CHAPTER 11

The Role of the EU Courts in Competition Cases: A View from the Bar

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1 INTRODUCTION

The Global Competition Law Centre has invited me to comment on the role of the European Union (EU) Courts from the point of view of a private practitioner who is a frequent user of the General Court (GC) and the Court of Justice (CJ).[1] The views developed in these pages are therefore necessarily subjective and non-academic in nature; they are inevitably informed and deformed by my personal experience, mainly challenging European Commission ("Commission") decisions on behalf of clients (and, in a few cases, defending decisions on the Commission's behalf).

Practising lawyers involved in litigation tend to take an ex-post and relatively simple approach to the review of the Courts' performance in competition cases: if we win a case, then the merit is on us, and the Court only did what it was required to do; if we lose, then it is the Court's fault for failing to adequately play its role. Other stakeholders, including in academia and in the media, often assess the performance of the Courts in a quantitative manner, associating effective or thorough judicial review with the number of annulments or with other observable metrics (e.g., number of cases decided, amount of fines annulled or average duration of proceedings). But these, too, are very superficial ways of measuring performance.

In my view, one cannot assess the work of the EU Courts without inquiring first about the role that one may reasonably expect them to play in competition cases. It is

1. This written contribution develops the points made in my intervention at the GCLC's annual conference in Bruges on March 26, 2022 at a panel that also featured Marc van der Woude (President of the GC) and Judge Ingeborg Simonsson (Stockholm City Court). I provided my views about the role and performance of judges, and I was relieved that they did not provide their views about the role and performance of lawyers.

only once we have identified this benchmark that we can properly discuss the Court's performance and identify possible challenges.

Following this logic, section 2 discusses the role that one can expect the EU Courts to play in the field of competition law; section 3 seeks to evaluate the Court's performance against that benchmark; section 4 identifies new generation challenges.

2 THE ROLE OF THE EU COURTS IN THE FIELD OF COMPETITION LAW

There have been various, and very valuable, attempts to conceptualize the role of the EU Courts and the hallmarks of effective judicial review in competition cases.[2] For the purposes of this contribution, the following pages will discuss what I regard as their three core missions, namely (i) preserving the rule of law and the legitimacy of the EU enforcement system; (ii) contributing to a stable, consistent and predictable legal framework, and (iii) balancing the need for effective enforcement with the need for constraints to administrative discretion.

2.1 Preserving the Rule of Law and the Legitimacy of the EU Enforcement System

Competition law is not only about policy or economics or outcomes; it is primarily law, and it is a field of the law where undertakings are subject to penalties that are *quasi-criminal* in nature.[3]

In this context, the first and arguably most important role of the EU Courts is to ensure that the interpretation and enforcement of the competition rules are in line with fundamental rights and general principles of law that also apply in other domains. There are fundamental rights and principles, like the principle of presumption of innocence or the rules on the burden of proof, that cannot be bypassed or sacrificed in the altar of expediency because they are core rule of law requirements.[4] These principles, rights, and constraints are what make public enforcement sound, effective and legitimate. In the peculiar context of the EU administrative enforcement system, moreover, full review of all questions of fact and law by the EU Courts is necessary to ensure compliance with basic due process requirements.[5]

2. Pablo Ibáñez Colomo, *Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law* (September 5, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4210327.
3. Case C-546/18, *FN and Others v. Übernahmekommission*, 9.9.2021, EU:C:2021:711, para. 46 and case law cited therein.
4. As observed by the current President of the GC, "where the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed ones. Uncertainty must then be balanced against the requirements of the presumption of innocence […]. [T]his balance is struck by relying on legal concepts, such as the burden of proof"; Marc van der Woude, *Judicial Control in Complex Economic Matters*, Journal of European Competition Law and Practice Volume 10, Issue 7, 415-423 (2019).
5. *See*, *e.g.*, case of A. *Menarini Diagnostics SRL v. Italy*, ECHR:2011:0927JUD004350908 and case C-510/11P, *Kone*, 24.10.2013, EU:C:2013:696, para. 22.

2.2 Contributing to a Stable, Consistent and Predictable Legal Framework

The rule of law also requires legal certainty; to play by the rulebook, one needs to know what the rules are. This is a major concern for private practitioners and for our clients. As much as we might enjoy the dynamic nature of competition law and the case-by-case discussion, we need to build on a common and stable analytical framework that we can anticipate.

This is particularly important in a context where companies are required to self-assess their conduct and can be subject to multi-billion-euro fines and to very intrusive remedies. This is also a concern for the Commission, a repeat player that needs to base its decisions on a clear and established analytical framework.[6] It is of course desirable for the law to move and evolve but, in this area, wide pendulum swings do not benefit anyone, certainly not the public interest.

