



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

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The Nature of Judicial Control

Introduction

One of the main reasons for the creation of the Court of First Instance of the European Communities (“the CFI”) was a concern about the level and effectiveness of judicial control in competition cases given the extended responsibilities of the Court of Justice of the European Communities (“the ECJ”) and its heavy workload.¹ Having regard to the contribution of the CFI to the development of judicial control over the last 20 years, the topic of the nature of judicial control is eminently suitable for discussion in the context of a celebration of the first 20 years of the history of the CFI.

The nature of judicial control is necessarily determined by the law that defines the jurisdiction and powers of the judiciary, and the relationship between the judiciary and other persons and bodies, in a polity governed by the rule of law. In that sense, the nature of judicial control is nothing more or less than what the relevant law says that it is. However, there is within the Member States of the European Union what can be described as a “classic” understanding of the nature of judicial control, which is that it is concerned solely with the legality of the exercise of public powers. Judicial control goes beyond that only if and to the extent that the court exercising control is empowered to do so by express legal provision.² There are two main reasons for that state of affairs. The first is a legal reason based on the idea of the separation of powers between the different organs of a state or other entity (such as, here, the European Community or European Union)³ that is subject to the rule of law: the role of the courts is to ensure respect for the rule of law; and that carries with it the corollary that the courts should act within the scope of the function allocated to them and should not involve themselves in functions allocated to other organs. The second reason is practical: courts and court procedures are designed for deciding cases and

¹ Competition cases in fact provide good illustrations of the different facets of the nature of judicial control in the context of European Community (“EC”) law; but this paper will not be devoted exclusively to judicial control as it applies in the sphere of competition law.

² *E.g.* Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, paragraphs 209-210 (pp 3719-3720) – reversed on grounds that are not here material by Cases C-402/05P and C-415/05P *Kadi v Council*, 3 September 2008. It should be noted in passing that *judicial control* of the exercise of public powers underlies the constitutional traditions common to the Member States (in other words, the *existence* of some form of judicial control is common to the Member States). It does not follow that the *nature and extent* of judicial control is uniform across all the Member States. On the other hand, it does appear that the control of legality is a commonly held value, subject to express provision otherwise.

³ For present purposes, there are no material distinctions between the European Community and the European Union.

not for the performance of the kind of functions allocated to the legislature or the executive.

Subject to certain exceptional situations,⁴ judicial control in the Community's legal order follows the same basic pattern as the "classic" understanding described above: Article 230 of the EC Treaty lists the grounds on which an act of a Community institution may be annulled; those grounds thus indicate the criteria for the "legality" of such acts;⁵ and Article 229 provides that an "unlimited" form of jurisdiction (or judicial control) can be conferred by express provision.

The main problems concerning the nature of judicial control arise not in relation to the basic idea that judicial control is limited to verifying the legality of the exercise of a public power but in relation to particular aspects of the judicial control of the exercise of discretionary powers and certain aspects of the judicial control of what can be described as "fact-finding" (whether or not a discretionary power is being exercised),⁶ in other words, in relation to the identification of the point at which judicial control reaches its farthest limits and cannot go further. The expression "margin of appreciation" is often used to describe the limit placed on judicial control in relation both to the control of the exercise of discretionary powers and in relation to the control of certain types of fact-finding,⁷ although that expression is not in all cases entirely accurate.

Where, exceptionally, judicial control extends beyond ascertaining the legality of the exercise of a public power (cases in which, to use the terminology of Article 229 of the EC Treaty, the jurisdiction of the court is "unlimited"), the court has power to substitute its own decision for that of the person or body originally entrusted with the exercise of the power in question. Analytically, where the court's jurisdiction is "unlimited" in that sense, the exercise of such jurisdiction is not an instance of judicial control of the acts of another person or body since the power of the court is actually to substitute its own decision for that of the person or body entrusted with the power, rather than "control" the exercise of the power.⁸

After the scope of the topic under consideration has been defined, the general position regarding the nature of judicial control will be described. More detailed treatment will then be given to what happens when the limits of judicial control are reached.

⁴ Historically, the best example was Article 37 of the ECSC Treaty: see Cases 2 and 3/60

Niederrheinische Bergwerks AG v High Authority [1961] ECR 133.

⁵ The same criteria apply to the "validity" of an act of a Community institution under Article 234 of the EC Treaty.

⁶ The intellectual universe inhabited by lawyers is generally assumed to comprise two, and only two, elements: law and facts. One example is provided by Article 225(1) of the EC Treaty, which states that appeals to the Court of Justice from the Court of First Instance are limited to points of law, thereby generating in the case law of the Court of Justice a distinction between appealable matters of law and unappealable matters of fact. Although the law/fact dichotomy has certain uses, it also has its limitations. In general, and particularly so far as is relevant in the present context, the legal universe comprises at least three elements: law, facts and evaluations. In a two-element universe, the making of an evaluation can, however, be classified as the finding of a fact (or of a cluster of facts).

⁷ Lagasse, *L'erreur manifeste d'appréciation en droit administratif* (Bruylant, 1986) remains a useful study of the topic.

⁸ For that reason, the exercise of "unlimited" jurisdiction falls outside the scope of this paper. However, that topic is in any event of limited interest since, in cases of "unlimited" jurisdiction, the court is entitled to exercise a discretionary power as it thinks best – a situation that does not call for prolonged legal explanation.

The scope of the topic

In the preface to *Development of Judicial Control of the European Communities*,⁹ Gerhard Bebr described the topic of judicial control in Community law, as he was going to approach it in his book, as falling into two parts: direct and indirect judicial control, depending upon the authority that applies and enforces Community law. Direct control was exercised by the ECJ (to which must now be added the CFI and the European Union Civil Service Tribunal – “the CST”) by means of the various actions that can be brought directly before it (and, now, them). Bebr took direct control as covering judicial control over: the exercise of Community powers by Community institutions; the respect and execution of Community obligations by Member States; and the non-contractual liability of the Community. Indirect control, in his view, took place within the national legal orders of the Member States, primarily in those instances in which national courts referred to the ECJ a question concerning the interpretation or validity of a provision of Community law. That indirect control was exercised by the ECJ by means of the rulings delivered by it in response to such a request.

The distinction between direct and indirect control, which is, of course, a commonly described classification not unique to Bebr, need not detain us. It is essentially a procedural matter. The “indirect” nature of the latter form of control reflects the fact that, in the devolved system of judicial control in the European Union, securing the uniform and correct interpretation and application of Community law requires a mechanism of cooperation between the ECJ (and the CFI, if and when jurisdiction to hear and determine references for a preliminary ruling is conferred on it), on the one hand, and the courts and tribunals of the Member States, on the other. The control is “indirect” only if viewed as a form of control performed by the ECJ through the intermediary of national courts and tribunals, which is not an exact way of describing the situation: judicial control is actually exercised “directly” by national courts and tribunals, the role of the ECJ (and, potentially, the CFI) in the context of the preliminary ruling procedure being to provide the referring court or tribunal with the assistance that the latter requires in order to perform its function of exercising “direct” control (in so doing, the ECJ ensures the uniform and correct application of Community law). The one qualification to be made to that way of describing matters is that, when a reference for a preliminary ruling concerns the *validity* of an act of a Community institution (or of the European Central Bank), the control exercised by the ECJ is “direct” and the control exercised by the referring court or tribunal is “indirect”: only the ECJ has jurisdiction to declare such an act to be invalid;¹⁰ and, depending upon the national rules governing the jurisdiction and procedure of the referring court or tribunal, the latter may be able to approach the validity of an act of a Community institution (or the European Central Bank) only through a direct challenge brought against a national measure whose legality depends upon the Community act in question.¹¹

⁹ Martinus Ninjhoff, 1981. *Development of Judicial Control of the European Communities* was the sequel to Bebr’s 1962 landmark work *Judicial Control of the European Communities*.

¹⁰ E.g. Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513, paragraphs 16-25 of the judgment (pp 10547-10549). It is, of course, tenable that, as the national court or tribunal can dismiss a challenge to the validity of a Community act, it does exercise a form of “direct” judicial control over such acts. However, the concept of judicial control is better viewed as involving control of the substantive validity (in the context of Article 234 of the EC Treaty) or legality of the act, rather than the screening of challenges to the act to see if they are at least arguable, which is essentially a procedural function.

¹¹ As a matter of Community law, the ability of a person to challenge a Community act before a national court or tribunal does not depend upon the existence of a domestic implementing measure: Case C-491/01 *R v Secretary of State, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, paragraph 40 of the judgment (p 11568). So far as is

Putting the distinction between “direct” and “indirect” judicial control on one side as essentially a procedural matter, there remain: (i) judicial control of the acts and defaults of the Community institutions and related bodies; and (ii) judicial control of the Member States and their emanations.

As a matter of principle, there is not, and should not be, a difference in EC law in the *nature* of judicial control so far as Community institutions (and related bodies) and Member States are concerned: in short, Community institutions, related bodies, Member States and, for that matter, legal and natural persons are all subjects of the law; and their acts and defaults are all (in principle) subject to judicial scrutiny of their legality because it is fundamental, to respect for the rule of law, for unlawful behaviour to be identified, stopped and, where appropriate, remedied, irrespective of the identity of the wrongdoer. Differences in the *nature* of judicial scrutiny – more accurately, refinements in the way in which that scrutiny is performed – emerge by reference to the capacity in which a subject of the law acts or, to put it another way, by reference to the particular function that a subject of the law may discharge within the Community’s legal system.

In general terms, subjects of the law lie under a general duty to comply with the law; but the notion of judicial *control* is more usually seen as being directed at the control by the judiciary of the acts and defaults of other arms of the State (or, here, the Community institutions): entities that can be described as subjects of the law but that perform specified functions within the legal system in question.¹² In the present context, Bebr was right to consider that judicial *control*, in that sense, covered both the Community institutions and the Member States because of the role played by the latter in the administration and application of Community law.

Given that state of affairs, there is no reason in principle to draw distinctions concerning the nature of judicial control, as understood in Community law, depending upon whether or not it is exercised in relation to, for example, an administrative decision of the Commission made in performance of a power conferred on the Commission by, for example, a Council Regulation or in relation to an administrative decision of a competent authority in a Member State made in performance of a power conferred on that State by a Council Regulation. Indeed, placing Member States under the same legal constraints as apply to Community institutions, when Member States act within the scope of Community law, is quite fundamental to the Community’s legal order and one of the main justifications for the application of the general principles of Community law to the Member States when acting in that context. Some difference may well be justified by the terms of the relevant provision in the Council Regulation or other empowering provision in question; but that would reflect the specifics of the case at hand rather than a matter of principle concerning the nature of judicial control as it applies to acts of Community institutions and acts of Member States.

possible, national courts and tribunals are required to interpret and apply national procedural rules in such a way as to enable persons to challenge domestic measures implementing Community acts of general application on the basis of the invalidity of the latter: Case C-50/00P *Union de Pequenos Agricultores v Council* [2002] ECR I-6677, paragraph 42 of the judgment (p 6735). It does not necessarily follow that national courts and tribunals must accept challenges to Community acts where there is no national implementing measure at all (although that is the logical conclusion of the case law). If the challenger could have brought proceedings for the annulment of the Community act under Article 230 of the EC Treaty but failed to do so, that failure cannot be remedied by bringing proceedings before a domestic court or tribunal: *e.g.* Case C-178/95 *Wiljo NV v Belgium* [1997] ECR I-585.

