T-78/89, *SIV v. Commission*, 1992 E.C.R. II-1403, at paras. 318–20.

The CFI can only annul the Commission's decision on limited grounds and, most importantly, upon annulment it cannot re-take a decision on the merits of a case. The matter is sent back to the Commission for a re-examination.

This limited, judicial-review role of the CFI leads to certain idiosyncratic elements of the system which give it a distinctive flavor compared to systems of full jurisdiction. First, as far as the applicants are concerned, the fact that the case is sent back to the Commission seems ineffective. It is, of course, beyond any doubt that it is incumbent upon the Commission to draw the consequences of the Court's judgment having regard not only to the operative part of the judgment but also to the Court's reasoning. This is established in Article 233 EC and is settled case law.<sup>47</sup> Nonetheless, it is not always clear what measures the Commission must take and, in any event, a fresh (possibly long) examination would still be required. Take an example in the mergers area where the Merger Regulation itself governs the procedure to be followed in cases in which the CFI annuls the Commission's decision. Then Article 10(5) of the Regulation expressly provides that the administrative procedure before the Commission restarts, and that the examination must take into account the current market conditions. In the meantime, conditions in the market may have changed—sometimes dramatically. The parties face the uncertainty of having a new review of their case and, possibly, (if their deal can survive for that long) a new prohibition. From the parties' perspective, it would, therefore, be more effective if closure to the litigation could be achieved by allowing the CFI to take a final decision on the merits.

Second, the judicial review system (in contrast to a system of full jurisdiction) creates problems for the Commission as well. This merits further explanation. Under the current system what is really on trial before the CFI is not the merger or anticompetitive agreement or conduct in question; it is the Commission's decision. In other words, it is the legality of the decision that the CFI controls. This has some important consequences in terms of the type of trial conducted, the type of evidence admitted before the Court, and the responsibility incumbent upon the Court.

The trials before the CFI are administrative, judicial-review-type trials which are very different to what most U.S. lawyers would recognize as an antitrust trial. More emphasis is placed on written pleadings rather than the oral hearing, and there is far less reliance on expert reports and witness testimony. Most importantly, the decision, in principle, must stand or fall depending on what is in it, not

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47 Article 233 EC reads as follows: "The institution...whose act has been declared void...shall be required to take the necessary measures to comply with the judgment of the Court of Justice." See, e.g., Case T-48/00, *Corus UK Ltd, formerly British Steel plc v. Commission*, Judgment of Jul. 8, 2004, not yet published in the ECR, at paras. 222–25 and the case law cited therein.

what the Commission can subsequently produce before the Court.<sup>48</sup> If there are significant procedural breaches, inadequate reasoning, inconsistencies or other errors in the decision that amount to a manifest error appreciation, no amount of external evidence on the merits of the case can, in principle, correct them and save the decision from annulment. An annulment on such grounds does not, therefore, necessarily entail a substantive conclusion by the CFI that, on the merits, the merger or conduct in question should or should not be allowed.

The above idiosyncratic features of a judicial review system, in contrast to a system of full re-examination on the merits, are inherent features of a typical system of administrative judicial review and do not suffice to draw the conclusion that radical changes are needed. As noted earlier, the system works effectively with regard to the Court's ability and readiness to review the substance of the Commission's decisions in the field of competition. As a result, it would not, in all likelihood, be necessary at this stage to consider radical changes to the current system of judicial review which would result in a move to a U.S.-style prosecutorial system or even a system of full jurisdiction of the CFI (i.e. the ability to re-take a decision on the merits rather than simply annul the Commission's decision).

These radical changes (such as moving to a prosecutorial system or even a system where the CFI would have full jurisdiction in areas other than fines) would have significant consequences on the way the CFI deals with cases (e.g. the types of trial, evidence, etc.). Such changes would also, in all likelihood, necessitate change of the provisions of the EC Treaty and in particular Articles 229 EC and 230 EC and would, therefore, not be legally possible under the existing Treaties.

However, less radical improvements can be made using the existing Treaty provisions, especially in terms of improving the current system's speed. Indeed, in my view, the main problem with our current system of judicial review is not its effectiveness in terms of how closely the Courts scrutinize the Commission's decision, but in terms of the speed of that review. This is of particular importance in the field of mergers as I explain in the following section.