When it comes to predictability, it is remarkable that after many decades of EU competition law enforcement we continue to debate questions such as, what is a restriction of competition?;[7] do we need always need to consider a realistic and likely counterfactual?;[8] what is the meaning of "anticompetitive effects" and of "foreclosure"?;[9] does the as-efficient competitor principle apply across the board to the assessment of all unilateral practices or does it only apply to pricing cases?;[10] or what is a significant impediment to effective competition absent dominance?.[11] These are not minor questions, but the very matters that need to be established, as the bottom line, in any given case.

Against this background, and because Articles 101 and 102, like the merger rules, "are drawn up using imprecise legal concepts,"[12] a key role of the Courts is to provide guidance about meaning of these and other concepts and, importantly, about the methodology to inquire about them.

At the same time, however, we also need to be realistic. We lawyers expect the Courts to state what the law is, but we often fail to realize that the Courts do not always enjoy this possibility. Courts are subject to their own constraints: they are generally called upon to decide on specific cases, based on arguments raised by the parties, and they cannot substitute their own assessment for that of the institution at issue, but only

6. On the relevance of the Commission's role as a repeat player in competition litigation *see, generally*, Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press 2018).
7. Pablo Ibáñez Colomo & Alfonso Lamadrid de Pablo, *On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know,* Damien Gerard, Massimo Merola and Bernd Meyring (eds.), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017).
8. Case T-612/17, *Google and Alphabet v. Commission,* 10.11.2021, EU:T:2021:763, para. 378.
9. Pablo Ibáñez Colomo, *Anticompetitive Effects in EU Competition Law*, Journal of Competition Law & Economics, Volume 17, Issue 2, 309-363 (2021).
10. Assimakis Komninos, *Practical Thoughts of a 'Consumer' of the EU Courts' Judicial Review 'Services'*, EU Law Live (October 5, 2022), https://eulawlive.com/competition-corner/practical-thoughts-of-a-consumer-of-the-eu-courts-judicial-review-services-by-assimakis-komninos/#.
11. Case C-376/20 P, *Commission v. CK Telecoms UK Investments* (pending).
12. Case T-167/08, *Microsoft v. European Commission*, 27.6.2012, EU:T:2012:323, para. 91.

review the legality of a given act. Admittedly, the CJ does enjoy more freedom in the context of preliminary rulings but, even then, it is somewhat constrained by the questions and the factual framework provided by the referring Court.

2.3 Balancing the Need for Effective Enforcement with Effective Constrains to Administrative Discretion

Courts do not only need to protect general principles of law and fundamental rights and lay down a stable and predictable framework, they also have the complex duty of doing this while not getting in the way of effective enforcement and of the way of protecting a system of "free and undistorted competition" as foreseen in the Treaties. The application of the law must not be arbitrary, discretional and based on mere hypothesis, but constraints to administrative action need to be reasonable.

In my view, the standard of judicial review applied by the EU Courts already factors in this trade off. The Commission enjoys no discretion to establish the law or the facts, but it does enjoy discretion as to priorities and policy choices,[13] and it has, traditionally, enjoyed a generous margin of appreciation when it comes to complex economic assessments.[14] What is interesting in this regard, however, is not what Courts say (i.e., how the standard of review is formulated), but what the Courts actually do.[15] This is discussed below.

3 THE PERFORMANCE OF THE EU COURTS IN THE FIELD OF COMPETITION LAW

3.1 Have the EU Courts Preserved the Rule of Law and the Legitimacy of the EU Competition Enforcement System?

A historical complaint from the bar is that the Courts have been excessively deferential to the Commission.[16] Over the years, prominent practitioners even argued that the

13. The Commission may nonetheless, by adopting rules of conduct designed to produce external effects, such as guidelines, impose a limit on the exercise of its discretion; those rules may produce legal effects and bind the Commission, as departing from them would breach general principles of law, such as equal treatment of the protection of legitimate expectations. *See*, *e.g.*, joined cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, *Dansk Rorindustri,* 28.6.2005, EU:C:2005:408, paras. 209-211, case C-167/04, *JCB Service v. Commission*, 21.9.2006, EU:C:2006:594, paras. 207-208, or case C-226/11, *Expedia*, 13.12.2012, EU:C:2012:795, para. 28.
14. *See* Marc van der Woude, *Judicial Control in Complex Economic Matters*, Journal of European Competition Law and Practice Volume 10, Issue 7, 415-423 (2019); Marc Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, Journal of European Competition Law & Practice, Volume 2, Issue 4, 295-314 (2011).
15. *See also* Fernando Castillo de la Torre & Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Elgar Competition Law and Practice 2017), p. 299.
16. *See*, *e.g.*, Damien Geradin & Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, TILEC Discussion Paper No. 2011-008 (2010), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1698342.

standard of marginal judicial review could compromise the very legality of the institutional set up under which the Commission both investigates and decides cases.[17]

