

# Judicial Remedies under EC Competition Law: Complex Issues arising from the “Modernisation” Process

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## I. Introduction

Article 230 EC allows any natural or legal person to “institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”.<sup>1</sup> Private parties thus frequently rely on this provision to challenge acts adopted by the European Commission (hereafter the “Commission”) in accordance with the powers granted to it in the field of competition law. While this particular subject has generated extensive scholarly analysis,<sup>2</sup> the last decade of reforms of EC competition law – often cited as the “modernisation” process – makes it particularly necessary to re-examine this topic.<sup>3</sup> Two major developments in the field of competition law give rise to novel and complex questions with regard to judicial review pursuant to Article 230 EC.

First, the reforms introduced by virtue of the modernisation of the implementation of EC competition rules have generated a proliferation of new acts whose legal character (and therefore by implication the possibility to challenge these new acts before the European Court of Justice – hereafter, the “ECJ” – and the Court of First Instance – hereafter, the “CFI”) is not necessarily clear. This is the case, for example, of the multitude of soft law instruments (notices, guidelines, etc.) which the Commission adopted with a view to clarifying its

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<sup>1</sup> See Article 230 EC: “The Court of Justice shall review the legality of acts [...] of the Commission [...] intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers [...]. Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. The proceedings [...] shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be”. It should be observed that the scope of Article 230 EC is neither limited to the Commission’s acts, nor to the competition law field.

<sup>2</sup> For the most part the studies carried out in relation to annulment actions are general studies that do not specifically focus on competition law. Several commentators do, however, devote a substantial part of their analysis to the competition law field. See the various studies cited in the footnotes below and, above all, P. Duffy, “Quelles réformes pour le recours en annulation”, (1995) 5-6, *Cahiers de Droit Européen* 553. M. Canedo, “L’intérêt à agir dans le recours en annulation en droit communautaire”, (2000) 3 *Revue Trimestrielle de Droit Européen* 452. See also the various books on EC competition law procedure which raise these questions and, in particular, C. Kerse and N. Khan, *EC Antitrust Procedure*, 5<sup>th</sup> ed., Thomson – Sweet & Maxwell, 2005; L. Ortiz Blanco, *EC Competition Procedure*, Clarendon Press – Oxford, 1996.

<sup>3</sup> See D. Geradin, ed., *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, 2004. The founding text of the modernisation process is Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) O.J. L 1/1. In the area of merger control, one can also mention Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, (2004) O.J. L 24.

decisional practice,<sup>4</sup> as well as new binding acts envisaged by Regulation 1/2003 such as findings of inapplicability and decisions to remove a case from a National Competition Authority.

Second, the increased emphasis on the use of economic analysis following the successive reforms of the rules pertaining to horizontal and vertical agreements and merger control has transformed competition law into a technically complex subject matter whereby economists are stealing a lead over lawyers.<sup>5</sup> The corollary of this development could be to limit the scope of judicial review exercised by generalist EC and national courts. Indeed, faced with having to make complex evaluations involving the weighing up of anti-competitive restrictions and efficiency gains, the generalist judge could quickly find himself lost. Therefore, the more opaque and complex a particular case is, the wider the Commission's discretion in its decision making becomes. Certain recent judgments of the CFI concerning the annulment of Commission prohibition decisions in merger control, however, put this danger into perspective.<sup>6</sup>

Apart from the above-mentioned developments, it is equally worth highlighting the proliferation of litigation running in parallel to annulment actions. Such litigation calls for, first and foremost, a re-examination and revision of the fines imposed by the Commission under Articles 81 and 82 EC.<sup>7</sup> Subsequent to successful annulment actions, such litigation also encompasses actions for compensation of the losses incurred by the firm(s) subjected to unlawful Commission decisions. The recent case *Holcim v. Commission* or the request lodged by Mytravel after the *Airtours* judgment illustrate the development of such litigation in the field of competition law.<sup>8</sup>

Against this background, the developments that follow intend to provide a critical analysis of annulment actions against Commission decisions in the field of competition law in the aftermath of the modernisation process. This study is made up of seven parts. Part II identifies those acts that can be the subject of an annulment action within the meaning of Article 230 EC. Part III reviews and analyses the rules laying down who is entitled to initiate an annulment action. Part IV recalls the modalities for an annulment action. Part V evokes the parallel actions (revision of fines) and subsequent actions for indemnity following an annulment action. Part VI evaluates the effectiveness of the Community annulment action

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<sup>4</sup> See, for example, the Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), (2004) O.J. C 101/78; Commission Guidelines on the application of Article 81 (3) of the Treaty, (2004) O.J. C 101/97. See also D. Geradin, ed., *supra* note 3.

<sup>5</sup> Commission Regulation 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, (2000) O.J. L 304/3; Commission Regulation 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, (2000) O.J. L 304/7; Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, (1999) O.J. L 336 21; Commission notice - Guidelines on Vertical Restraints, (2000) O.J. C 291; Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, (2001) O.J. C 3/2; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004) O.J. C 31/5.

<sup>6</sup> See Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II-258; Case T-310/01, *Schneider Electric v. Commission*, [2002] E.C.R. II-4071; Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381.

<sup>7</sup> See on this, D. Geradin and D. Henry, "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission's Decisional Practice and the Community Courts' Judgments", (2005) *GCLC Working Paper 03/05* available at <http://gclc.coleurop.be/>.

<sup>8</sup> See Case T-28/03, *Holcim AG v. Commission*, not yet reported and Request, Case T-212/03, *MyTravel v. Commission*.

procedure in the light of the principles laid down by the CFI and ECJ as regards judicial review. Part VII provides a brief conclusion.

## **II. Acts that can be challenged within the context of EC competition law post Modernisation**

The modernisation of EC competition law has given rise to new categories of act whose “challengeable” characteristics within the context of annulment actions require examination. To determine whether those new acts are challengeable, it is useful to give a brief reminder of the principles identified in the case-law (1). The different acts envisaged by Regulation 1/2003 are then examined in the light of these principles (2).

### 1. Establishing whether an act is challengeable within the meaning of Article 230 EC

Three conditions must be satisfied in order for an act to be the subject of an annulment action. First, the act must have been adopted by a Community institution.<sup>9</sup> With the modernisation process having come to a close, this condition allows for a distinction to be made between those acts adopted by the Commission which do fall within the scope of Article 230 EC, and those decisions and judgments of national competition authorities and courts which do not. This condition further lays down that those acts adopted by either the consultative committee, which is composed of Member State representatives, or the network of competition authorities created following the adoption of Article 1/2003 fall outside the scope of a possible annulment action.

Second, only those acts producing legal effects on a person’s situation and affecting that person in an adverse manner can be challenged on the basis of Article 230 EC.<sup>10</sup> The origins of this condition can be found in the *ERTA* judgment whereby an annulment action is permitted against “all acts adopted by the institutions, whatever their nature or form, which are intended to have legal effects”.<sup>11</sup> Commission decisions within the framework of the implementation of competition law produce such an effect.<sup>12</sup> The *ERTA* case-law has, however, allowed for a broadening of the scope of annulment actions so as to include those acts which do not formally meet the characteristics of a decision but nevertheless, in substance, produce binding legal effects. EC competition law constitutes one of those areas which falls within the broadening of the scope of the notion of “legal effects” within the meaning of the *ERTA* case-law.<sup>13</sup> During the administrative procedure, the Commission is indeed required to take numerous investigative and organisational acts, which directly affect the legal position of the undertaking(s) concerned. The case-law provides a large number of examples where acts have been re-qualified so as to become decisions.<sup>14</sup> In the *Cement*

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<sup>9</sup> See D. Simon, *Le système juridique communautaire*, 3rd ed., PUF, at para. 407.

<sup>10</sup> See Marie-Pierre Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quééré et Cie SA v. Commission* and *Union de Pequeños Agricultores v. Council*", (2003) 1 *Modern Law Review*, 124 at p.132.

<sup>11</sup> See Case C 22/70, *Commission v. Council*, [1971] E.C.R. I-263 at para. 42. See also Case C 294/83, *Les Verts v. Parliament*, [1986] E.C.R. 1339 at para. 24 which states that those acts “intended to have legal effects vis-à-vis third parties” can be challenged on the basis of Article 230 EC.

<sup>12</sup> In accordance with Article 249 EC: “A decision shall be binding in its entirety upon those to whom it is addressed”.

<sup>13</sup> See D. Simon, *supra* note 9 at para. 414.

<sup>14</sup> The contrary scenario by which a decision is re-interpreted so as to be qualified as a non-binding act seems theoretically feasible but has limited practical application. The *Dalmine* case, however, provides an example.

judgment, for instance, some of the undertakings challenged a letter through which the Commission withdrew the benefit of immunity from fines.<sup>15</sup> The ECJ held that the appeal was admissible since the letter was “a measure which produces legal effects touching the interests of the undertaking concerned and which is binding on them. It thus constitute[d] not a mere opinion but a decision”. The CFI even recognised that in the context of the control of concentrations between undertakings laid down by Regulation 4064/89, a statement by the spokesman for the Commissioner responsible for competition matters, made on behalf of the Commission, announcing that a proposed concentration between two undertakings fall outside the ambit of the aforementioned regulation, since it did not have a Community dimension within the meaning of Article 1, was capable of forming the subject-matter of an action for annulment.<sup>16</sup>

In other cases, the ECJ has not explicitly interpreted an act so as to qualify it as a decision but merely assessed the content and reach of a given act in order to conclude that it produced or aimed at producing binding legal effects.<sup>17</sup> Therefore, the rejection of a complaint,<sup>18</sup> a letter detailing the reasons for which the Commission will not follow up on a complaint,<sup>19</sup> the grant or refusal to grant third-party access to the file,<sup>20</sup> and the refusal to hear interested third parties,<sup>21</sup> were considered as challengeable acts within the meaning of Article 230 EC. In *France v. Commission*, the ECJ held that even a Commission notice which aimed at formally interpreting a directive but which surreptitiously introduced new legal obligations could be the subject of an annulment action.<sup>22</sup>

Third, the relevant act must be of a definitive nature. In other words, a preparatory act which only constitutes one of the steps towards a final decision cannot be challenged.<sup>23</sup> This principle was established in the well-known judgment *IBM v. Commission*.<sup>24</sup> The ECJ held:

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The CFI adjudged a decision enjoining the applicant to provide the required information within 30 days, failure to do so resulting in periodic penalty payments as “not produc[ing] binding legal effects and does not therefore constitute a challengeable measure for the purposes of Article [230] of the Treaty. Nor does such a decision produce binding legal effects in so far as it holds the applicant jointly liable for the periodic penalty payments imposed on addressees of the same decision. That decision constitutes only a procedural stage during which the Commission adopts, where appropriate, a decision definitively fixing the total amount of the periodic penalty payment and thus bearing enforceable authority”. It is therefore only a preparatory act which does not raise objections as such. See Order of the European Court of First Instance, T-596/97, *Dalmine v. Commission*, [1998] E.C.R. II-2383.

<sup>15</sup> See Joined Cases C-8-11/66, *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v. Commission* [1993] E.C.R. 75.

<sup>16</sup> Case T-3/93, *Air France v. Commission*, [1994] E.C.R. II-121.

<sup>17</sup> See S. Van Raepenbusch, *Droit Institutionnel de l'Union Européenne*, Larcier, 4th ed., 2005, p. 616.

<sup>18</sup> Case C-39/93, *SFEI v. Commission*, [1994] E.C.R. I-2681.

<sup>19</sup> Case T-64/89, *Automec I*, [1990] E.C.R. II-3671.

<sup>20</sup> Case T-2/03, *Verein für Konsumenteninformation v. Commission*, (so-called Lombard Cartel) not yet reported. See L. Ritter and D. Braun, *European Competition Law: A Practitioner's Guide*, 3<sup>rd</sup> ed., Kluwer Law International, 2004, p.1155.

<sup>21</sup> See C. Kerse and N. Khan, *supra* note 2 at para. 8.033.

<sup>22</sup> Case C-325/91, *France v. Commission*, [1993] E.C.R. I-3283

<sup>23</sup> Case C-23/63, *Société anonyme Usines Emile Henricot and others v. High Authority*, [1963] E.C.R. 441, 455: “It follows from the natural meaning of the word that a decision marks the culmination of procedure within the High Authority, and is thus the definitive expression of its intentions [...] that a decision must appear as a measure taken by the High Authority, acting as a body, intended to produce legal effects and constituting the culmination of procedure within the High Authority, whereby the High Authority gives its final ruling in a form from which its nature can be identified”.

<sup>24</sup> Certain commentators have explained that this rule is necessary to avoid a situation by which the Commission finds itself impeded by too many intermediary appeals. See P. Duffy, *supra* note 2 at p. 555. See also D. Simon, *supra* note 9 at p. 520. This justification is not, however, convincing. An annulment action does not produce

“[...] it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision”.<sup>25</sup>

Relying on this principle, the ECJ held that a statement of objections or a letter initiating a procedure were not open to challenge.<sup>26</sup> In *Guérin*, the letters through which the Commission responded to complaints and invited the plaintiffs to make comments were adjudged preparatory and as such deemed to fall outside the scope of an Article 230 EC annulment action.<sup>27</sup> The same response was also given in cases involving a refusal to give access to the file to those involved in the procedure or a refusal to hear them.<sup>28</sup>

The ECJ did, however, recognize in its *IBM* judgment that there was one exception to the principle establishing that the act must be of a definitive nature:

“[...] if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above [that is to say producing legal obligations affecting the interests of the appellant] but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case”.<sup>29</sup>

This exception is directed at those situations in which the acts fall within a phase which can be separated from the course of proceedings leading to the definitive act.<sup>30</sup> EC competition law provides numerous illustrations of this exception insofar as the implementation of Articles 81, 82 and the merger regulation is organized in several successive and distinct phases (such as, for example, the preliminary investigation, the investigation, the hearing, etc.). The case-law has therefore accepted that requests for information or on-the-spot investigations are acts challengeable within the meaning of Article 230 EC.<sup>31</sup>

## 2. Acts open to challenge within the field of competition law post modernisation

The recent spate of reforms in the field of competition law was accompanied by the removal, within the Community legal order, of a series of acts whose contentious status was the object

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suspensive effects. It is therefore difficult to see how the lodging of an annulment action could hinder institutional action. See Article 242 of the EC Treaty. It would seem more correct to state that the ECJ does not regard preparatory acts as producing legal effects insofar as they can later be cancelled out by a subsequent measure.

