

# Understanding the limits of judicial review in European competition law

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This article aims to contribute to better understanding of the scope of judicial review in European competition law. It does so by exploring its boundaries and highlighting the different functions of judicial review and competition law enforcement. On the one hand, the European courts have to protect citizens' rights. Fit for this purpose, Article 263 Treaty on the Functioning of the European Union (TFEU) provides a comprehensive way to review the law, the facts and their appraisal. However, on the other hand, courts are not competition authorities. This raises some limits for judicial review. First, courts are entitled to annul the Commission's decision, but as a rule they cannot pronounce on the merits of the case. Second, courts can annul discretionary decisions when they do not conform with the legal framework, but cannot substitute their own discretion for that of the European Commission. Third, judicial review can eventually be limited to control whether the Commission made a manifest error in the assessment of complex and technical issues. Fourth, in spite of the unlimited jurisdiction (Article 261 TFEU), in fact courts give the European Commission significant leeway in the application of fines.

Keywords: competition law, judicial review, antitrust enforcement, discretionary powers, citizens' rights, competition authorities

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## I. Introduction

*To what extent are European courts entitled to control administrative decisions?*  
This issue is at the very heart of every administrative law system. It is therefore

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also at the core of the European competition law, whose enforcement is entrusted to the European Commission.

The Court of Justice of the European Union shall review the legality of the Commission's decisions on the Article 263 Treaty on the Functioning of the European Union (TFEU) grounds. This is a *comprehensive control of the legality of the European Commission's decisions, which extends to the law, the facts and their appraisal* (Section II). Bear in mind that what is at stake is the protection of citizens' rights through an independent and impartial instance (Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)). Moreover, European courts have the so-called 'unlimited jurisdiction' related to fines, by which they can not only void, but also amend the quantum of the sanction, increasing or reducing it (Article 261 TFEU in relation to Article 31 of Regulation No 1/2003).

However, judicial review has its *limits* as well. The legal framework entrusts the European Commission with the task of defining and implementing competition policy, not the courts. Therefore, *the role of the European courts is to control the legality of the Commission's decisions and to protect the citizen's rights, but not to enforce competition law*. This raises two limits for judicial review.

First, under Article 263 TFEU the courts are entitled to *annul* the Commission's decision, but they cannot pronounce on the merits of the case (Section III). Courts are not the competition authority, so they are not supposed to get involved in making economical appraisals, providing evidences or taking executive decisions instead of the European Commission.

Second, the exercise of administrative *discretionary powers* can be challenged when it is contrary to the legal framework and, in particular, to the general principles of law (Section IV). However, courts cannot substitute their own discretion for that of the European Commission. For the same reason, in complex economic and technical issues, judicial review can eventually be limited to verifying whether the Commission made a manifest error in the assessment of the facts (Section V). Courts' scrutiny has become more intense over time. However, we have to accept that in the appraisal of the facts sometimes there is not a right or wrong answer, but a margin of discretion. Thus, when there is a margin for choice, it is for the Commission rather than for the courts to make the decision. Finally, unlimited jurisdiction (Article 261 TFEU) does not prevent the courts from leaving a significant leeway to the European Commission in the application of fines (Section VI). Ultimately, the power to impose fines can be regarded as a means conferred on the Commission to carry out a general competition policy.

In short, judicial review needs to strike the right balance between the conflicting forces of improving courts' scrutiny as a means to protect the citizens' rights, on the one hand, and leaving the competition authority the necessary room to shape and implement competition policy, on the other.

## 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.<sup>1</sup> It could be argued that Article 261 TFEU does not limit the powers of the judge to the amount of the fines, but extends them to the whole fining decision.<sup>2</sup> If this were the case, a major part of competition law enforcement would be subject to unlimited jurisdiction. However, according to case law, unlimited jurisdiction refers exclusively to the penalties for infringement of Articles 101–102 TFEU, which can be regarded as criminal in nature.<sup>3</sup> Therefore, the jurisdiction to amend fines is more limited than it may first appear.

To begin with, it should be noted that Article 263 TFEU *does not amount to a limited form of judicial review* ('light judicial review'),<sup>4</sup> but is a *comprehensive way to review the law, the facts and their appraisal*. It has been argued that courts should not be limited to annulling a Commission decision but should be empowered to submit a final decision, when this seems appropriate.<sup>5</sup> We can accept this, as long as we do not forget that courts cannot become competition authorities, as we will see below. This means that courts can only make a decision when the procedure has gathered enough evidence and there is no room for administrative discretion.

The reason for a comprehensive judicial review is that what is at stake is not just the control of legality ('the objective legal order'), but also the protection of citizens' rights. Competition law enforcement can have a significant bearing on fundamental rights, such as private property, freedom of commerce and industry (Articles 16 and 17 of the Charter of Fundamental Rights of the European Union) or due process and fair trial (Article 6(1) ECHR). The European Commission is an administrative body engaged in the-day-to-day management, while courts are independent and impartial bodies entrusted with the task of controlling the legality of administrative actions, declaring law and protecting citizens' rights.<sup>6</sup> An effective regime of judicial review acts as counterbalance to

<sup>1</sup> 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.

<sup>2</sup> Ian Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"', *EUI-RSCAS* (2009) 38–39 <<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf>> accessed 19 November 2012, also published in Ehlermann and Marquis (eds) (2011). See also Damien MB Gerard, 'EU Antitrust Enforcement in 2025: "Why Wait? Full Appellate Jurisdiction, Now"' (2011) 1 *CPI Antitrust Journal* 7 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1762047](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762047)> accessed 19 November 2012.

