

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**The standard of review by courts in competition cases – Note by the EU**

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This document reproduces a written contribution from the EU submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

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## EU\*

### 1. Nature of EU competition enforcement

1. The European Union (EU) competition enforcement system is an administrative system, entrusted principally to the European Commission (Commission), under the judicial control of the Court of Justice of the European Union (CJEU or the Court).<sup>1</sup> It is for the Commission to ensure the application of the principles laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union<sup>2</sup> (TFEU) and in the EU Merger Regulation.<sup>3</sup> The Commission decides by majority vote on cases after an investigation by its relevant services.

2. The Commission carries out investigations, takes decisions finding infringements, authorises or prohibits mergers, and has the power to impose fines or appropriate structural or behavioural remedies. The Commission is subject to the duty to state the reasons for its decisions, including for example a positive decision to authorise a merger. Also, the Commission carries the burden of proving an infringement of Article 101 and 102 or whether a merger is or is not compatible with the internal market.<sup>4</sup> In its enforcement of EU competition law, the preparation of a decision is subject to a number of internal checks and balances, such as involvement of the Chief Economist team, consultation of the Legal Service, consultation of other Commission services as the case may be, review by an internal peer review panel, involvement of the Hearing Officer on procedural issues, review of the draft decision by the Advisory Committee composed of representatives of all the Member States, etc.) and, more importantly, external control by the GC at first instance and by the CJEU on appeal on points of law.

3. The European Court of Human Rights (ECtHR) confirmed the lawfulness of an integrated system of administrative enforcement, which combines investigation and decision-making functions in one body with the power to impose fines of quasi-criminal

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<sup>1</sup> When reference is made hereinafter to the "Court", this includes both the CJEU and the General Court (GC).

<sup>2</sup> *Official Journal C 326*, 26.10.2012.

<sup>3</sup> EU competition law applies also to public undertakings or undertakings with special or exclusive rights on the basis of Article 106 TFEU in conjunction with Articles 101 or 102 TFEU.

<sup>4</sup> See recital 5 and Article 2 of Regulation 1/2003. Although this Regulation applies only to antitrust, it is submitted that the same allocation of the burden of proof applies also in the area of merger control. The EU standard of proof is best encapsulated in the concept of "firm conviction", which requires of the Commission to produce evidence supporting the conclusion that the alleged infringement took place. See e.g., joined cases T-185/96 and T-190/96, *Riviera v Commission*, ECLI:EU:T:1999:8, para. 47, and joined cases C-239/11 P, C-489/11 P and C-498/11 P, *Siemens v Commission*, ECLI:EU:C:2013:866, para. 2017. It is submitted, however, that this standard is equivalent to a balance of probabilities standard of proof, known mostly in common law jurisdictions.

nature, in its *Menarini* judgment.<sup>5</sup> As long as the undertakings affected by the Commission's enforcement activities have an opportunity to challenge any decisions before a judicial body that has full jurisdiction, the system does not run counter to Article 6 of the ECHR. The wide scope of the judicial scrutiny to which the Commission is subject is illustrated notably by the Court's competence to review not only the legality of actions or decisions of the Commission, but also the claims for failure to act and claims for damages.

## 2. Standard of review by the Court of Justice of the European Union

The principle of effective judicial protection is a general principle of EU law.<sup>6</sup> In line with this principle, the enforcement activity of the Commission is subject to a wide and thorough scrutiny by the Court. The scope and intensity of this review will also depend on the nature of the act involved.

4. Article 263 TFEU provides that the Court reviews the legality of acts of the Commission intended to produce legal effects *vis-à-vis* third parties. The Court therefore can review the legality of Commission decisions in antitrust and merger cases, for instance conditional and unconditional clearance decisions in mergers, rejections of complaints, commitment decisions, etc.<sup>7</sup>

5. An action for annulment may be brought against a Commission decision in antitrust and merger cases, at first instance before the GC, which has the power of full judicial review.<sup>8</sup> This entails that the GC can review the legality of the Commission decision relating to proceedings applying Articles 101 TFEU and 102 TFEU and the EU Merger Regulation. It can review the factual basis of the decision, the interpretation of the law on which it is based, the finding of a violation, the legality of any fines or of other remedies imposed, the grounds on which a merger is authorised or prohibited, etc.. The Court may annul a Commission decision, in full or in part, on grounds of lack of competence, infringement of an essential procedural requirement, lack of reasoning, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.<sup>9</sup>

6. Appeals against judgments and orders of the GC may be brought before the CJEU on points of law only.<sup>10</sup>

7. The scope of the exercise of the judicial review by the Courts is to a large extent set by the pleas raised by the appellants.<sup>11</sup> The Court may take into account all the elements

<sup>5</sup> ECtHR, *Menarini*, no. 43509/08, 27 September 2011.