¹² Not everyone would agree with that way of putting matters, which can be criticised as being too heavily influenced by the legal system in which the author was first trained.

In that connexion, it should be noted that, in Case C-55/06 *Arcor AG & Co. KG v Bundesrepublik Deutschland*,¹³ it was held that, because the relevant EC legislation did not harmonise the scope of judicial control over the decisions of national authorities entrusted with various decision-making powers under those provisions, it was for national law to determine the appropriate type of control, subject to the principles of equivalence and effectiveness. In that case, reliance had been placed upon the general approach in Community law to the judicial control of acts of Community institutions. Under that approach, a broad margin of appreciation is accorded to a Community institution where, as part of the exercise of its powers, it is called upon to make complex economic evaluations.¹⁴ The ECJ did not hold that that approach was inapplicable, as a matter of Community law, to the judicial control of acts of Member States and their authorities in implementation of Community law. It simply acknowledged the procedural autonomy of the Member States and their freedom to adopt other modes of controlling administrative action (subject to the principles of equivalence and effectiveness).

It is not difficult to see that the result in practice is that the Community law approach, which recognizes situations in which a margin of appreciation must be accorded to a person or body entrusted with the exercise of a public power, provides in those circumstances a base line or standard of judicial control but does not exclude the adoption, within a given national jurisdiction, of a more intrusive form of judicial control.

In contrast to the situation in the *Arcor* case, where the relevant EC legislation left matters in all relevant respects to the Member States, a different approach has been adopted in other areas. For example, Article 4(1) of Directive 2002/21 of the European Parliament and the Council,¹⁵ which provides for rights of appeal against decisions of national regulatory bodies entrusted with the regulation of electronic communications networks, specifies: “Member States shall ensure that the merits of the case are duly taken into account”. Accordingly, appellate bodies must have at their disposal “all the information necessary in order to *decide* in full knowledge of the facts *on the merits* of the appeal”.¹⁶ That implies the obligation to perform a more intrusive form of control than would ordinarily be expected in such a context.¹⁷

The starting point for a discussion of the nature of judicial control in the Community’s legal order is, therefore, the model of judicial control that applies to the Community institutions, account being taken of the fact that, within limits, it is open to the Community legislator to specify a different model of judicial control and, in the absence of such specification in Community legislation, it is also open to the Member States, acting within the scope of national procedural autonomy, to prescribe a different model of judicial control over domestic entities. In both instances, it would appear that, ordinarily, the only permitted divergences from the model applying generally to Community institutions are those that lead to a more intrusive, rather than a less intrusive, form of judicial control. The main reason for that conclusion is that the Community law model of judicial control of the acts and defaults of the Community institutions discloses a concept of a basic standard of legal protection. As explained above, there is no logical justification for restricting that basic standard to the judicial control of Community institutions when Member States, too, may be

¹³ [2008] ECR I-2931, paragraphs 163-170 of the judgment.

¹⁴ See further below.

¹⁵ OJ 2002 No. L108/33.

¹⁶ Case C-438/04 *Mobistar SA v Institut belge des services postaux et des telecommunications* [2006] ECR I-6675, paragraph 40 of the judgment (p 6717), emphasis added.

¹⁷ The position is considered in more detail by the author in *Appeals under the New Regulatory Framework in the Electronic Communications Sector* [2005] EBLR 787.

placed in the same position as Community institutions in relation to the implementation and application of Community law. Any slackening of the basic standard of judicial control would risk infringing the principle of the effectiveness of Community law; but no general principle of Community law stands in the way of a more intrusive form of judicial control, where one is prescribed by a competent legislator acting within its powers.

Thus far, the discussion has concerned only the question of judicial control of the Community institutions and the Member States. It is implicit that that is so because the Community institutions and the Member States are subjects of the law (here, EC law). Judicial control operates in relation to their acts and defaults, within parameters defined by the law. It follows that judicial control does not extend to the very acts that create the legal system within which judicial control operates; although it cannot be excluded that, within those acts, some parts may be more fundamental than others.¹⁸ A different, but related, problem concerns the judicial control of acts (or defaults) of persons who are not subjects of the law (more particularly, EC law): third countries and international organizations.¹⁹ As a matter of principle, there seems to be no logical objection to the CFI or ECJ acknowledging the unlawfulness of an act or default of a person or body that is not a subject of EC law, as measured or disclosed by the criteria of lawfulness (including criteria of universal or commonly accepted value and relevance) and any relevant legal procedures applicable to that person or body. Judicial control by reference to criteria peculiar to the Community's legal order would not be appropriate. If the act or default of the person or body in question benefits from the presumption of legality,²⁰ it does not appear that, within the Community, the legality of the act or default can be questioned in the absence of a decision on the point made by a competent court (save in the extreme case of manifest illegality or non-existence). On the other hand, an act of a person subject to EC law is not immune from judicial control by reference to the standards of legality recognized by EC law merely because it is based on or derived from an act of a person or body who is not a subject of EC law.²¹

Before proceeding further, it may be useful to make a brief observation about those situations in which the scope of judicial control *is* less than the basic standard referred to above.

European Community law recognizes very limited exceptions to the general principle that the exercise of public powers is subject to judicial control.²² Since effective judicial control is a fundamental value in the Community's legal order, it follows that any reduction in the basic standard of judicial control must be based upon an express Treaty provision and would be narrowly construed.

¹⁸ Cf. Cases 31 and 35/86 *Levantina Agricola Industrial SA (Laisa) v Council* [1988] ECR 2285: judicial control by way of an action for annulment does not extend to primary Community law, such as an act of accession. A distinct procedure exists for the purpose of controlling the making of international agreements: see Article 300 of the EC Treaty. If the EC Treaty were (for example) to be amended so as to introduce a new provision that appeared to infringe a fundamental principle of EC law or a fundamental provision of the EC Treaty, the tendency would be to mediate the apparent conflict through the court's power to determine the true meaning of legal provisions.

¹⁹ See the discussion in, for example, the *Kadi* case (above), paragraphs 212 and following of the CFI's judgment (pp 3720 and following) and the ECJ's judgment generally..

²⁰ As to which, in the context of EC law, see, for example, Case 101/78 *Granaria BV v Hoofprodukschap voor Akkerbouwprodukten* [1979] ECR 623 (p 636).

²¹ Cases C-402/05P and C-415/05P *Kadi v Council* (above), paragraphs 280-328 of the judgment.

²² Article 35(5) of the EU Treaty and Article 68(2) of the EC Treaty exclude the jurisdiction of the ECJ.

Judicial control and the concept of legality

To observe that the basic model or pattern of judicial control is one of the control of *legality* raises necessarily a question about the meaning, in that context, of “legality”. Taking “legality” to mean that an exercise of public powers must have a legal basis and be justified on the grounds laid down by law²³ leads one to a consideration not only of the legal provision creating the power and defining the circumstances in which it can be exercised but also of the legal provision or provisions that empower a competent court to exercise judicial control. Hence, the concept and extent of “legality” are defined by those provisions; and “legality” is a relative, not a fixed, concept. More particularly, “legality” seems to be nothing more than an allusion to the court’s power of control (however that power is defined). Viewed in that sense, “legality” is a redundant hypothesis since the control of “legality” means nothing more or less than the control that the court is itself empowered by law to exercise. It is then a short step to the assimilation of (by way of example) Articles 229 and 230 of the EC Treaty as both expressing a control of “legality”.

In reality, however, the observation that judicial control is a control of legality is not an over-elaborate way of saying that a court exercises judicial control to the extent to which it is empowered to do so. Describing judicial control as a control of legality has meaning when applied in the context of the judicial control of discretionary powers, where it serves to identify an area of activity (or an aspect of the power) that falls within the purview of the court and is distinct from another area of activity (or aspect of the power) that falls within the particular remit of the person or body on whom the power is conferred. More specifically, what lies within the control of the court is scrutiny of compliance with the legal conditions defining the scope of the power and the circumstances in which it can be exercised. What falls within the remit of the person or body on whom the power is conferred is the actual exercise of the power, within those parameters.

Where (by express provision, in the context of Community law) the court’s power of control is extended into the remit of the person or body on whom the power has been conferred, it is still legitimate to distinguish between the control of “legality” (as meaning scrutiny of compliance with the legal conditions defining the scope of the power and the circumstances in which it can be exercised) and the more extended control of the actual exercise of discretion; and that is commonly the way in which the control of “legality” is understood in that context. Accordingly, it is meaningful to describe Article 230 of the EC Treaty as enunciating the principle of judicial control of legality and to refer to Article 229 as covering a different type of jurisdiction.

Before turning to a consideration of the principle of legality as it can be illustrated by Article 230 of the EC Treaty, it is worth noting, as a preliminary observation, that it is a general principle of interpretation of EC law that EC legislation is, wherever possible, to be construed so as to be in accord with the EC Treaty and the general principles of EC law (since, otherwise, the provision in question would be inconsistent with the Treaty and those principles and therefore unlawful).²⁴ Accordingly, where EC legislation is ambiguous, preference will be given to an interpretation that is consistent with superior rules of EC law. That affects judicial control of the legality of an act of a Community institution because, in effect, judicial control must proceed in two stages: (i) ascertainment of the true meaning of the provision or measure at issue; and (ii) determination of its lawfulness. Where the challenge to a provision or

²³ Cases 97 to 99/87 *Dow Chemical Iberica and others v Commission* [1989] ECR 3165, paragraph 16 of the judgment (p 3186).

²⁴ See, for example, Cases C-90/90 and C-91/90 *Neu and others v Secrétaire d’Etat* [1991] ECR I-3617, paragraph 12, page 3637.

measure is based upon an assumption as to its true meaning that is incorrect, the challenge may be circumvented by declaring what the correct interpretation of the provision or measure is.