<sup>3</sup> Case C-137/92 P-DEP, *Hüls v Commission* [1999] ECR I-4383, paras 149–59.

<sup>4</sup> Forrester (n 2) 3 and 'A challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 *European Law Review* 206.

<sup>5</sup> Heike Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' (2009) *EUI-RSCAS*, 57 <<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Schweitzer.pdf>> accessed 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).

<sup>6</sup> Heike Schweitzer (2009, 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'.

the Commission's broad powers.<sup>7</sup> Therefore, *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 Rights.<sup>8</sup> The legal frameworks of the Member States can also reinforce this interpretation. For instance, in German law judicial review is considered a fundamental right granted to any person who is potentially violated in his rights by any act of a public authority (Article 19 [IV] Of the Basic Law).<sup>9</sup>

This explains why, according to Article 263 TFEU, the European courts carry out a comprehensive review of *issues of law*,<sup>10</sup> including the procedural guarantees. Control of legality also extends to the *facts* on which the administrative decision is based and to their *appraisal*.<sup>11</sup> These elements are intertwined, since it is usually hard to distinguish between facts, law, and economic appreciations.<sup>12</sup> Somehow, they are all facets of the same process of review.<sup>13</sup> For instance, the Court 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 measure,<sup>14</sup> the application of the 'private creditor test'<sup>15</sup> or a comprehensive review as to whether the tax scheme at issue came within the scope of Article 107(1) TFEU.<sup>16</sup>

Obviously, control of legality also extends to the *evidence* provided for the Commission to prove the infringements<sup>17</sup> and to support the conclusions

<sup>7</sup> Heike Schweitzer (2009) 9.

<sup>8</sup> 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.

<sup>9</sup> Jörg P. Terhechte, 'Administrative Discretion and Judicial Review in Germany' in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 84–85.

<sup>10</sup> 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 (eds), *Comparative Administrative Law* (Edward Elgar 2010) 453.

<sup>11</sup> Kerse and Khan state that the establishment of the Court of First Instance (1989) has given way to an increasing intensity of judicial review of the Commission's decisions. The Court of First Instance has fulfilled its intended purpose of detailed scrutiny of factual issues. CS Kerse and N Khan, *EC Antitrust Procedure* (5th edn, Thomson 2005) 446, para 8-002.

<sup>12</sup> Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (2010) TILEC Discussion Paper No. 2011-008, 19 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1698342](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342)> accessed 12 November 2012.

<sup>13</sup> A. Meij, 'Judicial Review in the EC Courts: Tetra Laval and Beyond' in Essens, Gerbrandy and Lavrijssen (n 9) 20.

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> Case C-487/06 P, para 115; Case C - 452/10 P, para 104.

<sup>17</sup> 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.

drawn from it<sup>18</sup> (Article 2 Regulation 1/2003).<sup>19</sup> The tendency to apply a more economic approach to competition law enforcement requires that the Commission has a more demanding standard of proof in order to establish the economic effects of its decisions.<sup>20</sup> A decision can be made void when based on insufficient, incomplete, insignificant and inconsistent evidence.<sup>21</sup> For instance, in *Hellenic Republic*, the General Court annulled the Commission's decision, since it had not provided sufficient evidence to prove 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 inequality of opportunities between economic operators (Article 106 (2) TFEU).<sup>22</sup> 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 obligations.<sup>23</sup> Similarly, in *MTU Friedrichshafen*, the Court stated that the Commission cannot assume that an undertaking has benefited from a State aid solely 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 advantage.<sup>24</sup> Notwithstanding this, it is clear that the proof of the existence of the prohibited effect may be inferred from a bundle of converging facts having a certain degree of reliability and coherence.<sup>25</sup>

In short, courts must not only control the law, but also the facts, their appraisal and the evidence provided by the European Commission to support its decision. In this sense, it is worth highlighting that control of the facts and of their appraisal is equally crucial within national legal frameworks. It is true that in the *USA*, the appellate review model rests on the assumption that the initiating institution (agency) has superior competence in questions of fact, while the reviewing institution has superior competence in issues of law and will decide the matter independently.<sup>26</sup> This assumption leads the courts to be deferent to agency decisions (*Chevron*).<sup>27</sup> The rationale is 'to place policymaking in the

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<sup>18</sup> 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.

<sup>19</sup> Case C-272/09 P *KME v Commission*, para 105.

<sup>20</sup> Annetje T Ottow, 'Observations on Economic Proof in Economic Cases' in Essens, Gerbrandy and Lavrijssen (n 9) 43.

<sup>21</sup> Case C-12/03 P *Tetra Laval* [2005] ECR I-987, paras 46 and 48.

<sup>22</sup> Case T-169/08 *Hellenic Republic v Commission*, para 105.

<sup>23</sup> Case T-266/02 *Deutsche Post v Commission* [2008] ECR II-1233, para 91.

<sup>24</sup> 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.

<sup>25</sup> Case T-154/10 P, para 120.

<sup>26</sup> Thomas W Merrill, 'The origins of the American-style Judicial Review' in Rose-Ackerman and Lindseth (n 10) 389.