<sup>6</sup> Article 47 of the EU Charter of Fundamental Rights.

<sup>7</sup> The CJEU also reviews the legality of State aid decisions of the European Commission and decisions against public undertakings or undertakings with special or exclusive rights. This has resulted in a number of relevant judgments. For the purposes of this contribution, however, these cases are not discussed.

<sup>8</sup> See Article 256 TFEU.

<sup>9</sup> Second paragraph of Article 263 TFEU.

<sup>10</sup> Article 58 of the Statute of the Court of Justice of the EU.

<sup>11</sup> Case C-272/09 P, *KME Germany and Others v Commission*, EU:C:2011:810, paragraphs 102 and 109; Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815, paragraphs 62 and 82; and Case C-

submitted by the appellant, whether those elements pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to review the legality of the Commission decision.<sup>12</sup> In addition, the Court is required to raise of its own motion pleas involving matters of public policy, such as the failure to state reasons for a contested decision.<sup>13</sup> But the principle of effective judicial protection does not require of the Court to undertake of its own motion a new and comprehensive investigation of the file on which the challenged Commission decision is based.<sup>14</sup>

8. In decisions whereby the Commission has fixed a fine or periodic penalty payment, the Court has in addition unlimited jurisdiction. This entails that the Court can cancel, reduce or increase the fine or periodic penalty payment involved.<sup>15</sup> Unlike the review of legality provided for in Article 263 TFEU, the scope of the unlimited jurisdiction is strictly limited to reviewing the amount of the fine.<sup>16</sup> The decision to impose a fine, the assessment of the gravity and duration of the infringement and of the Commission's compliance with its fines guidelines are not subject to the unlimited jurisdiction of the Court.

### 3. Acts and decisions subject to review by the Court

9. An action for annulment may be brought against any Commission act which produces legal effects that are capable of affecting the applicant's interests by bringing about a distinct change in its legal position.<sup>17</sup> The form of the Commission's act is of no importance, only the substance counts. The legal standing of the applicants before the Court is broad, and is not limited, for example, to the notifying parties in merger cases or the undertakings on which a fine has been imposed in antitrust cases.<sup>18</sup>

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295/12 P, *Telefónica and Telefónica de España v Commission*, EU:C:2014:2062, paragraphs 56 and 59.

<sup>12</sup> Case C-407/08 P, *Knauf Gips v Commission*, EU:C:2010:389, paragraphs 87 to 92, and Case C-603/13P, *Galp v Commission*, EU:C:2016:38, para. 72.

<sup>13</sup> Case C-386/10 P, *Chalkor v Commission*, 2011, paragraph 64.

<sup>14</sup> Case C-386/10 P, *Chalkor v Commission*, 2011, paragraph 66.

<sup>15</sup> See, Article 261 TFEU and Article 31 of Regulation 1/2003.

<sup>16</sup> Case C-3/06 P, *Groupe Danone v Commission*, EU:C:2007:88, paragraph 62; Case C-679/11 P, *Alliance One International v Commission*, EU:C:2013:606, paragraph 105; Joined Cases C-231/11 P to C-233/11 P, *Commission and Others v Siemens Österreich and Others*, EU:C:2014:256, paragraph 126; and Case C-295/12 P, *Telefónica and Telefónica de España v Commission*, EU:C:2014:2062, paragraph 45.

<sup>17</sup> Case C-60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9 and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others v Commission* [1992] ECR II-2667, paragraph 28.

<sup>18</sup> Pursuant to Article 263 TFEU, 4<sup>th</sup> paragraph, any natural or legal person directly and individually concerned by a regulatory act may institute an action for annulment.