The concept of “legality” can be derived from Article 230 as follows.²⁵

Article 230 of the EC Treaty provides that an action for annulment can be brought upon the following grounds: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the Treaty; (iv) infringement of any rule of law relating to the application of the Treaty; and (v) misuse of powers. Those grounds indicate that the legality of an exercise of power requires the person or body in question to have the competence to exercise the power, to comply with essential procedural requirements, to act consistently with the Treaty and with any rule of law relating to its application, and to “use” rather than “misuse” the power. It is common to group grounds (iii) and (iv) together; and that will be done here. The plea of illegality can be advanced on the same grounds.²⁶ The first two grounds can be taken by the Court of its own motion; the others must be pleaded.²⁷

Article 234 of the EC Treaty does not specify the grounds that may be invoked in order to contest the validity of an act of a Community institution. There is no particular reason why the grounds should be any different from those referred to in Article 230. The existence of a discrepancy between Articles 230 and 234 would seriously undermine the rationale of the approach in the case law to the relationship between those provisions (and, specifically, the rule that a person cannot use Article 234 to challenge a measure that he or she could have challenged, but did not, under Article 230: if the grounds of review under those Articles are different, why should a person be precluded from disputing, in proceedings before a national court, a measure that has not been challenged under Article 230 – unless the grounds for asserting the invalidity of a measure are narrower in scope than those on which its annulment can be sought?).

The concepts of legality in the three basic ways by which legality may be scrutinised under Community law (the action for annulment, the plea of illegality and consideration of validity in the context of a reference for a preliminary ruling) are therefore coextensive.²⁸

When considering the grounds listed in Article 230, it is necessary to bear in mind that they are to be construed purposively and not in a restrictive or overly literal way.²⁹ By following that approach, it is possible to ensure that the rule of law is observed because all appropriate bases on which the legality of an act should be

²⁵ The description set out below has been included for the sake of completeness only and is a brief summary since, on the one hand, the grounds on which an act of a Community institution may be annulled under Article 230 are well known and, on the other hand, a comprehensive analysis of those grounds does not fall properly within the scope of this paper.

²⁶ Article 241 of the EC Treaty.

²⁷ See Lasok & Millett, *Judicial Control in the EU* (2004), paragraph 107. *E.g.* Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, paragraph 61 (3680).

²⁸ “Legality”, as it applies in relation to the lawfulness of a failure to act and in the context of non-contractual liability has been deliberately omitted from consideration. An action in respect of a failure to act can be brought where the failure is in breach of the Treaty: Article 232 of the EC Treaty. That reflects the specific nature of that form of action. Actions in respect of non-contractual liability usually involve a consideration of the legality of an act or default of a Community institution but are primarily concerned with the consequences flowing from a wrongful act or default; and the circumstances giving rise to non-contractual liability reflect other considerations as well as legality.

²⁹ Indeed, in Case 66/63 *Netherlands v High Authority* [1964] ECR 533, referring to the parallel list of grounds in Article 33 of the ECSC Treaty, Advocate General Lagrange noted how the different grounds may overlap (see page 553).

open to challenge will be covered. That a purposive and not a literal approach to the construction of Article 230 is, and has consistently been, followed can be illustrated by the cases concerning error of fact as a basis of review. Article 230 does not refer in express terms to error of fact (and surprisingly late in the lifetime of the Community it was possible to encounter people who questioned whether an action for annulment could be brought on that ground despite the long line of cases showing that that was indeed the case). However, error of fact is likely to lead inevitably to an error of law particularly where, for example, a power to act (including a power to adopt legislation) is premised upon the existence of a defined state of affairs.

Each ground of review set out in Article 230 offers a different perspective from which legality is to be considered.

In the first ground, *lack of competence*, competence refers to the legal power to adopt an act. Hence, lack of competence arises when the author of the act in question is not authorized by a superior rule of law to adopt that act. Generally speaking, four issues arise in connexion with lack of competence as a ground of judicial review.

The first concerns the problem that arises when competence is conferred by a superior rule of law subject to certain conditions. It follows that, when the conditions in question have not been satisfied, competence to act has not been conferred and the measure in question lacks an appropriate legal basis. Thus, the ECJ has construed Article 95 of the EC Treaty as conferring power to adopt harmonizing legislation where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms enshrined in the EC Treaty and thus have a direct effect on the functioning of the internal market. The mere existence of disparities between national rules is not sufficient to justify having recourse to Article 95.³⁰ The question whether or not a condition placed upon a legislative power has been satisfied overlaps with two other grounds of review: error of fact and infringement of the Treaty or a superior rule of law (both of which are considered below).

The second issue concerns the problem that arises when more than one superior rule of law may be a candidate for the legal authority to adopt the challenged act. If the measure is adopted on the basis of all of them, no difficulty arises; and it may, indeed, be the case that it is only a combination of different legal provisions (and not each of them individually) that provides the lawful authority for the adoption of a particular measure.³¹ Generally, the legal basis of a measure is determined by objective factors that are amenable to judicial control, such as the aim and content of the measure. If the act has more than one purpose or component, the predominant one (if there is one) determines the correct legal basis. Predominance is here to be understood in the sense that the other purpose(s) or component(s) are merely incidental to the main purpose or component. If that is not the case, the act must be based on the particular empowering provisions that are appropriate to each of the non-incidental purposes or components.³²

The third issue concerns the problem that arises when one superior rule of law appears to cut down on the scope of the rule relied on as giving competence to the

³⁰ E.g. Cases C-154/04 and C-155/04 *The Queen (on the application of ANH and others) v Secretary of State for Health and others* [2005] ECR I-6451, paragraphs 28-29 of the judgment (pp 6498-6499): the ECJ's consideration of the question whether or not the conditions for relying upon Article 95 had been fulfilled appears in paragraphs 34 and following (pp 6500-6502).

³¹ E.g. the CFI judgment in the *Kadi* case (above), paragraphs 87-135 (pp 3688-3700), not affected by the ECJ decision.

³² E.g. the *BAT* case (above), paragraphs 93-94 of the judgment.

author of the act. For example, as noted above, Article 95 of the EC Treaty empowers the Community to adopt harmonizing legislation in certain circumstances. In a number of cases, that power has been exercised in relation to legislation that concerns or affects public health even though Article 152 refers to human health and, more particularly, in Article 152(4)(c), the Treaty provides that the Community has no power to harmonise national legislation on human health. In such circumstances, the tendency is to reconcile the meaning of the provisions in question (where they are at the same level in the hierarchy of legal norms) so as to avoid any conflict between them and maintain consistency in the system of norms. In the example given above, the solution adopted by the ECJ was to say that, provided the conditions for recourse to Article 95 are satisfied, the Community legislature cannot be prevented from relying on it on the ground that public health protection is a decisive factor in the choice of measure to adopt.³³

The fourth issue concerns delegation of powers. The general rule *delegatus non potest delegare* applies. The Community legislature can delegate power to amend aspects of a legislative act but, if it does so, it must ensure that the delegated power is clearly defined and that the exercise of that power is subject to strict review in the light of objective criteria.³⁴

*Infringement of an essential procedural requirement*³⁵ vitiates an exercise of power. For example, legislation may be validly adopted only after following the procedures laid out in the Treaties or in the secondary legislation conferring (on the Commission) power to adopt subordinate legislation³⁶. However, not every error in following those procedures is sufficient to result in the annulment of an act and, therefore, a breach of the principle of legality. The general rule is that a breach of a procedural rule vitiates the exercise of a power only if the breach was capable of affecting the outcome of the procedure.³⁷ It will therefore be noted that the “legality” of an exercise of power does not exactly mean, or require, complete compliance with the law.

The requirement to give an adequate statement of reasons for an act (including a legislative measure), which is laid down in Article 253 of the EC Treaty, is often classified as an essential procedural requirement although it may also be classified as a superior rule of law whose breach gives rise to the ground of review referred to immediately below (infringement of the Treaty). However it is classified, it is important to note that the obligation to give reasons exists in order to enable there to be judicial control of a challengeable act. The obligation is discharged if the reasons provided enable the court to discharge its function of exercising control even if the reasons given do not canvass every single point of fact and law. The degree of sufficiency of the reasons given depends upon the nature of the act in question: decisions must

³³ See, for example, the *ANH* case (above), paragraphs 30-33 of the judgment and the authorities cited there (6499-6500).

³⁴ The case usually cited on the question of the delegation of powers is Case 9/56 *Meroni v High Authority* [1957-1958] ECR 133. On the latter point stated in the text above, see also the *ANH* case (above), paragraph 90 of the judgment.

³⁵ See generally Lasok and Millett, *op. cit.*, paragraphs 109-112.

³⁶ Some procedural requirements (of which the best example is the right to be heard) flow from the general principles of EC law. The right to be heard does not normally arise in the context of the adoption of a legislative measure because, *ex hypothesi*, such measures are not concerned with deciding upon individual cases. The position is different in relation to legislative measures such as regulations imposing anti-dumping duties, which constitute bundles of individual decisions (for a similar situation, albeit in a rather different legal context, see the CFI judgment in the *Kadi* case, above, paragraphs 253-276). For the position where the contested act has more than one legal basis involving differing procedures, see, for example, the *BAT* case (above), paragraphs 103-111 of the judgment.

³⁷ *E.g.* Case C-241/00P *Kish Glass v Commission* [2001] ECR I-7759, paragraphs 36-37 of the judgment (p 7773).

normally give (and do give) considerably more detail than legislative acts.³⁸ The obligation to state the reasons for an act is distinct from the obligation that the reasons for an act be well-founded.

Infringement of the Treaty or of any rule relating to its application is simple illegality. The rules relating to the application of the Treaty include the general principles of EC law, such as the principle of the protection of legitimate expectations, proportionality and legal certainty, and any applicable rules of public international law.³⁹ In the case of measures based (or purportedly based) on secondary legislation and not a Treaty provision, an infringement of the secondary legislation is sufficient to ground an action for annulment without reference to any Treaty provision. However, if one piece of secondary legislation is not based on another, the latter cannot be used as a basis for reviewing the former:⁴⁰ legislation is reviewed by reference to *superior* rules of law, not by reference to those occupying a comparable, or lower, level in the hierarchy of legal norms.

Where EC legislation is derived from a norm of public international law, a question may arise as to the legality of the latter. In principle, judicial review applies to acts of the Community institutions and does not apply to the EC Treaty or some other treaty adopted by the Member States.⁴¹ In the *Kadi* case,⁴² the CFI was faced with a challenge to the lawfulness of certain provisions of a regulation adopted in order to give effect to UN Security Council resolutions directed to the freezing of funds destined for Islamic terrorist organisations. Among other things, it was asserted that the provisions in question infringed the human rights of Mr. Kadi, a Saudi Arabian businessman. That in turn impugned the Security Council resolutions. The CFI held that it had no jurisdiction to question the lawfulness of the resolutions directly but, since the resolutions took effect subject to general principles of public international law (including respect for human rights), it had jurisdiction to consider compatibility with those principles when examining the lawfulness of the measures adopted by the EC institutions in order to implement the Security Council resolutions.

Misuse of powers occurs where an institution exercises a discretion conferred upon it for purposes other than those for which the discretion was conferred or uses a particular form of act or procedure in order to circumvent procedural safeguards laid down by EC law.⁴³ The measure in question is technically within the competence of the institution; but the exercise of the institution's powers is vitiated by one or other of those factors.