In my view, however, the Courts have generally been up to the task. This does not have to do with numbers or with the outcome of cases, but rather with the scope and the intensity of the Court's scrutiny. Over the years, the EU Courts have (i) recalibrated the standard of judicial review, marginalizing marginal review;[18] (ii) placed a renewed emphasis on the right allocation of the burden of proof[19] and the presumption of innocence;[20] and (iii) they have been acutely aware of the need to protect fundamental rights, including rights of defence.[21]

The recent intensification of judicial review is particularly important at a time when the role of the law in competition law enforcement has diminished significantly. Indeed, recent enforcement has privileged cooperation procedures (including commitments, leniency, cartel settlements and cooperation in non-cartel cases)[22] which, in turn, has reduced the role of the law in administrative enforcement, and has also largely reduced the number of direct actions in competition cases reaching the EU Courts.[23] This move away from legal standards, and the shift from the analysis of

17. *See*, for instance, Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, European Law Review, Volume 34, Issue 6, 817-843 (2009); Ian S. Forrester, *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, in Claus-Dieter Ehlermann & Mel Marquis eds., *European Competition Law Annual 2009: Evaluation of Evidence and Its Judicial Review in Competition Cases* (Hart Publishing 2011). Ivo Van Bael, *Due Process in Competition Proceedings*, 357-363 (Kluwer 2011), and Donald Slater, Sébastien Thomas and Denis Waelbroeck, *Competition Law Proceedings Before the* [EC] *and the Right to a Fair Trial: No Need for Reform?*, The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08 (2008).
18. Case C-272/09 P, *KME Germany and Others v. Commission*, 8.12.2011, EU:C:2011:810, para. 106 and case C-386/10 P, *Chalkor v. Commission*, 8.12.2011, EU:C:2011:815, para. 67.
19. *See*, *e.g.*, case C-67/13 P, *Groupement des cartes bancaires (CB) v. European Commission*, 11.9.2014, EU:C:2014:2204; and case C-413/14 P, *Intel v. Commission*, 6.9.2017, EU:C:2017:632, and, in the field of State aid, T-101/17, *Apple Distribution International v. Commission*, 27.7.2018, EU:T:2018:505, and case C-300/16 P, *Commission v. Frucona Košice Frucona*, 20.9.2017, EU:C:2017:706.
20. *See*, *e.g.*, case C-457/10 P, *AstraZeneca v. Commission*, 6.12.2012, EU:C:2012:770, paras. 48-49, 199; case T-180/15, *Icap and Others v. Commission*, 10.11.2017, EU:T:2017:795; and case T-286/09 RENV, *Intel Corporation v. Commission*, 26.1.2022, EU:T:2022:19, paras. 160-162, and case T-235/18, *Qualcomm Inc v. Commission*, 28.1.2021, EU:T:2022:358, para. 192.
21. *See* case C-117/20, *bpost*, 22.3.2022, EU:C:2022:202 and case C-151/20, *Nordzucker and Others*, 22.3.2022, EU:C:2022:203 (regarding the principle of *ne bis in idem*), case T-249/17, *Casino, Guichard-Perrachon and AMC v. Commission*, 5.10.2020, EU:T:2020:458 (on the right to private domicile), the Order of the President of the GC in *Facebook Ireland*, T-451/20 R, *Meta Platforms Ireland v. Commission*, 29.10.2020, EU:T:2020:515 (in relation to the right to privacy), or case T-791/19, *Sped-Pro v. Commission*, 9.2.2022, EU:T:2022:67 (in relation to the right to effective judicial protection).
22. For an overview of all competition decisions adopted since the entry into force of Regulation 1/2003, *see* Wouter P.J. Wils, *Regulation 1/2003: An Assessment after Twenty Years*, World Competition, Volume 46, Issue, 1, Annex A (2023); accessible at http://ssrn.com/author=456087.
23. *See*, *e.g.*, L. Crofts, *Increase in EU Settlements Risks Sidelining Courts, Victims, Wahl Says* (Mlex 2014), citing then Advocate General Wahl's view that this trend "risks marginalizing courts and antitrust victims by reaching too many settlements with companies suspected of abusing their market clout […]. The increasing use of 'commitments' (…) means that the policymaker is escaping judicial scrutiny"; *see also* Melchior Wathelet, *Commitment Decisions and the Paucity*

conduct and to the design of remedies has arguably reached a paroxysm with the adoption of the Digital Markets Act (DMA).[24]

The EU Courts have so far stepped up to the challenge posed by this paradigm shift, paying particular attention to the new procedural questions that these cases entail regarding, for example, the principle of presumption of innocence,[25] third parties' rights and the principle of proportionality,[26] or the need to balance an undertaking's rights of defence with other considerations.[27]

The Courts' emphasis on the need for negotiated or cooperation procedures to strictly abide to general principles of law and rights of defense is what ensures the legitimacy and soundness of this new breed of competition cases. The same will be true for the DMA; creating a regulatory system from scratch is a challenge, and the Courts will also face the challenge of keeping the law relevant and ensuring that this system is compatible with general principles of law.