<sup>25</sup> Case C-60/81, *IBM v. Commission*, [1981] E.C.R. 2639.

<sup>26</sup> In any case, the legal defects affecting preparatory acts can always be challenged incidentally on the back of an appeal against the final act. See *IBM v. Commission*, id. at para. 12: “whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step”.

<sup>27</sup> Case C-282/95, *Guérin automobiles v. Commission*, [1997] E.C.R. I-1503.

<sup>28</sup> Case T-10/92, *Cimenteries CBR SA v. Commission*, [1992] E.C.R. II-2667 at para. 42. See also Case T-61/02, *Commerzbank v. Commission*, not yet reported. See also C. Kerse and N. Khan supra note 2 at para. 8.033, p. 473.

<sup>29</sup> *IBM v. Commission*, supra note 25 at para 11.

<sup>30</sup> See S. Van Raepenbusch, supra note 17 at p. 617.

<sup>31</sup> See respectively Case C-374/87, *Orkem v. Commission*, [1989] E.C.R. 3283 and Case C-46/87 and 227/88, *Hoechst v. Commission*, [1987] E.C.R. 2859.

of strained debate.<sup>32</sup> The reforms have, however, maintained a series of acts whose contentious status deserves mention (2.1). In addition, they have introduced new types of acts, whose challengeable status, from the point of view of Article 230 EC is to say the least obscure (2.2).<sup>35</sup>

## 2.1. Acts maintained under Regulation 1/2003

Regulation 1/2003 maintains a large amount of acts that were found in Regulation 17/62. The challengeable status of these acts within the meaning of Article 230 EC therefore remains similar and the solutions found in the case-law can be transposed. These acts include decisions finding and terminating an infringement,<sup>34</sup> the ordering of interim measures by decision,<sup>35</sup> binding commitment decisions,<sup>36</sup> exemption decisions and the withdrawal of the benefit of exemption regulations.<sup>37</sup> In the same way, Commission decisions involving a rejection of a complaint foreseen in Article 7 of Regulation 773/2004 with regards to the implementation of Articles 81 and 82 must be considered challengeable, as is foreseen by a steady stream of case-law.<sup>38</sup> Finally, all those decisions for which the right to appeal to the Community Courts is expressly envisaged by Regulation 1/2003 can be the subject of an annulment action, e.g. requests for information by decision,<sup>39</sup> inspections ordered by decision,<sup>40</sup> or decisions imposing a fine or periodic penalty payments.<sup>41</sup>

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<sup>32</sup> For instance, “comfort letters” through which the Commission terminated a procedure without taking a negative clearance decision or granting an exemption. See C. Kerse and N. Khan, *supra* note 2 at p. 475. In accordance with the *Perfume* cases, the Commission was of the opinion that these letters were devoid of any binding legal effect and that they therefore escaped judicial review as envisaged by Article 230 EC, while the ECJ and CFI have both acknowledged, with great caution, the admissibility of an appeal against these decisions. See M. Waelbroeck and A. Frignani, *Commentaire Mégret – Concurrence*, 2<sup>nd</sup> ed., 1997, at paras. 433 and 485.

<sup>33</sup> These observations are particularly relevant in relation to Regulation 1/2003. Regulation 139/2004, on the other hand, does not bring about any real changes with regards to acts open to challenge in an annulment action. The applicants can request the annulment of various formal decisions envisaged in Articles 6, 8, 9, 11, 13, and 14, (See Case T-119/02, *Royal Philips Electronics BV v. Commission*, [2003] E.C.R. II-1433) or of those decisions by which the Commission dismisses a potential acquirer of a divested entity following the imposition of a structural remedy (See Case T-342/00, *Petrolessence et SG2R v. Commission*, [2003] E.C.R. II-1161).

<sup>34</sup> Article 7 of Regulation 1/2003, *supra* note 3.

<sup>35</sup> Article 8 of Regulation 1/2003, *supra* note 3 codifying the *Camera Care* case-law, Order of the European Court of Justice, C-792/79, *Camera Care v. Commission*, [1980] E.C.R. 119.

<sup>36</sup> Regulation 17/62 did not include a specific provision entrusting the Commission to adopt binding commitment decisions. However, the case-law recognised this power to the Commission which it used in a substantial number of cases. An explicit legal basis is now provided for by Article 9 of Regulation 1/2003, *supra* note 3. See J. Temple Lang, “Commitment Decisions under Regulation 1/2003”, (2003) 8 *E.C.L.R.* 350; E. Paulis and C. Gauer, “La réforme des règles d’application des articles 81 et 82 du Traité”, (2003) 97 *JTDroit Européen* 63.

<sup>37</sup> The adoption of exemption decisions following Regulation 1/2003 cannot be excluded, even if such decisions are likely to be rare in practice. See *contra*, S. Blake, C. Gauer, L. Kjolbye, D. Dalheimer, E. De Smijter, D. Schnichels and M. Laurila, “Regulation 1/2003 and the Modernisation Package fully applicable since 1 May 2004”, (2004) 2 *Competition Policy Newsletter* 5-6. The power to withdraw an exemption is provided for by Article 29 (1) of Regulation 1/2003, *supra* note 3.

<sup>38</sup> See Article 7 (2) of Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (2004) L 123/18. See *SFEI v. Commission*, *supra* note 14 and C. Kerse and N. Khan, *supra* note 2 at p. 473.

<sup>39</sup> See Article 18 (1) of Regulation 1/2003, the right to appeal being expressly envisaged in Article 18 (3).

<sup>40</sup> See Article 20 (1) of Regulation 1/2003, the right to appeal being expressly envisaged in Article 20 (4). See also Articles 21 (1) and (3) which foresee the same right in relation to inspections of non business premises.

<sup>41</sup> See respectively Articles 23 and 24 of Regulation 1/2003 which endow the Commission with the power to impose fines and periodic penalty payments. Article 31 of the Regulation explicitly envisages that decisions through which it imposes a fine or a periodic penalty payment can be the subject to appeal before the Court which has unlimited jurisdiction. Certain commentators do, however, consider that periodic penalty payments are not acts open to challenge. See C. Kerse and N. Khan, *supra* note 2 at p. 476.

## 2.2. New acts foreseen by Regulation 1/2003

It is on the other hand with regards to certain “new acts” envisaged by Regulation 1/2003 that the situation is slightly delicate. Admittedly, some of these measures are mentioned in Chapter III of the Regulation which deals with “Commission decisions”. But that does not rule out in any way the possibility that the Community Courts may declare an annulment action in relation to one or several of these acts inadmissible under Article 230 EC.<sup>42</sup>

### a) *Commission decisions to remove cases – Article 11(6) of Regulation 1/2003*

Under the former system of Regulation 17/62, the Commission enjoyed an overarching supremacy over the implementation of EC competition rules. The advantage of this system was the uniform application of EC competition law. The reforms brought in by Regulation 1/2003 entailed a shift of the centre of gravity in the implementation of Articles 81 and 82 EC towards the national level. In order to prevent the risk of the non-uniform application of EC competition law, the legislator bestowed upon the Commission the power to relieve national competition authorities of their competence to apply the EC competition rules.<sup>43</sup> In accordance with Article 11 (6) of Regulation 1/2003:

“The initiation by the Commission of proceedings for the adoption of a decision [...] shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty”.

Questions concerning whether Commission decisions relieving national competition authorities of their competence are challengeable could be summarily treated on the basis of the principles found in the case-law. The *IBM* case-law, which excludes decisions to initiate a procedure from the scope of challengeable acts on the grounds that these acts are a preparatory step towards a final decision, could potentially be transposed to this type of act. Several reasons, however, could allow us to hold that Commission decisions recalling cases from the national level deserve special treatment and be considered as “challengeable” within the meaning of Article 230 EC.<sup>44</sup> First, the decision to open a procedure on the basis of Article 11 (6) is admittedly a preparatory decision, but it is above all a final decision to close the phase of examination in progress before the national authority. The decision could, therefore, as such benefit from the exception laid down in the *IBM* judgment on the ground that it constitutes the end of a special procedure.

Second, the implementation of the power to recall a case undeniably produces legally binding effects. First and foremost, Member States are legally affected when the Commission

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<sup>42</sup> See our comments above. See contra, E. Paulis and C. Gauer, supra note 36 at para. 38, who consider that all decisions adopted by the Commission are acts within the meaning of Article 249 EC and thus seem to infer that they are challengeable on the basis of Article 230 EC.

<sup>43</sup> Various reasons give rise to the fear that the different national competition authorities may not apply EC competition law uniformly. First, there are considerable differences in material and human resources within the various national competition authorities. Further, the national competition authorities could potentially discriminate between domestic and foreign undertakings when applying the competition rules in order to achieve protectionist objectives. Finally, the legal and political traditions of the Member States are so different, that the risk of divergent interpretations of identical concepts has been judged as high. See D. Geradin, “Competition between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law”, (2002) 9 *Columbia Journal of European Law* 1.

<sup>44</sup> This question has been evoked but left unanswered by C. Kerse and N. Khan, supra note 2 at p. 476.

neutralizes the competence of the national competition authority.<sup>45</sup> Further, by being subjected to a new procedure governed by different rules the undertakings concerned are legally affected. The effect on the undertakings is all the stronger if the procedure before the relevant national authority has reached an advanced stage. Indeed, in this hypothetical scenario, apart from the extra costs for the undertaking concerned, the Commission's decision wipes out a quasi-definitive conclusion of the national authority which has legal effects for the undertakings concerned (for example, if they have negotiated commitments, etc).

Finally, the coherence of the system of EC competition law militates in favour of recognizing the possibility to initiate annulment actions against Article 11 (6) decisions. Indeed, within the framework of merger control, Article 9 of Regulation 139/2004 on the control of concentrations allows the Commission to refer in part or in whole merger operations to a national authority.<sup>46</sup> This mechanism, which brushes aside the competence of one authority in favour of another one at a different level is not so different from the Article 11 (6) mechanism. In addition, within the framework of the control of concentrations, the CFI has held that the decision to refer a case affected the legal situation of the parties to the concentration and could therefore be the subject of an action for annulment.<sup>47</sup>

b) *Guidance Letters - Paragraph 38 of the preamble to Regulation 1/2003*

The abolition of the requirement to notify agreements has meant that undertakings are no longer able to clarify their legal position by subjecting a given agreement to Commission examination. In order to temper the legal uncertainty resulting from this development, paragraph 38 of the preamble to Regulation 1/2003 allows undertakings to seek the informal view of the Commission on a practice (the mechanism does not limit itself to agreements) which would create uncertainty in the application of the competition rules because of the novel problems it raises and the absence of clarity in the law.<sup>48</sup> The Commission has specified in its "Notice on informal guidance relating to novel questions" the circumstances in which it would reply to such requests.<sup>49</sup> It would seem, on this occasion, that the Commission has

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<sup>45</sup> See D. Schnichels, "The Network of Competition Authorities : How Will it work in Practice", in D. Geradin, ed., supra note 3 at p. 119; A. Weitbrecht, "The Network of Competition Authorities: How will it work in Practice – Remarks from a practitioner" in D. Geradin, ed., supra note 3 at p. 127. A similar point had been made in the context of Regulation 17/1962 by M. Waelbroeck and A. Frignani, supra note 32 at para. 493.

<sup>46</sup> See Article 9 of Regulation 139/2004, supra note 3.

<sup>47</sup> See Case T-119/02, *Royal Philips Electronics BV v. Commission*, supra note 33 at para. 281. The analogy is not complete, however. As the CFI recalls, the decision to refer excludes on the one hand the application of the EC competition rules to an operation and submits it on the other hand to the exclusive control of the national competition authority. Unlike Article 11 (6) whose employment does not modify the applicable rules (Articles 81 and 82), Article 9 of the merger regulation leads to a change in the substantive rules applicable to the parties as the national competition authorities apply national laws that differ from Community law. The modification of the applicable rules ensuing from a reference under Article 9 thus unquestionably affects the legal situation of the parties. However, one can observe, on the one hand, that the referral mechanism was instituted on the premise that the national merger control laws ensure an effective regime comparable to that found at Community level and, on the other hand, that an Article 11(6) referral affects the legal situation of the parties concerned as there is a change in the procedural rules. These two factors suggest that although not complete, an analogy between the two referral procedures can be envisaged.

<sup>48</sup> See para. 38 of the preamble to Regulation 1/2003: "Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance".

<sup>49</sup> See Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), (2004) O.J. C 101/78. Three cumulative conditions



chosen to exclude the possibility of introducing an annulment action against these guidance letters by making it clear that these letters are not Commission decisions and that they bind neither the national competition authorities nor the national courts.<sup>50</sup>

This solution is justified as long as these guidance letters do not disguise texts which in reality are prescriptive in nature imposing detailed legal obligations on the undertaking concerned much as decisions do. If need be, these letters should be challengeable on the basis of Article 230 EC on the ground that they produce legal effects.

c) *The reallocation of cases mechanism - Article 13 of Regulation 1/2003*

In declaring that all members of the network of competition authorities are competent to apply Articles 81 and 82 EC in all cases where trade between Member States is affected, Regulation 1/2003 poses the risk (i) that one authority that takes up a case considers at a later stage that it is not *well placed* to act because other national competition authorities (already seized or to be seized at a later date) are *better placed* or (ii) other authorities consider themselves *better placed* to act. In order to avoid the multiplication of parallel procedures stemming from one and the same case, the Commission has outlined in a Notice the principles concerning the reallocation of cases amongst authorities.<sup>51</sup> The reallocation of a case has to be undertaken at the beginning of a procedure.<sup>52</sup> Insofar as Regulation 1/2003 grants no powers to the Commission to take a decision on the reallocation of a case, the mechanism is implemented by decisions of the national competition authorities. In accordance with Article 13 of Regulation 1/2003, the national competition authority wishing to transfer the case must take a decision to suspend or close the procedure. Numerous commentators have suggested that these “decisions” to reallocate could be the subject of an annulment action.<sup>53</sup>

In legal terms, Article 230 EC does not allow decisions by national competition authorities to reallocate a case to be challenged, as only decisions taken by a Community institution fall within this Article. An action for annulment should, however, be available in the particular scenario where the Commission uses the Article 11 (6) procedure to recall cases from national competition authorities to itself.<sup>54</sup> The Commission has, however, sought to remove this possibility by stating in paragraph 31 of its Notice that “[...] the allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement

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must be fulfilled: (i) the substantive assessment of an agreement or practice with regard to Articles 81 and 82 EC must raise a question of application of the law for which there is no clear answer in the existing EC legal framework; (ii) the clarification of the novel question through a guidance letter must be useful, especially in relation to its economic consequences; (iii) it must be possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.

