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Judicial Review of Merger Control Decisions After the *Impala* Saga: Time for Policy Choices?

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I Introduction

Shortly following the adoption of the first EC merger regulation, a question arose among legal scholars and practitioners: will the EC courts make a sufficiently swift and thorough review of the Commission's merger decisions?¹ Or, in other words, will judicial review be both effective and expedient enough to be compatible with the constraints of commercial life? The Court of First Instance (the CFI) and the Court of Justice (the ECJ, together with the CFI, the EC Courts) did not shy away from addressing these legitimate concerns. The timeliness of judicial review was significantly enhanced in 2000 when the Rules of Procedure of the CFI and the ECJ were amended to establish an expedited procedure allowing the EC Courts to give priority to certain types of cases.² Merger control is by far the field of law that has benefited the most from the new procedure.³ As to the thoroughness of the CFI's review, it invites much less criticism now that the CFI has demonstrated its readiness to control Commission decisions extensively and annul them if need be, as illustrated inter alia by its three famous judgments of 2002 annulling prohibition decisions.⁴ In 2005, the importance of a thorough substantive review was confirmed by the ECJ itself in its no less famous *Tetra Laval* judgment (*Tetra Laval II*).⁵ All these cases were decisive milestones in the coming of age of the judicial review of merger control decisions in the EU.

Yet, in spite of these significant efforts, the combination of the need for timely legal certainty and efficient judicial review remains a lively problem. There is indeed an inherent conflict between these two objectives: effective judicial review by the CFI takes more time and inherently increases the probability of judgments annulling Commission decisions which obviously lead to the reopening of the administrative procedure, potential new appeals and additional legal uncertainty weighing on the merging parties. The absence of a legal presumption in favour of merger clearances and the existence of a right of appeal on questions of law before the ECJ do not contribute to solve this conflict.

There is no better illustration of this persisting issue than the recent ECJ ruling in *Impala* (*Impala II*).⁶ The *Impala* saga exemplifies the strong tension between effective judicial control at all levels and the need for timely legal certainty (see part II). It further reveals that it may be time to contemplate hard policy choices (see part III).

II Thorough judicial control at all levels versus timely legal certainty

In *Impala II*, the ECJ confirmed that not only the CFI, but also the ECJ itself, are pro-active actors in the merger control system (see section A). While the intensity of the review performed by the EC Courts should be welcomed as a strong reinforcement of judicial protection, it also inherently increases the probability of judicial and administrative sagas that delay legal certainty (see section B).

A Thorough control of Commission decisions by the CFI but also of CFI judgments by the ECJ

Impala II clearly confirms that – in spite of the Commission's margin of appreciation – the CFI must perform a thorough and meaningful review of merger control decisions. The ECJ reaffirmed a key principle that had already been set out in *Tetra Laval II*:

[W]hile the Court of First Instance must not substitute its own economic assessment for that of the Commission [...] that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. [...] [T]he Community judicature [must] establish [...] whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information [...] and whether it is capable of substantiating the conclusions drawn from it.⁷

The ECJ held that the CFI had acted in conformity with the requirements of the case law when it 'carried out an in-depth examination of the evidence underlying the contested decision when considering the arguments raised before it'.⁸ In other words, the EC Courts are allowed, and indeed obligated, to perform 'their own analysis of the facts and the evidence' to assess whether the Commission has stayed within the limits of the margin of discretion allowed to it.⁹

Far from limiting itself to this sole reminder, the ECJ also signalled that it did not intend to hold back on its own control of CFI judgments in the field of merger control. As is well known, pursuant to article 58 of the Statute of the ECJ, the ECJ cannot conduct a reappraisal of the facts assessed by the CFI. However, it can review the legal characterisation and the legal conclusions that the CFI has drawn from them, which amounts to deciding whether the CFI applied the correct legal standard when examining the evidence.¹⁰ In practice, it is not always easy to draw the dividing line between issues of fact and questions of law, in particular in those competition cases that require a complex economic assessment. This difficulty led Advocate General Jacobs to advocate 'a restrictive view of [the ECJ's] appellate jurisdiction in appeals on competition matters, given the purposes of the establishment of the Court of First Instance and the fact that in competition proceedings there will already have been two reasoned decisions'.¹¹

