Celebration of 20 years of the Court of First Instance of the European Communities

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Theme: Access to Justice: Nature of Judicial Control

I) Introduction

The nature of the control made by the EU Courts is a permanent subject of discussion. This was already the case at the time of my first direct contacts in the mid-eighties with what I would call "the complex world of the Court(s) in Luxembourg". Most probably, it will continue to be for quite a long time…

Let me say, at the outset, that my views on this topic are clearly influenced by the fact that, during the last 25 years, I have played quite a number of different – and to some extent hardly reconcilable – roles. First, as a member of the Commission's Legal Service; then, at the Court of First Instance (CFI) during its first five years, between 1989 and 1994; later, as a lawyer representing parties in cases brought before the EU and national Courts, but also as a "law enforcer" (head of the Portuguese competition DG) and as a "law maker" (both at the Portuguese Government and Parliament) for almost 10 years.

This track record puts me in quite a peculiar position: I am fully aware of the different arguments which are invoked by the "parties" concerned and recognize that a significant number of them are well-founded (depending, of course, of the perspective and of the interests that we are supposed to represent…). The problem is that we have to make choices and try to find an acceptable balance between those interests. This is not an easy task, as everyone will agree.

When we talk about "judicial control", it is my view that, in this last quarter of a century, clear progresses were made at the level of the EU Courts. But we are far from having a "perfect system". The frontier between what is the field of intervention of the judge vis-à-vis the reserved sphere of the administration remains unclear. The "time dimension" continues to be a real burden for everyone and puts at risk both the access to justice and the effectiveness of judicial control. The protection of the rights of defence by the judge still needs to be improved.

Not having the time to set an exhaustive description of the nature of judicial control by the EU Courts, I will try to identify some of its most remarkable features with a

specific focus on competition matters. Notwithstanding, I think that the reasoning, the assessment and the recommendations may also apply to other areas of EU law.

II) Judicial Control: What Is Not Going Well?

The judicial control by the EU Courts has always been subject to critics, in particular by the addressees of the Commission's decisions. Most of them invoke that judicial review processes are too long and do not entail a real re-examination on the merits, mainly because judicial control is limited to procedural rules, factual errors, law errors and manifest errors of appraisal.

The first critic – concerning the duration of the judicial review processes – is not specific to EU judicial control. I would say that everywhere in the world we hear that judicial control is lengthy, expensive and, as we frequently say nowadays, not "user-friendly". This is true (although it should be noted that there are clear differences existing between the "judicial communities" in this regard). As we will see further bellow, the EU Courts – and the CFI, in particular – have made some progresses in this field. But, in my view, those progresses are clearly insufficient. Indeed, the long periods of judicial review lead to considerable uncertainty and delay to the parties, significant costs and are often detrimental to business life and to EU law itself.

We all know that the number of cases brought before the EU Courts has constantly been growing since they were created. We also know that in a great number of cases the EU Courts – and, in particular, the CFI in competition cases – have to dealt with very complex cases; thousands and thousands of pages, endless data; all kind of arguments…

It is not an easy task to render a judgment in a timely manner without putting at risk an effective judicial review and the full respect of the rights of defence. But it is our duty, the duty of the legal community, to use our best endeavours to find a new framework which leads to an acceptable balance between efficiency and the rule of law. I think that nobody is happy with the "Impala saga" , just to mention one of the most striking examples…

The second critic – the fact that judicial control is limited to procedural rules, factual errors, law errors and manifest errors of appraisal – is also not specific to EU judicial control. The same applies in Portugal, in Spain, in France and probably in every Member State of the EU (not to say all over the world). It results from the choice of a given model of relationship between the administrative and the judicial bodies.

It is true, however, that the criticism on the nature of the EU judicial control seems to have a "special dimension". The reason for this is mainly financial. Either because the level of the fines imposed by the Commission is very high (and still increasing…) or because of the importance and dimension of the matters which are subject to the EU Courts control (this is, of course, the case for mergers which met the EU thresholds, but this could also be the case for many legal acts adopted by the EU institutions).