3.2 Have the EU Courts Contributed to a Stable and Predictable Legal Framework?

Absolute predictability may not be a reasonable aspiration, but it is probably fair to say that, in recent years, there has been a meaningful evolution in our understanding of some key notions.

The EU Courts have provided us with a clearer framework to understand, for example, what is and what is not a restriction by object,[28] the criteria that are relevant to assess anticompetitive effects,[29] or how to assess selectivity in State aid cases.[30]

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of Precedent, Journal of European Competition Law & Practice, Volume 6, Issue 8, 553-555 (2015) and Ryan Stones, *Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law*, Yearbook of European Law, 361-399 (2019).

24. Regulation (EU) No. 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022. The DMA establishes a new regulatory framework to address certain practices, many of which were previously addressed under competition law. Under this new regulatory framework, legal principles and rules governing market definition, market power, counterfactuals, effects, pro-competitive effects, efficiencies and incentives will no longer play a role; enforcement will eminently focus on the proportionality of remedies.
25. Case T-180/15, *Icap and Others v. Commission*, 10.11.2017, EU:T:2017:795; and case C-440/19 P, *Pometon v. Commission*, 18.3.2021, EU:C:2021:214.
26. Case C-132/19 P, *Groupe Canal + v. Commission*, 9.12.2020, EU:C:2020:1007.
27. Case T-79/19 R, *Lantmännen and Lantmännen Agroetanol v. Commission*, 2.4.2019, EU:T:2019:212.
28. Case C-67/13 P, *Groupement des cartes bancaires (CB) v. European Commission*, 11.9.2014, EU:C:2014:2204, and case C-228/18, *Budapest Bank and Others*, 2.4.2020, EU:C:2020:265, and C-307/18, *Generics (UK) and Others*, 30.1.2020, EU:C:2020:52.
29. Case C-23/14, *Post Danmark*, 6.10.2015, EU:C:2015:651 and C-413/14 P, *Intel v. Commission*, 6.9.2017, EU:C:2017:632.
30. Case C-51/19 P, *World Duty Free Group and Kingdom of Spain v. European Commission*, 6.10.2021, EU:C:2021:793, and case C-53/19 P, *Banco Santander and Santusa v. Commission*, 6.10.2021, EU:C:2021:795, case C-885/19 P, *Fiat Chrysler Finance Europe v. Commission*, 8.11.2022, EU:C:2022:859.

There certainly remains room for improvement in the quest to have a more systematic and internally consistent doctrine, perhaps particularly in the field of Article 102 Treaty on the Functioning of the European Union (TFEU), where fundamental issues remain in dispute.[31] At the same time, however, one needs to be realistic, and prudent; progress is more often than not incremental; it takes place case by case; and that is, for the most part, a good thing. "Legal change may seem slow; *eppur si muove*."[32]

3.3 Have the EU Courts Succeeded at Constraining Administrative Discretion While Enabling Effective Enforcement?

Over the years, I have often heard practitioners complain that litigating against the Commission before the EU Courts is like playing a match where one starts losing 2-0 in an away game. There was even an assumption that it was impossible to win certain cases,[33] and that there was no point in trying to litigate them. That perception may also have contributed to the surge of commitment decisions in recent years, particularly in abuse of dominance cases. Some argued, critically, that this was not a problem of judicial deference, but rather had to do with the inadequate normative legal standard applied by the EU Courts.[34]

31. Further clarity on those fundamental questions is, however, expected to result from the CJ's forthcoming judgments on several cases that are pending at the time of writing, including C-240/22 P, *Commission v. Intel Corporation*, case C-48/22 P, *Google and Alphabet v. Commission (Google Shopping)*, and case C-738/22 P, *Google and Alphabet v. Commission* (*Google Android*). Given my direct involvement in the latter two cases, I will not engage in any substantive discussion of the questions at issue in these matters.
32. Pablo Ibáñez Colomo, *Judicial Review and Article 102 TFEU: Undue Deference to the Commission? Not So Fast,* Chillin' Competition Blog (May 11, 2018), https://chillingcompetition.com/2018/05/11/judicial-review-and-article-102-tfeu-undue-deference-to-the-commission-not-so-fast/.
33. *See, e.g.*, Christian Ahlborn & David S. Evans, *The Microsoft Judgment and Its Implications for Competition Policy Towards Dominant Firms in Europe*, Antitrust Law Journal, Volume 75, Issue 3, 887-932 (2009), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115867, p. 2 ("the Microsoft Judgment confirms a trend which has been so long standing that it almost has become a law itself: the Commission always wins Article [102] on appeal as far as points of substance are concerned. During the last 20 years, the Commission has not lost a single Article [102] on substance, while the failure rate of the Commission on points of resistance was in the region on 25%").
34. Damien Geradin & Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, TILEC Discussion Paper No. 2011-008 (2010), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342, p. 35: "In our opinion, the fact that undertakings challenging Article 102 TFEU decisions of the Commission almost systematically lose before the GC is not due to the fact that the Court would apply weaker standards of review to abuse of dominance cases (judgments such as Microsoft review in excruciating details the challenged Commission decision), but that the normative legal standards relied upon by the GC to assess the compatibility of dominant firm practices with Article 102 TFEU, and the way the GC applies such standards when reviewing a Commission decision, are generally inadequate. … the legal tests developed by the Court of Justice in the field of abuse of dominance are sometimes so strict that they can almost accommodate any decision of the Commission even if it appears poorly in line with elementary economics. In other words, the problem is not one of judicial deference in the degree of control exercised by the GC with respect