<sup>27</sup> However, it has also been stated that 'contrary to the expertise hypothesis, we find the evidence suggests the Commission does not perform as well as generalist judges in its adjudicatory antitrust decision-making

hands of the politically accountable agencies to which Congress has delegated that power, rather than in the hands of politically unaccountable judges'.<sup>28</sup> However, in the USA antitrust law is not enforced by an administrative body, but directly by the courts. In contrast, 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* (specialized administrative body<sup>29</sup>), which carries out a control on the merits of decisions, such as the imposition of fines and the blocking of mergers, as well as the legality of such decisions.<sup>30</sup> 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"').<sup>31</sup> A further appeal is available from the Tribunal to the 'appropriate court' but only regarding points of law or penalty amounts. Generally speaking, the courts exercise a 'supervisory' jurisdiction, since they are primarily concerned with the legality of the decision, not with its merits.<sup>32</sup> However, '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'.<sup>33</sup> In this context, it is 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 in ignorance of relevant facts (error of material fact).<sup>34</sup> In comparison, in *German* competition law, judicial review is entrusted to civil 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 fining procedures, but also in merger cases.<sup>35</sup> In this context, courts have full control of the facts. They can also take into account new facts and evidence not considered by the administrative

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role'. Joshua D Wright and Angela M Diveley, 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission' (2012) 1 *Journal of Antitrust Enforcement* 82, 103.

<sup>28</sup> Kenneth C Davis and Richard J Pierce, *Administrative Law Treatise*, I (3rd edn, Little, Brown and Company 1994) 130.

<sup>29</sup> Paul Craig, *Administrative Law* (7th edn, Sweet&Maxwell 2012) 6–7.

<sup>30</sup> C Graham, 'Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK' in Essens, Gerbrandy and Lavrijssen (n 9) 244.

<sup>31</sup> Peter Cane, 'Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals' in Rose-Ackerman and Lindseth (n 10) 429 and 432–33.

<sup>32</sup> Peter Leyland and Gordon Anthony, *Administrative Law* (6th edn, OUP 2009) 272–73, 205, 208–11.

<sup>33</sup> Cane (n 31) 434.

<sup>34</sup> Leyland and Anthony (n 32) 273.

<sup>35</sup> Heike Schweitzer (2009) 30.

authority. However, according to the principle of separation of powers, the role of the courts is to review, not to substitute the administrative decision.<sup>36</sup> 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*,<sup>37</sup> similarly, the courts are less deferent to agency decisions than in the USA. The competition authorities are subject to the *Court of Appeal* (civil law jurisdiction), which has to examine in fact and in law the administrative decisions.<sup>38</sup> If it declares the appealed decision void, the court has to replace or reform it with its own decision, to terminate the dispute. Merger cases, however, are subject to the *Council of State* (administrative jurisdiction), which applies a standard of marginal review (*contrôle restreint*) when the administrative authority exercises discretionary powers.<sup>39</sup> Although, this standard of review not only controls errors of law, but also errors in the facts and errors in characterizing 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 well.<sup>40</sup> Moreover, there is a control of the merits relating 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 facts.<sup>41</sup> 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 law.<sup>42</sup> Thus, it is clear that contrary to the deference shown to decision-making agencies in the USA, there are various ways in which the courts in European jurisdictions may engage in judicial review of such decisions.

### III. European courts cannot become competition authorities

Comprehensive judicial review under Article 263 TFEU should not make us forget that competition enforcement is entrusted to the European Commission, which acts as investigator, prosecutor, and decision-maker. The role of the courts is to verify the legality of the contested measure,<sup>43</sup> testing whether the

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<sup>36</sup> Heike Schweitzer (2009) 33–35.

<sup>37</sup> Geradin and Petit (n 12) 31–32.

<sup>38</sup> N Petit and L Rabeux, 'Judicial Review in French Competition Law and Economic Regulation' in Essens, Gerbrandy and Lavrijssen (n 9) 109.

<sup>39</sup> *ibid* 110–11.

<sup>40</sup> R Caranta and B Marchetti, 'Judicial Review of Regulatory Decisions in Italy. Changing the Formula and Keeping the Substance?', in Essens, Gerbrandy and Lavrijssen (n 9) 153–68.

<sup>41</sup> Inigo del Guayo, 'Judicial Review in Competition Law and Economic Regulation in Spain' in Essens, Gerbrandy and Lavrijssen (n 9) 203–23.

<sup>42</sup> S Lavrijssen, 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands. Vice or Virtue?' in Essens, Gerbrandy and Lavrijssen (n 9) 178–79.

<sup>43</sup> 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.

information and evidence relied on by the Commission in its decision is sufficient to establish the existence of the alleged infringement.<sup>44</sup> This explains why control of legality under Article 263 TFEU is limited to annulling the Commission's decisions. Notwithstanding this, we could admit that courts can go further and declare the rights at stake when the procedure has gathered enough evidence and there is no margin for discretion. However, in competition law issues, courts have little room for doing so, since they mainly deal with infringements or with decisions that have to be taken by the Commission. Thus, 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).<sup>45</sup> In sum, 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'<sup>46</sup>.

The limits of judicial review do not stem from the fact that the Commission is technically best placed to deal with such issues, but from the *principle of separation of powers*,<sup>47</sup> which *guarantees the administrative body's ability to act within the territory assigned to it by the Treaty*<sup>48</sup> and the legal framework.

For this reason, the exercise of administrative discretionary powers can be challenged by the courts only insofar as it is contrary to the legal framework and, in particular, to the general principles of law. Courts cannot substitute their own discretion for that of the European Commission.

This is also the reason why courts are not supposed to act as competition authorities, getting involved in making economical appraisals,<sup>49</sup> providing evidences, and taking executive decisions instead of the Commission.<sup>50</sup> Also it is important to note that proceedings before the courts of the European Union are *inter partes*.<sup>51</sup> Thus, it is not for the courts to review of their own motion the weighting of the factors taken into account by the Commission to determine the amount of the fine.<sup>52</sup> With the exception of pleas involving matters of public policy which the courts are required to raise of their own motion (eg failure to

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> Meij (n 13) 10.