INDEED, IN MY VIEW, THE MAIN PROBLEM WITH OUR CURRENT SYSTEM OF JUDICIAL REVIEW IS NOT ITS EFFECTIVENESS IN TERMS OF HOW CLOSELY THE COURTS SCRUTINIZE THE COMMISSION'S DECISION, BUT IN TERMS OF THE SPEED OF THAT REVIEW.

<sup>48</sup> Even though the Commission may, where appropriate, provide explanations and produce evidence contained in its file to support elements contained in a contested decision. It should be noted here that issues concerning adequacy of reasoning and the amount or types of evidence that the Commission may produce before the Court to support elements in a contested decision are complex; a detailed discussion of such evidentiary issues falls outside the scope of this paper.

### 3. Speed

Competition cases before the CFI (both antitrust and merger cases) are complex cases which involve lengthy pleadings, voluminous dossiers, important questions of law, and an enormous amount of factual evidence, such as economic studies, etc. They require significant attention on the part of the Court so that all arguments are assessed fully and comprehensively and that, hopefully, the right outcome is achieved. However, such full assessment does not tally well with speedy judicial review. Naturally, the more complex a case is, the longer it takes to adjudicate on it.

Currently, the average time required for the adjudication of an antitrust or merger case under the normal procedure of the CFI is approximately 33 months (in cases resulting in a final judgment, i.e. excluding cases resulting in orders) and approximately ten to twelve months under the expedited procedure (closer to nine-and-a-half months in merger cases).

In antitrust cases, this is perhaps not a major concern as such cases typically involve past events or conduct which has come to an end. Where this is not the case, an action for annulment can be successfully coupled with a request for interim measures suspending the Commission's remedial orders whenever this is necessary to avoid serious and irreparable damage to the companies concerned.<sup>49</sup> In addition, with respect to fines, companies are normally allowed to avoid paying the fine immediately, on the condition that they provide a bank guarantee.

THE REALITIES OF COMMERCIAL LIFE ARE SUCH THAT FEW COMPANIES CAN OR ARE WILLING TO KEEP THE DEAL ALIVE FOR SUCH A LENGTH OF TIME. SPEEDY ADJUDICATION IS OF CRUCIAL IMPORTANCE. THE CFI HAS BEEN AWARE OF THIS PROBLEM AND HAS ATTEMPTED TO IMPROVE THE SITUATION THROUGH THE ESTABLISHMENT OF AN EXPEDITED (FAST-TRACK) PROCEDURE.

By contrast, in the field of mergers, following a prohibition decision by the Commission, the parties find themselves in a situation where they can either abandon the deal or wait until final adjudication of the matter by the Court and, if successful, upon annulment, a subsequent reassessment of the case by the Commission. The realities of commercial life are such that few companies can or are willing to keep the deal alive for such a length of time. Speedy adjudication is of crucial importance.

The CFI has been aware of this problem and has attempted to improve the situation through the establishment of an expedited (fast-track) procedure. This procedure was successfully used in the *Schneider* and *Tetra Laval* cases which were decided by the CFI within ten months of their introduction (in the *Schneider* cases, judgments were actually delivered a little over seven months

<sup>49</sup> See Articles 242 and 243 EC and Article 104 of the CFI's Rules of Procedure.

after acceptance by the CFI of the applicability of the procedure), while the judgments in *BaByliss* and *Philips v. Commission*<sup>50</sup> were both given within a year of those cases being lodged (and only nine months after the granting of the expedited procedure). Most commentators believe that this may still be too long for merger cases, but the realities of the Court's procedure and resources would mean that a shorter procedure would be difficult to follow as a generalized practice in all merger cases, although a shorter procedure can be achieved in specific cases.<sup>51</sup>

It should be noted here that these problems of speed should not be exaggerated. It is true that certain cases, in particular merger cases, require speedier adjudication because there is a real urgency to have the matter conclusively brought to an end within a short period of time. However, it should be kept in mind that the number of such cases remains particularly small and that the CFI has been able to adjudicate under the expedited procedure whenever necessary.<sup>52</sup>

#### 4. Reflections on Possible Future Improvements

Having identified speed as the main aspect of the CFI's procedure that could be the subject of improvements, it is possible to identify some avenues of possible future changes which would enable the CFI to deal more effectively and expeditiously with competition cases.<sup>53</sup>

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50 Case T-119/02, *Royal Philips NV v. Commission*, 2003 E.C.R. II-1433.