In this context, one must not forget that the role of the EU Courts must respect the powers granted by the Treaties to the other EU institutions, and in particular to the Commission. This entails a delicate balance of powers which is not easy to achieve. But although the EU Courts – and the CFI in particular – cannot substitute themselves to the Commission's assessment, they do undertake, as we shall see below, a full and close review of the Commission's decisions when they consider it necessary.

III) The Evolution: How Has The Cfi Responded To The Challenges?

A) Speed and efficiency

The problems arising from the length of proceedings have been the subject of a long debate and have been recognized by law makers. Indeed, it is recognized that the length of proceedings can discourage litigation and therefore negatively affect the access to EU justice.

The timeliness of judicial review was significantly enhanced at the beginning of this century when the Rules of Procedure of the CFI were amended and introduced a faster procedure (see Article 76 of the Rules of Procedures of the CFI). Such accelerated procedure applies for certain cases where there is particular urgency.

Despite the fact that the need of particular urgency is determined on a case to case basis and subject to the CFI's discretion, such procedure has enabled the CFI to be faster and to better deal with the amount of cases that are brought before it. Cases subject to this "fast-track" are usually decided in less than a year, which proves the CFI's willingness and capacity of reducing the duration of proceedings, thereby improving the access to justice, although within some limits.

Regarding efficiency, and despite all the critics, the CFI appears to have showed a consistent and in-depth approach when scrutinizing the Commission's decisions closely, as well as when determining the extent of its own judicial review. Of course, there is always room to some criticism on the approach followed by the CFI in each case. But this criticism is much more related to the findings than to the approach itself…

B) Effective control of merits and of facts of Commission's decisions

i) The extent of judicial review

The lack of guidelines on the applicable standard of review gave the EU Courts the opportunity to clarify the degree of review that they shall undertake.
This has become the object of an interesting debate, especially since 2002, when the CFI has criticized the Commission in an unprecedented manner and annulled its decisions in three remarkable merger cases: Airtours , Tetra Laval and Schneider Electric .

The CFI has proved its willingness to scrutinize the Commission, thereby confirming the importance of a close review of the Commission's acts. Since the Commission

has wide powers when assessing mergers and other cases, such as wide investigative powers, and it is the sole arbitrator by enforcing its decisions, imposing fines, and finally prohibiting the merger, this represents a multiplicity of roles that call for a tight control by the Courts.

At the same time, however, it is important to keep a balance between judicial review and the Commission's powers. One must not forget that the European legislator has always sought to give the Commission the role of shaping EU law, which explains the Commission's margin of discretion. Therefore, the EU Courts have tried to keep a delicate balance between the standard of proof incumbent upon the Commission and the need for an adequate standard of review that controls the Commission's wide powers while respecting its margin of discretion.

Indeed, and despite the close scrutiny that might be undertaken by the CFI, its review is subject to several limits.

Firstly, the CFI is limited by the Commission's analysis, as it can only review the allegations and reasoning in its decision. Secondly, the CFI's review is limited in scope by the pleas in law of the application and it must abstain from reviewing documents that introduce fresh arguments. Thirdly, it is limited by the need to preserve the institutional balance and the need to respect the Commission's competence.

In short, as the CFI consistently affirmed (for instance in Microsoft), the review of complex economic assessments is limited to check whether: (i) the rules on procedure have been complied with; (ii) the facts have been accurately stated; (iii) the evidence is factually accurate, reliable and consistent; (iv) the evidence contains all the relevant data; (v) the evidence is capable of substantiating the conclusions drawn from it and (vi) there has been a manifest error of assessment of misuse of powers.

In other words, complex technical assessments are in principle subject to limited review by the Court (manifest error) and there can be no substitution of the assessment of matters of fact made by the Commission.