<sup>50</sup> See *id.* at para. 25.

<sup>51</sup> See Commission Notice on cooperation within the Network of Competition Authorities, (2004) O.J. C 101/43. The concept of “*well placed*” prevents multiple procedures before several national competition authorities. According to the Commission, a national competition authority is well placed to deal with a restrictive practice when three conditions are met. See paras. 8-9.

<sup>52</sup> *Id.* at para. 18. In any case, the re-allocation must take place within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of the Regulation: “Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action”.

<sup>53</sup> See E. Paulis and C. Gauer, *supra* note 36 at para. 74, as well as L. Idot “Le nouveau système communautaire de mise en oeuvre des articles 81 et 82 CE”, (2003) *Cahiers de Droit Européen* 283 at para. 82.

<sup>54</sup> In its Notice (see above), the Commission seems to interpret Article 11 (6) as an instrument to re-allocate cases.

to have the case dealt with by a particular authority”.<sup>55</sup> One can only guess that the Commission considers that a decision to reallocate a case, should it take the form of a decision to recall a case within the meaning of Article 11 (6), does not affect the legal situation of natural and legal persons. This opinion is open to criticism for the reasons outlined above, however.<sup>56</sup>

d) *Findings of inapplicability*

The abolition of the system of notification/exemption with the introduction of Regulation 1/2003 could have had the effect of depriving the Commission of a useful instrument to develop its general policy. Published individual exemption decisions allowed the Commission to lay down, in a given sector, the general principles applicable to agreements between undertakings.<sup>57</sup> Article 10 of Regulation 1/2003 therefore aims to allow for this possibility by permitting the Commission to adopt *ex officio* decisions finding that Articles 81 and 82 are not applicable to certain practices.<sup>58</sup> Despite them being formally regarded as decisions, doubts could be voiced as to the legal status of decisions finding Articles 81 and 82 inapplicable. First and foremost, these decisions do not put an end to a procedure, since the Commission acts on its own initiative and does not address specific undertakings.<sup>59</sup> Moreover, Regulation 1/2003 states that these decisions are “declaratory” in nature and therefore, *a contrario*, not constitutive of rights.<sup>60</sup> Finally, they produce adverse legal effects against the undertakings which could benefit from such decisions in so far as they hold that there is no violation.<sup>61</sup>

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<sup>55</sup> See L. Idot, *supra* note 53 at para. 82.

<sup>56</sup> E. Paulis and C. Gauer consider that “the only decision taken by other authorities is to refrain from acting and thus to exclude [...] another procedure. This does not raise objections against an undertaking and therefore does not constitute a challengeable act”. See E. Paulis and C. Gauer, *supra* note 36 at para. 74. It seems, however, difficult to subscribe to this opinion. Several parties consulted by the Commission before the adoption of the notice have, for instance, mentioned that a re-allocation decision leads to considerable costs for the undertakings concerned, for example, translation fees, delays, etc. See the observations submitted by Clifford Chance at p. 11. Freshfields Bruckhaus Deringer, p. 6, Gide Loyrette Nouel, p. 2; Latham & Watkins, p. 10 available at: [http://www.europa.eu.int/comm/competition/antitrust/legislation/procedural\\_rules/comments/](http://www.europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/)

Decisions of reallocation thus affect the legal position of the parties insofar as the procedural rules applicable before the various national competition authorities diverge considerably in relation to procedure or sanctions. Certain commentators have proposed that the question of resolving case allocation issues should be the object of a mechanism within the framework of the consultative committee on agreements and dominant positions. See comments made by Cleary, Gottlieb, Steen and Hamilton at p. 5. The final Notice envisages that the consultative committee could be the forum for examining and allocating cases, in the situation where the Commission decides to make use of its power to remove cases after the initial time-limit for reallocation foreseen in the Notice, i.e. two months. It makes it clear, however, that the opinion of the Committee is unofficial. See para. 62 of the Notice, *supra* note 51.

<sup>57</sup> Certain commentators have reported that, under the former system of Regulation 17/62, the Commission had, after having adopted individual exemption decisions, conferred an educational value to these decisions by indicating that it would no longer grant individual exemptions to analogous practices. See L. Idot, *supra* note 53 at para. 210.

<sup>58</sup> Unlike guidance letters which are requested by the undertakings.

<sup>59</sup> They cannot therefore be challenged on the basis of the *SFEI* case-law, *supra* note 18.

<sup>60</sup> An act is regarded as “constitutive” when it gives rise to a novel state of the law. See G. Cornu, *Vocabulaire Juridique*, PUF, 3<sup>rd</sup> ed., 2000. An act is considered as “declaratory” when it simply acknowledges a legal or factual situation.

<sup>61</sup> Within the framework of Article 81, where the conditions of para. 1 are not satisfied, or whether the conditions of para. 3 are satisfied. Within the framework of Article 82, the conditions for its application are not satisfied. See L. Idot, *supra* note 53 at para. 212.

Despite these reservations, it would seem that these decisions do nevertheless show characteristics of challengeable acts. First and foremost, in the same way as an exemption decision taken on the basis of Article 81 (3) EC, a finding of inapplicability of provisions of the Treaty produces legal effects potentially affecting the interests of third parties to the practice which is the subject of the particular decision.<sup>62</sup> Moreover, findings of inapplicability are binding on national competition authorities and the national courts of the Member States in as far as Article 16 of Regulation 1/2003, which prohibits these bodies from taking a decision contrasting with that of the Commission, does not draw any distinction between the different types of decisions.<sup>63</sup> The possibility to appeal against findings of inapplicability must therefore be retained.

e) *Decisions refusing to grant interim relief*

Regulation 17/62 did not explicitly envisage the possibility for the Commission to order interim acts. After an extensive interpretation of Article 3 in its *Camera Care* order, the ECJ did however bestow upon the Commission the power to order this type of act.<sup>64</sup> In practice, however, most interim measures were ordered upon the request of undertakings rather than by the Commission acting on its own initiative.<sup>65</sup> The ECJ subsequently accepted that the order or refusal to grant interim measures by the Commission could be the subject of an annulment action.<sup>66</sup>

This power granted by the ECJ to the Commission has been codified in Article 8 of Regulation 1/2003. The formulation of this provision strays, however, from the solutions found in practice. In the words of the Regulation, “the Commission, acting on its own initiative may by decision [...] order interim measures”. By laying down that *ex officio* action by the Commission is the only circumstance under which interim measures can be ordered, Article 8 would seem to mean that complainants do not have a corresponding right to seek interim relief.<sup>67</sup> As Kerse and Khan observe, the formulation of Article 8 aims principally at shielding the Commission from annulment actions when it refuses to provide interim relief.<sup>68</sup>

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<sup>62</sup> The case-law has recognised that exemption decisions could be challenged on the basis of Article 230 EC by competitors to the agreement in question. See E. Paulis and C. Gauer, *supra* note 36 at para. 35; L. Idot, *supra* note 53 at para. 212; See also article 10 of Regulation 1/2003, *supra* note 3.

<sup>63</sup> *Id.* at para. 213.

<sup>64</sup> See Order of the European Court of Justice, Case C-792/79, *Camera Care v. Commission*, [1980] E.C.R. 119 at para. 18: “from this point of view the commission must also be able, within the bounds of its supervisory task conferred upon it in competition matters by the treaty and regulation no 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by article 3 from becoming ineffectual or even illusory because of the action of certain undertakings the powers which the commission holds under article 3 (1) of regulation no 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist”.

<sup>65</sup> See, for a well-known example, Commission decision of 3 July 2001, *NDC Health/IMS Health*, (2003) O.J. L 268/69.

<sup>66</sup> For an example where interim measures were granted, see Order of the President of the CFI, Case T-184/01, *IMS Health Inc. v. Commission*, [2001] E.C.R. II-3193. For an example where interim measures were refused, Case T-44/90, *La Cinq v. Commission*, [1992] E.C.R. II-1.

<sup>67</sup> In practice, however, it is very likely that complainants will continue to request that the Commission orders interim measures.

<sup>68</sup> See C. Kerse and N. Khan, *supra* note 2 at para. 6.032.

Indeed, this refusal cannot affect the legal situation of undertakings requesting them insofar as these undertakings are in no position to avail themselves of such a right.<sup>69</sup>

The formulation of Article 8 is open to criticism. The ECJ has always considered that the adoption of interim measures is essential in the scenario where there is a “risk of serious and irreparable damage to competition”.<sup>70</sup> A steady and constant line of case-law demonstrates that this condition covers harm caused to certain economic operators as a result of an anti-competitive practice.<sup>71</sup> The Community Courts thus acknowledge that interim measures are primarily directed at economic operators that have suffered at the hands of such a practice. A real right to interim relief is consequently acknowledged on the part of economic operators as long as the conditions laid down by the Community Courts are fulfilled. The refusal to give access to this right directly affects their legal situation and therefore raises objections within the meaning of Article 230 EC.<sup>72</sup>

f) *Final observations on challengeable acts*

The preceding analysis demonstrates that the challengeable status of certain acts remains unclear.<sup>73</sup> This situation is unsatisfactory. The lack of clarity harms potential plaintiffs who, believing that they have been the victim of illegal behaviour, envisage the introduction of an annulment action but are, however, put off because of the risk that their claim will not be examined and declared inadmissible from the beginning. On the other hand, this obfuscation may benefit the Commission, which takes a back-seat role when its decisions are the subject of an annulment action. In this context, the need for adequate legal protection calls for a clarification of the legal nature of a series of new acts which can be adopted by the Commission in its implementation of EC competition law.

The question as to how this subject should be clarified, or in other words whether there should be an extension of the range of challengeable acts, remains open. The Commission is generally in favour of a restrictive interpretation of the notion of challengeable act while practitioners prefer a more flexible approach. In support of a restrictive approach one could cite the necessity to avoid a paralysis of the enforcement effects of the Commission actions.<sup>74</sup> One could also argue that generalist judges are not capable to effect satisfactory judicial control of competition law decisions involving complex economic analysis.

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<sup>69</sup> A principle to which the Commission entirely subscribes in its Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, (2004) O.J. C-101/65 at para. 80: “Article 8 of Regulation 1/2003 makes it clear that interim measures cannot be applied for by complainants under Article 7 (2) of Regulation 1/2003”. This codification was immediately interpreted by legal scholars as aiming to “reserve the weapon in the form of interim measures” to the Commission exclusively, complainants being able to address themselves to the national courts to obtain interim measures. See L. Idot, *supra* note 53 at para. 204. Van Bael & Bellis, *supra* note 8 at para. 10.17, p. 1100.

<sup>70</sup> In addition to proof of *fumus boni juris*, i.e. a finding of a *prima facie* violation. See Article 8 of Regulation 1/2003 *supra* note 3.

<sup>71</sup> See Order of the President of the Court of 29 September 1982, *Ford v. Commission*, 228/82 R and 229/82 [1982] E.C.R. 3091.

<sup>72</sup> See L. Ritter and D. Braun who reach the same conclusion, without giving reasons why however. The question as to whether we are dealing with preparatory and non definitive acts could be raised. The case-law seems to see them as final acts, *supra* note 20 at p. 1154.

<sup>73</sup> Outside the cases examined above, other acts adopted by the Commission do not seem to be challengeable as (i) they do produce legal effects affecting adversely a legal or natural person or (ii) are simply preparatory acts. Such is the case, for example, with measures by which the Commission transmits documents to national competition authorities in accordance of Article 11 (2) of Regulation 1/2003, *supra* note 3.

<sup>74</sup> See by analogy, D. Simon, *supra* note 9 at para. 415.

The above justifications are not convincing, however, and it would seem on the other hand that if the legal nature of some new acts under Regulation 1/2003 is crying out for clarification, it is perhaps an opportune moment for the Community courts to insist upon a broad interpretation. First, there is a real risk of arbitrariness if the European Commission, within the framework of the powers given to it by Regulation 1/2003, is not subject to wide-ranging judicial review. The risk of such arbitrariness, which has often been criticized given the Commission's functions of both investigation and decision-taking, could be accentuated by the application of a restrictive interpretation of the notion of challengeable act to new acts under Regulation 1/2003. Second, the justifications forwarded in support of a restrictive approach fail to convince. First and foremost, the risk that the Commission will be hindered in its action is nonsense since the bringing of an annulment action does not, as is foreseen by Article 242 EC, have a suspensive effect. Further, the Community Courts (especially the CFI) have already shown that they are capable of dealing with complex economic questions, such as in the *Gencor*, *Airtours* and *Tetra Leval* judgments.

### III. Those having the “quality to act” in annulment

The definition of those entitled to bring an annulment action is found in Article 230 EC. The Treaty distinguishes between two types of potential applicant. First, there are the “privileged” applicants, which encompass the institutions of the Union and its Member States. This type of applicant can initiate annulment proceedings against any act (both normative and individual) without having to furnish proof of a “*specific quality to act*”.<sup>75</sup> Second, there are the “individual” applicants which encompass both legal and natural persons. An individual applicant is presumed to be able to bring an annulment action if he is the addressee.<sup>76</sup> On the other hand, an individual applicant may not bring an action for annulment against an act if he is not the addressee (a decision addressed to a third party or an act of a general nature unless he proves that he is “*directly and individually concerned*” by the act in question).<sup>77</sup>

The latter condition has been restrictively interpreted by the judiciary, the result being that the ECJ has generally refused access to the court to individual applicants wishing to challenge decisions that are not addressed to them or acts of a general nature. Competition litigation is, however, frequently cited as an example of a field where the rigour of the legal test has been relaxed.<sup>78</sup> Individual applicants are therefore often able to act against decisions to which they are not the addressee (1). On the other hand, the case-law remains excessively strict in relation to acts of a general nature (2).