<sup>47</sup> Marc Jaeger, 'The Standard of Review in Competition Cases involving complex economic assessments: towards the marginalisation of the marginal review?' (2011) 2:4 JCLP 296.

<sup>48</sup> T Zwart, 'The Scope of Review of Administrative Action from a Comparative Perspective' in Essens, Gerbrandy and Lavrijssen (n 9) 10.

<sup>49</sup> 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, paras 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.

<sup>50</sup> D Bailey, 'Scope of Judicial review under Article 81 CE' (2004) 41 Common Market Law Review 1327.

<sup>51</sup> Case C-389/10 P, para 131.

<sup>52</sup> *ibid* para 63.



state reasons for a contested decision), it is for the applicant to identify the impugned elements of the contested decision, formulate grounds on which to challenge and adduce evidence to demonstrate that its objections are well founded.<sup>53</sup> In the context of such exceptions, to a certain extent, the court can sometimes be engaged in fact-finding. The Court may require the parties to produce all documents and to supply all information considered desirable (Article 24 of the Protocol).<sup>54</sup> If necessary, it may also demand the Member States and institutions, bodies, offices, and agencies not party to the case to supply all information that the Court deems 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 relies 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 applicant.<sup>55</sup>

The limits of judicial review can be clearly seen in the European Courts' case law. For instance, in *CEAHR* the Court annulled the Commission's decision<sup>56</sup> 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 assessment.<sup>57</sup> However, the Court did not declare the existence of sufficient Community interest so that the Commission could 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 have demonstrated 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,<sup>58</sup> but did not get involved in defining the market on its own.<sup>59</sup> 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'.<sup>60</sup>

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 aids.<sup>61</sup> However, the Court did not take on this task of applying the test, but left it to the Commission to adopt the necessary measures to comply with the

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<sup>53</sup> *ibid* para 132.

<sup>54</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union.

<sup>55</sup> Heike Schweitzer (2009) 12–13.

<sup>56</sup> Case T-427/08, paras 163–78.

<sup>57</sup> *ibid* paras 157–78.

<sup>58</sup> *ibid* paras 118–19.

<sup>59</sup> 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.

<sup>60</sup> Case T-68/89 *Società Italiana Vetro Spa v Commission*, [1992] ECR II-1403, para 160.

<sup>61</sup> Case T-156/04, para 285.

judgment. It was not just lack of jurisdiction in matters of State aid to reverse administrative decisions which prevented the Court from engaging in the private investor test, but its inability to carry out the analysis involved. 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 granted.<sup>62</sup> 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 involved or not. 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 obligation.<sup>63</sup> However, it did not rule on whether there was State aid or not. It was not for the Court to replace the Commission by carrying out in its stead an examination it never carried out and drawing the conclusions which the Court itself would have drawn.<sup>64</sup>

The same issue arises with Article 101(3) TFEU cases,<sup>65</sup> where the court is empowered to annul the administrative decision, but cannot substitute its own economic assessment for that of the institution that took the decision under review.<sup>66</sup> For the same reason, in abuse of dominant position cases (Article 102 TFEU), the court can only control the adequacy of the method of calculating the rate of recovery of costs chosen by the Commission<sup>67</sup> and its application, including the calculations (mathematical operations).<sup>68</sup> The Court can neither suggest an alternative method, nor replace the analysis of costs made by the Commission.

Finally, it is also very revealing that 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 proceedings.<sup>69</sup> An examination undertaken by the court has neither the objective nor the effect of replacing a full investigation of the case in the context of an administrative procedure.<sup>70</sup>

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<sup>62</sup> Cases T-29/10 and T-33/10, para 143.

<sup>63</sup> Case T-266/02.

<sup>64</sup> 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.

<sup>65</sup> 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.

<sup>66</sup> 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.

<sup>67</sup> 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.*

<sup>68</sup> Case T-340/03, paras 162 *et seq.*

<sup>69</sup> 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.

<sup>70</sup> Case C-110/10 P *Solvay v Commission*, para 51.

#### IV. Discretionary powers

The main competition policy options are provided for in the Treaty in detail. However, sometimes the European Commission has the *ability to make competition policy choices*.<sup>71</sup> In these cases, the Commission can decide what is most convenient to achieve the Treaty goals, by choosing among different interests.<sup>72</sup> Indeed, discretionary powers are the lawful power to choose<sup>73</sup> between more than one outcome.<sup>74</sup>

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 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 whether it is better off targeting the electricity markets.

Third, sometimes advocacy can be the most efficient means to pursue the competition authority's goals.<sup>75</sup> 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 law.<sup>76</sup> To achieve the goals of Article 107(3) TFEU, State aids may be considered compatible with the internal market. According to settled case law, the Commission has a wide discretion to allow *State aids* by way of derogation from the general prohibition laid down in Article 107(1) TFEU.<sup>77</sup>

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

<sup>71</sup> Craig (n 29) 533.

<sup>72</sup> Marco D'Alberty, 'Administrative Law and the Public Regulation of Markets in a Global Age' in Rose-Ackerman and Lindseth (n 10) 68.

<sup>73</sup> Graham (n 30) 244.

<sup>74</sup> Leyland and Anthony (n 32) 215.