Despite having been on the partially losing side on some of those Court cases (at least in the first instance, at the time of writing), and despite occasional frustration or disagreement, I have never shared that view. Some degree of deference might indeed have played a role in certain large-stake case, but my impression is that, generally, the Commission's successful track record before the EU Courts might be better explained by other factors.[35]

In recent times, the EU Courts have, generally, shown their willingness to engage in a thorough review of Commission decisions, also in the relative minority of abuse of dominance cases that have reached them. This has happened in relation to cases that the Commission won and lost. While most of the attention has focused on Commission defeats, arguably because of their exceptional nature, the EU Courts have also made a visible effort to convey an impression of greater thoroughness (both in the context of oral hearings and in the drafting of judgments) in cases where they have endorsed Commission decisions.

The EU Courts have largely responded to calls for more intense judicial review (and to the need to ensure compliance with the standards set by the European Court on Human Rights ("ECtHR") in *Menarini*[36]) by underscoring the need for the Commission to conduct a contextual assessment and satisfy its burden of proof by considering "all the relevant circumstances." The Courts have connected this more demanding review to the *Tetra Laval* standard for the review of complex economic assessment.[37] This was the message emphasized by the CJ in the landmark *Cartes Bancaires*,[38] and *Intel*[39] judgments. This was also the consistent message of a long list of State aid judgments.[40]

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of abuse of dominance decisions, but one of defective rule-making in that the legal standards relied upon by the Court are out of touch with contemporary economics (and even in some cases with basic common sense)."

35. *See also* Fernando Castillo de la Torre & Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Elgar Competition Law and Practice 2017). p. 287; *see also* Heike Schweitzer, *Judicial Review in Competition Law*, Ioannis Liannos & Damien Geradin (eds.), *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar Publishing 2013), pp. 491-538.
36. Case of *A. Menarini Diagnostics SRL v. Italy*, ECHR:2011:0927JUD004350908.
37. Case C-12/03 P, *Commission v. Tetra Laval*, EU:C:2005:87, para. 39 ("evidence must be factually accurate, reliable and consistent, contains all the information which must be taken into account in order to assess a complex situation and be capable of substantiating the conclusions drawn from it"). For a discussion on this "forgotten paragraph," *see* Marc Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, Journal of European Competition Law & Practice, Volume 2, Issue 4, 295-314 (2011).
38. *See* case C-67/13 P, *Groupement des cartes bancaires (CB) v. European Commission*, 11.9.2014, EU:C:2014:2204.
39. Case C-413/14 P, *Intel Corporation v. Commission*, 6.9.2017, EU:C:2017:632.
40. Alfonso Lamadrid de Pablo, *EU Judicial Review: Major Antitrust Implications of Recent State Aid Cases*, Chillin' Competition Blog (March 18, 2019), https://chillingcompetition.com/2019/03/18/eu-judicial-review-major-antitrust-implications-of-recent-state-aid-cases/, and Alfonso Lamadrid de Pablo, *EU Judicial Review: Major Antitrust Implications of Recent State Aid Cases, Part 2 (Real Madrid, Case T-791/16)*, Chillin' Competition Blog (May 28, 2019), https://chillingcompetition.com/2019/05/28/eu-judicial-review-major-antitrust-implications-of-recent-state-aid-cases-part-2-real-madrid-case-t-791-16/. *See also* case T-778/16 and T-892/16, *Apple v. Commission*, 15.7.2020, EU:T:2020:338.

And this is a key point underlying the recent partial annulments *Servier*,[41] *Intel*[42] and *Google Android*[43] as well as the full annulment in *Qualcomm*.[44]

This "contextual analysis"[45] or "process-oriented" review[46] would appear to be a way for the Courts to reflect the idea that administrative enforcers can enjoy some leeway, but not an unfettered one; or rather, that this leeway comes with obligations. The Courts "rarely disagree openly with the Commission's assessment (although they occasionally do)" and, instead, verify whether the Commission's analysis had regard to all the relevant elements and circumstances.[47] Indeed, while the Courts continue to defer to the Commission's assessment on substance (at least most of the time), they condition this trust on the Commission demonstrating that it has not avoided any relevant issues and that its assessment of the relevant economic and legal context is sufficiently complete and impartial.

