Judicial review of mergers in the EU

BY ANDREW RENSHAW* AND JAN BLOCKX**

The European Commission plays the most prominent role in European merger review, and judicial review of Commission decisions is rare. Despite this, European courts have an essential function in the merger review system in the European Union, both as guarantors of procedural rights and as a vector for the development of the law. This article discusses the procedural aspects of this judicial review, such as when an application can be brought, by whom, and against which decisions, and specific procedures such as interventions, interim relief, expedited procedures, and appeals. We also address the substance of the European courts' review, in particular on which grounds a Commission decision can be challenged. The article furthermore discusses the consequences of judgments, including the possibility of obtaining damages. We conclude by proposing a possible avenue to improve the process.

KEY WORDS: *competition, mergers, judicial review, European Union, General Court, Court of Justice.*

* Partner, Freshfields Bruckhaus Deringer LLP, Brussels, Belgium.

** Senior Associate, Hogan Lovells, Brussels, Belgium.

AUTHORS' NOTE: *We thank Foad Hoseinian and Kamran Vojdani for their help in preparing this article and for their comments on earlier drafts. Any errors and opinions remain our responsibility.*

I. INTRODUCTION

As in most other jurisdictions around the world, it is an administrative authority, the European Commission (the Commission) (and in particular its Directorate General for Competition), that plays the most prominent role in the enforcement of merger control rules in the European Union (the EU). Judicial review of the Commission's decisions is the exception.

Despite this, the European courts have an essential function in the merger review system. The courts provide an independent review of the decisions taken by the Commission, and they have demonstrated that, despite the Commission's margin of discretion, they are willing to verify in quite some detail whether the conclusions of the Commission are defensible based on the evidence before it. Although very few appeals are brought against Commission decisions in merger cases, the mere possibility of bringing an appeal, and the courts' scrutiny of the Commission's analysis in the cases that have been brought, has reined in possible arbitrariness and forced the Commission to improve the quality of its analysis.

At the same time, the courts have also had an important role in the substantive development of merger control in the EU.[1] The deference to the Commission's expertise that existed in the early 1990s[2] has given way to the explicit recognition by Europe's judges of their role in this respect.[3]

---

[1] For example, theories on coordinated and conglomerate effects of transactions were scrutinized in detail by the General Court in Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585, and Case T-5/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4381, respectively.

[2] Adrian Brown, *Judicial Review of Commission Decisions under the Merger Regulation: The First Cases*, 6 EUR. COMPETITION L. REV. 296, 305 (1994).

[3] *See* Marc Jaeger, *The Standard of Review in Competition Cases involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, J. EUR. COMPETITION L. & PRAC. 295 (2011). This development has been greeted with much enthusiasm by the legal community (*see, e.g.*, EC COMPETITION PROCEDURE ¶ 18.01 (Luis Ortiz Blanco ed., 2006)), but the increased role of the courts also gives them more responsibilities for example in terms of consistency. *See* Nicolas Petit, *The Future of the Court of Justice in EU Competition Law, New Role and Responsibilities*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW 397 (Ct. of Justice European Union ed., 2013).

Part II of this article gives a general overview of the merger control process in the EU in order to clarify at what moment judicial review comes into play. Part III then addresses the procedural aspects of the court's review, namely when an application to the courts must be brought, by whom, and against which decisions. We will also cover a number of specific procedures: interventions, interim relief, expedited procedures, and appeals. Part IV describes the substance of the courts' review and, in particular, the grounds on which a Commission decision can be challenged. Finally, Part V describes the outcome of the judicial review process: the consequences of judgments and the circumstances under which damages can be awarded to successful applicants. We conclude with a possible avenue to improve the process.

II. GENERAL DESCRIPTION OF THE EU MERGER CONTROL PROCESS

Although the Commission had previously reviewed a number of mergers under the general prohibitions in EU law on restrictions of competition and abuse of dominance,[4] a proper merger control regime was introduced in the EU[5] only in 1989 with the 1989 Merger Regulation,[6] which was subsequently replaced by the 2004 Merger Regulation,[7] still in force today.

The 1989 and 2004 Merger Regulations are not substantially different[8] and both provide for a merger control process that is essentially driven by an administrative body, the Commission, which takes a

---

[4] Its jurisdiction to do so on the basis of the rules prohibiting the abuse of a dominant position was confirmed by the European Court of Justice in Case 6/72, Europemballage & Cont'l Can v. Comm'n, 1973 E.C.R. I-215.

[5] Note that several EU member states already had merger control regimes at the time, such as the United Kingdom since 1963, Germany since 1973, and France since 1977.

[6] Council Regulation (EEC) No. 4064/89, Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1 (and amendments) [hereinafter 1989 Merger Regulation].

[7] Council Regulation (EC) No. 139/2004, Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 [hereinafter 2004 Merger Regulation].

[8] Reference will be made in this article to the "Merger Regulation" where the 1989 and 2004 Merger Regulations contain the same provisions.

decision either prohibiting or approving (possibly subject to conditions) certain envisaged transactions (essentially mergers, acquisitions and "full function joint ventures") that are notified to it. Notification must be made by one or more parties to the transaction (referred to as a "concentration" in the Merger Regulation) when certain turnover thresholds are met. In certain circumstances competition authorities in EU member states can refer transactions that are notified to them to the Commission and vice versa (and the merging parties can request such referrals).

The Commission assesses whether a transaction will lead to a significant impediment to effective competition, in most cases because of the creation or strengthening of a dominant position on a specific market.[9] If it considers this to be the case, it will declare the transaction incompatible with the internal market (thereby prohibiting its implementation), unless the merging parties propose commitments that remedy the competition concerns (which the Commission will then make binding on the parties). Such commitments may, for example, involve the divestment of one of the parties' businesses in a specific market to a third-party purchaser approved by the Commission. If the Commission concludes that the transaction does not result in a significant impediment to effective competition, it will approve the transaction.