However, even on a restrictive view, there remains ample scope for strict control by the ECJ of CFI judgments, including when complex economic assessments are at stake. For instance, *Impala II* clarifies that an alleged failure by the CFI to correctly apply the rules of evidence applicable during the administrative proceedings, and, significantly, also during the judicial proceedings before the CFI raises a question of law. Therefore – notwithstanding the CFI's freedom to assess different items of evidence¹² – such failures are within the scope of the ECJ's jurisdiction on appeal.¹³

More generally, questions of law subject to appeal can be substantial in number as shown by the numerous errors of law that were identified in the CFI's ruling by the ECJ, which seized on the opportunity to clarify a substantial number of important legal issues, including the absence of any presumption in favour of clear-

ance decisions, the functions of a statement of objections and the criteria that for assessing the existence of a collective dominant position as well as the coordinated effects of a merger. These are all crucial issues that cannot be dealt with in this article, which focuses on judicial review. Suffice it to note that by its judgment, the ECJ has clearly proved that it remains the final arbiter of EC law in spite of the spectacular rise of the CFI on the competition law scene. The ECJ will not hesitate to annul the CFI's judgments even when the annulment results in a legal maelstrom.

B The scope for judicial and administrative sagas delaying legal certainty

The serious control that the EC Courts perform at all levels fosters effective judicial protection. For that sole reason, it must certainly be welcome. Yet it may seriously affect legal certainty, and therefore the commercial imperatives of the merging parties, if its exercise is too slow and if it results in the merger case transiting back and forth between the Commission, the CFI and the ECJ. It can also delay bringing to market potential efficiencies created by pro-competitive mergers. The main facts of the *Impala* saga – which is far from finished – speak for themselves. On 19 July 2004, the Commission cleared the *Sony/BMG* merger.¹⁴ On 13 July 2006 – on appeal by a third party (*Impala*) the CFI annulled the clearance decision.¹⁵ Since *Impala* had not requested the CFI to suspend the implementation of the transaction, the notifying parties had already merged when the CFI annulled the clearance decision some 19 months later. The two merged parties, Sony and BMG, appealed the CFI judgment but did not request the ECJ to suspend the binding effects of the CFI's ruling. Accordingly, in parallel to the appeal before the ECJ, the Commission re-examined the transaction under current market conditions. On 3 October 2007 – that is, three years after the *Sony/BMG* joint venture was implemented – the Commission re-cleared the merger by way of a decision that *Impala* again is appealing before the CFI.¹⁶ Before the CFI could rule on this second application, the ECJ annulled the CFI judgment annulling the first clearance decision and remanded the case to the CFI for adjudication of the pleas that it had not addressed.

In practice, these complex proceedings result in quite a chaotic legal situation where the CFI must, on the one hand, continue the substantive review of the first clearance decision and deal with the pleas that were not adjudicated in its first judgment and, on the other hand, decide what to do with the pending appeal against the second clearance decision. Now that the first clearance decision has risen from the dead, it is not even clear whether and to what extent the second one somehow deprived it of its legal effects or whether it is the second decision that should be considered illegal for lack of a legal basis. Meanwhile the integration of the merged companies will continue, with even more reason to do so given the partial success of their appeal but still without any guarantees that they will not ultimately have to 'unscramble the eggs' once the dust has settled. It is difficult to find where legal certainty lies in this situation.

The imbroglio of the *Sony/BMG* merger illustrates what can become a lethal problem for certain transactions. The speed of execution and closing of corporate mergers obviously can be of paramount importance. Time is of the essence to ensure that the merging parties can capture market opportunities, maximise synergies and efficiencies, maintain customer credibility and minimise the damage caused by uncertainty (such as loss of key executives, contracts and corporate value). These constraints explain why the ECJ itself has stressed several times the importance of speed and

legal certainty in merger control proceedings.¹⁷ Negative externalities on other transactions can also be observed: one can easily imagine a situation in which the Commission wrongly allows a merger concerning a highly concentrated market, thereby preventing the implementation of other transactions that would have been perfectly legal in the absence of the (wrongly) cleared merger. Or it may wrongly block a merger on reasoning that, though faulty and eventually overturned, deters potentially beneficial mergers in the meantime.

