

JUDICIAL REVIEW IN EUROPEAN COMPETITION LAW

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CONTENTS

I. INTRODUCTION	1
II. COMPREHENSIVE CONTROL OF LEGALITY	2
III. ERRORS OF LAW AND MISUSE OF POWERS	5
IV. INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS	7
V. FACTS AND THEIR APPRAISAL.....	8
VI. MARGIN OF APPRAISAL IN COMPLEX ECONOMIC AND TECHNICAL ISSUES.....	12
VII. COURTS CANNOT REPLACE THE EUROPEAN COMMISSION IN MAKING POLICY CHOICES (DISCRETIONARY POWERS)	16
VIII. COURTS CANNOT BECOME COMPETITION AUTHORITIES	19
IX. THE LIMITED UNLIMITED JURISDICTION RELATED TO FINES	22
X. CONCLUSIONS	28

I. INTRODUCTION

To what extent are the European Courts entitled to control administrative decisions?
This issue is at the very heart of every administrative law system. It is also then at the core of the European Competition law, whose enforcement is entrusted to the European Commission.

In recent years, this debate has been fuelled by some judicial decisions taken in the field of merger control, which have put the spotlight on judicial review¹. In response, scholars and practitioners have paid thorough attention to this topic.

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¹ Case T-342/99 *Airtours v Commission* [2002] ECR-2585, Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

However, it is still worth addressing the main difficulties that administrative decision reviews by Courts raise.

To begin with, the Treaty on Functioning of the European Union (TFEU) is not quite clear in regulating judicial review, since it is based on a confusing distinction between control of legality (Article 263 TFEU) and the so-called “unlimited jurisdiction” (Article 261 TFEU). Indeed, limits to judicial review should not be deemed linked to the way of challenging the administrative performance, but to the principle of separation of powers and to the exercise of discretionary powers.

On the one hand, *control of legality* cannot be seen as a “limited jurisdiction”, but as a comprehensive way to review the law, the facts and their appraisal. The reason being that what is at stake is not just the control of legality (“the objective legal order”), but also the protection of citizens’ rights. This does not lead us to overlook the fact that the Commission enjoys a certain *margin to assess complex economic and technical issues*. In these cases, judicial review will be limited to control whether the Commission committed a “manifest error” of assessment. Otherwise, Courts would not be reviewing, but enforcing Competition law. Moreover, sometimes the Commission is entitled to make competition policy choices (*discretionary powers*). Naturally, these powers are subject to limits, which must be controlled by Courts. However, within those limits, discretionary powers leave the Commission the ability to choose what is more convenient for the competition policy goals. It explains that Courts cannot rule on the substance, which would involve taking policy choices in the place of the public body charged by the Treaty with this task.

On the other hand, *finés* are subject to unlimited jurisdiction (Article 31 of Regulation No 1/2003 in relationship to Article 261 TFEU), by which Courts not only can void, but also amend the sanction, increasing or reducing it. However, control of the merits has a limited scope in practice. The exercise of unlimited jurisdiction does not amount to a review of the Court’s own motion, which means that the applicant has to adduce evidence in support of his pleas. In addition, in most cases, ruling on the substance of the case would require the Court to act as investigator, prosecutor and decision-maker. The role of the European Courts is not to become a competition authority, but to control the legality of the Commission’s decisions and to protect the citizen’s rights.

II. COMPREHENSIVE CONTROL OF LEGALITY

As a rule, the Court of Justice of the European Union shall review the legality of the Commission’s decisions on the Article 263 TFEU grounds, namely lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. However, in Competition law cases the European Union Courts enjoy “unlimited jurisdiction with regard to the penalties” (Article 261 TFEU in relation to Article 31 of Regulation No 1/2003). In these cases, Courts are not only allowed to annul the

contested decision, but also to reduce or increase the fine or periodic penalty imposed. In this regard, it should not be overlooked that there is a widely held view that charges and penalties for infringement of Articles 101-102 TFEU are criminal in nature². In this context, unlimited jurisdiction is often viewed as linked to the requirements of the Article 6 (1) of the ECHR, which states that in “the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The first issue arising from the European system is the *extent of the provision granting unlimited jurisdiction “with regard to penalties”* (Article 261 TFEU) in European Competition law. It can be argued that it does not restrain the judicial powers to the amount of the fines, but extends them to the whole fining decision³. “The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment” (first sentence of Article 31 of the Regulation 1/2003)]. It is not possible to “cancel, reduce or increase the fine or periodic penalty payment imposed” (last sentence of Article 31 of the Regulation 1/2003) without reviewing the reasoning of the decision. Such interpretation would be best suited to the understanding of judicial review as a means to protecting citizens’ rights. If we admit this interpretation, a major part of competition law enforcement would be subject to unlimited jurisdiction (Articles 101-102 TFEU). It would only exclude decisions related to merger control and State aids. However, this distinction has a minor significance. As we will see below, in practice, Courts have very limited room to rule on the substance without becoming competition authorities.

Once the extent of unlimited jurisdiction has been decided, the second issue becomes *what does control of legality mean?* (Article 263 TFEU)⁴.

The existence of two ways to challenge the European Commission’s decisions is not unique to the European framework. It is inspired by French law, which is based on a twofold system of administrative resources⁵. One of them is intended to control the legality (*recours pour excès de pouvoir*), while the other provides for

² Heike Schweitzer, “The European Competition Law Enforcement System and the Evolution of Judicial Review” (2009) EUI-RSCAS, 3-4 [<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Schweitzer.pdf> (last visited 30 November 2012)], also published in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011).

³ Ian Forrester (2009) 38. See also Damien M.B. Gerard, “EU Antitrust Enforcement in 2025: “Why Wait? Full Appellate Jurisdiction, Now”, CPI Antitrust Journal (December 2010 (1)) 7 [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762047 (last visited November 19, 2012)].

⁴ Bo Vesterdorf, “Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement” (2005) 1 Global Competition Policy 9 et seq.

⁵ Damien Geradin and Nicolas Petit, “Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment” (2010) TILEC Discussion Paper No. 2011-008, 31-32 [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342 (last visited November 21, 2012)].

unlimited jurisdiction (*recours de plein jurisdiction*). In common law, it is also known the distinction between appeal, which is usually heard by tribunals (specialised administrative bodies)⁶, and judicial review⁷. Provisions for appeal in statutes may vary from a full appeal on the merits to an appeal limited to control the legality⁸. A merits reviewer may affirm or vary the decision, or set the decision aside and either make a substitute decision or remit it to the primary decision-maker for reconsideration (“the merits reviewer ‘stands in the shoes of the primary decision-maker’”)⁹. Instead, it is often said that Courts exercise a “supervisory” jurisdiction on a claim for judicial review, since they are primarily concerned with the legality of the decision, not with its merits¹⁰. Notwithstanding this, “the substantive distinction between legality and merits are merely points on a continuum representing the degree to which bureaucratic compliance with norms of good-making is subject to external scrutiny and the extent to which non-compliance with such norms is remediable”¹¹.

In this regard, it should be stressed that *control of legality does not mean “limited” judicial review*. On the one hand, Competition law enforcement might have a bearing on fundamental rights, such as private property, freedom of commerce and industry (Article 6(2) TEU) or due process and fair trial (Article 6(1) ECHR). On the other hand, the European Commission is an administrative body engaged in the-day-to-day management, while Courts are independent and impartial bodies to which is entrusted the task of controlling the legality of administrative actions, declaring law and protecting citizens’ rights¹². An effective regime of judicial review acts as counterbalance to the Commission’s broad powers¹³. If this point of view is taken¹⁴, *there is no reason for accepting that Article 263 TFUE provides for a*

⁶ P. Craig, *Administrative Law*, 3th edition (Sweet&Maxwell, 1994) 143.

⁷ Peter Leyland, Gordon Anthony, *Administrative Law*, 6th edition (Oxford University Press, 2009) 154-174.

⁸ C. Graham, “Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK”, in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 244.

⁹ Peter Cane (2010) 429 and 432-433.

¹⁰ Peter Leyland, Gordon Anthony (2009) 272-273, 205, 208-211.

¹¹ Peter Cane, “Judicial review and merits review: comparing administrative adjudication by courts and tribunals”, in Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law* (Edward Elgar 2010) 434.

¹² Heike Schweitzer (2010, 26) argues the need of a shift in the field of judicial review “from a ‘mere’ objective legality control to a dual-goal system in which objective legality control and individual rights protection are equally relevant”.

¹³ Heike Schweitzer (2010) 9.

¹⁴ On the contrary, reasoning on judicial review of questions of law, it has been held that “There is no *a priori* reason why the courts’ view on the legal meaning of a statutory term should necessarily and always be preferred to that of the agency (...) The court’s interpretation may not necessarily be better than that of the agency, and adequate control may be maintained through a rationality test rather than substitution of judgement”. Paul Craig, “Judicial review of questions of law: a comparative perspective”, in Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law* (Edward Elgar 2010) 453.

limited judicial review (“*light judicial review*”)¹⁵. On the contrary, we are bound to make an interpretation of the Treaty rules in such a way that ensures effective judicial protection, which is not only a general principle of European law, but also a right under Article 47 of the Charter of Fundamental Rights¹⁶. In addition, in some Member States judicial review is a fundamental guarantee, which cannot be denied to citizens¹⁷. Thus, limits in judicial review should not be linked to the way of challenging the administrative performance (control of legality or unlimited jurisdiction), but to the intensity of powers entrusted to the European Commission (discretionary powers) and to the principle of separation of powers (margin of appraisal in complex economic and technical issues). In fact, Article 263 TFEU does not limit the grounds of review, but allows controlling the administrative decision in all aspects. European Courts carry out a *comprehensive control of the legality of the Commission’ decisions, which extends to the law, the facts and their appraisal*. These elements are intertwined, since it is usually hard to distinguish between facts, law and economic appreciations¹⁸. Somehow, they both represent two faces of the same coin¹⁹.