However, from the analysis of its case law, it results that the CFI does not assess all the cases with the same "intensity". Sometimes, it appears that the CFI limits itself to a pure "legality control". Some other times, it conducts a review to the maximum extent possible under Article 230 of the Treaty (now Article 263 of the Treaty on the Functioning of the European Union), reviewing legal and procedural issues, controlling the accuracy and reasoning of the Commission's analysis and, even, resolving issues of economic nature…

It also results from the analysis of the CFI's case-law that the "standard of proof" is not necessarily the same when assessing an Article 81 or Article 82 cases (now Articles 101 and 102 of the TFEU) or a merger decision. Given the predictive nature of merger control, the Commission appears not to be required to prove

anticompetitive effects of a given merger using the “beyond reasonable doubt” standard, but will only have to establish that particular effects will occur “in all likelihood” .

But even in mergers the CFI appears to go beyond a mere “review of legality”, as it is clearly demonstrated by Airtours and in Schneider. Indeed, in Airtours the CFI placed a high standard of proof, requiring the Commission to show that three cumulative conditions were fulfilled before prohibiting a merger on the basis of collective dominance concerns . In Schneider, although the CFI itself has concluded that the merger would in fact create a dominant position after assessing all the relevant documents and arguments, it stated that the Commission did not provide sufficient evidence to prove that the merger would result in a dominant position.

In conclusion, the CFI has proven to be ready to undertake a more close scrutiny, which has been seen as an important development in the control by the judge. However, one should keep in mind that if the Courts were to set a higher standard of review they would concomitantly require the Commission to conduct a more detailed analysis.

ii) Right to damages

Schneider is also a remarkable case as it was first time that the CFI ordered the Commission to pay damages under Article 288 of the EU Treaty (now Article 340 of the TFEU) for mistakes made during a procedure under the Merger Regulation. It illustrates not only that judicial review may have a “demanding approach” and may punish the Commission for breaching EU law, but also that parties have the right to be compensated under certain conditions.

This case represents a very important evolution of the EU Courts case-law as it introduced a new “standard of balance”: the Commission’s must have a great margin of discretion in making policy decisions, but third parties shall not bear the costs of a flagrant misuse of such discretion. Indeed, and despite the fact that it found that there was no manifest and grave breach of EU law from errors or faults inherently related to the objective constraints of the merger control process, the CFI concluded that the Commission had failed to clearly express in the Statement of Objections its fundamental objection was sufficiently grave and manifest and was unrelated to the constraints inherent to the merger control process therefore giving rise to the right to damages.

The fact that, on one side, the parties were, in this specific case, entitled to very modest damages and, on the other side, the right to damages was further narrowed by the ECJ (it will be very hard to prove the conditions to a causal link…) must, of course, be taken into consideration. But the new “standard of balance” mentioned above remains valid…

C) The protection of rights of defence

Control over the full respect of procedural rights was always one of the main concerns of the EU Courts. It appears, from the recent case-law of the CFI, that such procedural rights have been broadened.

The Impala case appears to be a good example. The CFI had annulled the Commission's decision on the basis not only that it had committed manifest errors of assessment but also because it had failed to state adequate reasons for its conclusions . Despite the fact that, on appeal, the ECJ found that the CFI had committed some errors of law, it also clarified the procedural rights of the parties in a Phase II merger regulation investigation.

Schneider also goes in the same direction . As mentioned above, the CFI found that the fact the Commission had failed to clearly express in the Statement of Objections its fundamental objection was sufficiently grave and manifest and was unrelated to the constraints inherent to the merger control process therefore giving rise to the right to damages. This part of the judgment (which was upheld by the ECJ on appeal) clearly shows that EU Courts are ready to closely scrutinize the Commission's respect of procedural rights and that a violation of procedural rights is to be seen as an inadmissible violation of the rights of the defence of the parties which can lead to damages.

D) Interim measures

Interim measures are fundamental to guarantee effective judicial protection as they are the only way to avoid irreparable damages (for the parties' concerned or for the public interest) that would arise in case one would have to wait for the outcome of the (normally too long) judicial review.