For example, in the *Fabrique de Fer de Charleroi* case⁴⁴ (decided under the ECSC Treaty), power had been conferred upon the Commission to establish a system of production quotas applicable to the iron and steel industries in the EC in the event of a manifest crisis. The aim of the quota system was to improve market conditions so as to restore the undertakings concerned to profitability in the long term. The case concerned an amendment made by the Commission to the steel production quota system introduced in the 1980s. The amendment authorized the Commission to grant an additional supplementary quota to undertakings that satisfied certain conditions (in particular, they had to be the sole undertaking in the country in which they were

³⁸ See, for example, the *ANH* case (above), paragraphs 133-138 of the judgment (pp 6525-6526).

³⁹ On rules of public international law, see, for example, the CFI judgment in the *Kadi* case (above), paragraphs 181-208 (pp 3712-3719) and the authorities cited there and the ECJ judgment.

⁴⁰ E.g. the *ANH* case (above), paragraphs 94-98 of the judgment (pp 6515-6516).

⁴¹ E.g. Cases 31 and 35/86 *Levantina Agricola Industrial SA v Council* [1988] ECR 2285.

⁴² Above, see paragraphs 209-232 (pp 3719-3725). That part of the CFI's judgment was endorsed by the ECJ.

⁴³ E.g. the *BAT* case (above), paragraph 189 of the judgment.

⁴⁴ E.g. Cases 351 and 360/85 *Fabrique de Fer de Charleroi v Commission* [1987] ECR 3639.

situated). At the time of the amendment, there was only one undertaking in the EC that satisfied those conditions. Two rival undertakings complained, in essence, that the amendment was intended to favour that undertaking. The ECJ annulled the amendment on the ground that it ran counter to the aims of the production quota system which (in brief) was intended to share the burdens of the quotas equitably amongst all steel undertakings.

It is implicit in the concept of misuse of powers that, had the power in question been used properly, the result would have been different. Thus, if a measure is based upon a mixture of proper and improper grounds, it will not be annulled for misuse of powers if the main aim of the measure is entirely proper;⁴⁵ and likewise if the power could not have been exercised in any other way.⁴⁶ It is unclear if the person challenging a measure on the ground of misuse of power bears the burden of proving that, in the absence of the misuse, the result would have been different or if it is a defence to assert (and prove) that there would have been no difference.⁴⁷

The intrusion of legality into the discretionary sphere: the principle of proportionality

Thus far, judicial control has been asserted to be a control of legality; once the legal conditions governing the exercise of a power have been complied with (and assuming that there is no express provision otherwise), the person or body entrusted with the power is free to exercise the power as it thinks appropriate (as long as it remains within the parameters of legality).

An apparent exception to that way of expressing matters is the principle of proportionality, which provides the courts with a ground for controlling the appropriateness of the exercise of a discretionary power.⁴⁸

In the case law, the principle of proportionality has been formulated in a number of slightly different ways. Reduced to its essentials, proportionality has two aspects: cost-effectiveness and cost-benefit.⁴⁹ In English, the principle of proportionality is commonly illustrated by the adage that one does not use a sledge hammer to crack a walnut. That illustrates both aspects of proportionality. The cost-effectiveness aspect is this: wielding the sledge hammer in order to crack the walnut will certainly be effective; but the same effect can be achieved at less cost (in terms of the energy required to crack the nut) by using a nutcracker. The cost-benefit aspect is this: wielding the sledge hammer will certainly crack the walnut, but it will also scatter the pieces of the nut and risks causing collateral damage to, for example, the table on which the walnut has been placed, with the consequence that the benefit of the exercise (to be seen in the nutritional value of the various pieces of walnut that have been recovered from the floor) is less than the cost of the exercise (the energy consumed in swinging the sledge hammer, searching for the scattered pieces of the nut, removing any carpet fluff attaching to the pieces, the cost of repairing any damaged furniture and so forth).⁵⁰ Most, but not all, of the formulations in the case law refer to cost-effectiveness.⁵¹

⁴⁵ Case 1/54 *France v High Authority* [1954-1956] ECR 1, page 16.

⁴⁶ Case 8/55 *Federation Charbonniere Belgique v High Authority* [1954-1956] ECR 292, page 300.

⁴⁷ *Dicta* in the *Federation Charbonniere* case (above, pages 300-301) suggest the former.

⁴⁸ The literature concerning this topic is too extensive and well-known to require citation here.

⁴⁹ In the United Kingdom, the application of proportionality to the exercise of public powers has been the subject of extended analysis by the Treasury in a publication called “*The Green Book – Appraisal and Evaluation in Central Government.*”

⁵⁰ The game is not, therefore, worth the candle.

⁵¹ Cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Limited* [2002] ECR I-2569, paragraph 62 of the judgment (p 2621), for

Although it is often stated that the principle of proportionality requires that the measures taken in exercise of a power must be necessary and appropriate, or effective,⁵² the principle of proportionality is really concerned with limiting the choice made by the person or body entrusted with the power in question as between different *effective* measures.⁵³ Powers conferred on a person or body for the purpose of achieving a particular aim or result do not carry with them, or imply, the legal power to do something that is unnecessary, inappropriate or ineffective having regard to the purpose of the power. If that is how the power has been exercised, it has simply been exercised unlawfully rather than disproportionately.

The court's power to interfere with an exercise of discretion concerning the choice as to which effective measure should be adopted in order to achieve the purpose for which a power has been conferred on a person or body, or restraining the measure that has been selected so that it does not go beyond what is strictly necessary and appropriate in order to attain the purpose sought by the power, is well-entrenched.⁵⁴ In relation to the cost-effectiveness aspect of proportionality, it is based on the idea that private persons may be obliged to make only the least sacrifice consonant with the public interest in achieving the objective sought by the power.⁵⁵ The cost-benefit aspect is based upon the broader consideration that public powers are conferred for progressive, rather than regressive, purposes.

Although the application of the principle of proportionality involves the court in scrutinising an exercise of discretion by the person or body upon whom the power in question has been conferred, it is not always the case that, in those circumstances, the court is required to entertain a reserved attitude towards its power of judicial control. That is most obviously the case in relation to the cost-effectiveness aspect of proportionality, where it may be relatively easy to demonstrate that the measure in question goes further than is necessary or that there is an equally effective, and less onerous, alternative. Ordinarily, however, the matter is less clear; and that is most obviously the case in relation to the cost-benefit aspect of proportionality, which tends to raise sensitive policy questions.

Ex hypothesi, the principle of proportionality applies in cases in which the person or body on whom the power has been conferred exercises a discretion as to the nature of the action that it may take when (lawfully) exercising the power. Where the exercise of the power in question involves a "broad" discretion, the exercise of the power can be attacked only if it is manifestly inappropriate having regard to the information available to the person or body entrusted with the power at the time of its exercise,⁵⁶ or else vitiated by a manifest error of assessment, by a misuse of powers, or by a manifest exceeding of the limits of the discretion.⁵⁷ It is doubtful if much significance can be read into the word "broad": it appears to be an attempt to differentiate between situations in which the legal provision defining the scope of the

example, refers both to cost-effectiveness ("where there is a choice between several appropriate measures, recourse must be had to the least onerous") and to cost-benefit ("the disadvantages caused must not be disproportionate to the aims pursued").

⁵² *E.g.* Cases C-177/99 and C-181/99 *Ampafrance SA v Directeur des services fiscaux* [2000] ECR I-7013, paragraphs 43 and 60 of the judgment (pp 7069 and 7074).

⁵³ *Cf.* the formulation in the *Omega Air* case (above), paragraph 62.

⁵⁴ See, for example, the *Dow Chemical* case (above), paragraph 16 of the judgment, where it is mentioned alongside arbitrariness.

⁵⁵ *E.g.* Cases 17 and 20/61 *Kloekner-Werke AG and Hoesch AG v High Authority* [1962] ECR 325 at 340.

⁵⁶ *E.g.* Case T-30/99 *Bocchi Food Trade International GmbH* [2001] ECR II-943, paragraph 92 of the judgment (p 976).

⁵⁷ *E.g.* the *Omega Air* case (above), paragraph 64 of the judgment (p 2621).

power itself imposes express limitations on the exercise of the power that seek to encapsulate all or some part of the cost-effective or cost-benefit aspects of the principle, or provides some other criterion by which judicial control can be exercised, and situations in which no such limitation is present.

As the preceding paragraph mentions for the first time, thus far, the idea of a “manifest” error of assessment or exceeding of the limits of the discretion, it seems appropriate to say a brief word about it. The expression means that scrutiny of the elements that should, as a matter of law, have been taken into account in making the assessment or exercising the discretion leads to the conclusion that the assessment or exercise of discretion clearly does not fall within the range of possibilities open to the person or body entrusted with the power in question.

That brings the discussion round to the limits of judicial control.

The limits of judicial control and the margin of appreciation

(i) General observations

As noted above, judicial control (as a control of the legality of the exercise of a public power) necessarily has its limits. In the case of a discretionary power, the limit is reached once it has been ascertained that the legal conditions governing the exercise of the discretion have been satisfied. At that point, the exercise of the power moves into a sphere that is not the subject of direct judicial control. That feature is peculiar to the exercise of *discretionary* powers and does not figure in the exercise of powers that are not coupled with a discretion.

That statement of the position does not, however, accommodate comfortably one particular limit to judicial control that appears not only in Community law but also in the laws of the Member States: a margin of appreciation accorded to the person or body exercising the power in question in regard to matters of fact. In some instances, that margin of appreciation can reasonably be classified as part of the matters that fall within the specific remit of the person or body exercising the power. In other instances, however, that margin of appreciation appears in the context of the *legality* of the exercise of the power and should therefore, as a matter of principle, be within the remit of the court exercising judicial control.

The fact that, in those circumstances, a margin of appreciation is accorded to the person or body exercising the power can be explained in at least two ways. First, it may be said that it is simplistic to describe the exercise of a public power as comprising two parts or aspects: one, involving legality, that is subject to judicial control; and another, operating within the parameters of legality, that falls entirely within the remit of the person or body upon whom the power is conferred. The reality, it may be said, is that the exercise of a power is more complex: even within the sphere of legality, there are discretionary elements that pass outside the ambit of judicial control. The second explanation is that, instead of acknowledging a point of fundamental principle derived from the separation of powers between the legislature, executive and judiciary, the courts are simply recognizing their own limitations in terms of dealing with factual matters, particularly where the facts in question are complex or technical in nature.

It would seem from the cases that both explanations are valid.