The notification of the concentration to the Commission is usually preceded by prenotification discussions in which the merging parties and the Commission's case team iron out initial questions on the transaction and the relevant markets. After the formal notification, the Commission has twenty-five working days to reach a decision on the transaction (extendable to thirty-five working days if the notifying parties propose commitments within twenty working days from notification). During this Phase I review, the Commission will request additional information from the parties and will consult market participants (customers, competitors, and suppliers) to test the arguments of the parties in the notification and to gauge the opposition to

[9] Note that under the 1989 Merger Regulation, the Commission could prohibit a concentration only if it created or strengthened a dominant position, not because of any other significant impediment to effective competition that would result from it. *Compare* 1989 Merger Regulation, *supra* note 6, arts. 2(2) & (3), *with* 2004 Merger Regulation, *supra* note 7, arts. 2(2) & (3).

the transaction. If the Commission has serious concerns that the transaction will cause a significant impediment to effective competition, it can open an in-depth (or Phase II) investigation into the concentration—this happens in approximately two to three percent of cases. If not, it will approve the transaction at the end of Phase I. Market consultations will continue during the Phase II review and, if it continues to believe that the transaction will harm competition, the Commission formulates its concerns in a "statement of objections," to which the notifying parties have the opportunity to respond. The notifying parties can also request that an oral hearing be organized before the case team of the Commission, other Commission services, and interested third parties.[10] After consulting an advisory committee consisting of representatives of the EU member states, the Commission will then take a final decision on the transaction, either prohibiting the transaction or approving it (possibly subject to commitments).

It is in principle only after the Commission has taken a decision on the transaction (either at the end of Phase I or II) that there is an opportunity to obtain judicial review of the Commission decision. This review is exercised by the General Court (in first instance) and the Court of Justice of the European Union (on appeal) on the basis of Article 263 of the Treaty on the Functioning of the European Union (TFEU).[11]

Under the EU model for merger control, judicial review of mergers is relatively rare. Whereas 5140 transactions were notified to the Commission between the introduction of the merger control regime and the end of 2012 (resulting in almost as many final decisions by the Commission),[12] in only about one percent of these cases was an

[10] This oral hearing is presided over by a hearing officer, a Commission official whose function is to act independently to safeguard the procedural rights of the parties during the hearing (and during the administrative procedure before the Commission more generally). *See* Decision 2011/695/EU of the President of the European Commission on the Function and Terms of Reference of the Hearing Officer in Certain Competition Proceedings, 2011 O.J. (L 275) 29, art. 1(2). The hearing officer does not take a decision on the substance.

[11] Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47.

[12] The statistics are available on the website of the European Commission. European Comm'n, Competition, http://ec.europa.eu/competition/mergers

action for annulment of a Commission decision brought before the European courts.

Although third parties may in theory be able to challenge a merger in a national court under EU law,[13] in practice they prefer to raise competition concerns through observations made to the Commission during the merger control process or by challenging the outcome of that process before the European courts.[14]

III. PROCEDURAL ASPECTS OF JUDICIAL REVIEW OF MERGERS

A. Applications for annulment

1. TIMEFRAME WITHIN WHICH TO BRING APPLICATIONS Applications for annulment must be brought within a period of two months and ten days.[15] For the addressee of the decision, this period starts running from the notification of the decision to the addressee. For third parties, the period starts running either from the date of publication of the decision in the Official Journal of the EU (for acts that are published) or from the moment they become aware of the decision and its content (for acts that are not published in the Official Journal).

2. REVIEWABLE ACTS An application to the General Court will be admissible only if it requests the annulment of a reviewable act,

/statistics.pdf. Not all notifications have resulted in final decisions. For some recently notified transactions the Commission's review is still ongoing, occasionally notifying parties have withdrawn their notification, and in some cases the Commission has referred the merger review to competition authorities in EU member states. Note that many cases of these cases are "no-brainers"; in recent years over half of all notifications have been handled under the simplified procedure introduced in 2005.

[13] Challenges would be based on the general rules of EU competition law, which the Commission used to challenge mergers prior to the 1989 Merger Regulation. *See* note 4 and accompanying text.

[14] Note that, in the absence of a merger control process by the Commission, competition authorities in member states of the EU may also apply their own merger control rules to transactions falling within their respective jurisdictions.

[15] TFEU, *supra* note 11, art. 263; Rules of Procedure of the General Court, 1991 O.J. (L 136) 1, art. 102(2) (and amendments).

meaning "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position."[16] Only the content of the act is relevant, not its form, so a public statement by the Commission may also constitute a reviewable act if it has legal effect.[17] But the requirement that the act is binding means that communications by the Commission that merely express an opinion cannot be challenged,[18] and the same is true for decisions that merely confirm a previous decision that was already binding.[19]

The most obvious example of a reviewable act in the context of EU merger control is a decision on the compatibility of a concentration.[20] But certain decisions taken during the procedure leading up to the final decision on a concentration may also be challenged by an action for annulment. This is true not only for decisions of the Commission refusing jurisdiction over a transaction,[21] but also for requests for information issued by decision to the notifying party.[22]

However, decisions that are merely preparatory to the final decision of the Commission, and which therefore cannot adversely affect the legal position of the applicant, are not open to challenge. One of the many appeals brought by Schneider Electric against Commission decisions on its failed takeover of Legrand was directed against a decision to open a Phase II investigation into the concentration. The courts held that such an application was not admissible because it was merely preparatory to the Commission's final decision on the

---

[16] Case 60/81, IBM v. Comm'n, 1981 E.C.R. I-2639, para. 9.

[17] *See* Case T-3/93, Air France v. Comm'n, 1994 E.C.R. II-121, ¶¶ 45–48, 58.

[18] *See* Case T-57/07, E.ON Ruhrgas v. Comm'n, 2009 E.C.R. II-132, ¶¶ 30–52.

[19] *See* Case C-480/93 P, Zunis v. Comm'n, 1996 E.C.R. I-1, ¶ 14.

[20] Several examples of such cases are discussed further below in section III.A.3.

[21] *See Air France*, 1994 E.C.R. II-121, ¶¶ 45–48, 58; Case T-417/05, Endesa v. Comm'n, 2006 E.C.R. II-2533.