Following recent annulments of Commission decisions, this sort of judicial review has been criticized as "ticking boxes formalism" imposing an excessive burden on the Commission.[48] In my view, however, this sort of judicial review should rather be welcome by enforcers. The burden of conducting a complete analysis would not appear to be unreasonable, particularly when, in exchange, one can enjoy an appreciable leeway on substance. In my view, the analysis required by the Courts may indeed require greater care, but it is not liable of endangering enforcement. Provided that the Commission covers all bases, it still has a very high likelihood of winning any given case.

In my view, this kind of review is helpful when reasonable. Admittedly, not every error in a given reasoning is sufficient to invalidate an entire finding, conclusion or case. At the same time, however, there are certain elements that an enforcer must absolutely consider, the omission of which will necessarily taint its analysis. For example, as the CJ and the GC have arguably made clear, it is not possible to determine whether a given practice is capable of resulting in foreclosure without first inquiring about its coverage.[49]

41. Case T-691/14, *Servier and Others v. Commission*, 12.12.2018, EU:T:2018:922 (pending appeal).
42. Case T-286/09 RENV, *Intel Corporation v. Commission*, 26.1.2022, EU:T:2022:19 (pending appeal).
43. Case T-604/18, *Alphabet and Google v. Commission*, 14.9.2022, EU:T:2022:541 (pending appeal).
44. Case T-235/18, *Qualcomm Inc v. Commission*, 28.1.2021, EU:T:2022:358, paras. 477, 480, 483.
45. *See* Marc van der Woude, *Judicial Control in Complex Economic Matters*, Journal of European Competition Law and Practice, Volume 10, Issue 7, 415-423 (2019).
46. Koen Lenaerts, *The European Court of Justice and Process-Oriented Review*, College of Europe, Research Papers in Law (2012).
47. *See* Fernando Castillo de la Torre, *On Boxes and Paradoxes: Form and Substance in Judicial Review of Competition Decisions*, EU Law Live (September 29, 2022), https://eulawlive.com/competition-corner/on-boxes-and-paradoxes-form-and-substance-in-judicial-review-of-competition-decisions-by-fernando-castillo-de-la-torre/.
48. *Ibid*.
49. *See*, among others, case C-413/14 P, *Intel Corporation v. Commission*, 6.9.2017, EU:C:2017:632, para. 139; case C-23/14, *Post Danmark II*, 6.10.2015, EU:C:2015:651, paras. 38-46; case T-65/98, *Van den Bergh Foods*, 23.10.2003, EU:T:2003:281, para. 83; case C-234/89, *Delimitis*, 28.2.1991 EU:C:1991:91, para. 19; case T-286/09 RENV, *Intel Corporation v. Commission*, 26.1.2022, EU:T:2022:19, paras. 498, 499.

But this contextual review is not sufficient. The fact that a given analysis may seem complete does not necessarily mean that it is legally correct (although it is probably more likely to be correct). Similarly, more thorough judicial review is not necessarily better judicial review (although it is also more likely to produce better outcomes). For example, a seemingly rigorous analysis of foreclosure effects may not have great value if the enforcer relies on a wrong legal notion of "foreclosure."

The role of the Courts is indeed not limited to ascertaining that the Commission ticks all boxes; as discussed above, the Commission has no discretion on points of law, and it is for the Courts to verify that the Commission's application of the law (and not only the appraisal of the relevant facts or context) is correct.

4 NEW GENERATION CHALLENGES FOR THE EU COURTS

4.1 Preserving the Rule of Law and Legitimacy of the Enforcement System

Challenges to the rule of law, are unfortunately, a sign of our times, and the EU has a responsibility to uphold it, to set the global standard, and to not compromise on it, no matter the circumstances.

There may be a risk of believing that challenges to the rule of law may only originate from "the bad guys." One may, at times, feel that the law places uncomfortable constraints that ties our hands when facing certain problems. This may result in the temptation to avoid legal constraints regarded as inconvenient to the pursuit of a certain view of the public interest. That is natural; and that is why we need to remain vigilant against it.

Proposals to reverse the burden of proof in a *quasi-criminal* context,[50] disregard due process requirements, shield certain decisions from judicial review or "take antitrust away from the Courts"[51] because "they are barriers to progress"[52] are, in my view, some of the temptations that we should avoid at all costs. The law is about constraints, and constraints are uncomfortable; but those constraints are precisely "the wise restraints that make men free."[53] There are a few but vital red lines that cannot be crossed.