(ii) Exploring the margin of appreciation

The “margin of appreciation” reflects an important principle of modern constitutional law: the separation of powers between legislature, executive and judiciary. In short, the role of the courts in reviewing the acts of public bodies does not empower the courts to substitute themselves for those bodies. The principle of the separation of powers requires the courts to remain within the functions ascribed to them (which are, broadly speaking, to ensure that the law is observed) and not to descend into areas of activity attributed to the executive and the legislature⁵⁸. The margin of appreciation is a device that is used to maintain the separation of powers and to limit the courts to their true functions. It operates through a recognition, on the part of the courts, of an area of decision-making by the person or body subject to judicial review that involves an exercise of judgment or assessment (“appreciation”) by that person or body with which the courts will not interfere or will interfere only to a limited extent.

The margin of appreciation typically manifests itself in cases in which the courts are called upon to review the exercise of a discretionary power (whether it be an executive or, as the case may be, a legislative power); but such cases do not exhaust the circumstances in which the margin of appreciation operates.

A power conferring provision can, in general terms, identify a power coupled with an obligation to exercise it to particular effect (a mandatory power) or a power coupled with a discretion as to its exercise (whether it should be exercised at all or not; whether, if it is exercised, how it is to be exercised and, occasionally, to what effect) (a discretionary power). In the first case, the legal rule conferring the power is typically expressed in the following form: if *x* then *y*, where *x* identifies the criteria of legality and *y* indicates the response that, in the context of a mandatory power, the person or body entrusted with the power is legally obliged to make. Where the legal rule expresses a discretionary power, it may be expressed as follows: if *x* then *y*, *z*..., where *x* indicates the criteria of legality and *y*, *z*... indicate a range of possible responses, from which the person or body entrusted with the power can make its selection.

In both cases, there is no discretionary element about the legal meaning of the rule (so far as the person or body entrusted with the power – “the decision-maker” - is concerned⁵⁹). Further, in both cases the premise on which the power comes into existence and can (or must) be exercised is the same: the existence of *x*. The difference comes with the consequence of the existence of *x*. In the case of the mandatory power, there is an obligation to take the specified action; in the case of a discretionary power, there is no such obligation and/or there is a choice between the different steps that can be taken.

Where the power is discretionary, a court faced with a dispute about the lawfulness of the exercise (or non-exercise of the power) can decide whether or not the decision-maker construed the relevant rule(s) of law correctly, whether or not the

⁵⁸ For a discussion of the role of the courts in reviewing administrative acts, see Lagasse, *op. cit.*, preliminary chapter.

⁵⁹ Where the words used in the rule are, in linguistic terms, capable of bearing more than one meaning, that does not mean that the decision-maker has discretion to choose between the different possible linguistic meanings of the rule. Although the decision-maker may well have to take a view on what the rule means before it acts (particularly where there is no judicial exposition of what the rule means), the courts retain jurisdiction to determine the *legal* meaning of the words used. It is usually the case that a given rule bears only one *legal* meaning even if it is capable of bearing more than one *linguistic* meaning. The question of the discretion of courts as to the interpretation of legal rules (or, to put it another way, as to the selection of the legal meaning from among the different linguistic meanings) is outside the scope of this paper although it is quite important in the context of the judicial control of the legality of the exercise of a public power because the starting point for the exercise of judicial control is the ascertainment of the legal meaning of the provisions or measures in question.

premise on which the power could be exercised (x) existed and whether or not the action taken (or inaction) was within the range of possibilities open to the decision-maker. If the decision-maker made a choice that fell within the range of possibilities open to it to take, the court has limited powers of control: what was done fell within the decision-maker's margin of appreciation. Before passing on to consider what the court can do when the decision-maker acts within its discretion, it is worthwhile pausing for a moment to consider the premise on which the existence of the power is based (the x-factor).

At first sight, the premise is not something that involves any margin of discretion on the part of the decision-maker: either x exists or it does not. However, x could be a simple fact, a complex of facts, a fact that is technical in nature (that is, a fact whose existence can be determined only by a person having special knowledge) or a situation whose existence can be determined only by drawing inferences from facts and making a judgment of some sort. In addition, there are cases in which the x-factor is expressed in the form: "where the decision-maker has reason to believe x". In that situation, the x-factor is not the fact that x exists but a rather different factual situation: that the decision-maker has reasonable grounds for believing that x exists; and that requirement will be satisfied even if it subsequently emerges that x did not in fact exist at the time when the decision-maker acted⁶⁰. That apart, at this point, discussion of the margin of appreciation merges into another aspect of judicial control referred to above: the ability of courts to deal satisfactorily with factual investigations.

It is not unknown for the jurisdiction of courts to control the exercise of public powers to be limited to legal grounds only, not error of fact. In that event, there may be some debate as to the extent to which an error of fact may be an error of law. In principle, however, where the courts have a limited, or no, jurisdiction to entertain a dispute about the facts, determinations of fact have to that extent been allocated to the decision-maker. Even where determinations of fact fall within the jurisdiction of the courts, the decision-maker remains the primary fact-finder, if only because *ex hypothesi* the decision-maker was obliged to come to a view on the facts, in order to conclude whether or not the x-factor existed, before a court reviewing the decision-maker's decision is called upon to wrestle with that aspect of the exercise of the power.

The question that then arises is whether the court also acts as a primary fact-finder, in the sense that it must consider afresh the existence or non-existence of the x-factor⁶¹, or acts in its capacity as a review body, in which case it works off the finding made by the decision-maker. If the court acts in the latter capacity, the decision-maker remains the sole primary fact-finder and retains a margin of appreciation, albeit one that is likely to be extremely attenuated where the relevant facts are simple or primary facts. If, on the other hand, the court is a primary fact-finder, it does not follow that the decision-maker has no margin of appreciation at all in regard to the facts. Where x is a complex factual situation whose existence or non-existence can be determined only by drawing inferences from primary facts, it is common to see courts accepting the role of fact-finder in relation to the primary facts and conceding a margin of appreciation to the decision-maker in relation to the inferences to be drawn from the primary facts. In some instances, particularly where the drawing of inferences requires some technical expertise not available to the courts, that state of affairs may arise as a kind of self-denying ordinance of the courts – a recognition that

⁶⁰ It is commonplace for courts to review acts by reference to the circumstances prevailing at the time when the act was adopted (see, for example, in the context of Community law, Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, paragraph 49) and therefore, in the example given, by reference to the decision-maker's reasonable belief at that time.

⁶¹ As is the case in English public law: the "precedent fact" theory explored in *R v Home Secretary, ex parte Khawaja* [1984] AC 74.

they are no better equipped (and in all probability far less able) than the decision-maker to come to a correct conclusion. In other instances (as noted above), it is more properly to be seen as resulting from a more complex view of the division of functions between the decision-maker and the courts. Nonetheless, it is possible for there to be a margin of appreciation in relation to the x-factor; and, to that extent at least, there is no difference between mandatory and discretionary powers whose existence depends upon the x-factor.

Turning now to the situation that arises when the decision-maker (in principle at least) acts within the scope of its discretion, legal systems have developed different devices for enabling the courts to control the exercise of the discretion itself. In English public law, an exercise of discretion may be reviewed against the principles of fairness and reasonableness. In other systems, more precise concepts may be employed, such as the principle of proportionality. In order to protect the courts from the criticism that they are invading an area of discretion allocated by law to the decision-maker⁶², the use of such criteria may be explained on the grounds that they are implicit in the power-conferring provision or are derived from superior rules of law (or respect for the rule of law). In other words, such criteria can be described as forming part of the rules that define the discretion allocated to the decision-maker, instead of providing a basis on which the courts can attack an exercise of the discretion that the legislature has seen fit to confer upon the decision-maker⁶³.

So far, the discussion has centred on power-conferring provisions. Such provisions are rules of law superior to the act of the decision-maker challenged before a court; and they have the specific property not only of being binding on the decision-maker but also of conferring a power to act. Another area in which the margin of appreciation operates is the more general area of activity of organs of the State subject to the rule of law where the relevant superior rules of law are not power-conferring in the strict sense but power-curtailling provisions.

The form typically taken by a power-curtailling provision is that of a prohibition. In most instances, the application of a prohibition by a court does not involve any acceptance of a margin of appreciation on the part of the decision-maker. However, prohibitions may take different forms and may be subjected to exceptions or powers to derogate that are capable of introducing a margin of appreciation on the part of the decision-maker. There is no room for any margin of appreciation on the part of the decision-maker if, when applying a rule of law setting out a prohibition, the court need only find facts that are capable of providing a simple yes/no answer to the question, is the challenged measure prohibited? Problems arise when the facts are capable of leading to a more complex answer to that question or when the question cannot be answered at all save by means of an investigation of complex facts or judgmental inferences to be drawn from the facts. In such circumstances, a margin of

⁶² The argument is that, where the legislature confers a discretionary power on a person or body, the function of the courts is to control the lawfulness of the exercise of the power. Control of the appropriateness of the (lawful) exercise of the power is a matter for the administrative or other State bodies (not the courts) to which the decision-maker is answerable and, ultimately, to the Parliament and, through it, the electorate. It is not the role of the courts to short-circuit the correct lines of accountability leading ultimately to the electorate (*a fortiori* where the judges manning the courts are not elected and cannot ordinarily be removed by the electorate). In practice, accountability through the administrative hierarchy or through political/democratic processes (including the use of ombudsmen and the like) is not strikingly swift and efficient, whence the tendency of the courts to interfere – and to increase their interference just as the degree to which the intervention of the State and State bodies in everyday life has increased.

⁶³ Cf. the general review of the approach in different countries in J. Schwarze, *European Administrative Law* (Sweet & Maxwell, 2006).

appreciation on the part of the decision-maker slips into the equation and the scope of the court's power of review is limited correspondingly.

A more fundamental problem arises where the rule creating the prohibition is relatively "open-textured", that is to say, it is intrinsically incapable of generating a yes/no answer save in the clearest of cases and even where the relevant facts are simple. Such a rule remains operative as an injunction directed to the decision-maker but is of reduced effectiveness for the purposes of judicial control because it provides only a limited possibility of determining the lawfulness of the challenged act.

To explain the problem, an example of the last situation can be drawn from the case law of the ECJ concerning the principle of proportionality, which can be seen as a prohibitory rule governing the exercise of public powers. In Case 181/84 *R v Intervention Board for Agricultural Produce, ex parte E.D & F. Man (Sugar) Ltd.*⁶⁴, the ECJ held that a legislative provision prescribing the forfeiture in its entirety of a security given in respect of the export of sugar from the Community, when the time limit for submitting applications for export licences was not observed, was invalid as being inconsistent with the principle of proportionality. In that case, the applications had been submitted a matter of hours after the expiry of the time limit. In a subsequent case, Case 9/85 *Nordbutter v Germany*⁶⁵, a similar situation had arisen: financial aid was available if certain declarations were submitted in time but, in the event, the persons concerned delayed in submitting them. The relevant legislative provision did not provide that the aid would be withheld in its entirety if the time limit was not observed. Instead, it provided for a 10% reduction in the amount of the aid where the delay in submitting the declarations did not exceed 10 days. The entitlement to the aid was extinguished (in its entirety) only if the delay exceeded 10 days. In the *Nordbutter* case, the time limit was exceeded by 12 or 13 days and the entitlement to the aid was therefore lost in its entirety. The ECJ concluded that the legislation was not contrary to the principle of proportionality. It pointed out that, by providing for the reduction in the amount of the aid in the event of a delay of less than 10 days, the legislation had taken into account the difficulties of a strict application of the time limit where it had been only slightly exceeded; and had related the reduction in the entitlement to the seriousness of the failure to observe it. The ECJ went on to say: "In those circumstances it is not for the Court to consider whether the legislative bodies of the Community should have provided that time-limits were 'only slightly exceeded' where they were exceeded by 12 or 13 days rather than 10 days"⁶⁶.