<sup>75</sup> James C Cooper, Paul A Pautler, and Todd J Zywicki, 'Theory and Practice of Competition Advocacy at the FTC' (2005) 72 *Antitrust Law Journal* 1092.

<sup>76</sup> J Carlos Laguna de Paz, 'Protecting the Environment without distorting Competition' (2012) 3:3 *JCLP* 248–57.

<sup>77</sup> 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.

declared inapplicable, provided that the Treaty conditions are fulfilled. Under the system of individual exception granted by the Commission previously, it could be argued that the European Commission enjoyed discretionary powers. However, discretionary powers are hard to find after the 2003 framework reform, which makes 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).<sup>78</sup> The Commission must adequately examine the arguments and evidence offered by the parties, to ascertain whether they demonstrate that those conditions have been satisfied.<sup>79</sup> Sometimes the arguments and the evidence may be refuted by the Commission, failing which it is permissible to conclude that the burden of proof borne by the person who relies on the exception has been discharged.<sup>80</sup>

Courts must strike down discretionary decisions when they infringe the legal framework or are deemed not to be proportionate, that is, whether they are suitable, necessary and the least restrictive method for attaining the desired goal. However, discretionary powers are subject to a *limited judicial review*,<sup>81</sup> since courts cannot make policy choices in the place of the public bodies charged by the Treaty with competition law enforcement.<sup>82</sup> It 'is not for the courts to substitute their choice as to how the discretion ought to have been exercised for that of the administrative authority'.<sup>83</sup> 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 reached.<sup>84</sup> Discretion cannot simply be transferred from agency heads to judges.<sup>85</sup> It cannot be right for the court to overturn a decision merely because it would have balanced the conflicting interests differently.<sup>86</sup> It would 'entail a re-allocation of power from the legislature and bureaucracy to the courts'.<sup>87</sup> In this sense, decisions implying elements of economic policy would be clearly excluded from a 'comprehensive' review.<sup>88</sup>

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<sup>78</sup> Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, para 235.

<sup>79</sup> Case T-111/08, para 197.

<sup>80</sup> Case T-168/01, para 236; and Case T-111/08, para 197.

<sup>81</sup> 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.

<sup>82</sup> *Leyland and Anthony* (n 32) 235.

<sup>83</sup> *Craig* (n 29) 642.

<sup>84</sup> *Bailey* (n 50) 1338.

<sup>85</sup> *Davis and Pierce* (n 28) 106.

<sup>86</sup> *Craig* (n 29) 659.

<sup>87</sup> *ibid* 642.

<sup>88</sup> *Jaeger* (n 47) 310.

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, to verifying the accuracy of the facts relied on, and verifying that there has been no error of law, manifest error of assessment of the facts or misuse of powers.<sup>89</sup> The court must also verify whether the Commission has observed the requirements laid down in the Guidelines.<sup>90</sup> 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 competition.<sup>91</sup> However, the court cannot substitute its own economic assessment for that of the Commission.<sup>92</sup>

## V. Margin of appraisal in complex economic and technical issues

Competition law enforcement often involves the need to make *complex economic or technical*<sup>93</sup> assessments. According to settled case law, in these cases the appraisal of the facts is subject to a more limited judicial review, as courts only control whether the European Commission made a *manifest error of assessment*.<sup>94</sup> What does this mean?

It is readily apparent that these issues are subject to *judicial review* under Article 263 TFEU, which does not provide for exceptions to the control of the Commission's decisions.<sup>95</sup> The Commission has to state the reasons on which the decisions are based (Article 296 TFEU)<sup>96</sup> and, in particular, it

<sup>89</sup> 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.

<sup>90</sup> Case T-35/99 *Keller and Keller Meccanica v Commission* [2002] ECR II-261, para 77.

<sup>91</sup> Joined Cases T-115/09 and T-116/09, paras 72 and 78.

<sup>92</sup> 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.

<sup>93</sup> Case T-201/04, para 87.

<sup>94</sup> 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.

<sup>95</sup> 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 *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.

<sup>96</sup> 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.

has to explain the weighting and assessment of the factors taken into account.<sup>97</sup> As we have seen, the appraisal of facts and evidence ‘falls within the Court’s complete discretion’.<sup>98</sup> Courts cannot refrain from reviewing the Commission’s interpretation of information of an economic nature.<sup>99</sup> The obvious reason for this is that the legality of enforcement measures depends on whether there are legal assumptions or not. Indeed, ‘review of both fact and discretion has become more intensive over time’.<sup>100</sup> 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’.<sup>101</sup> Moreover, as we have seen, to a certain extent, the court can get involved in fact finding.

As discussed, the Commission’s leeway has been considerably reduced by several decades of case law, which set out standards of proof and very detailed interpretation criteria. For instance, the definition of the relevant market involves complex economic appraisals<sup>102</sup>. However, sometimes the courts do not hesitate in reviewing the Commission’s findings, as can be seen in *Telefónica*<sup>103</sup>. 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<sup>104</sup>. However, it did not prevent the Court from controlling whether the abusive practices had been properly determined by the Commission. 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 dominant undertaking, rather than looking at the situation of current or potential competitors.<sup>105</sup> The Court also stated that for the purposes of calculating 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 services.<sup>106</sup>

The quality of the evidence produced by the Commission is particularly important in merger control, which is based upon a prospective analysis.<sup>107</sup> When assessing the compatibility of a concentration with the common market, the court controls whether the Commission has taken into account the whole set of factors that determines strengthening the company’s dominant position (Article 2(1) of the Regulation) and not just whether there will be a reduction

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<sup>97</sup> Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECR I-7415, para 87; C-272/09 P, para 101.