III. ERRORS OF LAW AND MISUSE OF POWERS

The Commission has to apply the prohibitions as provided for and within the limits laid down in the Treaty and the legal framework, according to the general principles of law (Article 263 TFEU). In this sense, the European Courts play a *comprehensive review of issues of law*. This comes as a no surprise, since substitution of judgement on questions of law is the cornerstone of judicial review²⁰.

First, Courts must control whether the decision-maker had the power to act. If not, the *ultra vires* decision must be voided. It is noteworthy that the power to act, frequently, is also a duty to act. Then, there is also illegality when the Commission, having the duty to act, remains inactive (*CEAHR*).

Second, Courts control *errors of law* in Competition law enforcement, as decades of European jurisprudence shows. For instance, Competition law applies where there

¹⁵ Ian Forrester, “A Bush in Need of Pruning: the Luxuriant Growth of ‘Light Judicial Review’” (2009) EUI-RSCAS, 3 [<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf>] (last visited November 19, 2012)], also published in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) and “A challenge for Europe’s Judges: The Review of Fines in Competition Cases” (2011) 36 *European Law Review* 206.

¹⁶ Case C-279/09 *DEB* [2010] ECR I-0000, paras 30 and 31; Order in Case C-457/09 *Chartry* [2011] ECR I-0000, para 25; Case C-69/10 *Samba Diouf* [2011] ECR I-0000, para 49; Case C-389/10 P *KME Germany and Others v Commission*, para 119; and Case C-386/10 P *Chalko v. Commission*, para 52.

¹⁷ Article 19 (4) of the Basic Law of Bonn; Article 24.1 of the Spanish Constitution.

¹⁸ Damien Geradin and Nicolas Petit (2011) 19.

¹⁹ A. Meij (2009) 20.

²⁰ Paul Craig (2010) 461.

is an undertaking developing an economic activity. However, it is not easy to identify when we are in presence of such elements. In this sense, public bodies can also act as undertakings, since what matters is the entity being engaged in an economic activity, irrespective of its legal status and the way in which it is financed²¹. Moreover, a public entity may be regarded as an undertaking in relation to only part of its activities, those that can be classified as economic activities²². On the contrary, there is no economic activity where the activity falls within the exercise of public powers²³. In this sense, the fact that a service supplied by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law is not alone sufficient for the activity carried out to be classified as an economic activity²⁴. In other cases, for example, what is at stake is whether the parent company and its subsidiary form a single economic unit and therefore the Commission may address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement²⁵. When a legal entity ceases to exist in law, liability for its unlawful conduct is assumed by the absorbing company, since otherwise undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes²⁶. Courts also carry out a comprehensive review of the interpretation of law made by the Commission in every aspect of mergers, cartel cases or in deciding whether the undertaking is competing on the merits or abusing of its dominant position. The same margin of appraisal can be found in the qualification of a measure as a State aid or in assessing its compatibility with the common market.

Third, Courts control the *misuse of powers*, which results when a measure was taken with the exclusive or main purpose of achieving an end other than that stated²⁷. For instance, in *Deutsche Telekom*, the Court denied that when acting against the undertaking for anticompetitive behaviour the Commission really intended to act against the German authorities²⁸.

²¹ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21; and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, para 17.

²² Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para 74; Case C-49/07 *MOTOE* [2008] ECR I-4863, para 25.

²³ Case 107/84 *Commission v Germany* [1985] ECR 2655, paras 14-15; Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, para 30; and Case C-49/07, para 24.

²⁴ Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, Case C-364/92, paras 28 *et seq.*; Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paras 22 to 25; and Case C-138/11 *Compass-Datenbank GmbH. v. Republik Österreich*, paras 40-51.

²⁵ Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, para 58; Case C-521/09 P *Elf Aquitaine v Commission*, para 54; and Case C-520/09 P *Arkema v Commission* [2011] ECR I-0000, para 38.

²⁶ Case T-349/08 *Uralita v Commission*, paras 57 and 76.

²⁷ Joined Cases C-186/02 P and C-188/02 P *Ramondín and Others v Commission* [2004] ECR I-10653, para 44, and the case-law cited.

²⁸ Case T-271/03, *Deutsche Telekom v European Commission* [2008] ECR II-000, para 271.

IV. INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS

The combination of the investigative, prosecutorial and decision-making powers in the hands of the European Commission has to be compensated by procedural guarantees²⁹, which are under the Courts' scrutiny.

On the one hand, in proceedings in which *sanctions* may be imposed, the observance of the rights of the defense is a fundamental principle of EU law, which must be complied with³⁰. In Articles 101 and 102 TFEU cases, the Commission is required to examine everything relevant to the case, and to guarantee to the concerned person the right to access the file, to put forward his point of view before the decision is taken, the right against self-incrimination, as well as to have sufficient reasons given for its decision. In this regard, for instance, the Commission cannot deny access to the file to ensure the effectiveness of the leniency program³¹.

On the other hand, in *non-fining proceedings*, Courts have the duty to examine carefully and impartially all the relevant aspects of the individual case (sound administration principle)³². For instance, a State aid decision could be annulled because of the Commission's failure to carry out a detailed examination as laid down in the formal investigation procedure (Article 108.2 TFEU), even if it had not been established that the Commission's assessments as to substance were wrong in law or in fact³³. Not infrequently it is necessary to strike a balance between the need to improve efficient enforcement and the protection of the involved rights. In this context, where the Commission enjoys a broad power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more importance³⁴. In mergers, for instance, access to the file could be restricted to the internal documents prepared by the Commission's services, excluding the documents exchanged with the parties³⁵.

²⁹ Heike Schweitzer (2010) 7.

³⁰ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para 9; and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission* [2009] ECR I-7191, para 34.

³¹ Case T-344/08 *EnBW v Commission* [2012] ECR II-0000, para 125.

³² Case C-269/90 *Technische Universität München v Hauptzollamt München Mitte* [1991] ECR I-5469, para 14; and Case T-44/90 *La Cinq v Commission* [1992] ECR II-1, para 86.

³³ Case C-487/06 P *British Aggregates and Others v Commission* [2008] ECR I-10505, para 58; Case T-123/09 *Ryanair v Commission*, para 80.

³⁴ Case C-269/90, paras 13-14; Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589, para 73. See also Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, 1) and, concerning State aid, Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, para 58; and Joined Cases T-29/10 and T-33/10, *Netherlands v Commission*, para 103.

³⁵ Case C-477/10 P *Commission v Agrofert Holding*, paras 47 *et seq.*

V. FACTS AND THEIR APPRAISAL

The wording of Article 263 TFEU does not mention any control of the facts. However, it is evident that control of legality also extends to *the facts on which the administrative decision is based and to their appraisal, as well as to the evidence provided for the Commission to underpin its findings.*

Indeed, control of the facts is extremely important in Competition law. It is not possible to verify the legality of the decision without taking a close look at the facts and their appraisal. It is true that in the *USA*, the appellate review model rests on the assumption that the initiating institution (agency) is understood to have superior competence in questions of fact, while the reviewing institution has superior competence in issues of law, and will decide the matter independently³⁶. This assumption leads the Courts to be deferent to the agency decisions (*Chevron*). However, in this country antitrust law is not enforced by an administrative body, but directly by the Courts. On the other hand, in all European jurisdictions, Courts are not restrained to a mere control of law, but fully control the facts and their appraisal. In the UK, the decisions of the *Office of Fair Trading* can be appealed to the *Competition Appeal Tribunal* (specialised administrative body), which carries out a control on the merits, related to fines and a control of legality, related to merger decisions. A further appeal lies from the Tribunal to the “appropriate court” only on a point of law or the amount of any penalty. However, it is also accepted that not all errors of fact lie beyond the reach of judicial review. In particular, Courts have to control whether the decision-maker: has acted in absence of the required facts which allow him to exercise the power entrusted by the legislature (error of precedent fact); has failed to take into account all relevant considerations and/or has disregarded irrelevant considerations; has provided enough evidence; or has acted under a misunderstanding or ignorance of relevant facts (error of material fact)³⁷. In *German* Competition law, judicial review is entrusted to civil law Courts, instead of administrative law Courts. According to the inquisitorial principle, it is the Court's responsibility to ascertain, if necessary, the relevant facts *ex officio*, not only in fines procedures, but also in merger cases³⁸. In this context, Courts which carry out a full control of the facts. They can also take into account new facts and evidences not considered by the administrative authority. However, according to the principle of separation of powers, the role of the Courts is to review, not to substitute the administrative decision³⁹. They have to respect the administrative authority's competence to define the scope of the subject matter of a case, and its role as the first and principal investigator. In *French law*, the competition authorities are subject to the *Court of Appeal* (civil law jurisdiction), which has to examine in fact and in law the administrative

³⁶ Thomas W. Merrill, “The origins of the American-style judicial review”, in Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law* (Edward Elgar 2010) 389.