Arguably, an inevitable degree of legal uncertainty results from the interested parties' right to challenge a merger decision before the CFI and then the CFI judgment before the ECJ. The parties to a merger cannot demand immediate legal certainty to the detriment of the effective judicial protection of their competitors and consumers. One must also accept that there is probably no perfect system in this respect. The US system for instance – in which the federal agencies must seek a court order if they want to prohibit mergers from closing – is not deprived of the pitfalls linked to the various tiers of the US judicial system, as evidenced by the recent *Whole Foods* case.¹⁸ Legal certainty in the US system can be further affected by the private parties' standing to challenge a transaction that the federal authorities did not review or challenge before the federal courts. Finally, one must keep in mind that the merging parties' actual need for legal certainty varies depending on the transactions and that, in the EC system, merging parties may sometimes consider that it is in their interest to let proceedings drag on with a view to creating a *fait accompli* and thereby exerting enormous pressure on the EC Courts and the Commission not to undo the merger.

The problem nonetheless remains: an optimal balance must be found between the effective judicial protection of the rights of all the parties affected by the merger and the merging parties' need for legal certainty.

II Time for policy choices? Keeping on trying to square the circle or cutting the Gordian knot?

By themselves emergency proceedings cannot solve the tension existing between a thorough judicial review and the need for timely legal certainty (see section A). Many other remedies have already been explored, but they remain partial and cannot accomplish miracles (see section B). Is it time for a debate about more radical changes?

A The limited impact of interim measures and expedited procedures to solve the issue

While the *raison d'être* of interim measures is to guarantee effective judicial protection, in the field of merger control those measures are not very helpful in fostering legal certainty. First, like in any other case, very strict conditions must be met before such measures can be ordered. Second, the indispensability of these measures should be examined with much caution when they relate to merger control. In the case of a clearance decision, a provisional suspension may amount to a death sentence imposed on the transaction.¹⁹ As to the suspension of a prohibition decision, it will rarely be available: as a general matter, negative decisions cannot be suspended, even though the President of the CFI has recently confirmed that such a suspension could be warranted in very specific circumstances.²⁰ In any case, a provisional right to merge cannot settle the problem of legal certainty if it takes years before the merging parties know the final fate of their transaction.

Of course, the introduction of the 'fast-track' procedure was

an important step in the right direction, as it allows the CFI and the ECJ to swiftly reach a judgment on the substance. The CFI has made particular efforts in this respect, as an application for an expedited procedure is nearly always accepted if it concerns a merger case.²¹ However, the expedited procedure is not a magical solution. First, only the applicant and the defendant are allowed to apply for its application. As a consequence, when a clearance decision is challenged, the right to make a request is generally limited to competitors, consumers and the Commission; it is never available to the merging parties, which can only be interveners. This is a very sorry state of affairs, as it is mainly these parties that are in need of legal certainty. Second, and more importantly, even when an expedited procedure is applied, the proceedings may take on average 10 to 11 months, with the possibility of further appeals before the ECJ.²² Admittedly, the proceedings in the *Tetra Laval I* case lasted nine months and eventually the merger was implemented. However, this relative success was partly due to very specific circumstances, namely the ownership of Tetra Laval by a family that was ready to take more financial risks than the management of a publicly quoted company.²³ In addition, had the ECJ quashed the CFI judgment and dismissed the appeal against the Commission decision, it is very possible that the Commission would have tried to withdraw the clearance decision that it had adopted in the meantime and ordered the parties to unwind their transaction. In the *Impala I* case itself, the proceedings before the CFI on their own lasted 19 months. Nearly four years after the first appeal was filed, the case is more or less back to square one before the CFI, with the additional complication of a pending appeal against a second clearance decision relating to the same merger.