<sup>98</sup> Case T-154/10 *French Republic v Commission*, para 65.

<sup>99</sup> 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.

<sup>100</sup> Craig (n 10) 461.

<sup>101</sup> Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 892.

<sup>102</sup> 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.

<sup>103</sup> Case T-336/07 *Telefónica v Commission*, paras 109–44.

<sup>104</sup> Case T-271/03, para 185.

<sup>105</sup> *ibid* para 193.

<sup>106</sup> *ibid* para 203.

<sup>107</sup> Case C-12/03 P *Tetra Laval* [2005] ECR I-987, paras 42–44.

in potential competition.<sup>108</sup> In merger cases, the European 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’.<sup>109</sup> 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 operation.<sup>110</sup> Commitments offered by the undertaking are factors that 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 in one or more of the relevant markets.<sup>111</sup>

In this context, 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 put a margin of appraisal in the hands of the Commission to ascertain whether we are or not in presence of legal assumptions. The ‘legal characterization of the facts’ (appraisal of the facts) is by far the most subjective parameter<sup>112</sup> in competition law enforcement. It may be said that courts’ scrutiny should be as intense as possible, however, the point is that applying the criteria enshrined in Article 263 TFEU to complex economic and technical matters does not always allow a determination of whether the Commission was right or wrong (‘There is nothing inherently wrong with either choice’<sup>113</sup>). In these cases, there is a margin of appraisal that can only be controlled to a certain extent by legal principles, or by alternative technical reports. Such technical reports would not, in most cases, lead to more certainty in the analysis, but merely to another assessment. It may well be, therefore, that marginal judicial review should be confined to a few cases.<sup>114</sup> It has also been claimed that courts cannot put the resolution of disputes into the hands of non-legal experts,<sup>115</sup> but that they have to take on the responsibility of declaring the law. However, 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 modes.<sup>116</sup> Marginal review is applied, as the court is otherwise at risk of substituting its own views for those of the administrative body.<sup>117</sup>

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<sup>108</sup> Case C-12/03 P, paras 125 *et seq.*

<sup>109</sup> Bellamy and Child, *European Community Law of Competition* (6th edn, OUP 2008) 784–85, para 8.249.

<sup>110</sup> Case C-12/03 P, para 45.

<sup>111</sup> *ibid* para 85.

<sup>112</sup> Petit and Rabeux (n 38) 112.

<sup>113</sup> Davis and Pierce (n 28) 118.

<sup>114</sup> Forrester (n 2) 3.

<sup>115</sup> Jaeger (n 47) 314.

<sup>116</sup> M Schimmel and R Widdershoven, ‘Judicial Review after Tetra Laval. Some Observations from a European Administrative Law Point of View’ in Essens, Gerbrandy and Lavrijssen (n 9) 65.

<sup>117</sup> Meij (n 13) 19.

In this sense, for instance, the Commission enjoys of a degree of latitude regarding the choice of econometric instruments and appropriate approaches 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 inconsistently.<sup>118</sup> Thus, the more novel the discussed issues or the more controversial the nature of economic reasoning, the greater the margin of appraisal enjoyed by the Commission.<sup>119</sup> 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 economics.<sup>120</sup>

In the same vein, most national jurisdictions accept some kind of deference to administrative discretionary powers. In cases involving such powers, French courts apply a standard of 'marginal review' (*contrôle restreint*). In Italy, courts carry out a less intense scrutiny in relation to complex technical appraisals (*valutazioni tecniche opinabili*).<sup>121</sup> 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 reasoning.<sup>122</sup> In the Netherlands, the decisions that are made on the basis of 'discretion in assessment' are reviewed marginally.<sup>123</sup> 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 ever takes place, since it is very difficult to separate facts from the assessment of facts.

In short, according to Article 263 TFEU, the Commission's assessments of complex economic and technical matters are subject to a comprehensive judicial review. In fact, courts scrutiny has become more intense over the time. However, in the appraisal of the facts sometimes there is not a right or wrong answer, but a margin of discretion. This is the reason why in these cases judicial review can eventually be limited to verify whether the Commission made a manifest error of assessment.

## VI. Unlimited jurisdiction related to fines

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). They are not only allowed to annul the contested decision, but also to reduce or increase the fine or periodic penalty imposed,

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<sup>118</sup> Case T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237, para 132.

<sup>119</sup> Luis Ortiz Blanco, *EC Competition Procedure* (2nd edn, OUP 2006) 712, 18–36.

<sup>120</sup> It has been claimed that in these cases the burden of proof is reversed. Heike Schweitzer (2009) 25.

<sup>121</sup> R Caranta and B Marchetti (n 40) 156.

<sup>122</sup> Graham (n 30) 244.

<sup>123</sup> Lavrijssen (n 42) 179.



by taking into account all of the factual circumstances (Article 31 of Regulation No 1/2003).<sup>124</sup> 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's.<sup>125</sup>

In this sense, courts substitute the Commission's decision when based on *errors of law*, since legal interpretation is specifically entrusted to them. In exercising its sanctioning powers, the European Commission is bound to respect the legal framework. In fixing the amount of the fine, it has to take in to consideration both the *gravity* and the *duration* of the infringement (Article 23(3) of Regulation No 1/2003). In addition, the Guidelines<sup>126</sup> determine the method that the Commission has bound itself to use in assessing the fines, which ensures legal certainty on the part of the undertakings.<sup>127</sup> In this context, courts amend the Commission's decisions when they do not comply with the legal requirements, including the general principles of law. For instance, it would be discriminatory to apply different methods of calculation to fine the undertakings that have participated in a cartel.<sup>128</sup> 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 proportionality.<sup>129</sup> 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 cartel.<sup>130</sup>

Courts can also substitute the Commission's decision vitiated by *errors of fact or by errors in the appraisal of facts*, especially when the evidence at disposal clearly leads to another outcome. In *GDF Suez*, the General Court reduced the total amount of the fine to amend the error of the Commission regarding the infringement period, although it did not do so proportionally, since it would not take into account all the relevant circumstances.<sup>131</sup> In particular, due to the presumption of innocence, courts cannot conclude that the Commission has established

<sup>124</sup> 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.