[22] *See* Case T-145/06, Omya v. Comm'n, 2009 E.C.R. II-145.

transaction.[23] Similarly, Schneider Electric's challenge of the Commission decision closing the investigation after the withdrawal of the notification (and the abandonment of the concentration by Schneider Electric) was considered not open to challenge.[24]

Certain decisions subsequent to the decision on compatibility, such as decisions approving or rejecting the purchaser of a divestment to which the notifying parties committed, may be challenged by interested parties.[25] Appeals can also be brought if fines are imposed by the Commission in the context of its merger control powers, such as for failure to comply with the suspension obligation.[26] In recent years, several appeals have also been brought by notifying parties and by third parties against decisions refusing access to all or parts of the Commission's file.[27]

3. INTEREST OF APPLICANT Even if an application for annulment is brought against a reviewable act, it will be admissible only to the extent that the act affects the interest of the applicant by bringing about a distinct change in its legal position.[28] The interest must be shown by the addressees of the decision (such as the notifying parties in the case of a decision on compatibility) and third parties who wish to challenge the decision under Article 263 TFEU.

---

[23] Case T-48/03, Schneider Elec. v. Comm'n, 2006 E.C.R. II-111, ¶¶ 79–84. The fact that the extension of the Commission's review also extended to the obligation not to implement the transaction was not considered sufficient to challenge the decision.

[24] *Id.* ¶¶ 96–102.

[25] *See, e.g.*, Case T-342/00, Petrolessence v. Comm'n, 2003 E.C.R. II-1161; Case T-452/04, Editions Odile Jacob v. Comm'n, 2010 E.C.R. II-4713.

[26] *See* Case T-332/09, Electrabel v. Comm'n, 2012 E.C.R. II-0000.

[27] *See, e.g.*, Case T-403/05, MyTravel v. Comm'n, 2008 E.C.R. II-2027, *appealed at* Case C-506/08 P, Sweden v. MyTravel & Commission, 2011 E.C.R. I-0000; Case T-237/05, Editions Odile Jacob v. Comm'n, 2010 E.C.R. II-2245, *appealed at* Case C-404/10 P, Comm'n v. Editions Odile Jacob, 2012 E.C.R. I-0000.

[28] *See* Case T-125/97 & T-127/97, Coca-Cola v. Comm'n, 2000 E.C.R. II-1733, ¶ 77. Note that EU member states, the Council of the European Union and the European Parliament can bring applications for annulment without needing to show an interest.

(a) Interest of notifying parties The most obvious circumstance in which an act may affect the interest of the notifying parties is if the Commission declares a notified concentration incompatible with the internal market (and thereby prohibits it). The interest of a notifying party to request the annulment of such a decision does not disappear simply because the concentration was abandoned by the parties.[29]

A decision declaring a concentration compatible with the internal market subject to the compliance with certain conditions, even when offered as commitments by the notifying parties, may be open to a challenge by the notifying parties. In *Cementbouw*, one of the notifying parties brought a challenge to such an approval decision, albeit when it had notified a concentration to the Commission long after it had been implemented (it had "jumped the gun").[30] One of the (unsuccessful) arguments raised by Cementbouw was that the Commission's concerns as to the anticompetitive effects of the transaction were unjustified and that therefore it should not have required the submission of commitments.[31] Commitments, in any event, can be challenged by a notifying party only if they are effectively attached to the decision as conditions. If, on the other hand, the Commission merely "takes note" of declarations by the notifying parties, the notifying parties have no interest in having such an act annulled.[32]

Although it is possible that a decision declaring a concentration compatible with the internal market might adversely affect a notifying party, the General Court held in *Coca-Cola* that the mere fact that a decision defines a market in a certain way or finds that the applicant holds a dominant position does not give a notifying party an interest to challenge it.[33]

---

[29] *See* Case T-102/96, Gencor v. Comm'n, 1999 E.C.R. II-753, ¶¶ 38–46; Case T-22/97, Kesko v. Comm'n, 1999 E.C.R. II-3775, ¶¶ 46–65; Case T-210/00, MCI v. Comm'n, 2004 E.C.R. II-3253, ¶¶ 31-64.

[30] Case T-282/02, Cementbouw Handel & Indus. v. Comm'n, 2006 E.C.R. II-319.

[31] *Id.*

[32] *See Coca-Cola*, 2000 E.C.R. II-1733, ¶¶ 94-106.

[33] *Id.* ¶ 92.

(b) Interest of third parties Because Commission decisions in the context of a merger review are addressed solely to the notifying parties, third parties can contest them before the European courts only if they are of "direct and individual concern to them" in the sense of Article 263 TFEU, which means that "the decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."[34]

Such circumstances include the fact that the Merger Regulation and its implementing regulation specifically provide for the right of certain third parties to be heard in the procedure: All such third parties therefore have a right to challenge the Commission decision if their procedural rights are infringed. This covers representatives of employees,[35] consumer associations,[36] and any other natural or legal person showing a sufficient interest.[37] The fact that the party in question has actually been heard by the Commission during its review and has actively participated in that review can, as such, constitute evidence of the admissibility of its request for judicial review (although the mere right of the party to be consulted appears to be sufficient).[38]

---

[34] Case 25/62, Plaumann v. Comm'n, 1963 E.C.R. 95, at 107.

[35] 2004 Merger Regulation, *supra* note 7, art. 18(4). *See* Case T-96/92, Comité Centrale d'Entreprise de la Société Générale des Grandes Sources v. Comm'n, 1995 E.C.R. II-1213, ¶ 46; Case T-12/93, Comité Centrale d'Entreprise de la Société Anonyme Vittel, 1995 E.C.R. II-1247, ¶ 59.

[36] *See* Case T-224/10, Association Belge des Consommateurs Test-achats ASBL v. Comm'n, 2011 E.C.R. II-0000, ¶ 38.

[37] 2004 Merger Regulation, *supra* note 7, art. 18(4). This is particularly the case for competitors. *See, e.g.*, Case T-119/02, Royal Philips Elecs. v. Comm'n, 2003 E.C.R. II-1433, ¶¶ 283, 297; Joined Cases T-346/02 & T-347/02, Cableuropa v. Comm'n, 2003 E.C.R. II-4251, ¶ 62–63.