B Applying limited remedies or making more radical choices?

While there is no silver bullet to fix the complex interaction of effective judicial protection and legal certainty, some initiatives could at least improve the current situation. A number of partial remedies have already been explored, in particular by the House of Lords in its report on the possible creation of an EU Competition Court.²⁴ Such remedies include the formation of a specialist chamber at the CFI and the appointment of additional judges. While there is some merit in these ideas, as underlined by the House of Lords they nonetheless raise significant legal, logistical or political issues, such as the fact that some member states could be appointing more judges than others.²⁵ The House of Lords' proposal to lighten the CFI's caseload by transferring trademark cases to a judicial panel created under article 225a EC could be less problematic from a political point of view and more adequate to give breathing space to the CFI.

Stronger case management by the judge-rapporteur, in particular through the imposition of strict internal deadlines and informal meetings with the parties to encourage them to streamline their arguments, is also available and should be encouraged, but caution should be exercised in handling this tool as, in practice, it can seriously undermine the parties' freedom to choose the arguments they deem preferable to push forward.

There have also been proposals for the creation of an EU competition court by way of a judicial panel under article 225a of the EC Treaty,²⁶ but we doubt that this would be an optimal solution either. The advantages for such a court would be inter alia the introduction of tailor-made procedures and the formation of a class of 'expert' judges. Yet in most cases it would not be sufficient if the upper courts did not adjudicate appeals swiftly.²⁷ Even if this condition were met, the problem of the reopening of the administrative

procedure after the annulment of a decision would remain.²⁸

Other limited remedies of easier implementation are conceivable. For instance, where possible the CFI should strive to rule on all pleas of law so as to allow the ECJ to give final judgment in the matter. In the *Impala I* judgment, the CFI ruled on only two of the five grounds of appeal that were raised by Impala, which obliged the ECJ to refer the case back to the CFI. An additional and simple improvement would consist of changing the Rules of Procedure of the CFI to allow interveners – in particular the merging parties when a clearance decision is challenged – to apply for an expedited procedure, instead of obliging them to depend on the main parties' discretion.

The use of the expedited procedure in appeals before the ECJ should also be encouraged.²⁹ This would indeed be a welcome change since, where possible, the higher speed of judicial review at the CFI level should not be lost before the ECJ. Until now the ECJ has been very strict with the requirement of exceptional urgency laid down by its Rules of Procedure and rightly considers that other fields of law, such as the area of freedom, security and justice, are a priority for expedient treatment.³⁰ The expedited procedure was used by the ECJ only once in an appeal that was unrelated to competition law.³¹

There is certainly some merit in all the remedies that were just mentioned. But to the extent that there is always a genuine need for faster legal certainty – which sometimes is not so obvious (eg, the merging parties in *Impala II* apparently did not ask the ECJ to deal with their appeal by way of the expedited procedure) – there are good reasons to believe that not even the combination of all of these measures – should the interested parties decide to fully use them – would allow a substantial shortening of the judicial proceedings.

This may explain why, in a recent report, the House of Lords did not hesitate to suggest that the CFI be allowed to issue a final decision on mergers without any additional involvement of the Commission, as is generally the case for the Competition Appeal Tribunal (CAT) in the UK.³²

This option is politically very sensitive and would require amendments to the EC Treaty or the Statute of the ECJ, or both. It would also imply an actual revolution in the EC Courts' logistics and legal ethos. As already noted, it is questionable whether this radical step is really justified. After all, the EC industry has not collapsed yet and the overall track record of the merger regulation remains positive. Reasonable persons can also disagree on the trade off that should be made between, on the one hand, legal certainty in the field of merger control and, on the other hand, maintaining the traditional structure of the EC judicial system, in which the CFI exercises its full jurisdiction in very particular circumstances only (ie, mostly to modify the amount of fines in competition law cases). Finally, this option would probably have to be reserved to the cases that the CFI is objectively in a position to rule upon without substantive additional investigations. However, the idea put forward by the House of Lords rightly underlines that, should there be enough political consensus and will to really advance legal certainty in the field of merger control, the public debate should focus on solutions that minimise the scope for sagas. The *Impala* saga could help this idea to gain ground.