50. *See* Alfonso Lamadrid de Pablo, *Meeting and Shifting: The Burden of Proof*, Chillin' Competition Blog (October 31, 2019), https://chillingcompetition.com/2019/10/31/meeting-and-shifting-the-burden-of-proof-in-digital-and-beyond/.
51. Ganesh Sitaraman, *Taking Antitrust Away from the Courts*, Vanderbilt Law School Faculty Publications (September 2018), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2055&context=faculty-publications.
52. Ganesh Sitaraman, *Don't Trust the Courts to Fight Monopolies: They Are a Barrier to Progress*, The Guardian (October 26, 2018), https://www.theguardian.com/commentisfree/2018/oct/26/antitrust-monopolies-courts-concentration.
53. John MacArthur Maguire, LL.B. Harvard 1911, Professor of Law 1923-1957, Royall Professor of Law 1950-1957, composed this declaration, which has been used by Harvard Presidents when conferring degrees at Commencement since the late 1930s: "You are ready to aid in the shaping and application of those wise restraints that make men free." The quotation is enshrined on a plaque that hangs in the Harvard Law School Library's main stairwell.

4.2 Maintaining Predictability and Consistency in an Increasingly Fragmented Landscape

A major challenge for the future will be to offer a stable EU law framework in an increasingly decentralized but also fragmented landscape. This is particularly important at a time when much of what we knew is in dispute, when several Member States are experimenting with new theories, and when politicians are increasingly interested in competition law and in the introduction of sovereignty-related concerns.

While some degree of experimentation is acceptable, even desirable, major substantive divergences on the interpretation of the competition rules threaten the very idea of the internal market. The current enforcement system incorporates certain safeguards, but these would not appear to be working properly.[54] The EU Courts are much better placed than the Commission to address this challenge, for there may be a certain tension between an enforcers' desire to advance a certain interpretation of the law and its duty to ensure the uniform and consistent interpretation of the law.[55]

A second fundamental challenge has to do with consistency. The EU Courts have the responsibility of ensuring consistency across competition law provisions, across different types of practices, across time, between Courts (also between preliminary rulings and judgments in annulment cases) and even across Chambers of a same Court.

4.3 Contributing to a Balanced and Workable Framework: On Evidence and Speed

The discussion above has focused mostly on the law, but the outcome of cases ultimately hinges on the application of the law to a set of facts and evidence. Evidential requirements on both the Commission and private parties need to be realistic and proportionate to the information that is available to every party, depending on their means and powers of investigation at their disposal.

54. Alfonso Lamadrid de Pablo, *Against the Fragmentation of EU Competition Law: A Proposal for Reform EU Judicial Review: Major Antitrust Implications of Recent State Aid Cases*, Chillin' Competition Blog (May 31, 2021), https://chillingcompetition.com/2021/05/31/against-the-fragmentation-of-eu-competition-law-a-proposal-for-reform/. First, national competition authorities' obligation to apply EU law in parallel to national law when a given practice affects trade between Member States may not have been strictly complied with. Second, the obligation not to prohibit under national law conduct that would not be prohibited under EU law is diluted by the possibility for Member States to apply stricter national laws in relation to unilateral conduct pursuant to Article 3(2) of Regulation 1/2003. Third, the possibility for the Commission to comment on national draft decisions under Article 11(4) of Regulation 1/2003 has limited effects given that the Commission's feedback is generally oral, that it is always cautious and confidential, and that it may be influenced by the Commission's own policy priorities. Fourth, the possibly for the Commission to deprive national competition authorities from their competence pursuant to Article 11(6) of Regulation 1/2003 has practically not been used in the past 18 years. Fifth, to the extent that national competition authorities are not "Courts," they are prevented from referring questions to the CJ under the preliminary reference procedure (*see* C-462/19, *Anesco e.a*, 16.9.2020, EU:C:2020:715).
55. *See* Marc van der Woude, *The Preliminary Ruling Procedure: In Need of Rethinking?*, 17th GCLC Annual Conference, College of Europe (2022).

In recent years, the EU Courts have, in my view, moved the case law in the right direction. The Courts have clarified that the notion of information "available" to the Commission "includes that which seemed relevant to the assessment to be carried out in accordance with the case-law … and which could have been obtained, upon request by the Commission, during the administrative procedure."[56] In line with the case law of the ECtHR,[57] they have also identified the circumstances in which the Commission may be required to gather evidence not available to undertakings.[58]

At the same time, the Courts have also recently clarified that it is not sufficient for undertakings to raise the mere possibility that a circumstance might affect the value of the evidence relied on by the Commission, except in cases where such proof could not be provided by the undertaking itself. Indeed, when possible, it is for the undertakings to prove the existence of that circumstance and to show how it calls into question the probative value of other evidence.[59]

Altogether, these rules result in a balanced outcome that adequately combines accuracy and administrability in line with the "proof-proximity" principle.[60]