10. The Court exercises comprehensive<sup>19</sup> judicial review of the legality of decisions imposing fines under Article 101 and 102 TFEU. This applies to infringement decisions under Article 7 of Regulation (EC) No 1/2003, whether they come in the form of traditional decisions or of settlement decisions.<sup>20</sup> The same applies for decisions taken in the area of merger control. As indicated above, the Court has in addition unlimited jurisdiction to review the fine.

11. In the case of commitment decisions under Article 9 of Regulation (EC) No 1/2003, the Court also exercises its judicial review of the legality as provided by Article 263 of the Treaty.<sup>21</sup>

12. Other acts of the Commission that may be challenged under Article 263 of the TFEU include procedural measures that constitute decisions, such as a decision to terminate an investigation. In principle, intermediate or preparatory measures intended to pave the way for a final decision are not challengeable. However, an exception is applicable for acts adopted in the course of the preparatory procedure which are themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produces binding legal effects.<sup>22</sup>

13. Any legal defects in a preparatory act may be relied upon in an action directed against the definitive act for which they represent a preparatory step.<sup>23</sup> Preliminary steps such as the decision to initiate proceedings and the statement of objections therefore form procedural steps that are not challengeable. The reason is that if the Court were to rule itself on the legality of such acts, it would arrive at a decision on questions on which the Commission has not yet the opportunity to pronounce itself. This would be incompatible with the division of powers between the Commission and the Court and the remedies laid down by the TFEU, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission.<sup>24</sup>

14. Similarly, while an action for annulment of an inspection decision under Article 20 of Regulation (EC) No 1/2003 may be brought immediately, the Court will only review the conduct of the Commission during the inspection together with an action for annulment of the final decision.<sup>25</sup>

15. On the other hand, a decision of the Commission holding that the information transmitted by an undertaking during the investigation does not qualify for confidential treatment is challengeable immediately. This is because such a decision withholds from the

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<sup>19</sup> The Court of Justice also uses the term “*full and unrestricted*”: Case C-272/09 P, *KME Germany v Commission*, ECLI:EU:C:2011:810, paragraph 109.

<sup>20</sup> Case C-411/15, *Timab Industries v Commission*, ECLI:EU:C:2017:11.

<sup>21</sup> Case C-441/07 P, *Commission v Alrosa*, ECLI:EU:C:2010:377.

<sup>22</sup> A decision on the confidentiality of materials that may be communicated to another party may be considered as an act against which an action for annulment may be brought, Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse v Commission*, ECLI:EU:T:2006:151, paragraph 66.

<sup>23</sup> Case 60/81, *IBM v Commission* [1981] ECR 2639, paragraphs 11-12.

<sup>24</sup> Case 60/81, *IBM v Commission* [1981] ECR 2639, paragraph 20.

<sup>25</sup> Case T-135/09, *Nexans v Commission*, [2012] ECLI:EU:T:2012:596, paragraph 132.

undertaking the protection for confidential information provided by Community law and is definitive in nature and independent of a final decision finding an infringement.<sup>26</sup>

16. In merger cases, a decision to refer a case falling within the scope of the Merger Regulation to a national competition authority constitutes a challengeable act.<sup>27</sup> By contrast, like in antitrust proceedings, decisions that are only preparatory steps towards a final decision cannot form the subject of an action for annulment. Also, the Court held that a Commission's letter or email to a third party interpreting merger commitments made in the context of *ex post* supervision of the implementation of a merger decision does not constitute a challengeable act.<sup>28</sup>

#### 4. Margin of appreciation for the European Commission/Review of economic evidence

17. A Commission decision finding an infringement or approving or prohibiting a merger is presumed to be valid and enforceable. As mentioned above, it can only be challenged in Court on specific grounds set out in Article 263(2) TFEU, that is lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

18. The separation of powers between the Commission and the Court means that the latter, when reviewing the legality of a Commission decision, may annul it only when the exercise of administrative powers by the Commission is contrary to one of the grounds mentioned above, as interpreted by the Court. In this sense, the Court can only review the legality of the decision but it cannot substitute its own substantive assessment of the case for that made by the Commission.

19. In general, according to established case law, questions of fact and issues of law are subject to a comprehensive review, in which the Court is expected to thoroughly scrutinise the decision for errors in the factual findings or the interpretation of the legal rules. By contrast, policy choices and complex assessments are in principle subject to a marginal review. The latter is thought to be a less strict standard of judicial review which allows the Commission some latitude in its assessment of the case. As the Court has put it, marginal review entails checking whether “the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers”.<sup>29</sup>

20. Indeed, in its earlier case law, the Court stated that the legality review was limited to checking whether the Commission committed a *manifest error* of assessment in its

<sup>26</sup> Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, paragraph 65.

