DISCRETION AND JUDICIAL REVIEW IN MERGER CONTROL[1] . (SOME LESSONS LEARNED FROM THE RISK MANAGEMENT ADMINISTRATIVE PROCEDURES).

Paper presented to the Third Biennial conference of the Standing Group on Regulatory Governance of the ECPR and Regulatory Network, June 17-19 2010, University College Dublin

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Summary

EU merger regulations rely on the "significant impediment to effective competition" substantive test. However, the clause that incorporates these tests is not clear regarding implementation criteria. As a result, in many cases assessment and decisions about Mergers and Acquisitions are adopted in an uncertain legal context.

Often this situation is justified for two reasons: first, the need to incorporate the economic complexity into the decision; and second, the prospective nature of merger assessment.

Nevertheless, from the perspective of Law many questions arise. Prospective decisions are unsuitable to deal with classic theories of regulation and judicial review. As we explain in this paper, the European Commission adopts its decision based on the foreseeable behaviour of an undertaking. European Courts recognize the Commission's ample discretion to assess merger on a case-by-case basis and limit the scope of judicial review. As a result, commentators have criticized the EC merger regulation.

In this paper these issues are considered. In the first part, we study the clause that incorporates the substantive test in EC merger regulation. In the second we deal with the scope of judicial review of prospective decisions and appropriate standard of proof. Next, we argue that reform of EC merger administrative procedures will reduce the scope of discretionary authority to reasonable levels and improve the decision-making process. Finally, we suggest tools developed in the risk regulation literature to improve legitimacy and ensure rationality of the European Commission's decisions.

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[1] This research was funded by the Spanish Ministry of Science and Innovation. Research Project DER2008-04154/JURI, "Governance Procedures of Risk Regulation".

[2] This research is being developed in the framework of the Research Project "Frontiers and Culture". Institute of Culture and Society. University of Navarra.

THE SUBSTANTIVE TEST OF MERGER REGULATION

EU merger regulation rely on the substantive test. On the basis of this standard, the effects of mergers are analyzed and it is determined whether compatibility or incompatibility should be declared within the common market.

The Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, adapted the «sparsely worded» significant impediment to effective competition test. Its meager legislative density is nothing but an affirmation of the impossibility of the law to reach all areas needing regulation. As Scmidt-Assman reminds us, one cannot ignore that all legalization processes of a specific reality or sector must be performed with the consciousness that the law as an instrument of management has a limited capacity (SCHMIDT-ASSMANN, 2003: 64).

In addition to this limitation, another extremely important one must be added: the prospective nature of the merger decision. The analysis performed by the European Commission focuses on the possible future effects of mergers on competition. This type of analysis, categorized as prognostive decisions, poses a new perspective in the application of regulations which differs from the previously-used model (factual conditions and legal consequences), at least in two aspects. Prognosis is the prediction of a future state. This, from a temporal perspective implies that it be fundamentally future-focused, as opposed to the model which emphasizes the past or present seeking to establish a relation between cause and effect (OSSENBÜHL, 1995: 198; TETTINGER, 1982: 421-3).

Furthermore, with respect to a methodological perspective, a prognosis cannot and should not limit itself to analyzing actions and legal interpretations. These features must necessarily be focused on the future. The prognosis or predictive decision implies assessment obtained coordinating the previously known factual conditions (i.e, the basis for the prognosis) and available experience mediating with the foreseeable or realistic result of a future state of things.

Although prognosis-based decisions should be guided by previously established rules and legal criteria, these should be materialized and optimized along with other parameters in view of the future scenario. The structure of these rules and legal criteria, however, is characteristically scarce in its «regulatory density». The method that best adapts to an adequate application of these rules is not one based on the past or present but instead one which applies the deliberation of legally-protected rights or interests that come into conflict in the securing of the foreseen objectives in the regulatory program (HOPPE, 1974: 641; STOBER, 1992: 226).

In such cases the law does not identify legal consequences. As a general rule, it simply limits itself to establishing the objectives as well as corroborating the interests and expectations that must be contemplated (BULLINGER, 1987: 908-9). As a result of this, the margins for governmental administrative action are not subjected to many limitations. The rule (with ends-focused structure) is open to many more possible resolutions and thus more possibilities for the integration and materialization of a future reality via prospective procedures (HOPPE, 1993: 240-1).