³⁷ Peter Leyland, Gordon Anthony (2009) 273.

³⁸ Heike Schweitzer (2010) 30.

³⁹ Heike Schweitzer (2010) 33-35.

decisions⁴⁰. If it declares the appealed decision void, the Court has to replace or reform it with its own decision, to terminate the dispute. On the contrary, merger cases are subject to the *Council of State* (administrative jurisdiction), which applies a standard of marginal review (*contrôle restraint*) when the administrative authority exercises of discretionary powers⁴¹. However, this standard of review not only controls errors of law, but also errors in the facts and errors in characterising the facts in law. In *Italian law*, decisions taken by the competition authority are subject to administrative jurisdiction (*Consiglio di Stato*), which not only controls the law, but the facts as well⁴². Moreover, there is a control of the merits related to the amount of the fines. In *Spanish Competition law*, judicial review is not regarded as a sort of second instance, but as a comprehensive control of law and facts⁴³. In the *Netherlands*, Courts fully review the law and the facts, although some deference to the administrative bodies can be found in the assessment of the facts in the light of the law⁴⁴.

In this context, the European Courts carry out a *comprehensive review related to the facts*⁴⁵ and their appraisal, which is necessary to assess the legality of the Commission's decisions. It is to bear in mind that the Commission has to provide enough *evidence* to prove the infringements⁴⁶ and to support the conclusions drawn from it⁴⁷ (Article 2 Regulation 1/2003)⁴⁸. The decision can be made void when based on insufficient, incomplete, insignificant and inconsistent evidence⁴⁹. Moreover, the tendency to apply a more economic approach to Competition law

⁴⁰ N. Petit and L. Rabeux, "Judicial Review in French Competition Law and Economic Regulation", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 109.

⁴¹ N. Petit and L. Rabeux (2009) 110-111.

⁴² R. Caranta and B. Marchetti, "Judicial Review of Regulatory Decisions in Italy. Changing the Formula and Keeping the Substance?", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 153-168.

⁴³ Iñigo del Guayo, "Judicial Review in Competition Law and Economic Regulation in Spain", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 203-223

⁴⁴ S. Lavrijssen, "More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands. Vice or Virtue?", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 178-179.

⁴⁵ Heike Schweitzer (2010) 12.

⁴⁶ Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, para 58; and Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, para 86.

⁴⁷ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39; and Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paras 56 and 57.

⁴⁸ Case C-272/09 P *KME v Commission*, para 105.

⁴⁹ Case C-12/03 P *Tetra Laval* [2005] ECR I-987, paras 46 and 48.

enforcement requires that the Commission has a more demanding standard of proof, in order to establish the economic effects of its decisions⁵⁰.

For instance, the European Commission enjoys of a margin of appraisal or discretion in order to decide whether *investigations* pursuant an infringement of Articles 101 and 102 TFEU are to be carried out at European level. In this context, the Commission may decide to initiate proceedings or may reject a complaint without initiating them⁵¹. The Commission may also set priorities in examining complaints brought before it, establishing the order in which they are to be examined⁵². Courts cannot substitute their assessment of the Community interest for that of the Commission, but must focus on whether the contested decision is based on materially incorrect facts, or incur in an error of law, a manifest error of assessment or misuse of powers⁵³. In this sense, in *CEAHR*, the Court annulled the Commission's decision declaring the absence of sufficient Community interest in continuing the investigation, since such a conclusion was vitiated by insufficient reasoning, the failure to take account of a relevant factor raised in the complaint, and manifest errors of assessment⁵⁴. On the one hand, the Commission did not define the relevant market, but relied on a *prima facie* market definition to underpin its conclusion that there was a low probability of there being any infringements of Articles 101 and 102 TFEU, and on that latter conclusion to base its finding that there was no evidence of disturbance of the market⁵⁵. On the other hand, the Commission rejected carrying out the investigation, while it was evident that it was in the interest of the whole Community, as well as the fact that it was the authority best placed for assuming this task⁵⁶. This practice existed in at least five Member States, perhaps all, and was attributable to undertakings located outside the European Union, which suggested that action at European Union level could be more effective than various actions at national level⁵⁷.

In *Hellenic Republic*, the General Court annulled the Commission's decision, since it had not proved the abuse of dominant position (Article 102 TFEU). In this regard, it does not suffice to argue that the State measure distorts competition by creating

⁵⁰ A. Ottow, "Observations on Economic Proof in Economic Cases", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 43.

⁵¹ Article 2(1) and (4) of the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

⁵² Case T-224/95 *Tremblay and Others v Commission* [1997] ECR II-2215, para 60; Case T-24/90 *Automec v Commission* [1992] ECR II-2223, paras 83 to 85; and Case T-427/08 *CEAHR v Commission* [2010] ECR II-000, para 157.

⁵³ Case T-427/08, para 160.

⁵⁴ Case T-427/08, paras 157-178.

⁵⁵ The Court stated that "the Commission cannot validly claim that it did not need to define the relevant market because there was no evidence of disturbance of the market in question, given that its finding concerning the absence of such disturbance was based precisely on the definition of the relevant market which it had in fact made" (Case T 427/08, 169).

⁵⁶ Commission Notice on cooperation within the Network of Competition Authorities (text with EEA relevance) Official Journal C 101, 27/04/2004, 43-53, para 5 *et seq.*

⁵⁷ Case T 427/08, para 176.

inequality of opportunities between economic operators (Article 106 (2) TFEU)⁵⁸. In *Deutsche Post*, the Court held that the Commission was not entitled to classify as State aids the payments made to an undertaking entrusted with discharging a public service obligation, since it failed to check whether they exceeded the total amount of the net additional costs resulting from such obligations⁵⁹. The Commission carried out no examination, even though the State had provided information showing that it was plausible that the total amount of those transfers did not exceed the net additional costs. In *MTU Friedrichshafen*, the Court stated that the Commission cannot assume that an undertaking has benefited from an advantage constituting solely of State aid on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage⁶⁰. From that perspective, the Commission is, at the very least, required to ensure that the information at its disposal, even if incomplete and fragmented, constitutes a sufficient basis on which to conclude that an undertaking has benefited from an advantage amounting to State aid. The nature of the evidence the Commission must adduce depends, to a large extent, on the nature of the State measure at issue⁶¹. The Court also annuls the Commission's decisions regarding State aids when it finds errors in law from failing to carry out the assessment of the selectivity of the measure⁶², the application of the "private creditor test"⁶³ or a comprehensive review as to whether the tax scheme at issue came within the scope of Article 107(1) TFEU⁶⁴.

Of course, the Commission has to provide evidence only as far as it is necessary to prove the infringement. In *Deutsche Telekom*, for instance, the Court states that the Commission was not required to demonstrate that the applicant's retail prices were, as such, abusive⁶⁵. The undertaking could not be unaware that, notwithstanding the authorisation decisions of the national authorities, it had genuine scope to fix its retail prices and, consequently, to reduce the margin squeeze by increasing those prices⁶⁶.

⁵⁸ Case T-169/08 *Hellenic Republic v Commission*, para 105.

⁵⁹ Case T-266/02 *Deutsche Post v Commission* [2008] ECR II-1233, para 91.

⁶⁰ Case C-520/07 P *Commission v MTU Friedrichshafen* [2009] ECR I-8555, para 56; Case T-154/10 *French Republic v Commission*, para. 119.

⁶¹ Case T-154/10 P, para 120.

⁶² Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para 25; Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, para 114; and Case C-452/10 P *BNP Paribas and BNL v Commission*, para 103.

⁶³ "The fact that the capital increase at issue was partly the result of the waiver of a tax claim and that it therefore had tax implications did not in itself justify the non-application of the private investor test". Case T-156/04 *EDF v Commission* [2009] ECR II-04503, para 259 (confirmed on appeal by Case C-124/10 P). See also Case T-1/08, *Buczek Automotive* [2008] ECR II-0000.

⁶⁴ Case C-487/06 P, para 115; C-452/10 P, para 104.

⁶⁵ Case T-271/03, paras 166 to 168.

⁶⁶ Case T-271/03, paras 295 to 300.

VI. MARGIN OF APPRAISAL IN COMPLEX ECONOMIC AND TECHNICAL ISSUES

Competition law enforcement often involves the need to make *complex economic or technical assessments*. The European Courts recognize some discretion by the Commission in these cases. It means that the appraisal of facts made by the Commission is subject to a more limited judicial review⁶⁷, as Courts only control whether there has been a *manifest error of assessment*⁶⁸.

It cannot be denied that accepting such deference to the Commission's assessments raises some *difficulties*. In fact, despite this long-standing case law, "the exact meaning, scope and rationale of this judicial deference have remained vague"⁶⁹. To begin with, there is no consistent criterion to ascertain whether the facts are so complex that Courts have to be deferent to the appraisals made by the Commission. In addition, as we have seen, it is very difficult to separate facts and their appraisal from law interpretation⁷⁰. Thus, limiting the control of facts can also lead to limit the control of law. Finally, as we have seen, judicial review is the ultimate guarantee for the involved rights. In this regard, it has been claimed that Courts cannot put the resolution of the dispute into the hands of non-legal experts⁷¹, but have to take on the responsibility of declaring the law.