[38] Contrary to what is claimed in NICHOLAS LEVY, EUROPEAN MERGER CONTROL LAW: A GUIDE TO THE MERGER REGULATION ¶ 20.04[2][c] (8th ed. 2011), the General Court did not state the contrary in Case T-282/06, *Sun Chemical v. Commission*, 2007 E.C.R. II-2149, ¶ 45 (which merely reflects the argument of the Commission in that case). That standing appears to derive from the mere

However, this does not mean that a third party who had the right to be heard by the Commission can also bring an action before the courts contesting the *substance* of the final decision adopted by the Commission.[39] For that to be the case, the Commission decision must also affect the applicant's position in the market. This is true for parties to the transaction that are not notifying parties under the Merger Regulation (such as the target of an acquisition),[40] but also for competitors to the merging parties (which have been a major source of third-party appeals).[41] Potential competitors[42] and even undertakings active in neighboring upstream or downstream markets also may have standing on this basis.[43] It appears that for the same reason, third parties that are affected by commitments offered by the merging parties,[44] including as potential purchasers of divestments,[45] have standing to apply for the annulment of Commission decisions. On the other hand, in *Zunis*, several minority shareholders of Assicurazioni Generali brought an application for annulment against the Commission decision refusing to reopen an investigation into Mediobanca's acquisition of a stake in Assicurazioni Generali, but the General Court

right to be consulted and is in particular relevant if the Commission refuses to initiate a review of the transaction (because it considers it to be outside of its jurisdiction) and the third party is thereby deprived of its right to be heard. *See also* Case T-3/93, Air France v. Comm'n, 1994 E.C.R. II-121, ¶ 81.

[39] *See* Case T-96/92, Comité Centrale d'Entreprise de la Société Générale des Grandes Sources v. Comm'n, 1995 E.C.R. II-1213**,** ¶ 46; Case T-12/93, Comité Centrale d'Entreprise de la Société Anonyme Vittel v. Comm'n, 1995 E.C.R. II-1247, ¶ 59; *Association Belge des Consommateurs*, 2011 E.C.R. II-0000, ¶ 30.

[40] *See* Case T-417/05, Endesa v. Comm'n, 2006 E.C.R. II-2533.

[41] *See, e.g.*, Case T-2/93, Air France v. Comm'n, 1994 E.C.R. II-323, ¶ 45; Case T-119/02, Royal Philips Elecs. v. Comm'n, 2003 E.C.R. II-1433.

[42] *See* Case T-114/02, BaByliss v. Comm'n, 2003 E.C.R. II-1279, ¶ 105. *See also* Case T-290/94, Kaysersberg v. Comm'n, 1997 E.C.R. II-2137 (General Court refused to consider the admissibility of Kaysersberg's application, which was contested by an intervener, on its own motion).

[43] *See* Case T-158/00, ARD v. Comm'n, 2003 E.C.R. II-3825, ¶ 78.

[44] *See* Joined Cases C-68/94 & C-30/95, France & SCPA v. Comm'n, 1998 E.C.R. I-1375, ¶¶ 49–51, 55–56.

[45] *See* Case T-342/00, Petrolessence v. Comm'n, 2003 E.C.R. II-1161.

refused to grant them standing on the basis that they were minority shareholders of the target.[46]

B. Intervention

The fact that an application for annulment has been brought to the General Court will be publicized by way of a notice in the Official Journal of the European Union.[47] Third parties who can show a sufficient interest can request that the General Court grant permission to intervene in the proceedings. A request by an intervener to make written observations must be made within six weeks from the date of publication of the notice. After this six-week period, but provided that the application is received by the court before the initiation of oral proceedings, the prospective intervener will be allowed to make only oral observations.[48] Third-party intervention is limited to supporting the submissions of one of the parties (either the applicant or the Commission).[49] Such interventions commonly take place in merger appeals.

C. Interim relief

Actions brought before the EU courts do not have suspensory effect, so the Commission decision will continue in force pending the judgment of the General Court on the substance.[50] In light of the approximately four years that it takes on average for the General Court to reach judgment in competition cases,[51] this lack of

---

[46] *See* Case T-83/92, Zunis v. Comm'n, 1993 E.C.R. I-1169, ¶ 34–35. Note, however, that the Court of Justice confirmed that the application for annulment of Zunis was inadmissible not because the applicant lacked standing but because the act that was challenged was merely confirmatory and did not constitute an actionable decision. *See* Case C-480/93 P, Zunis v. Comm'n, 1996 E.C.R. I-1.

[47] Rules of Procedure of the General Court, 1991 O.J. (L 136) 1, art. 24(6) (and amendments).

[48] *Id.*

[49] Protocol on the Statute of the Court of Justice of the European Union, 2004 O.J. (C 310), art. 40 (and amendments).

[50] TFEU, *supra* note 11, art. 278.

[51] For statistics concerning the judicial activity of the General Court, see Court of Justice of the European Union, Annual Report, http://curia.europa.eu/jcms/jcms/Jo2_7000/.

suspensory effect may risk undermining the judicial protection of applicants.

However, the courts may order that the implementation of the contested act be suspended or prescribe any other interim measures,[52] on separate application to the President of the General Court by the party contesting the legality of the act. Requests for suspension or interim measures can be made only in relation to acts for which an action for annulment has been introduced.[53]

In order for an application to be successful, the applicant must establish a prima facie case (*fumus boni juris*) and show that the suspension or other interim measure is urgent.[54] According to settled case law, the urgency of an application for interim relief must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the relief.[55] This is a strict test: pure financial loss will, in principle, be regarded as irreparable only if it threatens the existence of the applicant or irreparably modifies its market share.[56] The only circumstance in which the courts have so far deemed the standard to be met was in relation to a commitment to dissolve a joint venture.[57]

Before granting a request for suspension or other interim measures, the courts will, in any event, balance the interests of the applicant against the other interests at stake in the proceeding, including those of other parties involved and the interest of maintaining effective competition. Furthermore, because the suspension or interim measures should not prejudice the outcome of the substantive review

---

[52] TFEU, *supra* note 11, arts. 278, 279.