To summarize, the substantive test imposes a finality (authorizing operations that do not significantly will result in anticompetitive effects and prohibiting those that do),

but at the same time grants government the possibility of choosing which means are best suited to achieve the desired results through a deliberative process.

This specific margin of discretion finds its correlate in the limited scope of judicial review. It is for this reason that interpretation of EC Merger Regulation must be viewed within the framework of discretionary powers since this is an aspect that does not involve all of the process of adjudication.

JUDICIAL REVIEW OF SUBSTANTIVE TEST OF MERGER REGULATION

In European Union Law the scope of judicial review is similar to that of French Law that differentiates the degree of intensity to which decisions are reviewed. In the case of Competitive Law, the Court of Justice of the European Union usually distinguish between questions of fact and those related to the law, which are under comprehensive or full review (review of legality, art. 230, EC Treaty) and assessments, especially of a complex nature, subject to restricted review under the test of manifest error (CHITI, 2002: 109-10).

Ever since the merger control was first established various decisions have been subjected to judicial review. Nonetheless, in the majority of these cases the Court of Justice of the EU has focused its analysis on procedural aspects. Yet for the past few years there exists a growing tendency on the part of the EU's Courts to review the substantive aspects of merger decisions made by the Commission. The *leading case* was established by the Kali und Salz Case in which for the first time the Court of Justice analyzed the economic arguments used by the Commission to review the effects of

mergers in the common market. This decision was later followed by other cases (i.e, case T-251/00, Lagardère SCA; T-119/02, Royal Philips; T-464/04, Impala). From these it is possible to deduct the doctrine upheld by the Court of Justice and the Court of First Instance (CFI) on the extent of judicial control over substantive aspects in cases of mergers. This paper will focus exclusively on reviewing those economically complex assessments.

JUDICIAL REVIEW OF ECONOMIC ASSESSMENTS: STATE OF THE ART

To begin with, it must be said that the scope of judicial review in merger control serves to reflect the doctrine maintained since 1966 by the Court of Justice in cases like Consten, Grundig, or Roquette (NICHOLSON, Malcolm, CARDELL, Sarah and MCKENNA, Bronagh, 2005: 123). In the case of merger regulation, the *leading case* would be Kali und Salz. In this case the Court of Justice recognized that legislation conferred the Commission with "certain discretionary faculties, especially with respect to reviews involving economic order". The conclusion drawn by the Court is that review exercised by EC Judges must take into account the margin of appreciation based on the economic assessment involving merger regulation (par. 223). The Court, therefore, will review a decision basing itself on mabifest error of assessment, analyzing whether economic appraisals were correctly verified by proven facts. This doctrine would be reaffirmed by the TPI in later sentences, like Gencor, Endemol or Kesko (case T-22/97). In these cases judicial control centered on determining that the Commission did not exceed the limits established to its discretionary powers or, the absence of manifest error of assessment and of any misuse of power.

This situation has been altered after the Airtours, Schneider, and Tetra Laval sentences in which the Court has intensified its control with respect to factual legal elements. This jurisprudential change has meant progress in terms of factual review in which the Court traditionally demonstrated an almost complete deference. To an extent, it has also intensified the review of legal concepts. Although little has been clarified in terms of the extent of margin of discretion that corresponds to the Commission itself.

Nonetheless, on the premise of the prospective nature of the decision, we believe that it is possible to go one step further and determine at which point the Commission's discretionary powers cannot be waivered. This can be achieved by undertaking an analysis of the European Union Courts' limitations when reviewing the complex assessment made by the Commission.

THE PROHIBITION OF SUBSTITUTING COMPLEX ASSESSMENT MADE BY THE COMMISSION AS GENERAL LIMITATIONS OF JUDICIAL REVIEW

As a matter of principle, in the EU the judge is limited in terms of the scope of the decision taken. It is prohibited that he/she substitute the interpretations made by the administrative authorities. This same doctrine has been assumed by the European Community Courts which have established through their jurisprudence, the limits of judicial control in the substitution of economic interpretations made by the Commission.