However, despite these difficulties, we have to stress that complex assessments are subject to an *effective judicial review* under Article 263 TFEU. According to settled case law, in cases involving complex economic and technical⁷² assessments, judicial review is "limited" to verify whether: (i) the relevant procedure rules have been complied with, (ii) there is a comprehensive statement of reasons, (iii) there was any error of law, (iv) the facts are accurate, reliable and consistent (v) and the evidence put forward contains all the relevant data that must be taken into consideration to assess a complex situation (vi) and there has been any manifest error of assessment of those facts (vii) or any misuse of powers or, on the contrary, they are capable of sustaining the conclusions drawn from it⁷³.

⁶⁷ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 89; Case T-301/04 *Clearstream v Commission* [2009] ECR II-3155, para 95; Case T-398/07 *Kingdom of Spain v European Commission*, para 62; Case C-452/10 P, para 103; Joined Cases T-29/10 and T-33/10, *Netherlands and ING v Commission*, para 103.

⁶⁸ Heike Schweitzer (2010) 19.

⁶⁹ Heike Schweitzer (2010) 18.

⁷⁰ Heike Schweitzer (2010) 18-19.

⁷¹ Marc Jaeger (2011) 314.

⁷² Case T-201/04, para 87.

⁷³ Joined Cases T-80/06 and T-182/09 *Budapesti Erőmű Zrt v European Commission*, para 65; Case T-36/99 *Lenzing v Commission* [2004] ECR II-3597, para 150 and the case-law cited, upheld by the Court of Justice in Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, para 59; Case T-11/07, *Frucona v European Commission*, para 108; Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, para 41; Case 42/84, *Remia and others v Commission*, Rec. p. 2545, para 34; Case 142/84 and 156/84 *BAT and Reynolds v Commission*, Rec. p. 4487, para 62; Case C-194/99 P

This is exactly what happens every day at the European Courts⁷⁴, which apply strict standards of review to cases involving complex economic and technical assessments⁷⁵. The appraisal of facts and evidence “falls within the Court’s complete discretion”⁷⁶, which is entitled to review the Commission’s interpretation of information of an economic nature⁷⁷. Indeed, “review of both fact and discretion has become more intensive over time”⁷⁸. Courts carry out a full control of the legality of the Commissions’ decisions, no matter how complex the underlying economic assessment. At the same time, the Commission’s latitude has already been considerably reduced by several decades of case-law, which sets out standards of proof and very detailed interpretation criteria. Well-defined case law criteria can reduce the administrative discretionary powers, which under certain conditions can become a “duty to act in a certain way”⁷⁹.

For instance, according to case-law, the definition of the relevant market involves complex economic appraisals on the part of the Commission, so that it is amenable to only limited review by the Courts⁸⁰. However, in defining the relevant markets, the Commission has also to take into account the differences resulting from Articles 101 and 102 TFEU, as they have been interpreted by the Courts⁸¹. The criteria for defining the geographic and product market also stem from case-law. Indeed, when the definition of the relevant market is in discussion, the Courts do not hesitate in testing the Commission’s findings, as can be seen in *Telefónica*⁸².

To take another example, in *Deutsche Telekom*, the Court stated that the choice of method used to establish a margin squeeze is subject to a restrained judicial review, since it corresponds with a complex economic appraisal⁸³. However, it did not prevent the Court from controlling whether the abusive practices had been properly determined by the Commission. Following the case-law, the Court concluded that the Commission was correct to analyse the abusive nature of the pricing solely on the basis of the own charges and costs of the undertaking with dominant position, rather than on the basis of the situation of current or potential

Thyssen Stahl v Comisión, Rec. p. I-10821, para 78; Case T-271/03, para 185; Case T-398/07 *Kingdom of Spain v Commission*, para 60; Case T-336/07 *Telefónica v Commission*, para 69.

⁷⁴ See earlier examples of judicial rigour in controlling complex economic assessments in Ian Forrester (2009), 25-29.

⁷⁵ Marc Jaeger “The Standard of Review in Competition Cases involving complex economic assessments: towards the marginalisation of the marginal review?” (2011) 2:4 JCLP 297.

⁷⁶ Case T-154/10 *French Republic v Commission*, para 65.

⁷⁷ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39; Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paras 56 and 57; C-389/10 P, para 121; and Case T-398/07, para 62.

⁷⁸ Paul Craig (2010) 461.

⁷⁹ N. Petit and L. Rabeux (2009) 112.

⁸⁰ Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, para 64; Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para 26; and Case T-111/08 *MasterCard v Commission*, para 169.

⁸¹ Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349, para 27; and Case T-111/08, para 171.

⁸² Case T-336/07 *Telefónica v Commission*, paras 109-144.

⁸³ Case T-271/03, para 185.

competitors⁸⁴. The Court also stated that for the purposes of calculating the margin squeeze, the Commission was entitled to take account only of revenues from access services and to exclude revenues from other services, such as call services⁸⁵.

In addition, *discretion does not imply lower standard of proof*⁸⁶. On the one hand, in proceedings imposing fines prevail the presumption of innocence, so that Court cannot conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point⁸⁷. On the other hand, the quality of the evidence produced by the Commission is also particularly important in merger control, since it is not based on past events, but on a prospective analysis⁸⁸. When assessing the compatibility of a concentration with the common market, the Court controls whether the Commission has taken into account the set of factors that determines strengthening the company's dominant position (Article 2(1) of the Regulation) and not just one of them (reduction in potential competition)⁸⁹. In merger cases, Courts have checked "meticulously the accuracy, reliability and consistency of the evidence taken into account by the Commission in its decisions, so as to ensure that the evidence provides a sound factual basis for the adoption of the contested decision"⁹⁰. For instance, in *Tetra Laval*, the Court annulled the Commission's decision declaring the proposed concentration incompatible with the common market because of the failure in establishing the anti-competitive effects that could have been expected from the operation⁹¹. Commitments offered by the undertaking are factors which the Commission has to take into account when assessing the likelihood that the merged entity would act in such a way as to make it possible to create a dominant position on one or more of the relevant markets⁹².

Finally, the Commission has *to state the reasons* on which the decisions are based (Article 296 TFEU)⁹³ and, in particular, it has to explain the weighting and assessment of the factors taken into account⁹⁴. In this regard, the Commission may not depart from the Guidelines in an individual case without giving sound reasons

⁸⁴ Case T-271/03, para 193.

⁸⁵ Case T-271/03, para 203.

⁸⁶ A. Meij (2009) 19.

⁸⁷ Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, para 265; and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para 177.

⁸⁸ Case C-12/03 P *Tetra Laval* [2005] ECR I-987, paras 42-44.

⁸⁹ Case C-12/03 P, paras 125 *et seq.*

⁹⁰ Bellamy & Child, *European Community Law of Competition*, Sixth edition (Oxford University Press 2008) 784-785, para 8.249.

⁹¹ Case C-12/03 P, para 45.

⁹² Case C-12/03 P, para 85.

⁹³ Matteo F. Bay and Javier Ruiz Calzado, "Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions" (2005) 28(4) *World Competition* 450.

⁹⁴ Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECR I-7415, para 87; C-272/09 P, para 101.

for doing so. Soft law has no legal binding effect, but in such cases, the Commission has to demonstrate that there is no infringement of the equal treatment principle⁹⁵.

As we have seen, the Court has demonstrated that it is “prepared to look quite deeply into both the Commission’s findings on primary facts and into the inferences drawn from them when determining whether its analysis was vitiated by manifest errors of assessment”⁹⁶. European Courts cannot refrain from reviewing the Commission interpretation of information of an economic nature⁹⁷. The obvious reason for this is that the legality of the enforcement measures just depends on whether or not we are or not in presence of the legal assumptions.

So, what does it mean when complex economic and technical appraisals are subject to a limited judicial review? When Courts refer to the limits of judicial review related to complex assessments, ultimately, they are accepting the limits resulting from the principle of separation of powers, which necessarily put a margin of appraisal in the hands of the Commission to ascertain whether we are or not in presence of the legal assumptions. The “legal characterization of the facts” (appraisal of the facts) is by far the most subjective parameter⁹⁸ in Competition law enforcement. The point is that applying the criteria enshrined in Article 263 TFEU to complex economic and technical matters does not always allow deciding whether the Commission was right or wrong. There is a margin of economic or technical discretion in the appraisal of facts that cannot be controlled by legal principles or by alternative technical reports, which would not lead to a more certainty in the analysis, but merely to another assessment. In other words, there is a limited margin of discretion for the Commission that cannot be controlled by the Courts, since it would not mean reviewing but making choices. In these cases, Courts can only ascertain whether there has been a manifest error of appraisal, that is, a mode of action that falls outside the given set of reasonable modes⁹⁹. Marginal review is then applied, as the Court is otherwise at risk of substituting its own views to that of the administrative body¹⁰⁰. In this sense, for instance, the Commission enjoys of a degree of latitude regarding the choice of the econometric instruments and the appropriate approach to the study of any matter, provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are not applied inconsistently¹⁰¹. Thus, the more novel the discussed issues or the more controversial the nature of economic reasoning, the greater the

⁹⁵ Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, para 91; Case C-272/09 P *KME v Commission*, para 100.