<sup>27</sup> Case T-119/02, *Royal Philips Electronics v Commission* [2003] E.C.R. II-1433, paragraphs 267-300; Joined Cases T-346/02 and 347/02, *Cabeleuropa and Others v Commission* [2003] E.C.R. II-4251, paragraphs 47-82.

<sup>28</sup> Cases T-43/16, *1&1 Telecom GmbH v Commission*, 2018; T-884/16, *Multiconnect GmbH v Commission*, 2018; and T-885/16, *Mass Response Service GmbH v Commission*, 2018.

<sup>29</sup> See, e.g., Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289, paras. 87-88; and C-12/03P, *Commission v Tetra Laval*, ECLI:EU:C:2004:318.

decisions.<sup>30</sup> The Court has also recognised that in the case of complex assessments, in particular of economic nature, the Commission enjoys a certain margin of appreciation. The Court has mentioned for example, that the Merger Regulation confers on the Commission "*a certain discretion, especially with respect to assessments of an economic nature,*" which the judicial review should take into account.<sup>31</sup> Similar statements have been used in judgments concerning antitrust and cartel infringements. This implies that the Court does not have to enter into the complexity of re-doing the economic analysis or revising the conclusions drawn therefrom by the Commission. As stated by the Court, "*it is not for the Court to substitute its own economic assessment for that of the Commission.*"<sup>32</sup>

21. More recently, however, the Court has made it clear that its comprehensive review subjects the Commission's complex (economic) analyses to rigorous scrutiny.

22. As the Court noted, "*Not only must [it] establish, in particular, 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.*"<sup>33</sup>

23. Thus, in the area of mergers, the Court in the *Ryanair v Commission* case devoted a substantial part of its judgment to a detailed review of the Commission's fixed-price effects regression analysis and cross-section price regression analysis, demonstrating significant economic expertise.<sup>34</sup> Similarly, close examination of the Commission's economic assessment was conducted by the Court in other merger cases.<sup>35</sup> The Court's review of such evidence may play a crucial role also in procedural matters. For instance, in *UPS v Commission*<sup>36</sup> the Court assessed in detail the technical changes made by the Commission in the econometric model between the Statement of Objections and the final decision prohibiting the merger, to decide whether a violation of the rights of defence had taken place; as a result, the Court annulled the Commission decision.

24. In an antitrust case, when the Commission had rejected a complaint on the basis that the market involved was of limited size or economic importance, the Court critically

<sup>30</sup> Cases 56/64 and 58/64, *Consten and Grunding v. Commission*, ECLI:EU:C:1966:41, 347.

<sup>31</sup> Case T-342/07, *Ryanair v Commission*, 2010, paragraph 29; See also Case T-370/17, *KPN v Commission*, 2019, paragraphs 58-59 and 106; Case T-279/04, *Éditions Odile Jacob v Commission*, 2010, paragraph 248.

<sup>32</sup> Case T-370/17, *KPN v Commission*, 2019, paragraph 107; Case T-342/00, *Petrolessence SA v Commission*, 2003, paragraph 101.

<sup>33</sup> Case T-342/07, *Ryanair v Commission*, 2010, paragraph 30. See also Case T-370/17, *KPN v Commission*, 2019, paragraphs 60 and 108 and Case C-413/06, *Bertelsmann and Sony Corporation of America v Impala*, 2008, paragraph 69; Case C-12/03 P, *Commission v Tetra Laval*, 2005, paragraph 39; Case T-210/01, *General Electric v Commission*, 2005, paragraph 63; Case T-342/99, *Airtours v Commission*, 2002, paragraph 64, Case T-168/01 *Glaxo v Commission*, 2006, paragraph 242.

<sup>34</sup> Case T-342/07, *Ryanair v Commission*, 2010, paragraphs 146-183 and 190-195.

<sup>35</sup> See, for example, Case T-175/12, *Deutsche Börse v Commission*, 2015.