51 It should be noted that, during the late stages of the editing of this paper, the CFI delivered its judgment in *EDP v. Commission* (Case T-87/05, *EDP v. Commission*, Judgment of the European Court of First Instance of Sep. 21, 2005, not yet published in the ECR). The judgment concerned an action for annulment of the Commission Decision C(2004)4715 final of Dec. 9, 2004 declaring incompatible with the common market the concentration by which EDP-Energias de Portugal SA and Eni Portugal Investment Spa proposed to acquire joint control of Gas de Portugal SGPS SA (Case COMP/M.3440 – EDP/ENI/GDP). The judgment, which dismissed the appeal, was delivered using the expedited procedure in a record time of just under seven months (the action was lodged with the CFI on Feb. 25, 2005).

52 The CFI has delivered only 25 merger judgments in total since 1989 and there are normally not more than five to six such judgments per year. (From 2000 to 2004, the number of merger cases each year was: one in 2000, one in 2001, six in 2002, six in 2003, and one in 2004.) The CFI has granted the benefit of the expedited procedure in the overwhelming majority of merger cases in which it was requested. It should be noted that more than 70 percent of expedited procedure cases are merger cases. There are, however, many merger cases where the parties themselves decide not to request adjudication under the expedited procedure.

53 It should be stressed that the various options for improvement of our current system which are outlined in this paper are merely personal reflections on various avenues which could be adopted if one were to make changes to our system. I am not arguing that such changes are necessary right now. As noted at the start of this paper, the views expressed herein are entirely personal and do not necessarily represent those of my colleagues.

*a. A specialized competition tribunal*

A far-reaching change would be to establish a specialized competition tribunal under Article 225A EC,<sup>54</sup> which would have competence to hear appeals against the Commission's decisions in merger cases or antitrust cases, or both. Appeals would then lie to the CFI and exceptionally to the ECJ.

Such a system would entail many and, in my view, significant advantages. First, a specialized court composed of judges familiar with competition cases may be better suited to examine closely the complex economic assessments undertaken by the Commission in this field of the law. Second, a specialized tribunal could function on the basis of tailor-made procedures which would be optimized for the specific needs of competition cases. Third, it is possible that a specialized tribunal would be endowed with greater resources in order to deal more effectively and more expeditiously with competition cases. Fourth, the creation of a specialized tribunal could be a move towards a more coherent system of three levels of jurisdiction: first instance tribunals, appeals to the CFI, and exceptional appeals to the ECJ. Finally, the creation of a specialized tribunal would also reduce the workload of the ECJ by relieving it of systematic appeals against the CFI's competition judgments in areas that do not always merit adjudication by the highest court (e.g. determination of the correct amount of a fine).

However, such a change would also entail disadvantages. First, this change under existing Treaty rules would not entail a grant of full jurisdiction to the new tribunal. In essence, the new tribunal would have the same powers as those of the CFI in reviewing the Commission's decisions in the field of competition. Second, it is not clear that such a tribunal would be able to deal more expeditiously with competition cases, and systematic appeals to the CFI could lengthen the proceedings. Third, specialization is an advantage but also a disadvantage. Specialized judges may be more prone to the insularity that sometimes characterizes the competition law community.

*b. Specialized CFI chambers*

Another solution would be to create one or more specialized chambers for competition cases within the existing structure of the CFI. Under such a move, one or more chambers of three or five judges would become specialized in and focus

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54 Article 225A reads as follows:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it. Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance.



on competition cases. This could have the result of speeding up the treatment of such cases. The advantage of this system would be its relatively easy implementation within the current system's rules. A disadvantage, however, would be that the specialized chambers may be over- or under-utilized, depending on the precise workload of competition cases at any given time. Given that such chambers would be internal and that the CFI would still be required to deal with the whole range of cases (not just competition cases), it would be difficult to resist pressure to allocate non-competition cases to the specialized chambers in times of under-utilization or not allocate competition cases to other chambers in times of over-utilization. In addition, it would be more difficult to establish specific procedures for such chambers while keeping them within the existing structure of the CFI.