In so concluding, the ECJ was accepting that, in the circumstances of the case, the decision-maker (there, the legislator) had a margin of appreciation in relation to the determination of the proportionality of the challenged measure that fell outside the scope of the ECJ's powers of review. In the *E.D. & F. Man* case, the ECJ had not encountered the problem because the circumstances of the case were different. In that case, the critical factor was that the security was forfeited in its entirety for an infringement of the rules that was significantly less serious than any infringement of the primary obligation that the security was intended to guarantee. The topsy-turvy nature of the legislation (imposing a more serious sanction for a less important infringement) provided a reliable basis on which to conclude that the principle of proportionality had been infringed. In *Nordbutter*, on the other hand, the application of the principle of proportionality could not provide a simple yes/no answer. There were obviously various ways in which delays in submitting declarations could be dealt with. The way selected by the decision-maker was to impose a 10% reduction in the entitlement for delays of up to 10 days and a 100% reduction for longer delays. Other

⁶⁴ [1985] ECR 2889.

⁶⁵ [1986] ECR 2831, followed in Case C-345/88 *Butterabsatz Osnabruck-Emsland* [1990] ECR I-159.

⁶⁶ Paragraph 17 of the judgment.

ways were conceivable. For example: 10% for 5 days, 20% for the next 5 days, 30% for the next 5 days again and so on. Or: 10% for 10 days; 50% for the next 10 days; 100% thereafter. The obligation flowing from the principle of proportionality was (and is) really capable only of requiring the decision-maker to direct its mind to the proportionality of the measure to be taken and to avoid a manifest lack of proportionality.

In conclusion, therefore, the margin of appreciation is the area of discretion allocated to a decision-maker in which it carries out a judgmental function (including, as the case may be, making value and policy judgments). A margin of appreciation may be conferred on the decision-maker by a power-conferring provision; or it may result from the nature of the superior rules of law to which the activity of the decision-maker is subject. In principle, at least, there is no margin of appreciation on the part of a decision-maker regarding the interpretation of the legal rules to which the decision-maker is subject. In relation to questions of fact, two broad distinctions need to be made: between facts relating to the definition of the discretion entrusted to the decision-maker (the x-factor referred to above) and facts that inform the exercise of that discretion; and between simple facts, complex facts, and factual inferences drawn from facts. Theoretically, at least, there is no margin of appreciation on the part of the decision-maker regarding the facts relevant to determining the existence and extent of the decision-maker's discretion (unless a power conferring provision makes the x-factor subject to a subjective assessment on the part of the decision-maker). It is also typically the case that simple facts (at the least) that inform the exercise by the decision-maker of its discretion are not within the decision-maker's margin of appreciation. That is so either because such facts are assimilated to facts relevant to determining the existence and extent of the discretion or because it is not considered that the finding of simple facts engages the "appreciation" (or exercise of judgment) of the decision-maker. Hence, even where the function of the court when reviewing the conduct of the decision-maker is not to act as a primary fact-finder, a margin of appreciation does not arise. Where the x-factor turns on complex facts or inferences drawn from facts, there is in principle no margin of appreciation on the part of the decision-maker unless the court is deprived of the role of a primary fact-finder. However, a margin of appreciation may arise through judicial self-restraint, particularly in relation to technical matters outside the court's area of expertise. Within the area of discretion allocated to the decision-maker, complex facts and inferences drawn from facts may be within the decision-maker's margin of appreciation.

(iii) The margin of appreciation in EC law

Any discussion of the margin of appreciation that Community law recognises on the part of the Community institutions is conducted on fairly conventional territory because the Community institutions are bodies on whom powers have been conferred by Community law. Both the constraints imposed by specific power conferring provisions and those resulting from the application of other superior rules of Community law (whether written or unwritten) operate directly upon the conduct of the institutions.

The first point that needs to be made concerns the "unlimited" jurisdiction of the ECJ and the CFI over the conduct of the institutions. In those cases in which the ECJ and the CFI have "unlimited jurisdiction" or exceptional powers that go beyond the control of legality, discussion of the margin of appreciation of the decision-maker is not relevant because of the power of the court to substitute its own appreciation for that of the original decision-maker. The relevance of the margin of appreciation arises where the ECJ and the CFI exercise their "normal" jurisdiction over the conduct of the institutions, which is a jurisdiction over the lawfulness of that conduct. Two general

points can be drawn from the existence in Community law of a distinction between judicial review of legality and those exceptional procedures in which the scope of judicial review is much greater. The first is that recognition of a margin of appreciation on the part of the Community institutions is fundamental to the separation of the powers of the judiciary (the ECJ and the CFI) from those of the other institutions. The second is that the basic rule in Community law is that the judiciary controls the lawfulness of the exercise of their powers by the other institutions and it is only in a few defined and exceptional cases that the separation of powers is removed and the margin of appreciation disappears as an area preserved from judicial intervention. Having said that, the *absolute* immunity of the margin of appreciation from judicial intervention is not a feature of the judiciary's "normal" jurisdiction – the review of the legality of the conduct of the institutions. Consistently with general trends within the Community, the ECJ and the CFI have made use of different devices (such as the principle of proportionality) in order to extend judicial control into the margin of appreciation of the institutions⁶⁷. Whether that process is properly to be described as judicial intervention in the margin of appreciation or as going to the correct definition of the extent of the margin of appreciation, is a matter of characterisation that need not detain us.

Passing now to the "normal" jurisdiction of the ECJ and the CFI, the margin of appreciation was the subject of express provision in the ECSC Treaty: in actions for annulment brought under Article 33 of the ECSC Treaty, it was provided that the court "may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the [Commission] took its decisions or made its recommendations, save where the [Commission] is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application". No such provision appears in the corresponding Articles of the EC and EAEC Treaties⁶⁸. Nonetheless, a similar limitation is to be found in the case law. Thus, in Case C-225/91 *Matra SA v Commission*⁶⁹, the ECJ held that "in the context of an action challenging legality, the Court's function is solely to ascertain whether the contested decision is vitiated by one of the grounds of unlawfulness set out in Article 173 of the Treaty [now Article 230], and the Court cannot substitute its own *assessment* of the facts, especially in the economic sphere, for that of the author of the decision" (emphasis added). The ECJ went on to hold that, in a "review of legality" of an administrative decision adopted in a sphere in which the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature, "the Court must therefore restrict itself to determining whether the Commission has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process"⁷⁰. As will later appear, an "assessment" of facts is not the same as a "finding" of a fact.

Before analysing in detail the implications of that basic rule, the principle that emerges is that it is inherent in the Community law concept of judicial control of the lawfulness of the exercise of a public power that judicial intervention cannot, and does not, extend to a complete review of all the factors taken into account by the

⁶⁷ A more detailed analysis of the case law than is possible here would reveal a certain ebb and flow in judicial intervention over the years that appears to have been influenced by three principal factors: the personality of the judges; the subject-matter of judicial review in particular cases; and changes in the case load of the ECJ and the CFI.

⁶⁸ Articles 230 (ex 173) and 146, respectively. For a brief discussion of the reasons for that omission, see G. Bebr, *Development of Judicial Control of the European Communities* (1981), pages 126-127.

⁶⁹ [1993] ECR I-3203, see paragraphs 23-25.

⁷⁰ In the French version of the judgment: "la Cour doit, des lors, se limiter à examiner si la Commission n'a pas excédé les limites inhérentes à son pouvoir d'appréciation par une dénaturation ou une erreur manifeste d'appréciation des faits ou par un détournement de pouvoir ou de procédure".

person or body exercising the power in relation to the challenged conduct: the principle is inherent in the concept because, in order to limit the scope of judicial control, it is not actually necessary to have a Treaty provision that uses the same words as those used in Article 33 of the ECSC Treaty for that purpose. It is implicit in the Treaty, but rarely stated expressly in the case law, that there is complete review of matters of law⁷¹. The need to draw lines of demarcation arises once the ECJ and the CFI are engaged in the task of reviewing aspects of the conduct of the institutions that do not turn on the meaning and effect of a rule of Community law but concern matters of fact and judgment.

In the context of the Community, where both legislative and administrative acts are subject to judicial control, it is convenient to look first at the review of legislative acts and then at the review of administrative acts (commonly referred to as “decisions”). Before embarking on that exercise, it seems useful to say a little about the difference between those two kinds of acts, or at least about those differences that appear to be relevant in the present context.

The provisions empowering a Community institution to adopt a legislative act must of necessity confer a discretionary power. Although it seems superfluous to refer expressly to the Treaty provisions that confer such a power in order to illustrate the point, one example will be given. Article 47(2) of the EC Treaty provides that, in order to achieve the purposes set out in Article 47(1) – that is, in order to make it easier for persons to take up and pursue activities as self-employed persons – “the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons”. Article 47(2) is mandatory as to the taking of action, as to the form that that action shall take (the adoption of directives, which are a species of legislative measure), as to the procedure to be followed (Article 251 of the Treaty), as to the object of such action (coordination of national provisions concerning the taking-up and pursuit of self-employed activities), and as to the purposes served by such action. To the extent that Article 47(2) is mandatory, the Council has no discretion. However, the obligations set out in Article 47(2) leave the Council with a considerable degree of leeway regarding the content of the measures to be taken. Even the obligation to take action does not translate into an obligation to achieve the desired result (or any specific step towards achieving the desired result) within a given period of time⁷². The result is that, where a provision confers a (mandatory) power to legislate, it cannot be expressed in the “if x then y” formula typical of mandatory power-conferring provisions. In contrast, the provisions empowering a Community institution to adopt an administrative act may confer either a mandatory or a discretionary power; and, where they are the former, they can be expressed using the “if x then y” formula (although that is not always the case in relation to every aspect of the exercise of the power, particularly the time period within which it is to be exercised).