[53] Rules of Procedure of the General Court, 1991 O.J. (L 136) 1, art. 104(1) (and amendments).

[54] *Id.* art. 104(2).

[55] *See* Case T-12/93 R, Comité Central d'Entreprise de la SA Vittel v. Comm'n, 1993 E.C.R. II-785, ¶ 22; Case T-88/94 R, SCPA v. Comm'n, 1994 E.C.R. II-401, ¶ 30; Case T-342/00 R, Petrolessence v. Comm'n, 2001 E.C.R. II-67, ¶ 40.

[56] *See Petrolessence*, 2001 E.C.R. II-67, ¶ 47.

[57] *See SCPA*, 1994 E.C.R. II-401, ¶ 30.

of the case, the situation that is created through them should not become irreversible.[58]

D. Expedited procedure

In response to the ever-increasing length of proceedings before the Court of First Instance (before December 1, 2009, the General Court), an expedited procedure was introduced in 2001.[59] It was designed to deal with cases of a particularly urgent nature, including merger control cases.[60]

Either the applicant or the defendant may request the use of the expedited procedure in a separate document lodged with the application or the defense. This document should indicate whether certain pleas are raised only in the event that the case is not decided under the expedited procedure and should include an abbreviated version of the application (or defense) for the purpose of the expedited procedure.[61]

If the General Court decides to allow the expedited procedure because of the particular urgency and the circumstances of the case, the case is automatically given priority[62] and the written procedure will be shortened.[63] The oral hearing of an expedited case will therefore have a particular importance.[64]

---

[58] *Id.* ¶ 32.

[59] Amendments to the Rules of Procedure of the Court of First Instance of the European Communities, 2000 O.J. (L 322) 4. In 2000, judgment was rendered on average after 27.5 months in cases other than intellectual property and staff cases.

[60] Kyriakos Fontoukakos, *Judicial Review and Merger Control: The CFI's Expedited Procedure*, 3 COMPETITION POL'Y NEWSL. 7 (2002).

[61] Rules of Procedure of the General Court, 1991 O.J. (L 136) 1, art. 76a(1) (and amendments).

[62] *Id.*

[63] In particular, in the event that the request for the use of the expedited procedure is made at the time of the application, the defendant receives only one instead of two months to submit its defense. Furthermore, the applicant will in principle not be allowed to submit a reply and the defendant not a rejoinder (and interveners not a statement in intervention), unless allowed by the court. *Id.*

[64] KOEN LENAERTS, DIRK ARTS & IGNACE MASELIS, PROCEDURAL LAW OF THE EUROPEAN UNION ¶ 24-059 (2d ed. 2006).

In the first years after its introduction, several merger control cases were adjudicated under the expedited procedure (usually within less than one year from the application),[65] but since 2006, all applications for the expedited procedure in merger cases have been refused.[66]

E. Appeals to the Court of Justice

All parties to the proceedings before the General Court (including interveners) can bring an appeal before the Court of Justice within two months after the judgment of the General Court has been served on them. Appeals are limited to points of law,[67] which means that the appellant must allege the lack of competence of the General Court, a breach of procedure by the General Court that affected the appellant's interest or an infringement of European law by the General Court.[68] The Court of Justice therefore, in principle, will not reassess the validity of the Commission decision, as the General Court did, nor will it assess the facts or the evidence before the General Court (unless it is alleged that the General Court distorted the evidence).[69]

IV. SUBSTANTIVE JUDICIAL REVIEW OF MERGERS

A. Grounds of appeal

A party wishing to appeal a Commission decision must set out the grounds for annulment. In accordance with Article 263 TFEU, these can be (1) lack of competence, (2) infringement of an essential proce-

[65] *See* Case T-310/01, Schneider Elec. v. Comm'n, 2002 E.C.R. II-4071; Case T-77/02, Schneider Elec. v. Comm'n, 2002 E.C.R. II-4201; Case T-5/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4381; Case T-80/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4519; Case T-114/02, BaByliss v. Comm'n, 2003 E.C.R. II-1279; Case T-119/02, Royal Philips v. Comm'n, 2003 E.C.R. II-1433; Case T-87/05, EDP v. Comm'n, 2005 E.C.R. II-3745; Case T-417/05, Endesa v. Comm'n, 2006 E.C.R. II-2533.

[66] *See*, *e.g.*, Case T-145/06, Omya v. Comm'n, 2009 E.C.R. II-145.

[67] TFEU, *supra* note 11, art. 256(1).

[68] Protocol on the Statute of the Court of Justice of the European Union, 2004 O.J. (C 310), art. 58 (and amendments).

[69] *See* Case C-413/06 P, Bertelsman v. Impala, 2008 E.C.R. I-4951, ¶ 29.

dural requirement, (3) infringement of the Treaties or of any rule of law relating to their application, or (4) misuse of powers. Even though the courts generally do not distinguish grounds of appeal according to these categories (and the categories overlap to some extent), grounds of appeal are discussed below in these four categories.

In order for the courts to analyze the grounds of annulment, these grounds must be effective, meaning that they can actually lead to the annulment of the decision. If the reasoning of the Commission's decision is based on several pillars, each of which is sufficient to justify that decision, the application must contest each of those pillars.[70] On the other hand, the court may abstain from ruling on all grounds of the application if one of them is sufficient to lead to annulment of the contested decision.

1. LACK OF COMPETENCE OF THE COMMISSION The European Courts have ruled in numerous cases on the competence of the Commission to review a transaction, with notifying parties contesting the existence of a concentration under the EU merger control rules,[71] the Commission's territorial jurisdiction,[72] the effect on trade between the EU member states,[73] the scope of a referral of a case by an EU member state to the Commission,[74] the allocation of competences between national competition authorities and the Commission,[75] and the continuation of the merger review after the withdrawal of the notification.[76] Third parties similarly have contested Commission decisions

---

[70] *See* Case T-209/01, Honeywell v. Comm'n, 2005 E.C.R. II-5527, ¶ 49. *See also Schneider Elec.*, 2002 E.C.R. II-4071, ¶¶ 404–20; Case T-210/01, Gen. Elec. v. Comm'n, 2005 E.C.R. II-5575, ¶ 734.