<sup>125</sup> 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.

<sup>126</sup> 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).

<sup>127</sup> 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.

<sup>128</sup> Case C-280/98 P *Wëig v Commission* [2000] ECR I-9757, paras 63 to 68; and Case C-291/98 P *Sarriro v Commission* [2000] ECR I-9991, paras 97–100.

<sup>129</sup> Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257, para 219.

<sup>130</sup> Case T-21/05 *Chalkor v Commission*, para 105 (confirmed on appeal, Case C-386/10 P, para 99).

<sup>131</sup> Case T-370/09 *GDF Suez v Commission*, para 458 *et seq.*

the existence of the infringement at issue to the requisite legal standard if they still have doubts on that point.<sup>132</sup> Where there is doubt, the benefit of that doubt must be given to the undertakings accused of the infringement.

The jurisdiction of the EU Courts under Article 261 TFEU is unlimited; *in practice, however, the case-law gives the European Commission significant leeway in the calculation of fines.*

To begin with, the basic amount of the fine is related to the value of sales,<sup>133</sup> depending on the gravity of the infringement.<sup>134</sup> 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 yet drawn up.<sup>135</sup> In this regard, the Commission may not depart from the Guidelines in an individual case without giving sound reasons for doing so. In such cases, the Commission has to demonstrate that there is no infringement of the equal treatment principle.<sup>136</sup> In this sense, administrative precedent can offer an indication for determining whether there is discrimination.<sup>137</sup> However, the level of the fine set by the Commission does not represent a change in its policy that fines warrant specific explanation, but represents a standard application of that policy.<sup>138</sup> 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 framework.<sup>139</sup> 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 penalties is deemed necessary in order to ensure implementation of competition policy.<sup>140</sup> The Commission may at any time adjust the level of fines, if proper application of the competition rules so requires,<sup>141</sup> since it may then be regarded as justified by the objective of general prevention.<sup>142</sup>

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<sup>132</sup> 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.

<sup>133</sup> Art 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.

<sup>134</sup> Guidelines (2006) para 19.

<sup>135</sup> Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, para 33; Case C-549/10 P, para 107.

<sup>136</sup> 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.

<sup>137</sup> 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.

<sup>138</sup> Case T-155/06, para 315, confirmed on appeal: Case C-549/10 P, para 108.

<sup>139</sup> 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.

<sup>140</sup> 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.

<sup>141</sup> 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.

<sup>142</sup> Case T-76/08 *El du Pont de Nemours and others v Commission*, para 126.

In presence of *aggravating circumstances*, the Commission can raise the basic amount of the fine.<sup>143</sup> 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 concerned,<sup>144</sup> the geographic scope of the infringement and whether or not the infringement has been implemented.<sup>145</sup> In this regard, courts not only control whether the Commission has departed from the Guidelines, but also whether the increase is ‘manifestly disproportionate’ or not<sup>146</sup> or whether the Commission is right in refusing to regard other factors, as for instance the undertaking’s financial losses, which, if included, could have the effect of conferring an unfair competitive advantage on undertakings less well adapted to the conditions of the market.<sup>147</sup>

On the contrary, the basic amount may be reduced where the Commission finds *mitigating circumstances*.<sup>148</sup> 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 circumstances.<sup>149</sup> For instance, the fact that in previous cases the Commission took account of the difficult economic situation in the sector as an attenuating circumstance does not mean that it must necessarily continue to follow that practice.<sup>150</sup> Indeed, cartels usually come into being when a sector is having trouble.<sup>151</sup>

In addition, the Commission is also well placed to calculate the *deterrent* effect of a fine,<sup>152</sup> which explains restrictions in judicial review.<sup>153</sup> 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 amount.<sup>154</sup>

In assessing the cooperation with investigations provided by members of a cartel (*leniency*), the Commission is required to state the reasons for which it considers that information provided from each does or does not justify a reduction of the fine.<sup>155</sup> However, 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

<sup>143</sup> Case T-25/05, para 115–17.

<sup>144</sup> Case T-25/05, para 106.

<sup>145</sup> Guidelines (2006) para 22.

<sup>146</sup> Case T-25/05, para 116.

<sup>147</sup> 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.

<sup>148</sup> Guidelines (2006) para 29.

<sup>149</sup> Case T-25/05, para 126; Case T-83/08, para 240.

<sup>150</sup> Case C-389/10 P, para 98.

<sup>151</sup> 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.

<sup>152</sup> Joined Cases 100/80 to 103/80, para 106.

<sup>153</sup> Bailey (n 50) 1333.

<sup>154</sup> Guidelines (2006) para 31.