⁹⁶ Richard Whish, *Competition Law*, 6th edition, (Oxford University Press 2009) 879.

⁹⁷ Case C-272/09 P, para 94.

⁹⁸ N. Petit and L. Rabeux (2009) 112.

⁹⁹ M. Schimmel and R. Widdershoven, “Judicial Review after Tetra Laval. Some Observations From a European Administrative Law Point of View”, in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 65.

¹⁰⁰ A. Meij, “Judicial Review in the EC Courts: Tetra Laval and Beyond”, in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 19.

¹⁰¹ Case T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237, para 132.

margin of appraisal enjoyed by the Commission¹⁰². For this reason, Courts can only void the Commission's decisions when they are based on a "manifest error" of assessment. In other words, in these cases, the applicant has to make a special effort to show that the Commission's decision was not based on sound economics¹⁰³.

In the same vein, most national jurisdictions accept some kind of deference to administrative discretionary powers. French Courts apply a standard of "marginal review" (*contrôle restraint*) when the administrative authority enjoys discretionary powers. In Italy, the intensity of scrutiny is less related to complex technical appraisals (*valutazioni tecniche opinabili*)¹⁰⁴. UK Courts exercise very limited scrutiny in issues of economic policy or technical expertise, although they will check whether there is a factual basis for the decision, supported by adequate reasoning¹⁰⁵. In the Netherlands, the decisions that are made on the basis of "discretion in assessment" are reviewed marginally¹⁰⁶. Courts are deferent to the legal and economic choices made by the national authorities (discretion in the assessment of the facts in the light of the law). Moreover, full review of the facts hardly takes place, since it is very difficult to separate facts and the assessment of facts.

In this context, errors affecting the economic analysis that underlies competition policy decisions may cause the Community to incur non-contractual liability¹⁰⁷. However, the legal requirements are higher in this case, since the Commission's act must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. In this regard, the Court states that the economic analyses necessary for enforcing competition law is generally complex, which may inadvertently contain certain inadequacies, in view of the time constraints to which the institution is subject¹⁰⁸. That is even more so where, as in the case of the control of concentrations, the analysis has a prospective element. The gravity of a documentary or logical inadequacy, in such circumstances, may not always constitute a sufficient circumstance to cause the Community to incur liability.

VII. COURTS CANNOT REPLACE THE EUROPEAN COMMISSION IN MAKING POLICY CHOICES (*DISCRETIONARY POWERS*)

¹⁰² Luis Ortiz Blanco, *EC Competition Procedure*, 2nd edition (Oxford University Press 2006) 712, 18-36.

¹⁰³ It has been claimed that in these cases the burden of proof is reversed. Heike Schweitzer (2010) 25.

¹⁰⁴ R. Caranta and B. Marchetti (2009) 156.

¹⁰⁵ C. Graham (2009) 244

¹⁰⁶ S. Lavrijssen (2009) 179.

¹⁰⁷ Case T-351/03, para 129.

¹⁰⁸ Case T-351/03, para 131.

The main Competition policy options are provided for in the Treaty in detail. However, sometimes the Commission has the *ability to make competition policy options (discretionary powers)*. In these cases, the Commission can decide what is most convenient to achieve the Treaty goals, by choosing among different interests¹⁰⁹. Thus, discretionary powers are the lawful power to choose¹¹⁰ between more than one outcome¹¹¹.

The first way through which the European Commission exercises discretionary powers is by acting as regulator. The Commission is entitled to propose regulations (Article 289 (1) TFEU) and to address directives to ensure fulfilment of competition rules by undertakings with special or exclusive rights or by undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly (Article 106 (3) TFEU).

Second, the European Commission has discretionary powers to launch sector inquiries, as a way to detect anticompetitive behaviours. For instance, it is for the Commission to decide whether its staff should focus their attention on monitoring patent settlements between originator and generic companies in the pharmaceutical sector or if it is better off targeting the electricity markets.

Third, sometimes advocacy can be the most efficient means to pursue the competition authority's goals¹¹². In this case, it is also for the Commission to decide on the best way to persuade governmental bodies to design competition friendly policies and to alert consumers to the benefits of a well-functioning market.

Forth, to a limited extent, the regulatory framework allows taking into account non-competition goals when applying Competition law¹¹³. To achieve the Article 107(3) TFEU goals, State aids may be considered to be compatible with the internal market. According to settled case law, it confers on the Commission a wide discretion to allow *State aids* by way of derogation from the general prohibition laid down in Article 107(1) TFEU¹¹⁴. In this regard, for instance, the Court states that in the application of the exception to facilitate the development of certain economic activities or of certain economic areas (Article 107 (3) c) TFEU) the

¹⁰⁹ Marco D'Alberty, "Administrative law and the public regulation of markets in a global age", in Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law* (Edward Elgar 2010) 68.

¹¹⁰ C. Graham (2009) 244.

¹¹¹ Peter Leyland, Gordon Anthony (2009) 215.

¹¹² James C. Cooper, Paul A. Pautler, Todd J. Zywicki, "Theory and practice of competition advocacy at the FTC" 72 *Antitrust Law Journal* 1092.

¹¹³ J. Carlos Laguna de Paz, "Protecting the Environment without distorting Competition" (2012) 3:3 *Journal of European Competition Law & Practice* 248-257.

¹¹⁴ Case 310/85 *Deufil v Commission* [1987] ECR 901, para 18; Case C-372/97 *Italy v Commission* [2004] I-3679, para 83; Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197, para 137; and Joined Cases T-115/09 and T-116/09 *Electrolux and Whirlpool v Commission*, para 37.

Commission has a wide discretion, the exercise of which involves complex economic and social assessments, which must be made in a Community context¹¹⁵.

Fifth, more doubtful is whether discretionary powers are provided for in Article 101(3) TFEU. The prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices may be declared inapplicable, provided that the Treaty conditions are fulfilled. Under a system of individual exception granted by the Commission, it could be argued that the European Commission enjoyed discretionary powers. For instance, in *Consten/Grundig*¹¹⁶, the Commission's refusal to grant an exemption plainly involved a degree of political and policy discretion¹¹⁷. However, discretionary powers are hard to find after the 2003 framework reform, which makes the undertakings responsible for appraising whether or not they fulfil the conditions for the exception. Either way, the distinction between discretionary powers and margin of appraisal is relative, since the latter also entails discretion, although to a lesser extent. On the other hand, the undertaking claiming the benefit of Article 101(3) TFEU has to prove that the conditions for providing the exception are fulfilled (Article 2 of Regulation No 1/2003)¹¹⁸. The Commission must adequately examine the arguments and evidence offered by the parties, to ascertain whether they demonstrate that those conditions have been satisfied¹¹⁹. Sometimes the arguments and the evidence may require the Commission to refute them, failing which it is permissible to conclude that the burden of proof borne by the person who relies on the exception has been discharged¹²⁰.

Discretionary decisions must be annulled when they infringe the legal framework or are deemed not to be reasonable, suitable or proportionate. However, discretionary powers are subject to a *limited judicial review*¹²¹, since *Courts cannot make administrative policy choices in the place of the public bodies charged by the Treaty with Competition law enforcement*¹²². As we have seen, discretionary powers grant the European Commission the ability to decide what is more convenient to achieve the Competition policy goals, by setting priorities and choosing the means and criteria by which the decision has to be reached¹²³. Therefore, decisions

¹¹⁵ Case 310/85, para 18; Case C-372/97 *Italy v Commission* [2004] I-3679, para 83; Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197, para 137; and Joined Cases T-115/09 and T-116/09, para 37.

¹¹⁶ Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, para 3. See also Case C-360/92 P *Publishers Association v Commission* [1995] ECR I-23.

¹¹⁷ Ian Forrester (2009), 19.

¹¹⁸ Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, para 235.

¹¹⁹ Case T-111/08, para 197.

¹²⁰ Case T-168/01, para 236; and Case T-111/08, para 197.

¹²¹ Case T-11/07, *Frucona v Commission*, para 226; Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, para 32; and Case T-137/02 *Pollmeier Malchow v Commission* [2004] ECR II-3541, para 52.

¹²² Peter Leyland, Gordon Anthony, *Administrative Law*, 6th edition (Oxford University Press, 2009) 235.

¹²³ David Bailey "Scope of Judicial review under Article 81 CE" (2004) 41 *Common Market Law Review* 1338.

implying elements of economic policy would be clearly excluded from a “comprehensive” review¹²⁴.

For instance, focusing investigations on certain sectors or allowing State aids to protect environment or culture are decisions to be taken by the European Commission, not by Courts. It is settled case-law that judicial review of the Commission’s discretion in applying the Article 108 (3) TFEU exception is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment of the facts or misuse of powers¹²⁵. The Court must also verify whether the Commission has observed the requirements laid down in the Guidelines¹²⁶. In fact, in *Electrolux*, the General Court annulled the Commission’s decision, because of the manifest error of assessment in the examination of the distortion of competition¹²⁷. However, the Court cannot substitute its own economic assessment for that of the Commission¹²⁸.