As the Court of Justice indicated in the Matra case (Case C-225/91) it is a limit that turns out to be inherent to the Action of Annulment in which only the Court of Justice can verify if the decision being challenged infringes one of the grounds for

annulment defined in article 230 of the EC Treaty (currently art. 173 of the Lisbon Treaty). This limitation is a particularly determining factor in those cases in which a european administrative authorities must make economic assessments or implement policies of a political/economic nature, as the European Courts has been establishing since the Westzucker or Roquette cases.

In Westzucker (Case 57-72), the Court of Justice had to scrutinise the regulatory powers of the Commission in relation to the sugar market. The Court of Justice of the European Union established that the Commission was conferred a significant margin of discretion which it should implement within the framework of economic policy. Thus, in the judicial review of the Commission's decisions, the Court could not substitute the Commission's appraisals or assessments with its own. This doctrine would be confirmed in the Roquette case also within the framework of common agricultural policy. In this case, the Court of Justice established that:

"when the implementation by the council of the agricultural policy of the community involves the need to evaluate a complex economic situation , the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as , in particular , it is open to the council to rely if necessary on general findings . in reviewing the exercise of such a power the court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion" (Case 138/79, Roquette, par. 25).

The doctrine established in the Westzucker and Roquette cases has been repeated by the European union Courts in various sectors where there exists an important economic or technical component and has thus required the concept of substitution.

With respect to the first, the European Courts have repeatedly sustained that it is not the role of the CFI to substitute complex interpretations of an economic nature when reviewing decisions related to state aids (i.e, case T-380/94 Aiuffass; T-149/95, Ducros; T-68/03, Olympiaki), collusive agreements or concerted practices (i.e case 42/84, Remia; 142-156/84, BAT; T-395/94, Atlantic Container) or protection againts dumping practices (i.e., case C-156/87 Gestetner; case C-174/87 Ricoh). In the scientific field, this limitation has been recognized among others in the Pfizer Animal Health case (T-13/99) or the Upjohn case (C-120/97).

This doctrine has been compiled without major modifications in the field of mergers linking the impossibility of substituting decisions made by the Commission to the grant of a margin of discretion. This is how the CFI among others has established it in the Petrolessence case:

"It is settled case-law that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, which relates to the appraisal of mergers, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of that discretion, which is essential for defining the rules on mergers, is under review, the Community Courts must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (see *France and Others* v *Commission*, cited above, paragraphs 223 and 224, and *Gencor* v *Commission*, cited above,

paragraphs 164 and 165; Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 64). It follows that review by the Community Courts of complex economic assessments made by the Commission in exercising the discretion conferred on it by Regulation No 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power. In particular, it is not for the Court of First Instance to substitute its own economic assessment for that of the Commission" (par. 101).

A doctrine which has been reiterated in the Air France (T-358/94), ARD (T-158/00) and Honeywell cases (T-209/01).

THE COMMISSION'S DISCRETIONARY MAP IN THE ASSESSMENT OF MERGER REGULATION

The intensity of judicial review of complex economic appraisals of the European Commission is one of the most complicated areas to be dealt with. This is thus so precisely because in these types of assessments is where the Commission's discretionary powers resides.

In the aftermath of sentences like Airtours, Schneider and Tetra Laval the review of application or interpretation of the Law (the so-called comprensive review of the pure question of Law) and of the factual elements is far more intense, reaching the point of correctness of the economic conclusions or interpretations made from facts (the so-called comprehensive review of material accuracy of facts). It also indicates an abandoning of the degree of deference the Court had conferred in previous sentences. In

this sense, when controlling the legality of a decision through the Action for Annulment the CFI must determine (i) if all the relevant information is founded on evidence and if this evidence is sufficient to sustain the conclusions drawn; (ii) if other factors that have not been interpreted or that have been overlooked should have been considered or if additional elements exist that should have been considered and (iii) if all the factual elements logically and reasonably sustain the conclusions drawn by the Commission (VESTERDORF, 2005: 17).