[71] *See* Case T-282/02, Cementbouw Handel & Indus. v. Comm'n, 2006 E.C.R. II-319, ¶¶ 23–149; Case C-202/06 P, Cementbouw Handel & Indus. v. Comm'n, 2007 E.C.R. I-12129, ¶¶ 35–48.

[72] *See* Case T-102/96, Gencor v. Comm'n, 1999 E.C.R. II-753, ¶¶ 48–111.

[73] *See* Case T-22/97, Kesko v. Comm'n, 1999 E.C.R. II-3775, ¶¶ 94–120.

[74] *See* Case T-221/95, Endemol Enter. Holdings v. Comm'n, 1999 E.C.R. II-1299, ¶¶ 37–47; *Kesko*, 1999 E.C.R. II-3775, ¶¶ 67–93.

[75] *See Cementbouw Handel & Indus.*, 2006 E.C.R. II-319, ¶¶ 150–64.

[76] *See* Case T-310/00, MCI v. Comm'n, 2004 E.C.R. II-3253, ¶¶ 69–114.

refusing jurisdiction[77] and referring the merger review to national competition authorities.[78]

2. INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENT The second category of grounds for annulment of a Commission decision is the failure by the Commission to respect the procedural rules for the merger review. Most commonly alleged in this category is a breach of the rights of defense, such as a failure to provide the notifying parties with sufficient access to the file.[79] In *Schneider Electric I*, the applicant successfully argued that the Commission had based its prohibition decision on a consideration that it had not included in the statement of objections. Schneider Electric's rights of defense therefore had been breached, because it had not received the opportunity to challenge the Commission's concerns in this respect or to submit a remedy to address these concerns.[80] It is noteworthy that it is settled case law that a breach of the rights of defense can lead to the annulment of the decision only if it is shown that the administrative procedure could have had a different outcome had the rules been observed.[81]

Other procedural issues that may arise include the respect of procedural time limits.[82] In many cases the failure to provide reasons is also invoked.[83]

3. INFRINGEMENT OF THE TREATIES—SUBSTANTIVE REVIEW Applicants can also appeal on the ground that any other legal provisions of

---

[77] *See* Case T-3/93, Air France v. Comm'n, 1994 E.C.R. II-121.

[78] *See* Case T-119/02, Royal Philips Electronics v. Comm'n, 2003 E.C.R. II-1433; Joined Cases T-346/02 & T-347/02, Cableuropa v. Comm'n, 2003 E.C.R. II-4251.

[79] *See Endemol Enter. Holdings*, 1999 E.C.R. II-1299, ¶¶ 48–96; Case T-5/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4381, ¶¶ 83–118; Case T-210/01, Gen. Elec. v. Comm'n, 2005 E.C.R. II-5575, ¶¶ 621–731.

[80] *See* Case T-310/01, Schneider Elec. v. Comm'n, 2002 E.C.R. II-4071, ¶¶ 421–62.

[81] *See Gen. Elec.*, 2005 E.C.R. II-5575, ¶ 632.

[82] *See Schneider Elec.*, 2002 E.C.R. II-4071, ¶¶ 74–113.

[83] *See, e.g.*, Case T-464/04, Impala v. Comm'n, 2006 E.C.R. II-2289, ¶¶ 51–58, 174–88, 278–326, 491–93, 506–14.

the European treaties or rules relating to their application (including the Merger Regulation) have been infringed. On this basis, the applicant can in particular contest the Commission's substantive analysis of the concentration, namely whether or not it created a significant impediment to effective competition in the sense of Article 2 of the 2004 Merger Regulation.

However, the scope of review by the General Court of the substantive assessment is limited—the Commission has a margin of discretion with regard to economic matters,[84] and the General Court must not substitute its own economic assessment for that of the Commission.[85] The court's review therefore is limited to verifying whether the evidence upon which the Commission relied is factually accurate, reliable and consistent, and whether it contains all of the information that must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[86]

Despite this limitation, the courts have been willing in a number of cases to scrutinize the Commission's assessment quite closely, and the Court of Justice has held that the General Court is even allowed to assess and determine the "test" (in the sense of the economic theory) that the Commission should use in its analysis.[87] In the past, the courts have analyzed whether the scope of the substantive test applied by the Commission was acceptable. In *Gencor* and *Airtours,* the General Court established the conditions under which a restriction of competition can result from positions of collective dominance,[88] and in *Tetra Laval*, it set out the benchmarks for concerns over conglomerate effects.[89]

---

[84] *See, e.g.*, Case C-12/03 P, Comm'n v. Tetra Laval, 2005 E.C.R. I-987, ¶ 39; *Gen. Elec.*, 2005 E.C.R. II-5575, ¶ 60.

[85] *See* Case C-413/06 P, Bertelsman v. Impala, 2008 E.C.R. I-4951, ¶ 145.

[86] *See Tetra Laval*, 2005 E.C.R. I-987, ¶ 39; *Bertelsman*, 2008 E.C.R. I-4951, ¶ 145; *Gen. Elec.*, 2005 E.C.R. II-5575, ¶ 63.

[87] *See Tetra Laval*, 2005 E.C.R. I-987, ¶ 45.

[88] Case T-102/96, Gencor v. Comm'n, 1999 E.C.R. II-753, ¶¶ 112–58; Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585, ¶¶ 55–295.

[89] Case T-5/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4381, ¶¶ 142–338.