VIII. COURTS CANNOT BECOME COMPETITION AUTHORITIES

The principle of separation of powers guarantees the administrative body’s ability to act within the territory assigned to it by the Treaty¹²⁹. It explains that *control of legality under Article 263 TFEU enables the Courts to annul the European Commission’s decisions, but not to substitute them*. Competition enforcement is entrusted to the Commission, which act as investigator, prosecutor and decision-maker. The role of the Courts is to verify the legality of the contested measure¹³⁰, testing whether the information and evidence relied on by the Commission in its decision is sufficient to establish the existence of the alleged infringement¹³¹.

To a certain extent, Court could be engaged in fact finding. The Court may require the parties to produce all documents and to supply all information considered

¹²⁴ Marc Jaeger (2011) 310.

¹²⁵ Case C-409/00 *Spain v Commission* [2003] ECR I-1487, para 93; Case T-565/08 *Corsica Ferries France v Commission* [2005] ECR II-2197, para 138; and Joined Cases T-115/09 and T-116/09 *Electrolux and Whirlpool v Commission*, para 40.

¹²⁶ Case T-35/99 *Keller and Keller Meccanica v Commission* [2002] ECR II-261, para 77.

¹²⁷ Joined Cases T-115/09 and T-116/09, paras 72 and 78.

¹²⁸ Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] ECR II-2405, para 79; and Case T-565/08, para 138.

¹²⁹ T. Zwart, “The Scope of Review of Administrative Action From a Comparative Perspective”, in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 10.

¹³⁰ Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para 174; Case T-348/08 *Aragonesas v Commission*, para 91.

¹³¹ Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* (‘PVC II’) [1999] ECR II-931, para 891.

desirable (Article 24 of the Protocol)¹³². If necessary, it may also demand the Member States and institutions, bodies, offices and agencies not party to the case to supply all information which the Court considers necessary for the proceedings (Article 24). During the hearings, the Court of Justice may examine experts, witnesses and the parties themselves (Article 32). However, in most cases, the Court rests on the information contained in the administrative file, inquiring whether the facts adduced by the Commission are reliable, consistent and sufficiently meaningful in relation to what has been challenged by the applicant¹³³. *The Court is not the decision-maker, so it cannot perform a new investigation or substitute its own assessment of matters of fact for that of the Commission's*¹³⁴. It "is not for the Court to pronounce itself on the merits of the case, and even less to take over the role of the administration in the event of an annulment to proceed to a fresh decision complying with the judgement of the Court"¹³⁵. As we have seen, the reason for this restriction is not just that the Commission is technically best placed to deal with such issues, but that of the principle of separation of powers¹³⁶. Courts cannot become a competition authority, getting involved in making economical appraisals, providing evidences and taking executive decisions instead of the Commission¹³⁷. Only as an exception, Courts may not only void the administrative decision, but also substitute it and declare the rights at stake, when the procedure has gathered enough evidence and there is no room for administrative appraisal or discretion. This is what case-law shows, as we will see in the following examples.

In controlling whether *investigations* are to be carried out at European level, Courts cannot substitute their assessment of the Community interest for that of the Commission, but focuses on whether the contested decision is based on materially incorrect facts, or is vitiated by an error of law, a manifest error of assessment or misuse of powers¹³⁸. In this regard, in *CEAHR* the Court annulled the Commission's decision¹³⁹, but did not declare the existence of sufficient Community interest for

¹³² Protocol (No 3) on the Statute of the Court of Justice of the European Union.

¹³³ Heike Schweitzer (2010) 12-13.

¹³⁴ Joined Cases T-80/06 and T-182/09, para 65; Case T-36/99 *Lenzing v Commission* [2004] ECR II-3597, para 150 and the case-law cited, upheld by the Court of Justice in Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, para 59; Case T-11/07, para 100 and 108; Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, para 41; Case C-323/00 P *DSG v Commission* [2002] ECR I-3919, para 43.

¹³⁵ A. Meij, "Judicial Review in the EC Courts: Tetra Laval and Beyond", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 10.

¹³⁶ Marc Jaeger (2011) 296.

¹³⁷ D. Bailey, "Scope of judicial review under Article 81" (2004) 41 *Common Market Law Review* 1327.

¹³⁸ Case T-427/08, para 160.

¹³⁹ The Commission stated that the complaint concerned only one market or a segment of a market of limited size, with the result that their economic importance was also limited. However, that consideration was vitiated by a lack of reasoning and an infringement of the duty to consider attentively all the matters of fact and of law which the applicant brought to its attention. The manifest errors of assessment made by the Commission in defining the relevant market also vitiate its conclusions concerning the low probability that Articles 101-102 TFUE were infringed, and on that latter conclusion to base its finding that there was no evidence of disturbance of the market in

the Commission to continue its examination of the complaint. The Court was not ready to make such an assessment in place of the Commission. On the other hand, it could not be ruled out that with a more accurate reasoning the Commission could demonstrate the absence of community interest. For the same reason, the Court stated that the Commission had committed a manifest error of assessment in defining the relevant market, applying the usual methodology¹⁴⁰. However, the Court did not get involved in defining the market on its own¹⁴¹. Clearly, “it is not for the Court to carry out its own analysis of the market but that it must confine itself to verifying, as far as possible, the correctness of the findings in the decision”¹⁴².

In *EDF*, the Court annulled the Commission’s decision for not having applied the private investor test to appraise whether fiscal measures could be qualified as State aids¹⁴³. However, the Court did not take on this task, but left it to the Commission adopting the necessary measures to comply with the judgment. It was not just lack of jurisdiction in matters of State aid to reverse administrative decisions, but the Court’s inability to carry out the analysis involved in applying the private investor test. The same happened in *ING*, where the Court stated that the Commission failed to prove that amendment of the repayment terms constituted an advantage for the company that a private investor in the same situation as the Netherlands State would not have granted¹⁴⁴. The Court annulled the contested decision, but did not take on the duty to carry out the analysis on its own. This was not self-restraint in judicial review, but showed the Court’s inability to carry out administrative investigations in order to prove whether economic advantages were or not involved. In *Deutsche Post*, the Court annulled the decision, in as far as the Commission had carried out no examination of whether the State payments exceeded the net additional costs of a public service obligation¹⁴⁵. However, it did not rule on whether there was or not State aid. It was not for the Courts to replace the Commission by carrying out in its stead an examination it never carried out and drawing the consequences which it would have drawn¹⁴⁶. For the same reason, infringement of the right of access to the Commission’s file during the procedure prior to adoption of a decision cannot be remedied by the mere fact that access was made possible during the judicial proceedings¹⁴⁷. An examination

question. The practice complained of exists in at least five Member States, or possibly in all the Member States, and is attributable to undertakings which have their head offices and places of production outside of the European Union, which suggests that action at European Union level could be more effective. Case T-427/08, paras 163-178.

¹⁴⁰ Case T-427/08, paras 118-119.

¹⁴¹ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 482; Case T-151/05 *NVV and Others v Commission* [2009] ECR II-1219, para 53; Case T-427/08, para 66.

¹⁴² Case T-68/89 *Società Italiana Vetro Spa v Commission*, [1992] ECR II-1403, para 160.

¹⁴³ Case T-156/04, para 285.

¹⁴⁴ Cases T-29/10 and T-33/10, para 143.

¹⁴⁵ Case T-266/02.

¹⁴⁶ Case T-266/02, para 95; Case T-274/01 *Valmont v Commission* [2004] ECR II-3145, para 136; and Joined Cases T-115/09 and T-116/09, para 42.

¹⁴⁷ 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* [2002] ECR I-8375, para 318.

undertaken by the Court has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure¹⁴⁸.

The same happens with Article 101(3) TFEU cases¹⁴⁹, where the Court is empowered to annul the administrative decision, but cannot substitute its own economic assessment for that of the institution that adopted the decision the legality of which is requested for review¹⁵⁰. For the same reason, in abuse of dominant position cases (Article 102 TFEU), the Court controls the adequacy of the method of calculating the rate of recovery of costs chosen by the Commission¹⁵¹ and its application, including the proper calculations (mathematical operations)¹⁵². However, the Court can neither suggest an alternative method, nor replace the analysis of costs made by the Commission.

Finally, when the Court annuls a merger decision in whole or in part, the concentration shall be re-examined by the Commission with a view to adopting a new decision (Article 10(5) of the Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings).

IX. THE LIMITED UNLIMITED JURISDICTION RELATED TO FINES

In Competition law cases, the European Union Courts enjoy of “unlimited jurisdiction with regard to the penalties” (Article 261 TFEU in relation to Article 31 of Regulation No 1/2003). They are allowed not only to annul the contested decision, but also to reduce or increase the fine or periodic penalty imposed, by taking into account all of the factual circumstances (Article 31 of Regulation No 1/2003)¹⁵³. In other words, this is not just a control of the lawfulness of the penalty, but also a control of the merits, which empowers the Courts to substitute their own appraisal for the Commission’s¹⁵⁴.

As a matter of fact, the Courts amend the Commission’s decisions when they do not comply with the legal requirements, including the general principles of law. For

¹⁴⁸ Case C-110/10 P *Solvay v Commission*, para 51.

¹⁴⁹ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission* [2009] ECR I-9291, para 241 and the case-law cited; Case T-111/08, para 201.

¹⁵⁰ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, paras 242 and 243; Case T-111/08, para 202.