In their jurisprudence the European Courts recognize that there exists a margin of appreciation that remains in the hands of the European Commission and that cannot undergo review. In Tetra Laval case, when analyzing substantive criteria, the Court begins its considerations with the reminder that the substantive rules of the EC Merger Regulation confer on the Commission a certain discretionary faculties, especially with respect to economic assessment. In addition, it recognizes that the review by the European Courts must take into account the margin of discretion implicit in norms of an economic nature that form part of EC merger regimes (Tetra Laval case, par. 119).

A margin of appreciation, therefore, exists and is exempt of judicial review which is not stated by European Courts in their decisions. The issue, thus, lies in discovering what exactly is this said discretionary margin.

THE AREA WHICH IS EXEMPT OF JUDICIAL REVIEW IN EC MERGER CONTROL

The answer to the question of discretionary margins can be found in the nature of the decision itself. As mentioned previously, what is inherent to prognostic decisions is that conjecture develops from indicia or information. This prognosis is made up of three

phases: in the first one, the information needed to formulate the prediction is compiled; afterwards, criteria that will direct the judgement are singled out and finally, a prognosis-based judgment is made.

It would be difficult to sustained that discretionary powers of the Commission resides in this first phase identified with forming the basis of the prognosis. Indeed, this phase is one which is characterized by intense control, so confirmed by the analysis of jurisprudence with respect to review of corretness of factual conditions and legal interpretations.

In our judgment what necessarily forms part of the discretionary powers of the Commission can be found in the two subsequent states. That is to say, in the selection of the criteria that will lead towards a prognosis and the prognosis itself. The margin of appreciation, therefore, resides in the selection of the focus that will best adapt to an analysis of a specific situation or phenomenon. In other words, it resides in the selection of the theory of competitive harm and the conclusions drawn from it.

It is an issue, therefore of the adequate choice of an economic method. No theory would be inadmissible to the extent that it facilitated useful instruments to reach convincing conclusions. As a general rule, the EU Courts will not embark on a discussion of the economic theory chosen by the Commission; nor will it censor the method selected even when other methods or economic theories are also applicable. Control in these areas is basically one based on reasonability.

In any case, this deference would be conferred in the measure that said theories or methods did not reveal a biased approach on the part of the Commission concerning the

merger analyzed (LEGAL, 2005: 115). This is thus so because the recognition of this discretionary margin implies the prohibition of arbitrariness.

As a consequence, a discretionary margin also exists in the global assessment of the conclusions drawn from factual elements whenever these are not contradicted by the facts or are not contrary to the accepted methods of economic reasoning (LEGAL, 2005: 115). It is precisely this global evaluation which allows for deciding if the merger significantly affects effective competition in the common market. It is an issue which may be considered the core of the Commission's discretionary powers which remains untouchable. In this area, judicial control would be totally banned and any interference on behalf of the Courts necessarily entails the substitution of the decision, prohibited by the European Union's own jurisprudence.

Indeed, other manifestations of this margin of discretion also exist and can be singled out but they are only understood in relation to this margin of judgment that pertains to the global evaluation of the merger at stake. In a sense, it is an issue of specific manifestations that cannot be understood without a direct reference to it and it could even be said that they gravitate around it. This would be the case when authorizing an operation by basing the decision on commitments (ARD case, par. 328 and 329) or for the definition of a relevant market (General Electric case, par. 520).

OTHER MECHANISMS OF CONTROL OVER THE COMMISSION'S DECISION: REINFORCEMENT OF THE ADMINISTRATIVE PROCEDURE. SOME LESSONS LEARNED FROM THE RISK MANAGEMENT ADMINISTRATIVE PROCEDURES.

In certain national's legal systems (e.g. Spain), when dealing with discretionary powers some authors have posed the idea of reinforcing control through legality, even allowing for the possibility of the judge substituting a decision made by administrative authorities or agencies (FERNÁNDEZ R., 2002: 97). We believe that this option is not sustainable in the European Community framework as indicated by the prohibition of substitution so fervently reiterated by its courts. On the contrary, we believe the solution lies in looking back to the moment prior to adopting the decision (TORNOS, 1996: 405), thus providing a space for the effectiveness of control through other mechanisms.