The Council decision establishing the CFI aimed at improving the judicial protection of individual interests in complex legal cases.³³ The line of case law running from *Airtours* to *Impala II* shows

that, in the field of merger control, the EC Courts have taken this mission seriously. It may nonetheless be time for the European legislator to confront an even more fundamental issue: are radical changes in the EC Courts' jurisdiction and structure desirable for the sake of legal certainty in the field of merger control? Should there be a real and wide consensus about the need to guarantee legal certainty within a limited period of time – such as 15 months – there will probably be no refuge in partial remedies such as strong case management or the creation of a trademark court designed to alleviate the CFI's caseload. A solution may have to be found in order to minimise the risk of cases continually going back and forth between the Commission and the EC Courts.

Merging parties can also learn practical lessons from the *Impala I* and *II* cases: the ongoing saga shows how important a role third parties may play in EC merger proceedings. Third parties may use their right to judicial review as a sword to create or maintain legal uncertainty. This tactic is facilitated by the fact that, when a clearance decision is challenged, the merging parties are not authorised to apply for an expedited procedure – which should be changed – and that even the fastest proceedings will probably take a year. The merging parties should therefore strive to manage third-party reactions in advance, for instance, by contacting their customers and explaining to them the efficiencies created by the transaction. Should they fail in convincing them, they should arm themselves with patience.