#### 1. Decisions where the applicant is not the addressee

An individual applicant wishing to bring an annulment action against a decision that is not addressed to him must prove that he is both *directly* and *individually* concerned by it. The first of these conditions (directly concerned) requires proof that the act produces immediate effects

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<sup>75</sup> See D. Simon, *supra* note 9 at paras. 416 and 419. The European Parliament, the Court of Auditors and the ECB must, however, prove the existence of an institutional interest to act, i.e. aiming at safeguarding their prerogatives.

<sup>76</sup> With the exception, however, of proceedings against positive decisions (e.g., exemption decisions). See D. Simon, *supra* note 9 at para. 422.

<sup>77</sup> See Article 230 EC.

<sup>78</sup> See D. Simon, *supra* note 9 at para. 428.

on the legal situation of the individual without the need for later intervention of national or Community authorities.<sup>79</sup> As the competition rules are implemented via the adoption of decisions addressed directly to undertakings, it is often acknowledged that third parties are directly concerned.

The second condition (individually concerned) requires applicants to prove 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”.<sup>80</sup> Within the sphere of competition law, this requirement is assessed with flexibility. The active participation of third parties within the administrative procedure generally allows for a presumption that these parties are directly and individually concerned by the adopted decision. However, in certain cases, the ECJ did not require that the applicant should have effectively participated in the procedure.<sup>81</sup> It has considered that in order to be regarded as individually concerned, it suffices that the texts governing the administrative procedure foresee the possibility for the applicant to intervene as a complainant,<sup>82</sup> or to be simply heard in order to make comments.<sup>83</sup>

In so far as the texts governing the enforcement procedure in relation to agreements and abuse of a dominant position,<sup>84</sup> or in relation to merger control,<sup>85</sup> extensively open up the ability to

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<sup>79</sup> See Case C-386/96, *Société Louis Dreyfus & Cie v. Commission*, [1998] E.C.R. I-2309 at para 43.

<sup>80</sup> Case C-25/62, *Plauman*, [1962] E.C.R. 305. This condition has been harshly criticized by legal commentators.

<sup>81</sup> See Joined Cases T-528/93, T542/93, T543/93 and T-546/93, *Métropole télévision SA, Reti Televisive Italiane SpA, Gestelevision Telecinco SA et Antena 3 de Television v. Commission*, [1996] E.C.R. 649 at para. 62. Case T-96/92, *CE de la Société des grandes sources and others v. Commission*, [1992] E.C.R. II-1213, paras. 35 and 36.

<sup>82</sup> See the principle laid down in *Metro*, Case C-26/76, *Metro SB-Grossmarkte GmbH & Co KG v. Commission*, [1977] E.C.R. 1875 at para. 13: “it is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3 (2) (b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests”.

<sup>83</sup> See, for example, the possibility to hear representatives of workers’ organisations envisaged in Article 18 (4) of the Regulation 4064/89; Case T-96/92, *CE de la Société des grandes sources and others v. Commission*, [1992] E.C.R. II-1213, paras. 35 and 36. But effective participation leads to the bestowal of having a “quality to act”, see Case 75/84, *Metro SB-Grossmarkte GmbH & Co KG v. Commission*, [1986] E.C.R. 3021 at paras. 222-223.

<sup>84</sup> See, for example, Articles 27 (3) and (4) of Regulation 1/2003, *supra* note 3 which envisage: “If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets”. See Article 13 (1) of Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; (2004) O.J. L 123/18: “natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing”.

<sup>85</sup> See Article 18 of Regulation 139/2004, *supra* note 3 and Article 11 of Commission Regulation 802/2004 of 7 April 2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings (2004) L 133. For the purposes of the rights to be heard pursuant to Article 18 of Regulation 139/2004, the following parties are distinguished: (a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4(2) of Regulation 139/2004; (b) other involved parties, that is, parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target

intervene in a procedure by making indefinite reference to the “interest” of persons in question, the number of potential applicants is extremely high.<sup>86</sup> The case-law provides many illustrations such as the admission of annulment actions by suppliers, consumer associations,<sup>87</sup> actual or potential competitors,<sup>88</sup> and even non-competitors operating on neighbouring markets.<sup>89</sup>

The broadening, in the case-law, of the scope of the “*quality to act*” in competition law litigation is to be welcomed as it guarantees effective legal protection to natural and legal persons.<sup>90</sup> Nevertheless, this approach could equally lead to access to the court being given on a too broad a basis and allowing annulment actions to be admitted by applicants whose “interest to act” is diametrically opposed to the objective of protecting competition. The condition of having an “*interest to act*” (“*intérêt à agir*”), which exists in numerous national legal systems, is not in fact a necessary requirement under Article 230 EC.<sup>91</sup> This gap has never been filled by the ECJ. The latter only examines sporadically whether the applicant well and truly has an interest to act. It often assumes that this interest exists once direct and individual concern has been proved.<sup>92</sup> This confusion of concepts has led to legal solutions which are open to criticism in two types of case.

First, trade unions often oppose mergers involving undertakings to which they are affiliated as these operations can have a detrimental impact on the employees they represent. Trade unions have therefore attempted to use annulment actions envisaged by Article 230 EC to challenge Commission decisions clearing a merger. Insofar as the interest of these applicants is foreign to the objectives pursued by competition rules (and being rather a matter concerning

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of the concentration; (c) third persons, that is natural or legal persons, including customers, suppliers and competitors, provided they demonstrate a sufficient interest within the meaning of Article 18(4), second sentence, of Regulation 139/2004, which is the case in particular - for members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees; - for consumer associations, where the proposed concentration concerns products or services used by final consumers; (d) parties regarding whom the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation 139/2004.

<sup>86</sup> C. Kerse and N. Khan define a person as having an interest to act as every person suffering or having suffered direct loss or harm as a result of the practice in question. See *supra* note 2 at para. 2.016 and para. 8.030.

<sup>87</sup> Case T-37/92, *Bureau européen des unions des consommateurs et National Consumer Council v. Commission*, [1994] E.C.R. II-285. See, on the other hand, the more restrictive conditions applicable to associations of undertakings, which must prove (i) that they are invested with the mandate to represent their members and (ii) that the practice in question causes serious harm to the interests of their members. See Case T-114/92, *BEMIM vs. Commission*, [1995] E.C.R. II-147. See also Case T-87/92, *BVBA Kruidvat v. Commission*, [1996] E.C.R. II-1913.

<sup>88</sup> Case T-3/93, *société anonyme à participation ouvrière Compagnie nationale Air France v. Commission*, [1994] E.C.R. II-121 at para. 82

<sup>89</sup> Case T-158/2000, *ARD v. Commission*, not yet reported.

<sup>90</sup> See K. Lenaerts and J. Vanhamme, “Procedural Rights of Private Parties in the Community Administrative Process”, (1997) 34 *C.M.L.R.* 557 and L. Ortiz Blanco, *supra* note 2 at p. 325 who consider that the case-law is quite flexible. This observation is limited to competition law litigation (or to anti-dumping litigation), as the case-law in other fields is much more restrictive.

<sup>91</sup> See M. Canedo, *supra* note 2 at p. 454.

<sup>92</sup> The ECJ may examine the question of interest to act in order to determine if, because of the development of legal and factual circumstances, there is still an interest in bringing an annulment action against the challenged act. Thus, in the recent *MCI Inc. vs Commission* where the parties (WorldCom – later MCI and Sprint) had abandoned the merger before the Commission had adopted a decision, it still continued with the procedure and adopted a prohibition decision. MCI brought an annulment action. The Commission invoked the lack of interest to act on the part of the applicant. The CFI considered that “In the present case, the disappearance of the contractual basis for the merger transaction, following the notifying parties' abandonment of the proposed merger, cannot therefore in itself preclude judicial review of the contested decision”. See Case T-310/00, *MCI Inc. v. Commission*, not yet reported at para. 49.

employment or company law), it follows that the principles governing the admissibility of annulment actions should impede these types of actions.<sup>93</sup> In *CE Société Générale des grandes sources Perrier*,<sup>94</sup> a case whereby several trade unions had brought an annulment action against a Commission decision authorising, with conditions, the takeover of Perrier by Nestlé,<sup>95</sup> the CFI declared such action inadmissible. It, however, relied on the conditions found in Article 230 EC rather than declaring the appeal inadmissible on the basis that there was a lack of interest to act. The CFI acknowledged that the Commission's decision "individually" concerned these trade unions. It refused to admit, however, that the Commission decision concerned them "directly". The CFI held that the alleged fall in employment was not a result of the Commission decision but of subsequent "autonomous and hypothetical" interventions of the undertakings concerned. The CFI therefore limited the admissibility of an appeal on the basis of simple verification of whether the procedural guarantees accorded to applicants by the rules governing the administrative procedure were ignored or not.

Second, the shareholders of an undertaking sometimes seek to impede the carrying out of a planned merger as it could reduce the scope of their powers. In the *Zunis Holding* case, three minority shareholders of Generali wished to obtain the annulment of a Commission letter confirming that the operation, by which Mediobanca increased its interest in Generali, did not constitute a concentration.<sup>96</sup> In the particular case, the minority shareholders sought to prevent another shareholder from increasing its interest in the capital. Their annulment action was brought for reasons having nothing to do with any potential harm that could have been caused to the structure of competition and – for reasons analogous to those developed above – their appeal was declared inadmissible. The CFI held that "the mere fact that an act may affect the relations between the different shareholders of a company does not of itself mean that any individual shareholder can be regarded as directly and individually concerned by that measure".<sup>97</sup>

These solutions should be welcomed in view of the results they achieve. It would, however, have been simpler and more analytically rigorous to refuse applicants' access to the court on the basis that they did not have an interest to act. It is thus suggested that both the CFI and the ECJ would in fact gain from systematically examining the condition of having an interest to act on the basis of the competition rules, rather than entering into unnecessary complex discussions over whether the conditions of "direct" and "individual" concern are met. This suggested approach would be analogous to the requirement traditionally imposed by US

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<sup>93</sup> See contra G. Vandersanden, "Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées", (1995) 5-6 *Cahiers de Droit Européen* 539-540 and P. Duffy, supra note 2, who enthusiastically welcomed the broadening of Article 230 EC to cover these types of actions.

<sup>94</sup> See Case T-96/92, *Société Générale des grandes sources Perrier v. Commission*, [1995] E.C.R. II-1213.

<sup>95</sup> See Commission decision of 22 July 1992, *Nestlé/Perrier*, (1992) L 356. The Commission obtained from Nestlé a transfer of a broad range of brands and production capacity as high as 3 billion litres of water (about 20% of the capacity of the three former operators) to a new and viable entrant which had sufficient production capacity to exercise competitive pressure on Nestlé and BSN.

<sup>96</sup> See Case T-83/92, *Zunis Holding and others v. Commission*, [1993] E.C.R. II-1169.

<sup>97</sup> *Id.* at para. 34. The CFI limited the shareholders' access to the court to "special circumstances" which it did not define more specifically. This judgment was appealed to the ECJ. See Case C-480/93, *Zunis Holding and others v. Commission*. The Advocate General expressed his disagreement with the CFI on the question of direct concern. On the other hand, he considered that the applicants were not individually concerned insofar as the number of shareholders within Generali was extremely high. The ECJ did not respond from this angle, stating that the act was not open to challenge insofar as "a decision [i.e. the Commission's letter] which merely confirms a previous decision [the clearance decision itself] is not an actionable measure".



federal Courts that applicants wishing to challenge an antitrust law decision establish proof of an “antitrust injury”.<sup>98</sup>

The simple fact that an individual has an interest to act does not necessarily mean, however, that it is desirable from the point of view of public policy that he act. As denounced by some renowned US scholars, competitors (whose interest to act is often presumed) may be tempted to use the paths of appeal provided in US antitrust law to reduce competition in the market.<sup>99</sup> Firms could indeed seek to invoke antitrust law violations to neutralize the efficiency gains resulting from a merger between competitors or to protect themselves from competitors’ aggressive pricing behaviour.<sup>100</sup> This issue has a special significance in American law, insofar as private actions are the most important tool in the implementation of the antitrust rules.

In the EU, the question of annulment actions brought by competitors equally presents an interest insofar as it could also be argued that a too great broadening of the scope of the conditions of admissibility to bring annulment actions would also allow undertakings to harm competitors by challenging Commission decisions for anti-competitive reasons. The current case-law seems to have dealt with this difficulty through relying on the conditions of direct and individual concern to block this form of unwanted litigation. It has also laid down the principle that the simple fact of being in a competitive relationship with the addressee of the act is not enough to give someone the capacity to act.<sup>101</sup>

It does not however seem to be opportune to restrict competitors’ access to the courts for the above mentioned reasons. Indeed, unlike appeals brought by trade unions or minority shareholders whose objectives are obviously abusive, the question of whether a competitor’s appeal is abusive involves an examination, when deciding on admissibility, of questions of substance in order to determine if, for example, an aggressive pricing policy is the result of greater economic efficiency, or the result of an anti-competitive strategy of predation. This would in fact lead to confusing the question of whether the claim is well-founded with the question of whether or not it is admissible. In accordance with Community case-law, it is preferable to maintain broad access for competitors to bring an annulment action.

## 2. Acts of a general nature

The *ratio legis* of Article 230 EC is to deny individual applicants the ability to bring an annulment action against acts of a general nature unless the act in question is a regulation disguising a decision.<sup>102</sup> The restrictive nature of this principle is based on the idea that it is not appropriate, for public policy reasons, that a normative act be hindered by appeals on the part of individuals.<sup>103</sup> Moreover, the ECJ has adjudged such a limitation reasonable insofar as individuals are always able to challenge the illegality of a Regulation by pleading its illegality

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<sup>98</sup> See *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc.*, 429, U.S. 477 (1977) at 489.

<sup>99</sup> Notably R. Posner, F. Easterbrook, W. Baumol and J. Ordover, cited in E. Snyder and T. Kauper, “Misuse of the Antitrust Laws: The Competitor’s Plaintiff”, (1991) *Michigan Law Review* 551.