In the domain of administrative procedures we also find an ideal means to rationalizing power (BACIGALUPO, 1997: 233; TORNOS, 1996: 405; SÁNCHEZ, 1994: 142). In this sense, the struggle for that which is rational consists of centering on the phases prior to making the decision, that is to say, in the procedure of decision-making (TORNOS, 1996: 394). In this case, the guarantee for success and rationality lies in a prior determination of who should make the decision or how it should be made (TORNOS, 1996: 410).

Organizationa of administrative authorities or agencies plays an important role in the search for rationality and impartiality in the decision-making process as well as in protecting citizens' rights. This does not mean adopting a formalistic vision of legal control. On the contrary, abiding the rules and principles of organization and functioning should not be considered a formal requirement but instead a guarantee of

agencies possibilities of success and tof meeting the objectives set (SÁNCHEZ, 1994: 143).

In a similar manner, the rationality of law can and should be attained through procedure (MAJONE 2010: 5; ALEXY, 1997: 174-6; SCHMIDT-ASSMANN, 1993: 321). The less capacity for guidance and subjection to substantive law by agencies, the weaker the judicial control and the greater the protagonism of procedure (BARNES, 2006: 269; SCHOCH, 1993: 285).

This same solution has been adopted in other fields like that of Science Law. In this sector we find an important parallelism with respect to what literature has termed Risk Management Administrative Procedures (LÓPEZ-JURADO, 2008: 141-82; RODRÍGUEZ, 2007; ESTEVE, 2003: 325- 46).

The law that regulates these procedures is similar in characteristics to that which regulates mergers. Both share a scarce regulation density and an ends-centered nature to their norms (LÓPEZ-JURADO, 2004: 61-81; ESTEVE, 2003: 143 and, 1999: 19-27). Furthermore, both legal fields entail administrative decisions made in very complex and uncertain contexts (LÓPEZ-JURADO, 2008: 19). Such similarities allow for the use of some of the constructs developed in the field of Risk Management to assess the procedure implemented in the control of mergers.

It should be taken into account that in this study no systematic and detailed analysis will be made of the procedure in the subject of mergers (cfr. ARAUJO BOYD, 2006; NAVARRO et al, 2005). Nonetheless, some aspects that should be refined to control of concentrations more efficiently will be mentioned. In other words, we will

center on procedure, but will focus on the analysis and reinforcement of the checks and balances that allow for more rational decisions.

Our proposal is structured around the adoption of a governance model in the politics and decisiones taken by public authorities (PRATS, 2005). With regards to what concerns us now, governance is understood as decision-making in complex and changing contexts with diverse actors representing different interests. In this sense, it implies a re-defining of control mechanisms including those created by the State itself in order to supervise its own abuses and inefficient behavior as occurs with the setting up of internal measures for administrative control, access to information, or transparency (CERRILLO, 2005: 19-21).

In the context of the European Union this perspective has already been adopted with respect to some complex referential sectors, with the objective of improving the control over agencies and public authorities and gaining democratic legitimacy (ROLLER 2006: 115; RUDLOFF and SIMONS, 2006: 146; HOFFMAN, 2006: 185). This leads to a reflection on the political and administrative mode best suited for the European Unión. This mode should include a bigger dose of participation and transparency that must be included, acting as channels that conduct to rationalization and prior control of administrative decisions as well as a greater guarantee of the protection of rights in the judicial phase (Cruz Ferrer 2002: 313-27 and 1988: 94-5).

In our opinion this same perspective should be adopted in the area of merger control framed in some of the principles already recognized by European Law. This paper, to give only one example, centers on the Principle of Due Diligence (also labelled as principle of case, see Reichel, 2008:247 and on).

The Principle of Due Diligence involves an Public Administration's duty to be responsible in determining and adequately examining the specific circumstances of a particular case, including allegations or contributions of the parties involved and to carry this out within a determined time period (PAREJO, 2000: 90). A correlate can be found in the area of the principles that guide good govenance. Specifically speaking, these would be the principles of accountability and efficiency depicted in the White Paper on European Governance.

In truth, it is one of the manifestations of the generic right to good administration (TOMÁS; 2004: 182), which conforms to the CFI (case T-54/99, Max.Mobil) forms part of the constitutional tradition common to all the member states. It is also explicitly stated in article 41.1 in the Charter of Fundamental Rights of the European Union (ALONSO and SARMIENTO, 2006: 333).