<sup>36</sup> Case T-194/13, *UPS v Commission*, 2017; confirmed on appeal in Case 265/17 P *Commission v UPS*, 2019.

reviewed the Commission's assessment of the market concerned. The Court found that while the Commission had considered that the complaint concerned only a market of limited size, it had failed to substantiate that assessment with any market data.<sup>37</sup>

25. These examples show that the Court fully appreciates and routinely scrutinises complex (economic) evidence in considerable detail, while recognising a certain margin of discretion for the Commission in such matters. Referring to the existence of a margin of discretion does therefore not prevent the Court from carrying out a full and unrestricted review, in law and in fact.<sup>38</sup>

## 5. Average duration of Court proceedings

26. The average duration of proceedings before the General Court is 20 months. For the Court of Justice this is 15.7 months.<sup>39</sup> While no figures for the average duration of competition cases are available, the Court of Justice itself recognises that the volume and complexity of such cases requires lengthier proceedings than the average for other cases.<sup>40</sup>

## 6. Court's access to competition expertise

27. In the European Union, there is a long standing practice for the undertakings to use economic studies or reports during the Court proceedings in support of their arguments. The undertakings may also bring an expert in order to make an oral presentation during the Court hearing. In addition, the Court may put to the parties to the proceedings specific questions or invite them to make oral or written submissions on certain aspects of the proceedings, including to clarify the relevant economic assessment. In many competition cases, the Court explicitly refers to the undertakings' economic submissions.

28. The Court can itself also appoint an economic expert to submit neutral expert evidence. To that end, Article 25 of the Statute of the Court of Justice provides that: "*The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.*"

29. The Court can commission this task on its own initiative or at the request of the parties. In competition cases, the Court has however rarely made use of the possibility to obtain an expert's report. Expert's reports were commissioned in the *Dyestuff* and *Woodpulp* cases, where both reports related to the proof of concerted practices in the presence of parallel behaviour. As the parties have ample opportunity to supply the Court with detailed economic studies and reports from various experts, the Court may also already consider itself sufficiently informed in most cases.

30. To facilitate the proper presentation of economic evidence, the Commission has adopted best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases. This guidance document contains recommendations regarding the presentation and content of

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<sup>37</sup> Case T-427/08, *CEAHR v Commission*, 2010.

<sup>38</sup> Case C-386/10 P, *Chalkor v Commission*, 2011, paragraph 82.

<sup>39</sup> See [https://curia.europa.eu/jcms/jcms/P\\_80908/en/](https://curia.europa.eu/jcms/jcms/P_80908/en/). Site visited on 24 April 2019.

<sup>40</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190039en.pdf>

economic and econometric analysis. The purpose of the best practices is to ensure that economic analysis is framed in such a way that the Commission and/or other parties such as the Courts can understand and evaluate its relevance and significance. The Commission itself follows the principles set out in its best practices in antitrust and merger cases. In that regard, in the body of its decisions the Commission strives to explain and summarise its economic assessment in a clear and non-technical way; a more comprehensive description with technical details is typically set out in an annex to the decision. This facilitates the Court's and other parties' understanding of the Commission's reasoning.

31. While economic evidence is important, it is not always decisive, by itself, for the outcome of a Court's review.

32. Economic assessment is only one of the sources of evidence relied upon by the Commission. The findings of the quantitative assessment are usually used to support or refine the findings of the qualitative analysis. The Commission's task is to make "an overall assessment" based on a "set of indicative factors". There is also no hierarchy between "non-technical evidence" and "technical evidence" in the sense that the latter must necessarily support the former. The prevailing principle in EU law is that of the "unfettered evaluation of evidence", and the only relevant criterion for such evaluation relates to its reliability. Hence, the Court verifies the arguments of the parties against the whole body of evidence and conclusions set out in a Commission decision.

33. Furthermore, the application for annulment by the affected undertaking defines the scope of the action. The undertakings may not later amend their pleas or raise new issues of law. In cases before the General Court, the initial submission of evidence is therefore dependent on the scope of contestation of the decision. The undertakings are expected to submit the evidence in the first exchange of pleadings. During the written procedure, both the Commission and the undertaking that brought the action for annulment will submit the evidence that they view necessary to support their arguments. This entails that for an action that is limited to only certain aspects of the decision, the amount of (economic) evidence that is submitted will also be more limited. There is no obligation to submit to the Court all the evidence relating to a case, although the Court may request access to such evidence at a later stage of the proceedings.