Notes

- 1 See eg, A Brown, *Judicial Review of Commission Decisions under the Merger Regulation: the First Cases*, ECLR, 1994, No. 6, p. 296; Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990, L 257, p. 13).
- 2 See article 76a of the Rules of Procedure of the CFI; article 62a of the Rules of Procedure of the ECJ. Either the applicant or the defendant may apply for an expedited procedure. The CFI will decide whether to grant it having regard to 'the particular urgency and the circumstances of the case'. If the request is granted, there will be only one round of written proceedings with the possibility of a longer oral hearing and case conferences between the parties and the Chamber.
- 3 See K Fountoukakos, *Judicial review and merger control: The CFI's expedited procedure*, EC Competition Policy Newsletter, October 2002, p. 7; É Barbier de La Serre, *Accelerated and expedited procedures before the EC courts: A review of the practice*, CMLRev., 2006, p.783.
- 4 See Case T-342/99, *Airtours plc v Commission*, [2002] ECR II-2585; Case T-310/01, *Schneider Electric v Commission*, [2002] ECR II-4071 (hereinafter *Schneider*); Case T-5/02, *Tetra Laval v Commission*, [2002] ECR II-4519 (hereinafter *Tetra Laval I*).
- 5 Cases C-12/03 P and C-13/03 P, *Commission v Tetra Laval*, [2005] ECR I-987, paragraph 39. Among other articles on this judgment, see eg, M Bay and J. Ruiz Calzado, *Tetra Laval II: The Coming of Age of the Judicial Review of Merger Decisions*, *World Competition*, 2005, p. 433.
- 6 Judgment of 10 July 2008 in Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Impala* (not yet reported).
- 7 *Impala II* at paragraph 145.
- 8 *Impala II* at paragraph 146.
- 9 See Opinion of Advocate General Kokott in *Impala II*, paragraph 239.
- 10 *Impala II*, paragraphs 117 and 118. See also Opinion of Advocate General Kokott in *Impala II*, paragraphs 47 and 48.
- 11 Opinion of AG Jacobs in Case C-53/92 P, *Hilti v Commission*, [1994] ECR I-667, paragraphs 8 and 46-49.
- 12 *Impala II*, paragraph 128.
- 13 *Impala II*, paragraph 44.
- 14 Commission Decision 2005/188/EC of 19 July 2004 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3333 – *Sony/BMG*) (OJ 2005, L 62, p. 30).
- 15 Case T-464/04, *Independent Music Publishers and Labels Association (Impala) v Commission*, [2006] ECR II-2289 (hereinafter, *Impala I*).
- 16 Commission Decision of 3 October 2007 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3333 – *Sony/BMG*) (OJ 2008, C 94, p. 19) ; Case T-229/08, *Impala v Commission*, pending (OJ 2008, C 197, p. 33).
- 17 *Impala II*, paragraphs 49 and 167. See also Case C-170/02 P, *Schlüsselverlag J S Moser and Others v Commission* [2003] ECR I-9889, paragraphs 33 and 34, and Case C-202/06 P, *Cementbouw Handel & Industrie v Commission* [2007] ECR I-12129, paragraph 37.
- 18 In *FTC vs Whole Foods*, the parties to the transaction are currently facing strong legal uncertainty due to the recent judgment by the US Court of Appeals for the District of Columbia (DC Circuit). In February 2007, Whole Foods announced its plan to buy its rival Wild Oats. Five months later, the FTC sued to block the deal, arguing that it would stifle competition in the market for natural and organic groceries. In August 2007, the District Court for the District of Columbia denied the FTC's request to block the deal. On 29 June 2008, the US Court of Appeals for the District of Columbia reversed this decision. The case has now gone back to the District Court. The transaction parties merged shortly after the District Court's denial of an injunction and now, over a year after closing, face the risk of divestiture remedies. Meanwhile, the parties have merged and could therefore be subject to a de-merger. As if that was not enough complexity, the FTC has initiated its own administrative litigation proceeding examining the transaction.
- 19 Although it is not always the case. See, eg what happened in the Endesa saga, where Gas Natural did not withdraw its bid in spite of Endesa having obtained an interim measure from the Spanish Supreme Court suspending the government's decision to clear with conditions the concentration.
- 20 Order of 18 March 2008 in Case T-411/07 R, *Aer Lingus Group v Commission*, not yet reported, paragraph 48.
- 21 See CFI Annual Report for 2007, Statistics of judicial activity.
- 22 See, eg, *Schneider* (10 months from date of application to date of judgment); *Tetra Laval I* (nine months); *Babyliiss* (12 months); Case T-119/02, *Royal Philips v Commission* (12 months); Joined Cases T-346/02 and T-347/02 *Cableuropa and Others v Commission* (10 months); Case T-87/05 *EDP-Energias de Portugal v Commission* (seven months); Case T-417/05 *Endesa v Commission* (seven-and-a-half months).
- 23 See B Bishop, *The House of Lords*, Report of 23 April 2007, An EU Competition Court, Answer to Q. 141.
- 24 The House of Lords, Report cit.
- 25 In 1999 the CFI requested the appointment of six additional judges for the setting up of two extra chambers dealing with trademark cases; the proposal was never adopted for lack of political consensus on the member states that would have more than one judge.
- 26 See Confederation of British Industry (CBI), Brief of 15 June 2006, 'The need for an EU Competition Court'. The House of Lords, Report cit., doubted whether a new court would in the long term achieve any great savings in time.
- 27 Article 225a EC provides that decisions given by judicial panels may be subject to appeal before the CFI. The CFI judgments ruling on such appeals may exceptionally be reviewed by the ECJ.
- 28 In any case, it seems unlikely that, as required by the EC Treaty, a proposal from the Commission or a request from the ECJ will be made, absent strong political pressure from the member states or the European Parliament.

- 29 Articles 62a of the ECJ Rules of Procedure.
- 30 See the adoption by the Council in 2007 of amendments to the ECJ Statute and to the ECJ Rules of Procedure in order to introduce an urgent preliminary ruling procedure for dealing with this type of case (Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice (OJ 2008, L 24; p. 42) Amendments to the Rules of Procedure of the Court of Justice (OJ 2008 L 24, page 39)).
- 31 Case C-39/03 P, *Commission v Argedon and Others*, [2003] ECR I-7887.
- 32 See The House of Lords, Report, cit., paragraphs 156-161.
- 33 See Council Decision 88/591/EEC, Euratom of 24 October 1988 establishing a Court of First Instance (OJ 1988, L 319, page 1), article 3 and recitals 2 and 4.

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