What could be considered to be the essence of this principle resides in the Administration's duty to impartially and conscientiously analyze all the relevant factual and legal elements paying attention to the characteristics and particularities of the case (PAREJO, 2000: 90).

A fertile ground for deployment of this principle is in the area of discretionary powers (CANANEA, 2006: 41). This is thus so because one of its most convincing manifestations is precisely that of banning arbitrariness of public authorities and that of banning the misuse of power (TOMÁS, 2004: 184).

As Nehl accurately observes, this principle moves midway between formal and material guarantees (NEHL, 1999: 107-109). This occurs because there is a necessary

interrelationship that ultimately overlaps in both extremes: the characteristics of each case require a search for information which is, in EC Merger regulation case, transferred to the internal workings of the Commission, complaints and fact-finding investigation. Determining information requires a preliminary in-depth assessment of the matter which is the objective of the administrative procedure and the consideration of the legal premises. It is linked to the Rule of Law or Principle of Legality which binds to the observance of all pertinent rules both procedural and material (PAREJO, 2000: 90).

The corollary is that the area of discretionary faculties constitutes the natural habitat for the principle of due diligence and is important because it permits control of public administration on both a fundamental and procedural perspective. It is a complementary instrument that as Parejo notes, “acts as a check and balance to administrative faculties of choice between alternatives in the measure that its demand is directed to guaranteeing that the administration situate itself in the best circumstances possible to make that choice and that the correct determination of the events never form part, properly speaking, of discretionary competence (PAREJO, 2000: 91).

The General Attorney Tizano refers to principle of due diligence in his conclusions on the Tetra Laval case -although not in a direct manner. In this case, when analyzing the standard of proof and the extent of judicial review, he concludes that Commission`s judgment does not merely mean a confirmation of a fact relative to whether certain requirements are complied with or not. In addition to this, verification of the said judgment requires a complex technical assessment that is not based on precise scientific rules but on the application of certain general principles and criteria.

For this reason it could not be demanded of the Commission to confirm whether an operation would create or reinforce a position of dominance proving to be an impediment to effective competition. As it is understood by Tizano, considering the difficulty of such a future assessment, it is enough for the commission to base its judgment on material elements whenever these have been obtained within the framework of a rigorous and detailed investigation (Opinion of the General Attorney in the Tetra Laval II case, par. 73 y 74).

It is obvious that this attorney recognizes that within the framework of the Commission's discretionary faculties alternative procedural guarantees must be reinforced. Such guarantees imply the duty of performing a good investigation. Although the General Attorney does not mention this issue directly, it is obvious that a reference is being made.

This obligation is even more outstanding if it is kept in mind that in the case of merger control, and competition Law in general, we are facing public administrative authorities that must both investigative and prosecutorial function and the adjudicative function (see Wills, 2004).

Within this framework of principle of due diligence two recently created figures have been inserted alongside the Directorate-General for Competition (DG Competition) which exists precisely to enforce procedural guarantees. These two figures refer to the "devil's advocate" panel on the one hand, and the Chief Competition Economist.

On the one hand the “devil’s advocate” panel is made up of the civil servants who compose the DG Competition. They must have no prior relation to the case in order to review the arguments about the economic teory (i.e, theory of harm) and the evidence presented by the DG Competition case team in the merger being examined. The Chief Competition Economist a figure with a three-year term, on the other hand, must independently assess the methodological features of the economic theories and econometrics techniques behind the application of competition rules (ALBORN et al, 2007: 177).

Clearly, this is a case of internal mechanisms that attempt to improve the decisions being made by acting as independent «fresh pair of eyes» to the investigation under way. To a certain extent they constitute reviewing organisms whose efficiency is linked to the decision-making procedures involved. Nonetheless, the results of said mechanism will depend on the level of consensus demanded (ALBORN et al, 2007: 178), and despite the fact that some authors have already expressed their opinions on this mechanism’s efficiency there are still aspects that need to be examined, specifically those related to transparency (PFLANZ, 2005: 127), which forms another manifestation of good administration principle.

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