<sup>100</sup> *Id.*

<sup>101</sup> Joined cases C-10 and 18-68, *Società “Eridania” Zuccherifici Nazionali and others v. Commission*, [1969] E.C.R. 459.

<sup>102</sup> The case-law has extended this exception to directives. See Case C-10/95, *Asocarne*, [1995] E.C.R. I-4149. But challenging directives poses problems from the point of view of “direct” concern insofar as they do not enjoy horizontal direct effect. See D. Simon, *supra* note 9 pp. 530-531.

<sup>103</sup> See C. Harding, “The Private Interest in Challenging Community Action”, (1992) 5 *E.L.R.* 354

incidentally on the basis of Article 241 EC, or through the preliminary reference procedure on the basis of Article 234 EC.<sup>104</sup>

Numerous commentators have expressed reservations about the fact that the restriction of individual applicants' capacity to act against acts of a general nature could deny them effective legal protection.<sup>105</sup> We concur with this view. Indeed, the last decade has seen the proliferation, on the Commission's initiative, of general acts known as *soft law* which come in the form of notices and guidelines. These acts do not always limit themselves to codifying the Commission's decisional practice but sometimes lay down new legal principles.<sup>106</sup> The Commission moreover seems to regard them as instruments having binding legal force.<sup>107</sup>

In *France v. Commission*, the ECJ acknowledged that notices are challengeable when they seek to produce legal effects by adding to the law.<sup>108</sup> However, an appeal against these acts is only open to privileged applicants. In accordance with steady and constant case-law, individual applicants are not likely to be affected "individually" by an act of a general nature that does not seek to address particular parties. This situation is open to criticism for several reasons. First, putting aside the field of State aid, notices adopted in the field of competition law are exclusively addressed to economic operators whose behaviour is covered by Articles 81 and 82 EC or by the merger regulation. The likelihood that Member States or other EU institutions would appeal against these acts is therefore low. Consequently, there is a risk that these notices would be, *de facto*, shielded from legal control by the Community Courts with the attendant risk that the Commission could take advantage of this to deliberately extend its own powers of control.

Second, the limits laid down in the Treaty appear stricter than those imposed by the rules governing the annulment of administrative acts in national law. French administrative law, for instance, acknowledges the possibility for someone wishing to go to court to challenge every administrative act affecting its legal situation including acts of a general nature.<sup>109</sup> The person wishing to go to court only has to prove he has a sufficient personal interest to do so.<sup>110</sup> A good example is provided in the field of tax law where an appeal for *ultra vires* allows

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<sup>104</sup> See Case 50/00 P, *Union de Pequenos Agricultores v. Council*, [2000] E.C.R. I-6677.

<sup>105</sup> The implementation of Article 234 or Article 241 demands, on the part of the applicant, an infringement of the regulation, in order to subsequently invoke illegality. This is problematic for the following reasons. First, it seems rather odd that the only way for an applicant to challenge a regulation is by first violating it. Second, these restrictions on the ability of individuals to challenge general acts seems incompatible with Article 6 (1) of the Convention on Human Rights. Finally, this seems to clash with the objective of promoting citizens' rights since the Maastricht Treaty. See notably, D. Waelbroeck, "Le droit au recours juridictionnel effectif du particulier – Trois pas en avant, deux pas en arrière", (2002) 1-2 *Cahiers de Droit Européen* 3 ; G. Vandersanden, supra note 93; D. Waelbroeck and A.-M. Verheyden, "Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit comparé et de la Convention des droits de l'homme", (1995) 3-4 *Cahiers de Droit Européen* 399; A. Arnulf, "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty", (1995) *C.M.L.R.* 7

<sup>106</sup> See I. Forrester, "Modernisation: an extension of the powers of the Commission?", in D. Geradin, ed., supra note 3 at pp. 87-88. See, for example, the low thresholds fixed by the Commission guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004 O.J. C 101/81 at paras. 52-53) which pose a double negative and positive presumption of effect on trade and thus extend the field of application of Community competition law. See also our observations, infra note 112.

<sup>107</sup> Id.

<sup>108</sup> See Case C-325/91, *France v. Commission*, supra note 22. The formal non binding nature of these acts does not exclude them from falling under Article 230EC.

<sup>109</sup> See, for example, Conseil d'Etat, 29 January 1954, *Institution Notre-Dame-du-Kreisker*.

<sup>110</sup> See J. Rivero and J. Waline, *Droit Administratif*, 17<sup>th</sup> ed. Dalloz, 1998, P. Lewalle, *Contentieux Administratif*, Ed. Collection Scientifique de la Faculté de Droit de Liège, 1997 at para. 293.

individuals to challenge the legality of simple circulars sent around by the tax administration. In principle these circulars must limit themselves to interpreting the tax rule. In practice, however, the public authorities merrily transgress this principle by adopting circulars of a statutory nature which add to the tax regulations by laying down conditions in relation to tax liability that are not envisaged by the core texts. The principles of Member State administrative laws plead therefore for an opening up, in favour of individuals, of annulment proceedings against acts of a general nature.<sup>111</sup>

Third, potential immunity from litigation for notices is all the more shocking given that the Treaty does not grant the Commission the competence to define new and general legal norms through a notice. It becomes unacceptable when the Commission uses this instrument to modify principles sanctioned by the ECJ when applying the Treaty rules. Such excesses have been found in the six Commission notices adopted after the entry into force of Regulation 1/2003.<sup>112</sup>

Finally, just as some commentators have observed, there is a paradox in acknowledging on the one hand that interested parties, more often than not undertakings and consumers, are affected by texts that are in the pipeline and should therefore be consulted at the time of their elaboration and on the other hand objecting to the fact that these same parties are directly and individually concerned by these texts once they want to challenge them before the Community Courts.<sup>113</sup>

These diverse arguments have been well received by the authors of the Treaty establishing a Constitution for Europe. Article III-365(4) which would replace the current Article 230 (4) EC envisages that:

“Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures”.

The new formulation proposed by the draft constitutional treaty allows all individual applicants to request the annulment of a general act without proving that he is individually concerned by it. In the field of competition law, economic operators could thus challenge the legality of notices and guidelines adopted by the Commission before the CFI. Moreover, it should become possible to challenge certain types of decision created by Regulation 1/2003, such as findings of inapplicability, which could be analysed in the same way as general decisions, insofar as they are not taken within the framework of individual proceedings but on the Commission’s initiative in order to clarify the principles applicable in a sector as a whole.

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<sup>111</sup> This tendency seems to be common to the vast majority of Member States. See D. Waelbroeck and A.-M. Verheyden, *supra* note 105 at p. 425.

<sup>112</sup> One can find many extensions, omissions and violations of the principles laid down in the case-law and in secondary law. See I. Forrester, *supra* note 106. See also the complete review carried out by Frank Montag and Thomas Janssens, “Article 81 (3) in the Context of Modernisation – A Lawyer’s View”, in D. Geradin, ed., *supra* note 3. They take, for example, the case of the guidelines concerning the application of Article 81 (3) EC and lay down the principle that an agreement restricting competition can only benefit from an exemption if the pro-competitive effects outweigh the anti-competitive effects, therefore going beyond the “compensation” standard laid down by the ECJ in *Consten & Grundig*. See Joined Cases 56 and 58-64, *Etablissements Consten S.à.R.L. et Grundig-Verkaufs-GmbH v. Commission*, [1966] E.C.R. 299 at p.348.

<sup>113</sup> See P. Craig and G. de Burca, *EU Law – Text, Cases and Materials*, 3<sup>rd</sup> ed., Oxford University Press, Oxford, 2003, at p. 516.

#### IV. The modalities of an annulment action

The reforms stemming from the modernisation process have not affected the rules governing the conditions for bringing an annulment action. The applicable rules follow the same principles which pertain to all matters concerning EU law. It is, however, useful to recall the fundamental principles applicable when bringing an appeal (1) as well as their substance (2).

##### 1. Lodging an appeal

An appeal must be brought within two months following the publication of an act, its notification to the applicant or, failing that, the day he became aware of it.<sup>114</sup> It may be brought in any official language of the Community. The applicant must be represented by a lawyer able to practise within the jurisdiction of a Member State or EEA State.<sup>115</sup> Any person establishing an interest in the result of a case submitted to the Community Courts may intervene in this litigation.<sup>116</sup> This possibility has been frequently used in competition litigation by competitors of the addressee of a decision,<sup>117</sup> inter-professional associations of undertakings,<sup>118</sup> client and user associations,<sup>119</sup> consumers,<sup>120</sup> workers' representatives through their works council,<sup>121</sup> and the consultative Commissions of the different bars within the EU,<sup>122</sup> etc.

In accordance with Article 242 EC, the bringing of an annulment action does not engender suspensive effects. A safety valve has, however, been catered for by the Treaty which allows the Community Courts to order a stay of execution or interim measures. The stay of execution does not necessarily cover the whole of the challenged act but may be limited to certain aspects, such as, for example commitments entered into by the parties to a concentration.<sup>123</sup>

##### 2. The content of an appeal

The annulment action must mention all the points of law and fact that the applicant wishes to invoke.<sup>124</sup> The initial appeal "binds the litigation", that is to say that it is no longer possible to raise new arguments while legal proceedings are pending, unless new points of fact and law appear during the written procedure.<sup>125</sup>

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<sup>114</sup> See Article 230 (5) EC. Additional time-limits are granted to those applicants who are geographically far away.

<sup>115</sup> See Article 19 of the Statute of the Court of Justice

<sup>116</sup> See Article 40 of the Statute of the Court of Justice.

<sup>117</sup> Case T-219/99, *British Airways plc v. Commission*, 17 December 2003, not yet reported; Case T-65/98, *Van den Bergh Foods Ltd. v. Commission*, 23 October 2003, not yet reported.

<sup>118</sup> Case C-2/01 P C-3/01, *Bundesverband der Arzneimittel-Importeure eV v. Commission*, not yet reported.

<sup>119</sup> Case T-191/98, *Atlantic Container Line AB v. Commission*, 30 September 2003, not yet reported.

<sup>120</sup> Case T-37/92, *Bureau européen des unions des consommateurs et National Consumer Council v. Commission*, supra note 82.

<sup>121</sup> Case T-219/99, *British Airways plc v. Commission*, supra note 117; Case T-65/98, *Van den Bergh Foods Ltd. v. Commission*, supra note 117.

<sup>122</sup> Case 155/79, *AM&S Europe Limited v. Commission*, [1982] E.C.R. 1575.

<sup>123</sup> See Articles 242 and 243 EC. See, for example, Case T-88/94, *Société commerciale des potasses et de l'azote et Entreprise minière et chimique v. Commission*, [1994] E.C.R. II-401. See, for a recent example of a request in this sense, Order of the President of the CFI; T-201/04, *Microsoft v. Commission*, not yet reported.

<sup>124</sup> An appellant is not justified to request the annulment of the whole decision but only those parts which have a direct and individual effect.

<sup>125</sup> See Article 42(2) of the ECJ's rules of procedure and Article 48 (2) of the CFI's Rules of Procedure.

Article 230 (2) EC prescribes four “grounds for review” with reference to the different forms of illegality whose finding by the Community Courts leads to the annulment of the challenged measure: “lack of competence”, “infringement of an essential procedural requirement”, “infringement of th[e] Treaty or of any rule of law relating to its application or “misuse of powers”.<sup>126</sup> This old classification, which finds its origins in French administrative law, is sometimes criticised for a lack of the watertightness of each “ground of review”.<sup>127</sup> Thus, for example, the insufficient reasoning of a Commission decision constitutes both an infringement of an essential procedural requirement and an infringement of the Treaty insofar as Article 253 EC requires the Commission to reason its decisions. The classification found in the Treaty remains useful, however, since besides its illustrative usefulness, the different grounds of annulment in an annulment action engender different legal effects. There is a classic distinction between those grounds for annulment which relate to “external legality” and which the Community Courts can raise on their own motion (2.1) and those grounds of review which relate to “internal legality” and which the Community Courts cannot raise on their own motion (2.2).

## 2.1. Grounds of external legality

Lack of competence is the first ground of external legality. This involves a defect which annuls an act because the institution that adopted it did not have the legal power to do so.<sup>128</sup> The Community Courts can raise this ground of annulment on their own motion, even if the parties have not done so in their appeal. In competition law, the lack of competence ground has only rarely been raised. This defect has been invoked in two types of circumstances, however. First, applicants have invoked a lack of competence *ratione personae* by the authority from which the act emanated. In *AKZO*, the undertakings thus challenged the possibility for the Competition Commissioner to take decisions ordering checks in accordance with an authorisation granted to him by the College of Commissioners.<sup>129</sup> Second, applicants have invoked the Commission’s lack of competence *ratione loci*. In *Gencor*, the parties sought to challenge the Commission’s power to rule on merger operations between undertakings essentially active outside the European Community.<sup>130</sup>

Infringement of an essential procedural requirement is the second ground of external legality. It is frequently invoked in EC competition law. It involves a defect resulting from a misappreciation of the rules which govern both the procedure as well as the form for each act. In the same way as the defect pertaining to a lack of competence, the Community Courts can raise this ground on their own initiative. The Community Courts are competent to determine if a procedural requirement is essential or not. An infringement of a duty to consult is generally considered as an infringement of an essential procedural requirement.<sup>131</sup> This finding could be

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<sup>126</sup> Litigants can invoke several grounds for review in support of their appeal.

<sup>127</sup> See C. Kerse and N. Kahn, *supra* note 2 at para. 8.037; L. Ritter and D. Braun, *supra* note 20.

<sup>128</sup> See J. Rivero and J. Waline, *supra* note 110 at para. 255.

<sup>129</sup> See Case C 5/85, *AKZO Chemie BV and AKZO Chemie UK Ltd v. Commission*, [1986] E.C.R. 2585.

<sup>130</sup> See Case T-102/96, *Gencor Ltd v. Commission*, [1999] E.C.R. II-753. One could add to these two cases, those cases in which the Commission introduces new legal principles, thereby going beyond the powers granted to it by the Treaty and secondary law. Such cases are, however, more often invoked as an infringement of the Treaty. See, for example, *Continental Can* where the Commission assumed the power to carry out merger control on the basis of Article 82 EC, Case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, [1973] E.C.R. 215.