In many respects, however, useful distinctions between legislative and administrative acts cannot be drawn by reference to the type of provision conferring the power to

⁷¹ For one of the few judicial pronouncements, see Case 14/61 *Hoogovens v High Authority* [1962] ECR 253 at 268: “to recognise the High Authority’s power of appraisal is not to deny the jurisdiction of the Court of Justice to see whether the Decision of the High Authority rests on a correct application of the Treaty, of the basic Decisions and of the rules recognised by the *SNUPAT* judgment, and whether it is accordingly justified in law”.

⁷² Witness the programme of legislation adopted under Article 47(2) in relation to the banking sector alone, which started in 1973 and has not yet ended. The programme has proceeded in fits and starts, tackling different aspects of the problem with a greater or a lesser degree of detail depending upon the circumstances.

adopt such acts. The greater freedom of discretion characteristic of legislative acts by comparison with administrative acts is an important point of differentiation; but there are many types of administrative acts that are characterised by the exercise of a broad discretion.

In that connexion, it is also right to point out that the distinction drawn in Community law between legislative and administrative acts cannot be elucidated by reference to the formal title or appearance of an act, or by reference to its placing in the hierarchy of legal norms. Particular acts take particular forms for a variety of reasons, some constitutional and some customary, and, on occasion, for no discernible reason at all. In consequence, the approach to that question in the case law has been to focus upon the real nature of the act in question and not upon its formal appearance or apparent status⁷³.

However, it is relevant to the present discussion to note that, in drawing a distinction between the real nature of administrative decisions and regulations, the ECJ has stated: "The criterion for the distinction must be sought in the general 'application' or otherwise of the measure in question. The essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety. Consequently, in order to determine in doubtful cases whether one is concerned with a decision or a regulation, it is necessary to ascertain whether the measure in question is of individual concern to specific individuals"⁷⁴.

From that, it may be concluded that an essential distinction between true legislative and true administrative acts is that the former are not concerned with the facts of a particular situation or group of situations whereas the latter are. For example, for constitutional reasons, retaliatory action taken against dumping takes the form of the imposition of anti-dumping duties by regulation. In principle, regulations are legislative acts. Regulations imposing anti-dumping duties apply throughout the Community whenever the dumped goods covered by the regulation in question are imported into the Community. To that extent, they have all the appearances (and consequences) of a legislative measure. However, a regulation imposing anti-dumping duties is adopted after an investigation into the particular facts surrounding the production and importation into the Community of particular goods sold by particular undertakings in one or more particular third countries. Unsurprisingly, therefore, such regulations are not classified as (true) regulations (or legislative measures) and are instead regarded as a bundle of individual decisions addressed to the undertakings accused of dumping (and, on occasion, to other undertakings) which those undertakings can challenge in an action for annulment. In relation to persons whose individual situation was not taken into account in the regulation, the regulation retains its character as such⁷⁵.

⁷³ See the case law on the admissibility of actions for annulment brought under Article 230 of the EC Treaty (such as Cases 789 and 790/79 *Calpak and SELF v Commission* [1980] ECR 1949, paragraphs 7-10).

⁷⁴ Cases 16 and 17/62 *Confederation Nationale de Producteurs de Fruits et Legumes v Council* [1962] ECR 471 at 478.

⁷⁵ E.g. Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraphs 13-17. In Case T-39/98 *Sadam Zuccherifici and others v Council* [1998] ECR II-4207, paragraph 19, that approach was expressed in terms of a general proposition applicable not only to anti-dumping measures.

True legislative acts may be based upon archetypal factual situations⁷⁶ but are not, therefore, based upon an assessment of a specific and real factual situation⁷⁷ or, to put it another way, upon an intention to impose a rule determining the outcome of a specific and real factual situation. Accordingly, they are motivated by policy considerations based upon an understanding of the relevant legal rules governing the exercise of the legislative power and upon assessments of a factual nature that are made at a relatively high level of abstraction – so high a level in fact that a legislative measure lacks the character of a measure that contemplates the resolution of individually identified factual situations. In theory at least, although not always in practice, the crystallisation of a legislative norm into a rule governing the individual case is a separate exercise and is performed by an administrative act based on the legislative measure⁷⁸.

The fact that legislative acts are intended to determine the outcome of general classes of case, but not to decide a specific individual case, does not lead to the conclusion that consideration of primary facts falls entirely outside the exercise of the legislative function. The point is that legislative activity involves making policy judgments that are based on general factual evaluations. Those evaluations must have some basis in primary factual material; but that material is itself general in nature. The legislature's margin of appreciation encompasses both the policy choices and the factual evaluations that have to be made; and the type of factual evaluation that is necessary is such as to minimise the significance of errors of basic facts. It does not follow that the legislator can hide behind its margin of appreciation when there has been an error of fact. The position, correctly stated, is that, because the exercise of the legislative function (in its true sense) involves making policy judgments based on factual evaluations that are relatively general or rarified in nature, it is only in exceptional circumstances that an error concerning a basic fact will be material. In order to be material, an error of fact would have to undermine the entire basis for the assessment upon which the policy judgment was made.

For example, *Case 55/75 Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof*⁷⁹ concerned the exercise by the Commission of a power to establish and determine monetary compensatory amounts (by regulation, using the Management Committee procedure). The exercise of the power did not involve the Commission in making its decisions on a case by case basis or in respect of each product or each exporting country individually; the Commission was entitled to make evaluations of a general nature⁸⁰. The power was to be exercised where there was a risk of disturbance in trade in agricultural products. The ECJ concluded that the Commission and the Management Committee enjoyed a wide measure of discretion and held: "In reviewing the legality of the exercise of such discretion, the court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its

⁷⁶ For example, Article 2 of Council Directive 67/227 (OJ 1967, Eng. Sp. Ed. p. 14), which set out the basic principle of the common system of value added tax appears to be based upon an archetypal chain of transactions leading to the final consumer from the producer and first seller of something.

⁷⁷ This is not intended to exclude the possibility that the inspiration for a particular legislative measure may be a particular factual situation (for example, European Parliament and Council Directive 95/26 – OJ 1995 No. L168/7 – which amended various directives in the financial services sector, was inspired, or at least materially influenced, by the lessons learned from the collapse of the Bank for Credit and Commerce International in 1991 and it was known as "the BCCI Directive": see the Opinion of the Economic and Social Committee – OJ 1994 No. C52/15, paragraph 1.2). The point is that a legislative measure in the strict sense is intended to govern types or classes of situation, usually through individual measures adopted in order to deal with a particular case.

⁷⁸ That is how Articles 230 and 241 and Articles 230 and 234 of the EC Treaty interrelate.

⁷⁹ [1976] ECR 19.

⁸⁰ Paragraph 9 of the judgment.

discretion”⁸¹. The ECJ went on to state: “even if it were shown that the importation from Bulgaria into the Federal Republic of Germany in April 1974 of the product at issue at the free-at-frontier price stated in the documents produced by the plaintiff was not in itself of such a nature as to cause disturbances in trade in agricultural products in the Federal Republic of Germany, it by no means follows that the Commission made an obvious mistake or clearly exceeded the bounds of its discretion in holding that the importation from third countries, in general, of the group of products derived from milk which included cheese of sheep’s milk was, in the absence of compensatory amounts, of such a nature as to disturb trade in agricultural products in the Community”⁸².

The judgment (and the case law generally) shows that the legislator has a margin of appreciation that covers all aspects of the exercise of a discretionary power (with the exception of the purely legal limits to the power). The judiciary may interfere only to the extent that the exercise of the discretion can be said to be “manifestly”, “clearly” or “obviously” wrong. As indicated above, that means that the exercise of discretion must produce a result that patently falls outside the range of possibilities open to the legislator on the basis of the facts and matters that, as a matter of law, had to inform the exercise of discretion. Accordingly, if the judiciary would have come to a different view on the exercise of the discretion, having regard to those facts and matters, that does not, in itself, justify judicial interference. The view of the judiciary prevails over that of the legislator in relation to the meaning and effect of the legal rule conferring on the latter the power to act; but, in relation to matters of pure fact, judicial intervention is limited to situations in which there is a manifest error in relation to a material fact underpinning the exercise of discretion.

Essentially the same approach has been followed in cases where the exercise of the legislative function has been based on more specific consideration of factual situations and also where the challenged act has not been legislative but administrative in nature. A few illustrations, drawn from different areas of EC law, are set out below.

Case 138/79 *Roquette v Council*⁸³ concerned the exercise of a legislative power so as to introduce a quota system for isoglucose producers modelled on that applied to sugar producers after the ECJ had annulled part of the isoglucose regime⁸⁴. It was contested *inter alia* on the ground that it infringed the principle of equal treatment. The ECJ rejected the challenge, holding: “When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also [applies] to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion”⁸⁵.

⁸¹ *Ibid.*, paragraph 8.

⁸² *Ibid.*, paragraph 11.

⁸³ [1980] ECR 3333. The action was admissible because it was directed against that part of the contested regulation that provided for the fixing of production quotas for individual undertakings. However, the focus of the challenge was on the policy decision to introduce a quota system.

⁸⁴ See Cases 103 and 145/77 *Royal Scholten-Honig v Intervention Board for Agricultural Produce* [1978] ECR 2037, paragraphs 38-84. In that case, the ECJ was able to detect the errors vitiating the relevant part of the regime without difficulty.

⁸⁵ *Roquette* (above), paragraph 25 of the judgment.

That *dictum* was repeated in Case C-4/96 *Northern Ireland Fish Producers' Organisation and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland*⁸⁶, which concerned the allocation of fishing quotas. The ECJ rejected arguments based on the principles of proportionality and non-discrimination by again emphasising the discretionary nature of the power that had been exercised and the need in such a case for a challenge to be based upon the disputed measure's "patent" unsuitability for achieving its objectives, its "arbitrary" nature or "manifest inappropriateness"⁸⁷.

In Case C-122/94 *Commission v Council*⁸⁸, the Commission unsuccessfully challenged two Council decisions authorising the grant of state aid under the third subparagraph of Article 88(2) of the EC Treaty. The Council had power to act if there were "exceptional circumstances". The ECJ pointed out that the Council had to decide whether or not there were such circumstances and, in doing so, it necessarily had to carry out an assessment of a complex economic situation. The ECJ regarded the Council's discretion as extending to finding basic facts (in that it could rely upon general findings) because the exercise of its power required such an assessment to be carried out. Even though the Commission (obviously a particularly well-informed critic) thought that, on the facts of the case, the Council was wrong, that was not the point. The question was whether or not the Council had made a manifest error in its assessment of the facts and in its assessment of the correct policy choice to make. No such error was apparent⁸⁹.