### *c. Removing other cases from the CFI's workload*

A more practical and realistic solution would be to focus the CFI's resources more on competition cases by removing from its jurisdiction a number of other cases in specific areas such as those relating to EC officials and trademarks. This is a solution that the Council has already adopted with respect to civil service cases through the creation of a Civil Service Tribunal.<sup>55</sup> This new tribunal, subject to logistics being finalized, could be in place before the end of the year or in early 2006.

The removal of civil service cases would reduce approximately 20 percent of the current case load of the CFI. Another approximately 17 percent could be removed through the creation of a trademarks tribunal.<sup>56</sup> The removal of such a significant number of cases would alleviate the CFI's caseload and would enable it to use the expedited procedure more frequently and more effectively in cases which merit it, including competition and, in particular, merger cases.

It should be noted here that, if it were deemed necessary, it could be examined whether it would be possible to make further improvements to the CFI's expedited procedure such as a more generalized application of the expedited procedure to all merger prohibition cases where parties can show urgency, and a further shortening of the expedited procedure to a period of six to nine months.

### *d. Preliminary rulings*

A final complexity with regard to case load and speed, which I would like to briefly touch upon in this paper, is that of the role of the Court's preliminary ruling procedure and the impact Regulation 1/2003 could have in this respect. If, as is expected, private litigation is increased—perhaps significantly thanks to the

<sup>55</sup> Council Decision of Nov. 2, 2004 establishing the European Union Civil Service Tribunal, 2004 O.J. (L 333) 7.

<sup>56</sup> These statistics are based on the number of pending cases at the end of 2004. It should be noted that, in terms of judgments and orders rendered in 2004, civil service cases represented approximately 30 percent and intellectual property cases approximately 22 percent. For further statistical information of this nature, see European Court of First Instance, 2004 Annual Report, available at <http://curia.eu.int/en/instit/presentationfr/rapport/stat/st04tr.pdf>.

newly decentralized antitrust regime, it will certainly be the case that national courts faced with complex competition law questions would refer questions to the ECJ for a preliminary ruling under Article 234 EC. In my view, in such a situation, it may be more coherent to allow the CFI the power to deal with such preliminary rulings as is possible under Article 225(3) EC. This would, however, inevitably increase the workload of the CFI even further and would be an additional factor to be considered in any discussion of changes with the aim of improving speed in the adjudication of competition cases before the Community Courts.

## V. Concluding Remarks

There are, of course, many other issues pertinent to the discussion of the role of the judiciary in competition law enforcement, such as the desirability of encouraging private actions, which are beyond the scope of this paper but are, nonetheless, clearly linked to the discussion on the role of the courts in the overall system of competition law enforcement.

In this paper, I attempted to set out my personal views on the role of the Community Courts and, in particular, that of the CFI over which I have the privilege of presiding.

In my view, the CFI, under the review of the ECJ on appeals in matters of law, has discharged the burden imposed on it by the EC Treaty to review carefully the legality of the Commission's decisions in the field of competition and not to shy away from engaging in close scrutiny of the facts and economic data underpinning those decisions.

As a learned Advocate General of the Court of Justice, AG Cosmas, has, in my view, aptly stressed in the relatively recent, state aid *Ladbroke* case:

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“[A] comprehensive review as to the substance...does not, of course, supplant the administrative work of the Commission but constitutes a correct exercise of judicial tasks in a legal order—like the Community legal order—governed by the principle of legality and the rule of law.”<sup>57</sup>

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Judicial review has an important role to play in the EC system of competition law enforcement. Future judgments in this field will continue to clarify the law, provide guidance, and, above all, ensure that the administration's actions in this important area of the law remain subject to effective checks and balances. ▼

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57 Case C-83/98 P, *France v. Ladbroke*, 2000 E.C.R. I-3271, at para. 16 [hereinafter *Ladbroke*].