We all know the very strict conditions that, under EU law, must be met in order for interim measures to be granted: the pleas of law and fact must establish a prima facie case (at least, a fumus non mali juris) and the urgency of the requested measures (the applicant has to show that, in the absence of said measures, it is likely to suffer a serious and irreparable harm, which is foreseeable with a sufficient degree of probability). Furthermore, the Courts will also take into consideration the different interests at stake (including public interest) and will examine to what extent granting interim measures would prevent the decision to be fully effective in case the main application is dismissed.

Although the conditions are very strict, the case-law of both Courts is full of examples where interim measures proved to be a very effective way to protect the parties' interests (as well as the public interest) and to ensure full respect of EU law. The recent order of the President of the CFI granting interim measures in the United Phosphorus Ltd (UPL) case (concerning a Commission decision imposing the withdrawal of authorizations for the plant protection products containing a given substance) tends to confirm the merits of the approach which was adopted since the early nineties.

Of course, interim measures are, by definition, no more than an intermediate solution. In some cases (mergers, for instance), I fail to see how they could be useful. But one should not disregard them as a powerful instrument to ensure effective judicial protection.

IV) Building the CFI of Tomorrow: Possible Solutions

It results from the above that significant steps were undertaken in order to improve the EU judicial system (accelerated procedure; a more in-depth analysis of the Commission's decisions; right to damages; reinforcement of procedural rights). However, there is still a long way to go before most critics become unfounded. What can we do more in order to improve the effectiveness of EU judicial control?

Do we need more judges and more chambers or shall we – as proposed by the House of Lords – create a specialist Competition chamber or section?

Would it be a good idea to transfer trade mark cases to a judicial panel (as it was done in 2004 when Member States agreed to the creation of a judicial panel for staff cases and the European Union Civil Service Tribunal was established)?

Would it be enough to reform the Rules of procedure and to allow the CFI and the ECJ some measure of autonomy to set their own Rules?

Shall we open the door to the possibility of adopting "substantive" interim decisions?

What about the idea of allowing the CFI to adopt the decisions itself, whenever it annuls a Commission decision?

Shall we review the rules of admissibility in order to grant a greater access to justice or would it be better to encourage the accelerated procedure, by lowering the requirements to apply such procedure?

Shall we change the standard of judicial review (which, of course, would require a modification of Article 263 of the TFEU)?

I could continue with an almost endless list of questions…
None of the measures indicated above would substantially change the problems that the EU Courts – and the CFI, in particular – face today. Probably, some of them would even aggravate those problems… In any case, I am not sure that many of those measures would be to the benefit of individuals and companies and we should never forget that judicial review of the acts adopted by the administration has (or at least should have) as its main purpose to protect the rights of individuals (and companies) ...

I tend to be quite sceptical about great reforms. This is quite particularly the case in the administration of justice. The history of law systems is full of bad examples of "legal revolutions"… But it is undeniable that we have to improve the effectiveness of judicial control. This means quicker decisions – without putting at risk the rights of

defence – but also a more in-depth review on the merits (whenever the act adopted by the administration has a substantial financial impact on the addressees).

Even with the improvements which were adopted at the level of the Rules of procedure, this appears to be impossible with the current procedural framework. We need to adopt a less formalistic procedure and to go “right to the point”. Both lawyers and judges (as well as law makers…) write too much and argue too much, as we were still living in the nineteenth or the twentieth century. We probably have to define mandatory time-limits for judicial decisions while being more flexible as to the degree of self-organization of Courts. We probably have to accept that the Courts lower the requirements for the accelerated procedure. We probably should encourage the Courts to define at an earlier stage (the preliminary report) what are the real issues at stake.

Those are different times in a totally different world. We do faster, we move faster and we communicate at the speed of light. This is, of course, no reason for a superficial and accelerated judicial control. But we have to improve our ability to administer justice. Otherwise, the famous quote “justice delayed is justice denied” attributed to the former British Prime-Minister William Gladstone will become even more actual.