<sup>155</sup> 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.

their denunciation.<sup>156</sup> In this sense, the Court must control whether the Commission has provided unequal treatment to the applicants for leniency,<sup>157</sup> taking into account the facts in order to decide whether the applicants were in a comparable position or not (such as precedence in supplying information to the Commission, quality, and usefulness of the supplied information, etc.).<sup>158</sup> 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 undertakings.<sup>159</sup> Accordingly, the review carried out by the Court in the context of the leniency program is limited,<sup>160</sup> since only an obvious error of appraisal is capable of being censured.<sup>161</sup> 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 infringement.<sup>162</sup>

This being so, we have to wonder *why courts leave considerable latitude to the European Commission in the application of sanctions*. The reason is once more that the role of the courts is to control the legality and to protect the rights at stake, not to become competition authorities.

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 infringement.<sup>163</sup> 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 Treaty.<sup>164</sup> 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 principles.<sup>165</sup> 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'.<sup>166</sup> In fact, courts can only substitute the administrative decision when it is quite evident that the conduct deserves another fine, in as far as the evidence at

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<sup>156</sup> Case T-25/05, para 137.

<sup>157</sup> Case T-25/05, paras 139–40; Case T-214/06, para 223.

<sup>158</sup> Case T-25/05, paras 139–40.

<sup>159</sup> 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-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.

<sup>160</sup> Case T-77/08 *Dow Chemical v Commission*, para 164.

<sup>161</sup> Case T-410/03 *Hoechst v Commission* [2008] ECR II 881, para 555.

<sup>162</sup> 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.

<sup>163</sup> Case C-386/10 P, para 76.

<sup>164</sup> Guidelines (2006) para 4.

<sup>165</sup> 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.

<sup>166</sup> *ibid* 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.

disposal leads to only one possible conclusion. Evidence has to result from the materials collected in the procedure or adduced by the applicant in support of the pleas in law put forward,<sup>167</sup> 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 fines.<sup>168</sup> For instance, the Court has recognized that the method used by the Commission of assessing the duration of an infringement by progressive thresholds, each of 6 months, might have the effect of ignoring the differences of the undertakings that participated in the infringement. However, the Court did not censure it, their reasoning being 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’.<sup>169</sup>

Finally, we could bring up another argument that calls for caution in the exercise of ‘unlimited jurisdiction’ by the courts. According to case-law, an appeal can lead to a *reformatio in peius*.<sup>170</sup> 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.<sup>171</sup> As a result, the fine was increased by the Court to the detriment of the appellant. This has been seen as a consequence of unlimited jurisdiction.<sup>172</sup> However, it is doubtful that increasing the fine conforms with the understanding of the proceeding as a way to protect citizens’ rights, due to the dissuasive effect linked to the *reformatio in peius*,<sup>173</sup> whose prohibition can be seen as a general principle of Community law.<sup>174</sup>

## VII. Conclusion

Judicial review needs to strike the right balance between improving courts’ scrutiny and leaving the competition authority the necessary room to shape

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<sup>167</sup> Case C-389/10 P, para 129; and Case C-386/10 P *Chalko v Commission*, para 52.

<sup>168</sup> Bailey (n 50) 1333.

<sup>169</sup> Case T-76/08, para 118.

<sup>170</sup> Joined Cases T-101/05 and T-111/05 *BASF*, paras 212–23.

<sup>171</sup> Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4949.

<sup>172</sup> Michael J Frese and Floris ten Have, ‘The Legal Characterization of Several Infringements under Article 81 EC: In Search of an Objective Framework of Assessment. Joined Cases T-101/05 & T-111/05, *BASF/UCB v. Commission*, Judgment of the European Court of First Instance of 12 December 2007’ (2008) 34(4) *Legal Issues of Economic Integration* 389.

<sup>173</sup> The Court has to date been reluctant to use its unlimited jurisdiction to increase the fine directly. Kerse and Khan (n 11) 463 para 8-025.

<sup>174</sup> Case T-73/95, *Oliveira v Commission*, [1997] ECR II-00381, para 36.

and implement competition policy. On the one hand, European courts must carry out a comprehensive review of the Commission's decisions, extending to the inextricably linked factors of the law, the facts and their appraisal (Article 263 TFEU). 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. However, on the other hand, we cannot forget that judicial review and competition law enforcement are different functions. The legal framework entrusts the European Commission, rather than the courts, with the task of implementing competition policy. This raises some limits for judicial review.

First, under Article 263 TFEU the European courts are entitled to annul the Commission's decision, but as a rule they cannot pronounce on the merits of the case, since they are not supposed to get involved in making economical appraisals, providing evidences and taking executive decisions instead of the European Commission.

Second, the exercise of discretionary powers by the European Commission can be challenged when it is contrary to the legal framework and, in particular, to the general principles of law. However, courts cannot substitute their own discretion for that of the Commission.

Third, courts' scrutiny of complex economic and technical assessments made by the European Commission has become more intense over the time. However, we have to accept that the appraisal of the facts does not always allow for a determination of whether the Commission was right or wrong. Thus, when there is a margin for choice, it is for the Commission, not for the courts to make the decision. This is the reason why, according to settled case law, in these cases judicial review can eventually be limited to verifying whether the Commission made a manifest error in the assessment of the facts.

Fourth, in spite of their unlimited jurisdiction (Article 261 TFEU), in fact courts give a significant leeway to the European Commission in assessing conduct and determining *finis*. Once more, this reflects the role of the courts, which is to control the legality and protect the rights at stake, but not to be the preeminent enforcer of competition law. In addition, it is doubtful that increasing a fine conforms with the aim of judicial review to protect citizens' rights, due to the dissuasive effect associated with the *reformatio in peius*.