<sup>131</sup> See, for example, Case T-25/95, *SA Cimenteries CBR and others v. Commission*, [2000] E.C.R. II-491 at 487 where the Commission infringed an essential procedural requirement by not inviting, during the administrative

transposed to duties to consult the consultative committee in relation to agreements and abuses of a dominant position envisaged in Article 14 of Regulation 1/2003. An infringement of the rights of the defence and, especially, the duty, as envisaged in Article 27 of Regulation 1/2003 to allow the parties concerned (by a decision) to make observations also constitute an infringement of an essential procedural requirement.<sup>132</sup>

In general, the Community Courts have sought to avoid drawing too radical consequences from a finding of annulment due to the infringement of an essential procedural requirement.<sup>133</sup> The Community Courts have thus strived not to annul an act in case of irregularity. Annulment ensues only if, in the absence of irregularity, the administrative procedure would have ended in a different result.<sup>134</sup>

## 2.2. Grounds of internal legality

The first ground of internal legality consists in an infringement of “th[e] Treaty or of any rule of law relating to its application”. In competition law, this defect relates to the infringement by the Commission of the Treaty competition rules, secondary legislation or general principles of Community law (proportionality etc).<sup>135</sup> In practice, this ground for annulment is invoked when the Commission commits errors of law or when it erroneously assesses the facts to which it applies the law. Examples abound in the case-law in relation to this ground for review.

Misuse of powers is the second ground of internal legality. It involves a defect by which the public authority exercises a power to achieve an end that is foreign to what the power attributed to it aims at.<sup>136</sup> Insofar as the Commission enjoys extensive powers to implement competition policy and insofar as this defect is, in practice, often closely related to a problem of competence, the misuse of powers ground has never been successfully invoked.<sup>137</sup>

## V. Judicial actions parallel and subsequent to Article 230 proceedings

Once the Community Courts have been made aware of a legal defect, the holding of annulment leads directly to the nullity of the challenged act in accordance with Article 231 EC.<sup>138</sup> Yet, in competition law litigation, the annulment of the act is becoming less and less the only and sole goal sought by the applicant. Litigants are increasingly seeking to obtain, in parallel, a revision of the sanction imposed on them through lodging an appeal where the

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procedure, the undertakings to present their observations on the potential exercise of its power to impose a fine on them in accordance with Article 15 (2) of Regulation 17/62.

<sup>132</sup> Insufficient reasoning of a decision most certainly constitutes an infringement of an essential procedural requirement. See Case T-305/94, *Elf Atochem SA and others v. Commission*, [1999] E.C.R. II-931 at para. 1172; Joined Cases 8 to 11/66, *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v. Commission*, [1993] E.C.R.

<sup>133</sup> See L. Ortiz Blanco, *supra* note 2 at p. 326.

<sup>134</sup> Case C-30/78, *Distillers v. Commission*, [1980] E.C.R. 2223

<sup>135</sup> Case C 27/76, *United Brands Company and United Brands Continental BV v. Commission*, [1978] E.C.R. 207.

<sup>136</sup> Case C-8/55, *Fédéchar*, [1956] E.C.R. 291.

<sup>137</sup> Though formally evoking the lack of competence of the Commission, the ECJ judgment in *Ford* involved, in fact, a misuse of powers. See joined Cases 228 and 229/82, *Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v. Commission*, [1984] E.C.R. 1129.

<sup>138</sup> The judgment is binding and the nullity has an *erga omnes* effect. The Court cannot, however, substitute its decision for that of the Commission. See on this, C. Kerse and N. Khan, *supra* note 2 at para. 8.052.

Community Courts have “full jurisdiction” (1). Moreover, one of the repercussions of a finding of annulment is that applicants attempt to hold the Community responsible and obtain compensatory damages from the Community Courts (2).

### 1. Increased parallel appeals where the Community Courts have full jurisdiction

The last decade is characterised by a marked strengthening in the Commission’s stance in the field of fines.<sup>139</sup> The levying of record fines is becoming more and more frequent, with the *Microsoft* decision representing a glaring example.<sup>140</sup> The response to this stiffened resolve in the Commission’s sanctioning policy comes in the form of litigation, where litigants are increasingly bringing, in parallel with an annulment action, appeals in line with the Court’s unlimited jurisdiction under Article 229 EC and the regulations adopted for its application. These provisions lay down that the Court may “cancel, reduce or increase the fine or periodic penalty imposed”.<sup>141</sup>

Until now, the CFI has exercised its control with moderation. The CFI does not repeat the whole assessment process. It essentially restrains itself to assessing whether the factors linked to duration and gravity, leniency and methodology have been correctly applied.<sup>142</sup> The implementation of these principles has, however, allowed the CFI to substantially reduce the fines imposed by the Commission on some occasions. On the other hand, the CFI has never revised a fine upwards.<sup>143</sup> A doctrinal debate has emerged on this point. Professors Waelbroeck and Frignani, amongst others, are of the view that to revise a fine upwards would be contrary to the principle by which a judge cannot give a ruling *ultra petita*.<sup>144</sup> Insofar as an appeal to revise a fine is brought by the undertaking being sanctioned, any increase in the fine would involve giving a ruling on points that the applicant did not raise.

It does not seem, however, desirable to exclude the possibility for the CFI to revise a fine upwards.<sup>145</sup> There are three reasons for this. First, in terms of the law, the power to do so is expressly acknowledged by the Treaty as well as in various Council implementing regulations adopted in the field of competition law.<sup>146</sup> Second, the philosophy behind the Court’s full jurisdiction as conceived in administrative law requires that the judge has unlimited jurisdiction, meaning that he should be bestowed with an unfettered power to assess the facts

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<sup>139</sup> See J.F. Bellis, “La détermination des amendes pour infraction au droit communautaire de la concurrence – bilan de cinq années d’application des lignes directrices de 1998”, (2003) 3-4 *Cahiers de Droit Européen* 377. This tendency is reinforced by the fact that the Commission seeks to make fines the central instrument in the implementation of the competition rules. To this end, it has put so-called “leniency programmes” in place which allows it to grant a reduction in fines or even immunity from fines, in the case where the parties privy to an anti-competitive agreement reveal its existence or assist the Commission in bringing to light a violation of the Treaty rules. See Commission Notice on immunity from fines and reduction of fines in cartel cases, (2002) O.J., C 45/3.

<sup>140</sup> The Commission imposed a fine of 437.196.304 Euros on Microsoft. See Commission decision of 21 April 2004, *Microsoft*, not yet published.

<sup>141</sup> A power which is confirmed in Article 31 of Regulation 1/2003, supra note 3 and by Article 16 of Regulation 139/2004, supra note 3. See on this S. Mail-Fouilleul, *Les sanctions de la violation du droit communautaire de la concurrence*, LGDJ, 2002, at para. 598.

<sup>142</sup> For an empirical analysis of this matter see D. Geradin and D. Henry, supra note 7.

<sup>143</sup> Unlike, for example, domestic courts. In France, on 11 January 2005, the Paris Court of Appeal, for the first time, increased a fine meted out by the national competition authority. It doubled the €20 million fine levied on France Telecom by the national competition authority for failing to respect an injunction imposed on it, see Council decision 04-D-18 of 13 May 2004.

<sup>144</sup> See M. Waelbroeck and A. Frignani, supra note 32 at para. 497.

<sup>145</sup> See the conclusions of Advocate General Verloren Van Themaat, Case 240/82, *Stichting Sigarettenindustrie v. Commission*, [1985] E.C.R. 3851.

<sup>146</sup> See supra note 141.

and the law. In the case in which the Court exercises its power to re-qualify the facts, it is not inconceivable that the Court should hold that a Commission finding that a violation was e.g. of a “serious” nature should instead be regarded as a “very serious” violation of the competition rules. It would therefore at the very least be strange to prohibit the Court from drawing any consequences from such a finding by refusing it the power to increase the fine. Finally, and wholly appropriately, allowing for the risk that there could be an increase in a fine which a litigant is challenging would without doubt stem the tide of litigation before the Luxemburg courts. Only the most well-founded appeals would as a result be lodged before the Courts.

These arguments have been acknowledged by the CFI who confirmed, in its April 2004 judgment in the *Graphite Electrodes* case, that:

“[...] the Court none the less has [...] unlimited jurisdiction within the meaning of Article 229 EC in actions brought against the decisions whereby the Commission has fixed a fine and may therefore cancel, reduce or increase the fine imposed (emphasis added)”.<sup>147</sup>

## 2. Appeals for indemnity

The virulence of the passages formulated by the CFI in its *Airtours*, *Schneider* and *Tetra Laval* annulment judgments and the drastic consequences resulting from the Commission’s prohibition decisions (abandonment of the merger transactions in question) forcefully brings to the fore the question of whether the Community competition authority can be held non-contractually liable *vis-à-vis* those wishing to bring proceedings against it.<sup>148</sup> In European law, the bringing into play of an institution’s non-contractual liability is possible in accordance with Article 288 EC.<sup>149</sup> An applicant can theoretically therefore lodge an appeal seeking to find the Community liable when a decision of the Commission in the field of competition law has had a detrimental impact on him in some way. This could, for example, be the case if the Commission has acted illegally by wrongly prohibiting a conduct or a concentration between undertakings.

Three conditions must be met for such a finding. First, the relevant institution must have committed a sufficiently serious breach of a legal rule designed to confer rights on individuals.<sup>150</sup> The assessment of the factor “sufficiently serious breach” must be carried out in the light of two parameters. On the one hand it depends on the margin of appreciation of the institution in question and on the other it depends on the complexity of the situation under consideration. Following a sliding-scale model, the greater the margin of appreciation is the more serious the illegality must be.<sup>151</sup> Second, the applicant must have suffered real and definite harm. In line with classic tort law principles, the harm may consist in a *damnum emergens* (material damage) or a *lucrum cessans* (loss of profits). In principle, the burden of

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<sup>147</sup> See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and others v. Commission*, 29 April 2004, not yet reported at para. 165. We thank Hans Gilliams for bringing these cases to our attention.

<sup>148</sup> Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II-258; Case T-310/01, *Schneider Electric v. Commission*, [2008] E.C.R. II-4071; Case T-5/02, *Tetra Laval v. Commission*, [2002] E.C.R. II-4381.

<sup>149</sup> This provision states: “[...] the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties”.

<sup>150</sup> See the seminal case, 5/71, *Aktien-Zuckerfabrik Schöppenstedt vs. Council*, [1971] E.C.R. 975 at para. 11.

<sup>151</sup> Inversely, if the margin of appreciation is reduced, a simple illegality suffices. See Case C-352/98, *Bergaderm et Goupil v. Commission* [2000] E.C.R. I-5291.



proving the actual damage in figures rests on the applicant. The Court sometimes acknowledges however, in special circumstances, that that the harm cannot be put into precise figures.<sup>152</sup> The applicant must, however, provide the Court with a reliable estimation of what the figure is.<sup>153</sup> Finally, the applicant must prove that there is a direct and immediate causal link between the damage and the act of the institution.

Scholars have not shown much interest with respect to the question of the bringing into play of the non-contractual liability of the Commission in the field of competition law. This reflects the lack of jurisprudence on the subject. To date no appeal claiming the non-contractual liability of the Commission has succeeded. The reason for this is that the three conditions laid down in the case-law are very difficult to satisfy. *Holcim v. Commission* amply demonstrates this.<sup>154</sup> In this case the Commission fined various undertakings in its *Cement* decision for operating a cartel.<sup>155</sup> The decision eventually came before the CFI. The latter partially annulled the Commission's decision as a result of finding that two undertakings, *Alsen* and *Nordcement*, had not violated Article 81 EC. These undertakings, which had given bank guarantees in order not to pay the relevant fine immediately, requested the Commission to reimburse the fees paid relating to bank guarantees. After their request was rejected by the Commission, the undertakings (which in the meantime had merged giving rise to a new undertaking *Holcim*) lodged a fresh appeal for indemnity before the CFI. They claimed that the illegal Commission decision caused them harm through having to pay bank fees.

The CFI carried out an examination to see if the above three conditions had been fulfilled. It considered that the first condition was not satisfied insofar as:

“regard being had to the fact that *Cement* was a particularly complex case, involving a very large number of undertakings and almost the entire European cement industry, to the fact that the structure of *Cembureau* made the investigation difficult owing to the existence of direct and indirect members, and to the fact that it was necessary to analyse a great number of documents, including in the applicant's specific situation, it must be held that the defendant was faced with complex situations to be regulated. Last, it is necessary to take account of the difficulties in applying the provisions of the EC Treaty in matters relating to cartels. Those practical difficulties were all the greater because the factual elements of the case in question, including in the part of the decision concerning the applicant, were numerous. On all of those grounds, it must be held that the breach of Community law found in the *Cement* judgment as regards the part of the decision concerning the applicant is not sufficiently serious”.

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<sup>152</sup> See Case T-64/89, *Automec Srl. v. Commission*, [1990] E.C.R. II-367 at paras. 75-76: “It must be pointed out that the applicant has not quantified the amount of the damage which it claims to have suffered or stated the factual criteria on the basis of which the nature and extent of that damage might be assessed. It merely alleged in general and abstract terms in its pleadings that it had suffered “serious damage” because it was no longer supplied by BMW. It gave no indication of its turnover at the time when it still had a contractual link with BMW, or of the effect which the termination of the distribution contract had on its commercial activities or, in particular, of any changes to its turnover following the lodging of its complaint with the Commission. It is true that the Court of Justice has acknowledged that, in special circumstances, it is not essential to specify the exact extent of the damage in the application and to state the amount of compensation sought. In the present case, however, the applicant has neither established nor even claimed the existence of such circumstances”.

<sup>153</sup> See J.V. Louis, G. Vandersanden, D. Waelbroeck and M. Waelbroeck, *Commentaire Mégret – La Cour de Justice, les actes des institutions*, 10, 1993 at p. 305.

<sup>154</sup> See Case T-28/03, *Holcim AG v. Commission*, not yet reported.

<sup>155</sup> See Commission decision of 30 November 1994, *Ciment*, (1994) O.J. L 343.