Finally, external observers commenting on the Court's work frequently complain that it takes too long to find out what the law is; parties to Court cases often do too. My personal experience includes several sagas of cases that have lived (moving up and down the Commission, the GC and the CJ) for over 10 years. This is not ideal but, once again, criticism may often be overstated. Going through all the motions of a case, giving all parties sufficient time to develop their arguments, thoroughly reviewing them, and writing (and translating) increasingly long and detailed judgments inevitably takes time. In some cases, moreover, some delay may allow Courts to decide cases with greater distance or less pressure and, in areas of scientific uncertainty, it may give time for consensus to emerge.[61]

In recent years, in any case, the EU Courts have made a significant effort to reduce the existing backlog, cut down the average duration of cases, and ensure an efficient management of particularly burdensome cases. The reform, and effective duplication of the GC, was in part meant to alleviate this problem (perhaps contributing to other challenges, including in relation to ensuring the consistency of judgments). Remarkably, in recent years the EU Courts have even awarded damages in cases where judicial proceedings took too long.[62]

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56. *See* case C-300/16 P, *Frucona Košice*, 20.9.2017, EU:C:2017:706, paras. 71 and 80-81. *See also* case C-579/16 P, *FIH Holding*, 6.3.2018, EU:C:2018:159, paras. 46-47.
57. *See Vidal v. Belgium [C]*, no. 12351/86, ECHR 1992, *Suominen v. Finland*, no. 37801/97, ECHR 2003.
58. *See* case T-286/09, *Intel v. Commission*, 12.6.2014, EU:T:2014:547, paras. 374-382 (set aside on other grounds).
59. *See* case T-286/09 RENV, *Intel Corporation v. Commission*, 26.1.2022, EU:T:2022:19, para. 166.
60. *See also* Cristina Volpin, *The Ball Is in Your Court: Evidential Burden of Proof and Proof-Proximity Principle in EU Competition Law*, Common Market Law Review, Volume 51, Issue 4, 1159-1185 (2014) (ISSN 0165-0750), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906724 and Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement* (Hart Publishing 2020).
61. *See also* Rebecca Haw, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, Boston College Law Review, Volume 55 (2014).
62. *See*, *e.g.*, joined cases C-138/17 P and C-146/17 P, *Gascogne v. Commission*, 13.12.2018, EU:C:2018:1013.

While there may still be a certain margin for shortening the duration of proceedings and reducing the number of cases sent back to the Commission or to the GC, doing things well, and the quality of judicial review, remains more important than the speed of judicial review.[63]

5 CONCLUSION

The EU Courts face the difficult task of preserving the legitimacy of the EU competition enforcement system, ensuring the predictability, stability, and consistency of competition law, and balancing effective enforcement with the need for constraints to administrative discretion.

In recent years, the GC and the CJ have had to fulfill these missions while reviewing fewer, different and increasingly more complex competition cases. At a time when competition law is in flux and, paradoxically, as the number of competition appeals before the EU Courts continue to decrease, the role of the EU Courts is arguably more important than ever.

The Commission's remarkable litigation track record has historically drawn criticism from the bar regarding an alleged excessive deference on the part of the EU Courts. More recently, a minority of exceptional annulments and partial annulments have attracted the opposite criticism targeting alleged excessive demands on the part of the EU Courts. This may be an additional signal that judicial review is accomplishing its mission.

In a properly functioning system, administrative authorities should arguably perceive that judicial review is demanding and uncomfortable, and they should do their best to meet those standards. As a result of that perception, and of those ensuing efforts, in a properly functioning system administrative defeats should be the exception.

This contribution has sought to explain, however, that it is misleading to assess judicial review in terms of victories or defeats. The quality of judicial review is better assessed with other benchmarks, and it is determined by factors that do not always have to do with standards of review (including, among others, the pleas, evidence and arguments raised by parties, and the mechanisms for the selection of judges).

This contribution also submits that, while helpful, more thorough judicial review does not necessarily equal better judicial review. Process-oriented review may be necessary to counterbalance the Commission's margin of appreciation in relation to complex economic assessments (particularly in areas where the presumption of innocence is of relevance), but it is not sufficient.

63. Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and others v. Commission*, 15.10.2002, EU:C:2002:582 para. 234. "the aim of promptness—which the Commission, at the stage of the administrative procedure, and the Community judicature, at the stage of judicial proceedings, must seek to achieve—must not adversely affect the efforts made by each institution to establish fully the facts at issue, to provide the parties with every opportunity to produce evidence and submit their observations, and to reach a decision only after close consideration of the existence of infringements and of the penalties."

Beyond making sure that the Commission has reviewed "all the relevant circumstances" of a given case, the primary task of the Courts is to interpret the law, to correct errors of law, and to safeguard the rule of law and fundamental rights. The EU Courts have overall been up to the task, but they will continue to be tested by new and ever more complex cases and challenges.