Parties also have contested the market definition used by the Commission[90] and the fact that a dominant position existed prior to the concentration[91] or was created[92] or strengthened[93] as a result of the concentration, as well as more generally the existence of a significant impediment to effective competition.[94] The courts also have ruled on the role of efficiencies in the Commission's analysis.[95]

With regard to remedies, the courts regularly have analyzed whether the Commission was right to refuse commitments offered by merger parties to eliminate any concerns that the transaction would result in a restriction of competition. The courts assess in those cases whether the Commission was right to block a transaction despite the remedies offered. For example, Gencor argued before the General Court that the Commission should have accepted behavioral commitments, including a commitment to maintain the output at one of its sites. It had offered this commitment in an attempt to overcome the Commission's concerns that the combination of Gencor's and Lonrho's activities in the platinum metals sector might result in a restriction of output and therefore an upwards pressure on prices for these metals. The General Court analyzed whether the Commission was right to reject this commitment, and concluded that behavioral remedies cannot be automatically ruled out as possible remedies for competition concerns but that, in the instant case, the offered remedy did not address the Commission's

---

[90] *See* Case T-221/95, Endemol Enter. Holding v. Comm'n, 1999 E.C.R. II-1299, ¶¶ 99–112; *Airtours*, 2002 E.C.R. II-2585, ¶¶ 17–48; *Gen. Elec.*, 2005 E.C.R. II-5575, ¶¶ 489–538, 585–609.

[91] *See Endemol Enter. Holding*, 1999 E.C.R. II-1299, ¶¶ 113–47; Case T-22/97, Kesko v. Comm'n, 1999 E.C.R. II-3775, ¶¶ 121–68; *Gen. Elec.*, 2005 E.C.R. II-5575, ¶¶ 92–280, 539–42.

[92] *See Gencor*, 1999 E.C.R. II-753, ¶¶ 159–298; *Airtours*, 2002 E.C.R. II-2585, ¶¶ 49–195; Case T-310/01, Schneider Elec. v. Comm'n, 2002 E.C.R. II-4071, ¶¶ 114–403; *Tetra Laval*, 2002 E.C.R. II-4381, ¶¶ 119–141; Case T-282/02, Cementbouw Handel & Indus. v. Comm'n, 2006 E.C.R. II-319, ¶¶ 165–287.

[93] *See Endemol Enter. Holding*, 1999 E.C.R. II-1299, ¶¶ 148–70; *Gen. Elec.*, 2005 E.C.R. II-5575, ¶¶ 281–314, 315–65, 366–473, 543–44.

[94] *See* Case T-342/07, Ryanair v. Comm'n, 2010 E.C.R. II-3457, ¶¶ 35–385.

[95] *Id.* ¶¶ 386–445.

concern, namely that the notified transaction would create a duopoly between, on the one hand, the combined Gencor and Lonrho business and, on the other, their main competitor for platinum metals, Amplats.[96]

As discussed above, in *Cementbouw*, one of the notifying parties contested a decision approving a concentration. It did so partly on the ground that the Commission should not have required the commitments that the notifying parties ultimately offered to obtain approval.[97] This indicates that a notifying party can challenge not only the Commission's refusal to accept a commitment, but also its acceptance of one.

Although the courts' review of the substantive assessment of the concentration is limited, this is not necessarily true for other breaches of law that an applicant may invoke. In particular, the courts' jurisdiction is unlimited with respect to fines that may be imposed in the context of the Merger Regulation.[98]

4. MISUSE OF POWERS The concept of misuse of powers refers to cases in which the Commission has used its powers for a purpose other than that for which those powers were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose. When more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers if it does not nullify the main aim.

Such a situation could arise, for example, if the Commission declared certain information provided by a notifying party to be incomplete, not in order to obtain full information that is necessary

---

[96] *Gencor*, 1999 E.C.R. II-753, ¶¶ 299-329. *See also Gen. Elec.*, 2005 E.C.R. II-5575, ¶¶ 52, 555–61, 610–20; Case C-12/03 P, Comm'n v. Tetra Laval, 2005 E.C.R. I-987, ¶¶ 52–89; *Ryanair*, 2010 E.C.R. II-3457, ¶¶ 447–525.

[97] *Cementbouw Handel & Indus.*, 2006 E.C.R. II-319, ¶¶ 288–321, *appealed at* Case C-202/06 P, Cementbouw Handel & Indus. v. Comm'n, 2007 E.C.R. I-12129.

[98] 2004 Merger Regulation, *supra* note 7, art. 16.

for its assessment, but merely as an excuse to suspend the timetable foreseen in the Merger Regulation for assessing the transaction.[99]

V. OUTCOME OF REVIEW

A. Consequences of judgments

If the General Court or the Court of Justice annuls a Commission decision, the decision disappears from the EU's legal order as if it never existed. The Commission is then required to take the necessary measures to comply with the judgment, taking into account the grounds constituting the essential basis for the operative part of the judgment.[100] Depending on the nature of the decision, the Commission may need to or may want to adopt a new decision replacing the one that was annulled.

When a decision on compatibility is annulled, the parties are required to submit a new notification to the Commission or supplement the original notification (or certify that there are no intervening changes in market conditions or in the information provided in the original notification).[101] A new period for review by the Commission

---

[99] This was argued (unsuccessfully) in Case T-145/06, Omya v. Comm'n, 2009 E.C.R. II-145, ¶¶ 87–111. *See also* Case T-87/05, EDP v. Comm'n, 2005 E.C.R. II-3754, ¶ 87.

[100] TFEU, *supra* note 11, art. 266.

[101] 2004 Merger Regulation, *supra* note 7, art. 10(5). This was also the approach followed by the Commission under the 1989 Merger Regulation. See, for example, its second compatibility decision in Case IV/M.308, *Kali + Salz/MdK/Treuhand*, *available at* http://eur-lex.europa.eu/Notice.do?val=226515%3Acs&lang=de&list=226515%3Acs%2C&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=, after the judgment in Joined Cases C-68/94 & C-30/95 *France v. Commission*, 1998 E.C.R. I-1375.) However, the press release of the General Court upon its judgment in Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071, which annulled the Commission decision in case COMP/M.2283, *Schneider/Legrand*, 2004 O.J. (L 101) 1, indicated that the Commission could proceed with its examination without renotification. Article 5 of the Merger Regulation was amended upon the introduction of the 2004 Merger Regulation to clarify that a renotification (or a confirmation that the original notification contained all necessary information) is required.

will start after such a renotification. The Commission is required to re-examine the transaction in the light of the market conditions prevailing at the time of the renotification, not of the original notification.[102]