The appeal was therefore rejected.<sup>156</sup> These grounds reveal the extreme caution in the Court's approach when dealing with litigation relating to economic torts and, in particular, with litigation in the competition law field. Furthermore, in insisting on the difficulties of applying the provisions of the Treaty in the field of agreements (which are amongst some of the most clear and precise rules in the field of competition law), the CFI casts serious doubts on the possibility to successfully lodge an appeal for indemnity against an illegal Commission intervention in a field as technical and speculative as, for example, merger control. Such considerations have in no way, however, dissuaded litigants from bringing an appeal, on the basis of Article 288 EC, in order to find the Community liable in the field of merger control. The harshness of the CFI's wording in *Airtours v. Commission* and *Schneider Electric v. Commission* led the parties to an unscrambled merger to lodge an appeal for indemnity on the basis of Article 288 EC.<sup>157</sup>

It would seem that the Court's cautious approach is justified. First, as the Court recalled in relation to the legislative action of the European institutions in *HNL*, a too greater broadening of the scope of the appeals for indemnity procedure could excessively hinder the Commission's task of protecting the general interest of the Community.<sup>158</sup> Admittedly, the recent work carried out on good governance shows that it is imperative that the Commission becomes increasingly liable for its actions.<sup>159</sup> However, in the field of competition law, the annulment of an erroneous decision seems to be an adequate and sufficient mechanism to discipline the Commission. The Commission's recent internal administrative reforms which followed the three annulment judgments in *Airtours*, *Schneider* and *Tetra Laval* bear testimony to the influence of the Court's control of the legality of acts of the Community institutions.<sup>160</sup>

Second, the issue of imputing harm to the action of the Commission is a delicate one. In its appeal for indemnity lodged following the *Airtours* judgment, MyTravel (formerly Airtours) claimed compensation as it was not able to appropriate the profits made by the target undertaking after the Commission's decision. If the operation had not been prohibited, these profits would have flowed to the acquiring undertaking. This line of argumentation is, however, entirely speculative. The target undertaking's profits that MyTravel would allegedly have appropriated had the merger not been prohibited may equally have originated from an independent commercial strategy that the target would not have pursued had the operation been authorized.

Finally, it would seem that the assessment of the economic harm caused to an applicant as a result of an infringement of the competition rules is, to say the least, an extremely complex exercise. For instance, in its appeal for compensation, MyTravel claimed "the loss of synergy costs savings that would have been obtained in consequence of the merger".<sup>161</sup> Practitioners in the field of competition law unanimously agree, however, on the difficulty

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<sup>156</sup> The CFI also concluded that there was an absence of a causal link between the illegality and the alleged harm insofar as the setting up of a bank guarantee was only a voluntary option left to the discretion of the parties.

<sup>157</sup> Request, Case T-212/03, *MyTravel v. Commission*, Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II-2585, Request, Case T-351/03, *Schneider Electric v. Commission*.

<sup>158</sup> See Joined Cases C-83 and 94/76, 4, 15, and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG and others vs Council and Commission*, [1978] E.C.R. 1209.

<sup>159</sup> On this point see D. Geradin and N. Petit, "Agencies in the EU: Conceptual Analysis and Proposals for Reform", (2004) 23 *Yearbook of European Law* 137.

<sup>160</sup> See F. Brunet and I. Girgenson, "La double réforme du contrôle des concentrations", (2004) 40 *Revue trimestrielle de droit européen* 1, especially pp. 27-28.

<sup>161</sup> Request, Case T-212/03, *MyTravel v. Commission*.

in assessing the efficiency gains resulting from cooperation agreements or concentrations.<sup>162</sup>

## VI. The effectiveness of an annulment action

Once an annulment action has been brought, its effectiveness is inextricably linked to the intensity of the Court's review, that is to say the extent of the review carried out by the Court of the Commission's decision (1). It equally depends on the effectiveness of the review from the point of view of its expedience (2). Even in the period after the modernisation process, it is still not certain whether the Courts are sufficiently equipped to effectively deal with annulment actions relating to infringements of the competition rules. The question of what alternatives there are to the review system is therefore posed (3).

### 1. Intensity of judicial review

The growing role of economic analysis inherent to the recent reforms has meant that competition law has become so technical that there is a worry that the CFI, in its role as a generalist Court, may not be in a position to exercise a thorough review of the legality of an act in cases put before it. This development could result in an increase in the discretionary powers of the Commission.<sup>163</sup>

The Community Courts have, however, shown themselves to be anxious to reaffirm the scope of the principle of judicial review of Commission decisions within the framework of Article 230 EC (1.1). In practice, more frequent recourse to outside expertise would certainly assist the Community Courts in exercising more extensive review of complex economic arguments put forward by the parties (1.2).

#### 1.1. The scope of judicial review by the CFI

Drawing inspiration from principles found in French administrative law, the ECJ was reticent, in the initial years of the implementation of competition law, to exercise its review of Commission decisions beyond an assessment of errors of law or manifest errors of appraisal that the latter may have committed in its analysis of a supposedly anti-competitive practice. The ECJ thus held in *Remia*:

“The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers”.<sup>164</sup>

This jurisprudence was equally continued in *Matra/Hachette* where the CFI recalled that:

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<sup>162</sup> See D. Geradin “Efficiency Claims in EC Competition Law and Sector Specific Regulation”, *Paper prepared for the first workshop on Comparative Competition Law*, Florence, November 2004 ; “Art of Science: Assessing Efficiencies under the Commission's Article 81 (3) Notice”, RBB Brief 15, July 2004.

<sup>163</sup> Or even confine to arbitrary. See the criticisms of R. Wesseling, *The Modernisation of EC Antitrust Law*, Hart Publishing, 2000, Oxford-Portland Oregon, and by F. Brunet and I. Girgenson, *supra* note 160.

<sup>164</sup> Case 42/84, *Remia BV and others v. Commission*, [1985] E.C.R. 2545 at para. 34.

“judicial review of the legal characterization of the facts is limited to the possibility of the Commission having committed a manifest error of assessment”.<sup>165</sup>

Notwithstanding this restrictive statement both the CFI and ECJ were, in fact, prepared to undertake a thorough examination of the Commission’s analyses (including the facts, their assessment and their qualification), as is witnessed by the *Woodpulp* case where the ECJ verified whether the alignment of prices identified by the Commission in its decision could be explained by economic circumstances unrelated to a concerted practice forbidden by Article 81 EC.<sup>166</sup>

Following the entry into force of the Merger Control Regulation, the question of the scope of judicial review was further discussed. In *Kali und Salz*, the ECJ seemed to refuse to undertake a thorough analysis of the economic analysis carried out by the Commission as the Merger Control Regulation was deemed to confer on the latter a “certain discretion, especially with respect to assessments of an economic nature” which the Courts had to respect.<sup>167</sup>

Within this context, the three annulment judgments handed down by the CFI in *Airtours*, *Schneider Electric* and *Tetra Laval* could be interpreted as an encroachment on the margin of discretion attributed to the Commission by the regulation. In its appeal against the CFI’s *Tetra Laval* judgment, the Commission criticized the CFI for having exceeded the standard laid down by the ECJ in *Kali und Salz* by examining the Commission’s economic analysis too closely.<sup>168</sup> The case gave rise to an interesting exchange of views on the principles governing the scope of judicial review. In his conclusions, Advocate-General Tizzano partially supported the Commission’s position.

“The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly – as I have just said – to enter into the merits of the Commission’s complex economic assessments or to substitute its own point of view for that of the institution (emphasis added).”<sup>169</sup>

After a both tortuous and sometimes obscure reasoning, the ECJ settled the difference in opinion by holding that:

“Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the

<sup>165</sup> Case T-17/93, *Matra Hachette SA v. Commission*, [1994] E.C.R. II-595 at para. 104

<sup>166</sup> Case 89/95, *Woodpulp II*, [1993] E.C.R. I-1307.

<sup>167</sup> Case C-68/94, *Republique française et Société commerciale des potasses et de l’azote (SCPA) et entreprise minière et chimique (EMC) v. Commission*, [1998] E.C.R. I-1375.

<sup>168</sup> Case C-12/03, *Commission v. Tetra Laval BV*, not yet reported at paras. 25 et seq.

<sup>169</sup> See the conclusions of Advocate General Tizzano, Case C-12/03, *Commission v. Tetra Laval* at paras. 88-89.

case of a prospective analysis required when examining a planned merger with conglomerate effect”.<sup>170</sup>

The ECJ considers therefore that the scope of judicial review carried out by the CFI encompasses an evaluation of any given economic data within the confines of an examination of their veracity, their relevance and their coherence. This solution should be positively welcomed. First, it reduces the risk that the competition authority will succumb to arbitrariness and stray away from its assigned duty. This objective is all the more urgent given that the economic theories currently used by competition authorities are often malleable instruments which can conceal, while simulating analytical rigour, purely opportunistic goals. Further this solution also assures the parties that there will be a real review of their legal situation, in line with the principle laid down by the European Court of Human Rights which requires that everyone have the right to appeal.

## 1.2. Recourse to outside expertise when dealing with matters of an economic nature

The growing technical nature of the economic arguments put forward by parties in competition law litigation complicates the Court’s mission to such an extent that it sometimes may prefer to hold back from examining whether the theories advanced by the parties are well-grounded. Admittedly, we have just seen that the Court pronounced itself in favour of a control of any given economic arguments put forward by the parties. In order to ensure that this jurisprudence does not remain a *de facto* declaration of intention, we consider that more frequent recourse to outside experts could usefully assist the Court in carrying out this delicate mission.

Article 70 of the CFI’s Rules of Procedure allows the CFI to order third party expertise. An independent expert operating under the control of the Court reporter can be nominated. He compiles an expert report covering all the points asked of him. Within the field of competition law, the Court has only sparingly used outside expertise. The *Woodpulp* case represents a rare example.<sup>171</sup> The ECJ ordered two expert evaluations on the question of whether the structure of the woodpulp market inevitably led to price harmonization through parallel behaviour or to different prices. The Court explicitly relied on the experts’ reports in order to conclude that the parallel behaviour observed on the woodpulp market could not be explained by concertation as the Commission had found, but could be satisfactorily explained by the oligopolistic nature of the market.<sup>172</sup>

The infrequency of the CFI’s recourse to outside expertise contrasts with the growing tendency for parties before the Commission or CFI to employ outside expertise.<sup>173</sup> This development makes it all the more pressing for the CFI to nominate independent experts able to arbitrate on the often opposing views of the experts in economics employed by the parties in competition law case. Otherwise, the CFI may, in cases involving complex economic issues, find itself unable to scratch beneath the surface of the evidence put forward by the parties.

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<sup>170</sup> Supra note 166 at para. 39

<sup>171</sup> See Case 89/85, *Woodpulp II*, at paras 30-32.

<sup>172</sup> Id. at paras. 126-127.

<sup>173</sup> See Order of the President of the CFI, T-201/04 R, *Microsoft Corp v. Commission*; *Airtours v. Commission* [2002] E.C.R. II-258; T-102/96, *Gencor v. Commission*, [1999] E.C.R. II-753.

## 2. The expedience of judicial review

The swiftness (or lack of) of annulment proceedings before the CFI has for a long time now been the subject of criticism, in particular in the field of merger control. Intervening on average 21 months after a Commission decision, an eventual judgment annulling a Commission decision prohibiting a merger was devoid of all practical effect insofar as very few undertakings were prepared to wait so long in order to implement a merger which was wrongly prohibited.

In these conditions Article 230 EC annulment proceedings were to a large extent devoid of all practical effect in the field merger control. This situation was all the more untenable as it bestowed a *de facto* power on the part of the Commission to decide on the life or death of a merger. Had a Commission decision been annulled, an operation would still not have gone ahead. Admittedly, prohibition decisions were rare.<sup>174</sup> However, the Commission made extensive use of the threat of a prohibition in order to extract substantial commitments from the merging parties.

In order to effectively ameliorate the effectiveness of its control of Commission decisions in this field, the CFI's Rules of Procedure were amended in December 2000 so as to introduce an expedited procedure.<sup>175</sup> Article 76 states:

“The Court of First Instance may, on application by the applicant or the defendant, after hearing the other parties and the Advocate General, decide, having regard to the particular urgency and the circumstances of the case, to adjudicate under the expedited procedure”.

Within the framework of merger control, a request for the use of the expedited procedure must come from one of the applicants (the parties to the merger or a third-party), or from the defendant, in this case the Commission.<sup>176</sup> They must reason their request, i.e. they must show in what way the case is urgent. Further, in order that the request be taken into consideration, they have to ensure that their statement of case is only a summary of the grounds invoked and includes a limited number of annexes.<sup>177</sup>

The CFI has a margin of discretion when deciding whether or not to grant an expedited procedure. Some criteria for a rejection to grant such a procedure can be gleaned from the recent jurisprudence of the CFI. First of all, in *Ineos Phenol v. Commission*, the complexity of the case seemed to create an obstacle to the grant of an expedited procedure.<sup>178</sup> Further, in *General Electric v. Commission*, the withdrawal of the merger before the lodging of the appeal prevented the use of the expedited procedure.<sup>179</sup> Finally, it would seem that the Court is reluctant to order an expedited procedure in fields other than merger control, as is witnessed by *Meca Medina v. Commission*, where the CFI refused to grant the use of the expedited procedure in an appeal against a rejection of a complaint introduced under Articles 81 and 82 EC.<sup>180</sup>

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<sup>174</sup> There are only 19 Commission prohibition decisions.

<sup>175</sup> See Amendments to the Rules of Procedure of the Court of First Instance of the European Communities, (2000) O.J. L 322/4.

<sup>176</sup> Practice Directions of the CFI, (2002) O.J. L 87/48 at point VI.

<sup>177</sup> Id.

<sup>178</sup> See order of the CFI, Case T-103/02, *Ineos Phenol v. Commission*.

<sup>179</sup> On the other hand, abandoning a merger while the case is pending does not bring an end to the expedited procedure. See, for example, *Schneider Electric v. Commission*, supra note 148.

<sup>180</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v. Commission*, not yet reported.

Once the Court has accepted the request, the case is given automatic priority. The most prominent characteristic of the expedited procedure is the minimal importance given to the written procedure, which is limited to an exchange of statements of case, in favour of an oral procedure.<sup>181</sup> The parties are also given, if appropriately justified, the possibility to put forward fresh evidence during the oral pleadings.