¹⁵¹ Case C-7/95 *Deere v. Commission* [1998] ECR I-3111, para 34; and Case T-340/03, *France Télécom (antes Wanadoo) v Commission* [2007] ECR II-107, para 129 *et seq.*

¹⁵² Case T-340/03, paras 162 *et seq.*

¹⁵³ 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 Case C-254/99 P, para 692; Case C-534/07 P, para 86; Case T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para 577; and Case T-214/06 *Imperial Chemical Industries v Commission*, para 293.

¹⁵⁴ 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, para 692; C-272/09 P, paras 103, 106.

instance, it would be discriminatory to apply different methods of calculation to fine the undertakings that have participated in a cartel¹⁵⁵. In *Ventouris*, the Court reduced the amount of the fine, since the Commission had punished to equal extent the undertakings that were found guilty of two infringements and those that were found guilty of only one of them, in disregard of the principle of proportionality¹⁵⁶. In *Chalkor* the Court reduced the starting amount of the fine, to take account of the fact that the Commission held that the undertaking was liable for participation only in one of the three branches of the cartel¹⁵⁷. In *Basf*, after having partially annulled the Commission's decision, the Court carried out a fresh calculation of the fine to reflect the exact duration of the undertaking's participation in the infringement, whilst pointing out that the Guidelines are without prejudice to the assessment of the amount of the fine by the Courts, which have unlimited jurisdiction¹⁵⁸. In *GDF Suez*, the General Court reduced the total amount of the fine to amend the error of the Commission related to the period of the infringement, although it did not in a proportional way, since it would not take into account all the relevant circumstances¹⁵⁹.

However, to complete the picture it is necessary to make three important complementary remarks, which *in practice reduce the Court's ability to substitute the Commission's decisions*.

First, the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, since proceedings before the Courts of the European Union are *inter partes*¹⁶⁰. Thus, it is not for the Courts to review of its own motion the weighting of the factors taken into account by the Commission to determine the amount of the fine¹⁶¹. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion (e.g., failure to state reasons for a contested decision), it is for the applicant to identify the impugned elements of the contested decision, formulate grounds to challenge and adduce evidence to demonstrate that its objections are well founded¹⁶². From this point of view, it is doubtful that increasing the fine conforms with the understanding of the proceeding as *inter partes*, along with its aim to protect citizens' rights, due to the dissuasive effect linked to the *reformatio in peius*.

Second, the amount of fines is set by the Commission according to very detailed criteria. In fixing the amount of the fine, it takes in to consideration both the *gravity* and the *duration* of the infringement (Article 23(3) of Regulation

¹⁵⁵ Case C-280/98 P *Weig v Commission* [2000] ECR I-9757, paras 63 to 68; and Case C-291/98 P *Sarrió v Commission* [2000] ECR I-9991, paras 97 to 100.

¹⁵⁶ Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257, para 219.

¹⁵⁷ Case T-21/05 *Chalkor v Commission*, para 105 (confirmed on appeal, Case C-386/10 P, para 99).

¹⁵⁸ Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4949.

¹⁵⁹ Case T-370/09 *GDF Suez v Commission*, para 458 *et seq.*

¹⁶⁰ Case C-389/10 P, para 131.

¹⁶¹ Case C-389/10 P, para 63.

¹⁶² Case C-389/10 P, para 132.

No 1/2003). In addition, the Commission Guidelines¹⁶³ determine the method that the Commission has bound itself to use in assessing the fines, which ensure legal certainty on the part of the undertakings¹⁶⁴. However, the Guidelines are not the base of the decision and do not create legitimate expectations. The Commission may at any time adjust the level of fines, if the proper application of the competition rules so requires¹⁶⁵, since it may then be regarded as justified by the objective of general prevention¹⁶⁶. The Commission can apply new Guidelines to calculate the fine in respect of infringements committed before they were adopted¹⁶⁷, on condition that the policy that they implement was reasonably foreseeable when the infringements were committed¹⁶⁸.

According to the current Guidelines, fines have to be applied following a two-steps method. Step one, the *basic amount* of the fine is related to a proportion of the value of sales¹⁶⁹, depending on the gravity of the infringement¹⁷⁰. It allows assessing the size and economic power of the undertakings concerned. The Commission can increase the fine per year of infringement by up to 10% of this amount¹⁷¹.

Step two, the Commission may adjust the basic amount of the fine upwards or downwards¹⁷². It can be increased in presence of *aggravating circumstances* (reincidence, refusal to cooperate, obstruction to investigations, role of leader, etc.)¹⁷³. It is also for the Commission to choose, in the context of its discretion, the uplift that it intends to apply to the basic amount of the fine¹⁷⁴. To this end, the Commission has to take into account a number of factors, such as the nature of the infringement, the market share of the undertakings concerned¹⁷⁵, the geographic scope of the infringement and whether or not the infringement has been

¹⁶³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 1.9.2006 (2006/C 210/02). The Guidelines form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2006] ECR I-4429, para 91 and Case C-389/10 P, para 127). “(...) Guidelines are a case of self-limitation on the Commission’s part (Case C-386/10 P, para 71).

¹⁶⁴ Joined Cases C 189/02 P, C 202/02 P, C 205/02 P to C 208/02 P and C 213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para 213; and Case T-83/08 *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals v European Commission* [2012] ECR. 0000, para 108.

¹⁶⁵ Joined Cases 100/80 to 103/80 *Musique diffusion française and Others v Commission* [1983] ECR 1825, para 109; and Case T 23/99 *LR AF 1998 v Commission* [2002] ECR II 1705, paras 236 and 237.

¹⁶⁶ Case T-76/08 *EI du Pont de Nemours and others v Commission*, para 126.

¹⁶⁷ Case T-83/08, para 119.

¹⁶⁸ Case T-83/08, para 126.

¹⁶⁹ Article 15(2) of Regulation No 17; recital 10 and Articles 14 and 15 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, para 121; Case T-25/05 *KME v Commission*, para 100.

¹⁷⁰ Guidelines (2006), para 19.

¹⁷¹ Case T-25/05, para 114.

¹⁷² Guidelines (2006), paras 10-11.

¹⁷³ Guidelines (2006), para 28.

¹⁷⁴ Case T-25/05, para 115-117.

¹⁷⁵ Case T-25/05, para 106.

implemented¹⁷⁶. In this regard, Courts not only control whether the Commission has departed from the Guidelines, but also whether the increase is or not “manifestly disproportionate”¹⁷⁷ or whether the Commission is right in refusing to regard other factors, as for instance the undertaking’s financial losses, which would have the effect of conferring an unfair competitive advantage on undertakings least well adapted to the conditions of the market¹⁷⁸.

On the contrary, the basic amount may be reduced where the Commission finds *mitigating circumstances* (infringement by negligence, ceasing the infringement, limited involvement, avoiding applying the anticompetitive conduct, cooperation, anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation)¹⁷⁹. In the absence of any binding indication in the Guidelines to this regard, the Commission has a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of attenuating circumstances¹⁸⁰. For instance, the fact that an undertaking did not behave in the manner agreed with its competitors is not necessarily a mitigating circumstance¹⁸¹, unless the undertaking is able to show that it opposed its implementation, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement it¹⁸². As another example, the Commission is not required to treat the poor financial health of the sector as an attenuating circumstance¹⁸³. The fact that in previous cases the Commission took account of the economic situation in the sector as an attenuating circumstance does not mean that it must necessarily continue to follow that practice¹⁸⁴. Indeed, cartels usually come into being when a sector is having trouble¹⁸⁵. The Court has repeatedly held that the Commission’s practice in *previous decisions* is not binding for the Commission, since it is not part of the legal framework¹⁸⁶.

Accordingly, the fact that the Commission in the past has imposed fines set at a specific level for certain categories of infringements cannot prevent it from setting fines at a higher level, if raising of penalties is deemed necessary in order to ensure

¹⁷⁶ Guidelines (2006), para 22.

¹⁷⁷ Case T-25/05, para 116.

¹⁷⁸ Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, para 105; Case T-62/02 *Union Pigments v Commission* [2005] ECR II-5057, para 175 and the case-law cited; and Case T-25/05, para 165.

¹⁷⁹ Guidelines (2006), para 29.

¹⁸⁰ Case T-25/05, para 126; Case T-83/08, para 240.

¹⁸¹ Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, para 277 and the case-law cited.

¹⁸² Case T-83/08, para 248.

¹⁸³ Case T-25/05, para 129.

¹⁸⁴ Case C-389/10 P, para 98.

¹⁸⁵ Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd v Commission of the European Communities*, para 345.

¹⁸⁶ Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, para 205; Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, para 233; Case C-549/10 P, *Tomra v Commission*, para 104.

implementation of competition policy¹⁸⁷. The Commission may adjust the level of fines to the needs of that policy¹⁸⁸. The gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and no binding or exhaustive list of the criteria that must be applied has been drawn up¹⁸⁹. Administrative precedent can offer indication for determining whether there is discrimination¹⁹⁰. However, the level of the fine set by the Commission does not represent a change in its policy with regard to fines warranting specific explanation, but a standard application of that policy¹⁹¹.

In addition, the Commission is also well placed to calculate the *deterrent* effect of a fine¹⁹², which explains restrictions in judicial review¹⁹³. The Commission will take into account the need to increase the fine in order to exceed the amount of gains improperly made because of the infringement where it is possible to estimate that amount¹⁹⁴.