B. Possibility of obtaining damages

The annulment of a Commission decision may give rise to a damage claim against the Commission by parties that consider themselves harmed by the unlawful act adopted by the Commission. Article 340 TFEU provides that the institutions of the European Union shall make good any damage caused by them. However, the criteria to obtain compensation are very strict, and to date damages actions have been brought against the Commission in this context on only two occasions (and in only one case did this result in the award of a limited amount of damages).[103]

In order to bring a claim for damages before the European Courts, the applicant must show (1) that the institution's conduct was unlawful, (2) that actual damage was suffered, and (3) a causal link between the institution's conduct and the damage.[104]

With regard to the first of these criteria, the damages claimant must show the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals.[105] In areas in which the institution has no (or only limited) discretion, the mere infringement of EU law may be sufficient to establish the existence of a serious breach.[106] A breach of the rights of defense (by the Commission's failure to clearly set out in the statement of objections its objections to the transaction) has therefore been found to constitute a sufficiently serious breach.[107]

---

[102] 2004 Merger Regulation, *supra* note 7, art. 10(5).

[103] *See* Case C-440/07 P, Comm'n v. Schneider Elec., 2009 E.C.R. I-6413. In Case T-212/03, *MyTravel v. Commission*, 2008 E.C.R. II-1967, the applicant was not successful.

[104] Case T-351/03, Schneider Elec. v. Comm'n, 2007 E.C.R. II-2237, ¶ 113.

[105] *Schneider Elec.*, 2009 E.C.R. I-6413, ¶ 160.

[106] *Schneider Elec.*, 2007 E.C.R. II-2237, ¶ 117; *MyTravel*, 2008 E.C.R. II-1967, ¶ 37; *Schneider Elec.*, 2009 E.C.R. I-6413, ¶ 160.

[107] *Schneider Elec.*, 2007 E.C.R. II-2237, ¶ 156.

However, when the institution enjoys a wide discretion, it must have manifestly and gravely disregarded the limits on its discretion for liability to arise.[108] This implies that it will be difficult to establish that the Commission committed a sufficiently serious breach when it comes to its economic assessment of the transaction, where the Commission enjoys a wide discretion.[109] The constraints by which the Commission is bound when analyzing concentrations, such as time constraints, further increase its latitude.[110]

The third of these criteria also is not easy to satisfy: The damages claimant must demonstrate a causal link between the breach of EU law by the Commission and the damage it suffered. In essence this implies that the claimant must show that it would not have suffered the loss but for the unlawful conduct of the Commission. A comparison must be made between the unlawful decision, such as a prohibition decision, and the decision the Commission could or should have instead adopted without breaching any rule of law (which may not be the same as a clearance decision).[111]

So far, a notifying party has been successful in obtaining damages from the Commission in only one case. The only damages that the European Courts accepted as resulting from the annulment of a prohibition decision in that case was the cost borne by the notifying party during the reassessment of the transaction by the Commission following the annulment of the prohibition decision.[112]

---

[108] *MyTravel*, 2008 E.C.R. II-1967, ¶ 37; *Schneider Elec.*, 2009 E.C.R. I-6413, ¶ 160.

[109] *Schneider Elec.*, 2007 E.C.R. II-2237, ¶ 132.

[110] *Id.* ¶¶ 124, 131; *MyTravel*, 2008 E.C.R. II-1967, ¶¶ 43, 84.

[111] *Schneider Elec.*, 2007 E.C.R. II-2237, ¶ 263.

[112] *Id.* ¶ 302. The General Court also accepted that Schneider Electric suffered damage caused by the Commission's unlawful conduct in the form of the reduced price which it received for the divestiture which it was required to make by the unlawful decision. However, the Court of Justice overturned this ruling in Case C-440/07 P, *Commission v. Schneider Electric*, 2009 E.C.R. I-6413, paras. 201-05, pointing out that Schneider had had the option to cancel the divestment after the judgment annulling the initial prohibition decision.

VI. A (MODEST) PROPOSAL FOR CHANGE

It is clear from the above discussion that the European courts are an essential part of the merger control system of the EU. However, a major problem with the effectiveness of judicial review is the time taken by the courts to reach judgment—the judgments of the General Court rendered in competition cases in 2011 had been in cases running on average for more than four years. As indicated above, expedited procedures have fallen into disuse in recent years, and applications for interim measures are rarely granted. Such a long period of uncertainty is difficult to reconcile with the pace of contemporary commercial dealings.

What can be done to speed up the review of the courts without jeopardizing its quality? Obviously an increase in the number of judges might help, but this requires an increase of the courts' budget. Another scenario that has been proposed is the creation of a specialized court or of specialized chambers in the General Court to deal with competition cases,[113] but it is questionable whether this would significantly increase the speed of review (apart from also increasing the risk that competition law becomes detached from the remainder of EU law).

A possibility that we consider worth exploring is to replace the current, lengthy Phase II investigation of the Commission by a shorter period of time during which the Commission and the notifying parties could try to resolve the Commission's concerns. If this is not possible, the Commission, instead of issuing a statement of objections, would bring its case to the court in order to prohibit the transaction. At the same time, the parties could apply to the court for an interim approval of the unproblematic parts of the transaction (obviously with the necessary safeguards for the viability of the remainder) so that the dispute before the court becomes focused on those markets in which the Commission believes the competition issues arise.

---

[113] The creation of such specialized chambers was part of the initial proposal of the European Commission for the reform of the statute of the Court of Justice, which was presented to the European parliament and the Council in 2011. By the time the final reform was enacted (Regulation 741/2012 Amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, 2012 O.J. (L 228) 1), this aspect of the proposed reform had been abandoned.

The integration of the current Phase II investigation of the Commission and proper judicial review would shorten the duration of the entire procedure and would facilitate the implementation of unproblematic parts of a transaction pending adjudication on the areas that raise concerns in the eyes of the Commission. Review of problematic parts of mergers still would take a long time, but this is unavoidable if a proper analysis is required. The role of the courts in the process would ensure that there is no prosecutorial bias against the transaction and would also give third parties the opportunity to voice their concerns in a transparent way.

It goes without saying that this would require the redesign of the setup of the Commission's case teams and the court's staff so that sufficient expertise is made available at the court to handle such cases.