The rare cases in which the Court has accepted the use of the expedited procedure in merger control show a significant reduction in time before a judgment is handed down. Thus, in *Schneider Electric v. Commission*,<sup>182</sup> *Tetra Laval v. Commission*,<sup>183</sup> *Royal Philips Electronics v. Commission*,<sup>184</sup> and *Cableuropa and others v. Commission*,<sup>185</sup> the CFI handed down a judgment after between 10 and 12 months. This can be contrasted with the standard time of on average 20 months and more before a judgment is given.

Does this mean, however, that an action for annulment following the expedited procedure is a panacea? Certain commentators have shown great enthusiasm for this procedure.<sup>186</sup> We consider, however, that the evaluation has to be more nuanced. Even if the expedited procedure marks a step in the right direction, it remains, in many ways, an insufficient organizational expedient. First, there is good reason to believe that despite the use of this procedure, only a tiny amount of mergers prohibited by the Commission will be revived after an annulment judgment.<sup>187</sup> Indeed, if the judgment is given after an average of 11 months, a further average of five months has to be added to take into account the preliminary administrative procedure before the Commission.<sup>188</sup> Moreover, the re-notification of the merger to the Commission as well as a potential appeal by the Commission to the ECJ could discourage the parties from reactivating their project. These observations are borne out by the facts. Only the merger between Tetra Laval and Sidel was completed at the end of the annulment judgment of the CFI. However, in that particular case, the completion of the merger was not the result of the expedited procedure before the CFI, but rather the consequence of the fact that Tetra Laval had already implemented the purchase of the target's stocks at the time of the notification.<sup>189</sup>

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<sup>181</sup> See Article 76 bis 2 of the CFI's rules of procedure, (1991) O.J. L 136 and point VI (2) of the Practice Directions of the CFI.

<sup>182</sup> *Schneider Electric v. Commission*, supra note 148.

<sup>183</sup> *Tetra Laval BV v. Commission*, supra note 148.

<sup>184</sup> *Royal Philips Electronics BV v. Commission*, supra note 33.

<sup>185</sup> Case T-346/02, *Cableuropa and others v. Commission* and Case T-347/02, *Aunacable SA and others v. Commission*, not yet reported.

<sup>186</sup> See notably M. Siragusa, "Judicial Review of Competition Decisions under EC Law", Speech delivered at the Competition Commission Lectures, 21 September 2004; C. Turner and R. Munoz, "Revising the Judicial Architecture of the European Union", (1999) 19 *Yearbook of European Law* 1.

<sup>187</sup> See B. Lyons, "Reform of European Merger Policy", CCR Working Papers, 03-5, at note 20.

<sup>188</sup> Admittedly, that could be reduced in the case where the parties only notify a future plan to merge, as is permitted by Article 4 (1) of Regulation 139/2004. This time-limit can also be prolonged if the Commission uses its suspensive powers to request information in order to prolong the administrative procedure (Article 10 (4) of the Regulation). In this regard, it would be useful if the Court could clarify the conditions under which the Commission can make use of these powers in order to avoid it abusing these prerogatives to limit the practical effect of the expedited procedure.

<sup>189</sup> In accordance with Article 7(3) of the old Regulation 4064/89, Tetra Laval was not, however, able to exercise the voting rights attached to the acquired shares during the whole period of the procedure. See on this point, M. G. Egge, M.F. Bay and J.R. Calzado, "The New EC Merger Regulation: Recipe for Profound Change or More of the Same", *Paper presented at the IBA 8<sup>th</sup> Annual Competition Conference*, 17-18 September, European University Institute, Florence at note 72.

Second, the option of an expedited procedure puts the parties in a dilemma as they must choose between, on the one hand, the putting forward of exhaustive arguments and grounds for annulment; and on the other hand, recourse to less extensive argumentation in order to benefit from swifter action by the Court. Some have denounced this situation considering that it constituted a breach of the rights of the defence.<sup>190</sup> This situation is not at all satisfactory because the simplification and the reduction of the grounds for annulment submitted by the parties do not fit well with the growing importance of increasingly technical economic analyses and therefore more sophisticated arguments in the field of competition law.

The Commission itself seems to have acknowledged these difficulties. After having welcomed the adoption of the expedited procedure in its XXXIInd report on competition policy, it evoked the need to ensure even swifter judicial review in merger control cases.<sup>191</sup> The need for more rapid and effective review raises the question of which alternatives there are to the current Community system of judicial review.

### 3. The alternatives to the current system of judicial review

The current system of judicial review is characterized by generalist CFI judges and, correlatively, by the absence of a formal recognition of the intricacies of competition law litigation. The recent decisional practice of the Commission and the case-law of the Court reveal, however, the specific nature of this branch of litigation. First, the growing technicality of cases and in particular the major role that industrial economics plays in the field of competition law are increasingly isolating competition law litigation from other branches of European law. Second, the current backlog of pending court cases is incompatible with the fast-moving nature of markets, especially in the field of merger control.

These characteristics raise the question whether the setting up of a specialist Court for competition law litigation would increase the effectiveness of judicial review. Several eminent commentators have recently evoked this question.<sup>192</sup> Indeed, various reasons show that the setting up of a specialist court does not remain a purely academic matter. First, at the European level, a legal basis is foreseen to this effect by Article 220(2) of the EC Treaty:

“[...] judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty”.<sup>193</sup>

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<sup>190</sup> See F. Brunet and I. Girgenson, *supra* note 160 at p. 6.

<sup>191</sup> See Commission's XXXIInd Report on Competition Policy, 2002, at paras. 316 and 317: “[...] the introduction by the Court of First Instance of a fast-track procedure represents an important step forward, demonstrating that judicial review can be delivered with relative speed [...] The Commission has announced its intention to explore with the Member States the various options available which would ensure speedier judicial review in merger cases. The Commission will also pursue contacts with the Court of Justice and Court of First Instance on this matter”.

<sup>192</sup> See B. Vesterdorf, “The Community Court System Ten Years from Now and Beyond”: Challenges and Possibilities”, (2003) *E.L.R.* 317; D. Waelbroeck, “Vers une harmonisation minimale des règles de procedure nationale”, in *L'avenir du système juridictionnel de l'Union Européenne*, Bruxelles, 2002, pp. 65-66.

<sup>193</sup> Article 225A EC states: “The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it. Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First



This provision is being increasingly used to create specialised chambers. In December 2004, for instance, the Council decided to create a Civil Service Tribunal, able to deal with litigation in this matter.<sup>194</sup> In the field of competition law, Article 220(2) has also aroused the interest of the European institutions. In 2002, the European Parliament, in a Resolution adopted after the Commission published its XXXIInd report on competition policy, evoked the possibility of creating a specialised judicial chamber in relation to mergers.<sup>195</sup> The Commission answered the Parliament in its XXXIIIrd report by adopting a moderate position:

“The Community Courts exercise a diligent and scrupulous control of the Commission’s enforcement actions. This concerns final decisions on the substantive assessment of major transactions as well as procedural questions involving undertakings’ rights of defence. The Community courts moreover introduced a fast-track procedure. They are also able to grant interim measures. The feasibility of a new judicial panel pursuant to Article 225A requires in-depth investigation. The Court itself possibly is best placed to carry out such an assessment. This would reach from workload considerations (internal to the Community Courts) to fundamental questions of interpretation of the Treaty in particular regarding the weight to be attributed to the competition rules and the consequential desirability of the continuous development of their interpretation by the Court of Justice”.<sup>196</sup>

To date, no detailed study on the feasibility of such a project has been carried out. However, the experience of a number of Member States which have decided to transfer litigation in relation to the legality of decisions from their competition authorities to specialist courts shows that in principle, there are no objections to a specialist court in the field of competition law. These states have followed various models. First and foremost, certain states like the United Kingdom and Denmark have instituted a specialist court in the field of competition law which deal with appeals against decisions adopted by the national competition authority.<sup>197</sup> Further, other states like Austria, Belgium and France have instituted a specialist chamber within a generalist court which focuses and deals with all appeals against decisions of their national competition authority.<sup>198</sup> Finally, states like Finland, have established a court

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Instance”. See also Article III-359(1) of the Treaty establishing a constitution for Europe: “European laws may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. They shall be adopted either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission”.

<sup>194</sup> See Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, 2004 O.J. L 333/7. On this point see I. Maselis, “Les nouvelles dispositions du statut de la Cour de Justice”, (2005) *Journal des Tribunaux – Droit Européen* 68. Note also that the Treaty also provides a legal basis (Article 229A) for the creation of a judicial chamber in the field of intellectual property.

<sup>195</sup> See European Parliament resolution on competition policy, P5\_TA(2004)0053 at §18: “The European Parliament [...] considers that the current system for appealing to the Court of Justice could be improved and requests the Commission to carry out feasibility studies for an independent review body, such as a new judicial panel in accordance with Article 225a of the Treaty, so that cases before the Court can be heard quickly and effectively by judges with specialist knowledge of the legal and economic implications of merger cases, and asks the Commission to report back to it on its findings as soon as possible”.

<sup>196</sup> See XXXIIIrd Report on Competition Policy, 2003, p. 345. In its previous report, the Commission received similar observations from the European Parliament and responded to them slightly less clearly in considering that: “it would also be useful to examine whether it might be appropriate to create a specialised merger chamber within the CFI which might be one of a number of specialised competition chambers”. See XXXIInd Report on Competition Policy, 2002, p. 376.

<sup>197</sup> In the UK the Competition Appeal Tribunal was set up by section 12 of the Enterprise Act 2002.

<sup>198</sup> The Austrian Cartel Court is competent to rule on appeals within the framework of the application of Articles 81 and 82 EC. It is a specialist chamber within the Vienna Court of Appeal.

with exclusive competence to deal with economic law which is, in this connection, also able to deal with competition law litigation.<sup>199</sup>

Second, the arguments invoked by some against the creation of specialist courts are not convincing.<sup>200</sup> First and foremost, the risk that the application and interpretation of European law will not be uniform as a result of a proliferation of specialist courts seems illusory, insofar as these specialist courts are subject to a common appeal mechanism. This is the case as long as the mechanisms foreseen by the Treaty of Nice as well as the one envisaged by the draft Constitutional Treaty offer the possibility to appeal on points of law before the CFI, in its quality as a generalist court.<sup>201</sup> Further, the risk that these specialist courts erroneously interpret constitutional questions or Community law provisions not falling within their competence is also limited by the appeal mechanism. Finally, the increase in costs resulting from the creation of new chambers reflects a misunderstanding of judicial economy. The current system and the modifications introduced by the Nice Treaty (transfer of civil service cases from the CFI to the Civil Service Tribunal) do not make it possible to eradicate the endemic evil that the considerable backlog of pending cases in Luxemburg represents (because the diversion of cases from the CFI to the Civil Service Tribunal is cancelled out by the transfer of all direct actions from the ECJ to the CFI).<sup>202</sup> Accordingly, the periods of time before a judgment is handed down should remain virtually identical. In that context, there are doubts that both the administrative and economic costs generated by the slowness of the Community judicial machine are lower than the fixed cost resulting from the creation of a specialist judicial chamber are justified.<sup>203</sup>

Under these conditions, the appropriateness of the creation of a Community court specialised in competition law should be the subject of serious analysis in terms of the costs and benefits that it could generate. The Commission, which drew the consequences from the annulment judgments referred to above at the administrative level, is strongly advised to reflect more on the use of the right of initiative that Article 225 bestows upon it.

## VII. Conclusion

The post-modernisation era forecasts new days for competition law. The substantive rules, on the one hand, have undergone profound change accentuating the technicality of the subject matter. The implementing rules, on the other hand, confer on the Commission broad powers

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<sup>199</sup> The “Market Court”, competent to deal with competition, public procurement and commercial practices.

<sup>200</sup> See especially the obstacles identified by C. Turner and R. Munoz, *supra* note 186 at p. 89.

<sup>201</sup> See Article 225A (3) EC, “Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance”.

<sup>202</sup> See K. Lenaerts, “The Future Organisation of the European Courts” in *30 Years of European Legal Studies at the College of Europe, Liber Professorum, 1973/1974 – 2003/2004*, P. Demaret, I. Govaere, D. Hanf, eds., P.I.E. Peter Lang, Presses Universitaires Européennes.

<sup>203</sup> The setting up of a specialist tribunal unquestionably involves high fixed costs. But the average cost of a judgment goes down as the number of cases brought before the Court rises since, in the same way as an undertaking, it becomes possible to distribute its fixed costs over a greater scale of production. It is therefore important that there is sufficient litigation to justify the creation of a specialist court. It is possible to observe, in light of the transfer of civil service and intellectual property litigation from the CFI’s competence, that the volume of cases before the CFI has already reached a critical mass in the competition law field. Thus, out of 56 closed cases in 2004 (excluding intellectual property), 33 concerned competition law while the other 23 cases fell under 10 different subject matters. See the legal statistics of the CFI’s Annual Report, 2004, p. 202.

which are to be found in the new acts envisaged by Regulation 1/2003 and the various notices and guidelines adopted since then.

In contradistinction to this development, the principles governing appeals against Commission acts (challengeable nature of various acts, the conditions pertaining to having an “interest” and “quality” to act, the conditions of an appeal procedure and the legal architecture of the Community) remain essentially the same or, at the most, have been the subject of only cosmetic modifications.

The consequent discrepancy which appears between the substantial development of the substantive rules and the inertia of the procedural rules governing appeals is problematic from the point of view of the degree of judicial protection afforded to economic operators. First of all, real legal insecurity emerges from the obscure status of certain acts added by Regulation 1/2003 to the Commission’s decisional normative arsenal. Further, the inefficiency of judicial review is blatant. Pressured by an excessive judicial backlog and faced with the increasing technicality of competition law litigation, generalist judges deliver rulings within excessive time-limits which are incompatible with the functioning of an efficient market economy.

In this context it would seem necessary to think about modernising the annulment action procedure within the field of competition law or even reform the system of legal protection of individuals who fall under this law or suffer the consequences of its application. Without limiting itself to the field of competition law, the Treaty establishing a Constitution for Europe defines certain contours (notably through the possibility to set up “specialist courts” or the broadening of the scope of the “quality to act” against acts of a general nature). This study attempted to offer new grounds for reflection.