In assessing the cooperation provided by members of a cartel (*leniency*), the Commission is required to state the reasons for which it considers that information provided does or does not justify a reduction of the fine¹⁹⁵. On the other hand, it is inherent to the logic of immunity from fines that only one of the cartel members can have the benefit, given that the effect being sought is to create a climate of uncertainty within cartels by encouraging their denunciation¹⁹⁶. In this sense, the Court must control whether the Commission has provided unequal treatment to the applicants for leniency¹⁹⁷, taking into account the facts in order to decide whether the applicants were or not in a comparable position (precedence in supplying information to the Commission, quality and usefulness of the supplied information, etc.)¹⁹⁸. However, within those limits, the Commission enjoys certain discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings¹⁹⁹. Accordingly, the review carried out by the Court in the context of

¹⁸⁷ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para 227; Case C-549/10 P, para 105.

¹⁸⁸ Joined Cases 100/80 to 103/80, para 109; Case C-549/10 P, para 106.

¹⁸⁹ Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, para 33; Case C-549/10 P, para 107.

¹⁹⁰ Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, para 205; Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, para 233; Case C-549/10 P, para 104.

¹⁹¹ Case T-155/06, para 315, confirmed on appeal: Case C-549/10 P, para 108.

¹⁹² Joined Cases 100/80 to 103/80, para 106.

¹⁹³ David Bailey (2004), 1333

¹⁹⁴ Guidelines (2006), para 31.

¹⁹⁵ Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, para 297; Case T-214/06, para 184.

¹⁹⁶ Case T-25/05, para 137.

¹⁹⁷ Case T-25/05, paras 139-140; Case T-214/06, para 223.

¹⁹⁸ Case T-25/05, paras 139-140.

¹⁹⁹ The Commission is justified in attributing limited value to cooperation which merely corroborates evidence obtained at an earlier stage of an inquiry. Case T-44/00, para 301; Case T-

the leniency program is limited²⁰⁰, since only an obvious error of appraisal is capable of being censured²⁰¹. The complainant has to show that, in the absence of the information provided, the Commission would not have been in a position to prove the infringement²⁰².

Third, as we have seen, *full jurisdiction does not mean Courts becoming competition authorities*. An enforcement authority is not the Court but the European Commission. For this reason, in practice, Courts have little room for amending the fine. Setting the amount of fines requires taking into account a large number of factors, which necessarily gives the Commission a variety of options in their assessment, their weighting and their evaluation so as adequately to punish the infringement²⁰³. Bear in mind that the Commission's power to impose fines, ultimately, is one of the means conferred on it to carry out the task of supervision entrusted to it by the Treaty²⁰⁴. That task not only includes the duty to investigate and sanction infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles²⁰⁵. On the contrary, Courts are not the proceeding authority, neither do they have the means to carry out the activities that would require being able to set an alternative fine. It explains that Courts recognize a significant leeway to the decision-maker, in assessing the conduct and determining the fine: "the Commission enjoys a wide discretion when exercising its power to impose such fines"²⁰⁶. In fact, Courts can only substitute the administrative decision when it is quite evident that the conduct deserves another fine. Evidence has to result from the materials collected in the procedure or adduced by the applicant in support of the pleas in law put forward²⁰⁷, since Courts are not supposed to develop their own investigations.

From this point of view, it is quite understandable that Courts do not tend to substitute their own criteria for that of the Commission in determining the appropriate level of fines²⁰⁸. This is evidenced in *KME*, where the Commission did not take into account the actual impact of the infringement on the market in setting the basic amount of the fine in a cartel proceeding, since it could not be

38/02 *Groupe Danone v Commission* [2005] ECR II-4407, para 455; CFI, Case T-25/05, para 152. Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paras 81 and 88; Case T-214/06, para 181.

²⁰⁰ Case T-77/08 *Dow Chemical v Commission*, para 164.

²⁰¹ Case T 410/03 *Hoechst v Commission* [2008] ECR II 881, para 555.

²⁰² Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others v Commission* [2009] ECR I 8681, para 297; Case T-214/06, para 184.

²⁰³ Case C-386/10 P, para 76.

²⁰⁴ Guidelines (2006), para 4.

²⁰⁵ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, para 170.

²⁰⁶ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, para 172; Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, para 123; and Case T-76/08 *El du Pont de Nemours and others v Commission*, para 124.

²⁰⁷ Case C-389/10 P, para 129; and Case C-386/10 P *Chalko v Commission*, para 52.

²⁰⁸ David Bailey, "Scope of Judicial review under Article 81 CE" (2004) 41 *Common Market Law Review* 1333.

measured²⁰⁹. On the contrary, the General Court found that there was evidence to prove the existence of such impact, but it did it only for the sake of completeness, without drawing consequences of it²¹⁰. In another example, Courts recognize that the method used by the Commission of assessing the duration of an infringement by progressive thresholds, each of six months, may have the effect of ignoring the differences of the undertakings that participated in the infringement. However, the Court did not censure it, on condition that the setting of such thresholds complies with the principle of equal treatment and the principle of proportionality. It is worth remembering that the “European Union Courts’ review of the lawfulness of the exercise of the Commission’s discretion in the matter must confine itself to checking that the thresholds set are coherent and objectively justified and that the Courts must not immediately substitute their own assessment for that of the Commission”²¹¹.

X. CONCLUSIONS

- (1) The Treaty on the Functioning of the European Union is based on a confusing distinction between control of legality (Article 263 TFEU) and unlimited jurisdiction (Article 31 of Regulation No 1/2003 in relationship to Article 261 TFEU). Limits to judicial review should not be deemed linked to the way of challenging the administrative performance, but to the principle of separation of powers and to the exercise of discretionary powers. The European Commission is an administrative body engaged in the day-to-day management, aimed at achieving of social, economic and political goals, while Courts are independent and impartial bodies, responsible for declaring the law and protecting citizens’ rights. In this institutional system, control of legality cannot be seen as a “limited jurisdiction”, but as a *comprehensive way to review the law, the facts and their appraisal*. The reason being that what is at stake is not just the control of legality of the Commission’s decisions, but also the protection of citizens’ rights.
- (2) Notwithstanding it, according to the jurisprudence of the European Courts, the Commission enjoys *some discretion in the assessment of complex economic and technical issues*. In these cases, judicial review limits to control whether the Commission committed a *manifest error of assessment*. As case-law shows, this is an effective control of legality, which leads Courts to annul the Commission’s decisions when they are not based on sound economics. However, if the decision does not appear as manifestly erroneous, it is necessary to recognize the Commission’s a margin of discretion in the appraisal of complex issues. The reason lies in the fact that such assessment

²⁰⁹ Case C-389/10 P, paras 37 et seq.

²¹⁰ According to the Guidelines, for the purposes of assessing the seriousness of the infringement, the Commission does not have to take its actual market impact into account unless it is measurable. Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, para 122.

²¹¹ Case T-76/08, para 118.

cannot be controlled by the legal principles, nor by alternative technical reports, which would not lead to more certainty in the analysis, but merely to another assessment. In other words, there is a margin of discretion for the Commission that cannot be controlled by the Courts, since it would not mean reviewing but enforcing Competition law.

- (3) Moreover, the European Commission has *discretionary powers, which involve the ability to make competition policy choices*. Discretionary decisions must be annulled when they infringe the legal framework or are deemed not to be reasonable, suitable or proportionate. However, within those limits, in essence, discretionary powers leave the Commission the ability to choose what is more convenient for the competition policy goals. Thus, under no circumstances, can the Courts rule on the substance, which would involve taking policy options in the place of the public body charged by the Treaty with this task.
- (4) According to the European legal framework, the role of the Courts is controlling not defining competition policy, nor enforcing Competition law. Therefore, Courts have to limit themselves to quash the decision, but cannot substitute their point of view for that of the Commission. It would involve developing administrative tasks, such as carrying out investigations, collecting evidences or making economic and technical assessments on their own. In other words, it would mean the Courts becoming competition authorities, which would be inconsistent with the European institutional system.
- (5) In Competition law, the European Union Courts enjoy “unlimited jurisdiction with regard to the penalties”, so that they are not only allowed to annul the contested decision, but also to reduce or increase the fine or periodic penalty imposed. In fact, Courts amend the Commission’s decisions when they do not respect citizen’s rights or do not comply with the legal requirements, including the general principles of law. However, in practice, control of the merits has a limited scope. There are two reasons for this. On the one hand, the exercise of unlimited jurisdiction does not amount to a review of the Court’s own motion, since proceedings before the Courts of the European Union are *inter partes*. It is for the applicant to raise pleas in law against that decision and to adduce evidence in support of them. Thus, it is doubtful that increasing the fine conforms with this understanding of the proceeding, along with its aim to protect citizens’ rights, due to the dissuasive effect linked to the *reformatio in peius*. On the other hand, “unlimited jurisdiction” does not alter the role of the Courts, which is to control and not to enforce Competition law. The Commission’s power to impose fines is a mean to carry out a general competition policy in the light of the principles laid down in the Treaty. In this context, setting the amount of fines requires taking into account a large number of factors, which necessarily gives the Commission a variety of options in their assessment, so as adequately to punish the infringement. For instance, the Commission is well placed to adjust the level

of fines to the needs of competition policy, to calculate the deterrent effect of a fine or to assess the cooperation provided by members of a cartel. It explains why Courts allow a significant leeway to the Commission, in assessing the conduct and determining the fine.