In Case T-203/96 *Embassy Limousines and Services v Parliament*⁹⁰, the European Parliament had issued an invitation to tender for a contract for the provision of chauffeur-driven transport. The contract was to be awarded in accordance with Directive 92/50⁹¹, which, at that time, harmonized the laws of the Member States governing the award of public service contracts. The criterion for determining the person to whom the contract should be awarded was the economically most advantageous tender, taking account of price and technical merits. After the contract award procedure had progressed for some time, the Parliament decided to halt it and start all over again on the ground that none of the tenders had proved satisfactory. Embassy Limousines & Services, which had been led to believe that it would get the contract, brought an action for damages, claiming that the Parliament had acted unlawfully⁹². The CFI held that, because the Parliament had a broad discretion in assessing the factors to be taken into account for the purpose of deciding on the award of the contract, "the Court's review should be limited to checking that there has been no serious and manifest error" or a "grave and manifest error"⁹³.

In such cases, because of the existence of a margin of appreciation derived from a discretionary aspect of the power in question, the focus of judicial control shifts to aspects of the exercise of the power that are controllable by the court.

It should also be noted that the margin of appreciation applies only to the extent that the decision-maker has a "broad" discretion – that is, a discretion that is not subject to express limitations that provide the court with an alternative basis for exercising

⁸⁶ [1998] ECR I-681, paragraph 42. See also Case C-179/95 *Spain v Council* [1999] ECR I-6475, paragraphs 28-29 (pp 6502-6503).

⁸⁷ The *NIFPO* case (above), paragraphs 57 and 62.

⁸⁸ [1996] ECR I-881.

⁸⁹ Paragraphs 18-25 of the judgment. The Commission did not assert misuse of power.

⁹⁰ [1998] ECR II-4239.

⁹¹ OJ 1992 No. L209/1.

⁹² The abbreviated description of the facts given above does not do full justice to the sense of grievance that Embassy Limousines & Services must have felt about the conduct of the Parliament.

⁹³ Paragraphs 56 and 60 of the judgment.

judicial control – but not to aspects of the exercise of the power that are not subject to a discretion. Thus, while the Commission has discretion to decide whether or not to open an investigation into the subject-matter of a complaint to it that, for example, Article 81 or 82 of the EC Treaty has been infringed and what action to take in the event that there was an infringement,⁹⁴ once it has embarked upon an investigation, it does not have *discretion* to decide *whether or not, on the facts of the case*, there has been an infringement: either there was an infringement or not; and if (viewed objectively) there was an infringement, the Commission has no discretion to find otherwise unless, in the context of Article 81, it exercises a distinct power (under Article 81(3)) to exempt the infringement from prohibition.

The margin of appreciation in relation to facts and evaluations

(i) Preliminary remarks

In EC law, the general position is that judicial control is exercised over the accuracy of the facts relied upon by the decision-maker to justify the exercise by it of a power, in the sense that the court (mainly, nowadays, the CFI) is entitled to come to a conclusion on the facts without being constrained by a margin of appreciation accorded to the decision-maker. In contrast, as indicated above, a margin of appreciation is accorded to the decision-maker in relation to “evaluations” and, in particular, “technical” or “economic” facts. In order to explain those different categories, and also what appear to be the reasons for the existence of a margin of appreciation, the different factual issues confronted by a court exercising judicial control will be considered separately, beginning with factual issues that arise in the context of the exercise of a legislative power. The topic of factual enquiry (in the context of judicial control) is not uncomplicated; and there is good reason to take the view that, instead of classifying situations by reference to the nature of the factual issue involved, it is more profitable to classify by reference to judicial responses to factual issues, which can (in broad terms) be described as follows: (i) judicial control without limit over findings of fact that involve no technical or specialist knowledge; (ii) judicial deference to the original decision-maker in relation to findings of fact that do require technical or specialist knowledge that the court does not possess (in other words, although the issue of fact is one that, in principle, falls within the remit of the court exercising judicial control, the court acknowledges the limitations of its own expertise and accords the decision-maker a margin of appreciation); and (iii) judicial control limited by the margin of appreciation in cases where the decision-maker is called upon to exercise a value judgment when addressing the issue of fact.

Facts can, at least loosely, be classified into facts capable of perception by the person of average (or notionally average) sensibility, facts whose perception requires some specialized or technical knowledge or expertise falling outside the ordinary experience of the average (or notionally average) person, and facts inferred from other facts. The last category can, in turn, be divided into inferred facts capable of perception by the average person and inferred facts capable of perception by a person with specialized or technical knowledge or expertise.⁹⁵ Strictly speaking, the inferring of a fact (whether or not the nature of the fact is technical) is different from an “appreciation” or “evaluation” in which a value judgment is made on the basis (normally) of a group of facts.

⁹⁴ E.g. Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223.

⁹⁵ Some care needs to be taken about reference to an “average” person, which supposes an identifiable range of knowledge or ability in terms of the understanding of facts. In English law, there exists the concept of the “reasonable” person, which is essentially a theoretical, not a real, concept. For an insight into the concept of the average customs officer, see the Advocate General’s Opinion in Case 317/81 *Howe & Bainbridge BV v Oberfinanzdirektion Frankfurt am Main* [1982] ECR 3257.

For present purposes, a “primary” fact is a fact perceived by the senses and a “secondary” fact is a fact inferred from one or more primary facts, while an “evaluation” involves a value judgment.

Without being too philosophical about the question, all facts are in principle both real and objectively ascertainable. However, some secondary facts are really judgmental evaluations. They have no real existence and are not objectively ascertainable. They can be classified as facts or matters of fact only if the underlying hypothesis is that, in the context of judicial control, there are only matters of fact and matters of law.⁹⁶

Although facts are in principle real and objectively ascertainable, it does not follow that, for legal purposes, facts are ascertained otherwise than subjectively.

In the context of judicial control, the process of the ascertainment of a primary fact often breaks down as follows: (i) there is the fact itself; (ii) perception of the fact by means of the senses; (iii) recording of the fact; (iv) proof of the fact to the decision-maker and its ascertainment by the decision-maker; (v) verification of the fact or of the legality of the decision-maker’s decision by the court exercising judicial control.

In order to illustrate what has just been said, let us take an example drawn from criminal law: an incident in which A punches B, who falls down, witnessed by C and D. The event itself is a fact or a cluster of facts that is real and objectively ascertainable. However, the independent witnesses, C and D, have perceived the fact by their senses. Their perception of the fact may well differ for a number of reasons, such as their distance from the event, the angle at which they perceived the event (D might not have been able to see the punch being thrown because a tree blocked his vision and might simply have seen B fall), the quality of the light (particularly important if the event took place at night and there was only dim illumination from a street lamp – C might not identify A as the assailant whereas D might be able to do so).

Both C and D record the fact in their mind; and the quality of the recording will be affected by a number of factors, such as the degree of attention that they had paid at the time to what they had seen (C might have seen the incident developing and been focusing on what was happening whereas D might have had his mind on something else) and the strength of their memory. Where the fact (or its perception) is recorded in a written statement made to the police investigating the incident, the quality of the recording is affected by the ability of C and D not only to remember what happened but also to articulate their recollection of the event (or their perception of it).

Later on, A is put on trial before a criminal court and evidence of his guilt is adduced. The court (here, the decision-maker) must evaluate the evidence in order to reach a conclusion about the fact. The proof of the fact to the court and the court’s evaluation of the evidence leading towards the ascertainment of the fact are subjective. If C and D give evidence in person (as may be the case), the court may have not only their subjective view of what happened, expressed in the written statement made to the police, but also (or, depending upon the procedure followed, only) their recollection of the event, given orally at the trial. Evidence given orally by a witness does not comprise only the words uttered by the witness. It also comprises the impression made upon the decision-maker (here, a court) by the demeanour of the witness when giving evidence. Hesitancy, poor use of language, changes of facial colour and other physical manifestations may reduce the credibility of the witness in the eye of the

⁹⁶ See footnote 6 above.

court and the value of his evidence.⁹⁷ A firm and confident manner may produce the opposite effect – although, depending upon the precise circumstances, it may also indicate that the witness is a consummate liar.

The decision-maker's ascertainment of a real and objectively ascertainable fact is, therefore, a subject assessment of material that may well be subjective itself. If we now suppose that, pursuing the illustration, a superior court is called upon to exercise judicial control of the criminal court's decision concerning A's guilt, what is the superior court to do? The answer is, obviously, largely a matter of (here) criminal procedure; but it is equally obvious that a control, by the superior court, of the fact-finding made by the criminal court can be contemplated only if the superior court engages in exactly the same factual enquiry as was carried out by the criminal court. For example, were the superior court to read a transcript of the evidence given orally by C and D, it would have no idea of the totality of the evidence received by the criminal court because the superior court would not see, from a perusal of the transcript, the behaviour of C and D, when giving evidence, that was taken into account when their evidence was evaluated.

The same problem of subjectivity in regard to objectively ascertainable facts is capable of arising in relation to other ways in which a fact can be found, such as where the fact is (or is not) disclosed by a document. For example, the Commission decision at issue in Cases T-79/95 and T-80/95 *SNCF and British Railways v Commission*⁹⁸ was annulled because of a factual error made by the Commission in its interpretation of an agreement allocating train paths in the Channel tunnel.

Judicial control of the exercise of a public power is almost invariably directed at situations in which the person or body exercising the power is not acting on the basis of primary facts that that person or body has itself perceived directly by the senses. Instead, the decision-maker will almost invariably be making an assessment of *evidence* for the purpose of finding a primary fact or inferring a secondary fact. In addition, of course, the decision-maker may well be analyzing the facts and evidence for the purpose of making an evaluation (in the sense of a value judgment).

The result is that, in reality, judicial control in relation to facts is, in one way or another, a control of subjective assessments (to use, here, a neutral term) made by the decision-maker. The subjective elements create a margin, or risk, of error in the finding of a fact: to use the example given above, C may have had a clear view of the incident, saw all the relevant actions of A and B, and have an accurate recollection of the incident, but that does not preclude the possibility that the court deciding on A's guilt may come to a wrong conclusion on the facts because of subjective factors, such as the impression made by C when giving evidence or, indeed, the confidence with which D delivers to the court an entirely erroneous account of what happened.

As illustrated in more detail below, what we observe in the case law is that there is unrestricted substitution, by the court exercising judicial control, of its assessment for that of the decision-maker in relation to some types of fact (or issues of fact) but not in relation to others despite the existence of subjectivity in the exercise of fact finding, whether the fact is a primary fact, a secondary fact (or inferred fact) or the product of a complicated analysis of other facts. Why do some aspects of the decision-maker's function benefit from a margin of appreciation whereas others do not?

⁹⁷ Hesitancy alone may, of course, suggest a witness who is taking care about his evidence and may support the credibility and accuracy of his recollection.

⁹⁸ [1996] ECR II-1491.

To begin with, the existence of a margin, or risk, of error in the fact finding process is inherent in that process; but it is quite different from a margin of appreciation reflecting the existence of a discretion accorded to the decision-maker.

Where the decision-maker's power (or some aspect of the power or its exercise) is dependent in law upon the existence or non-existence of a fact, it is difficult to accord the decision-maker a discretion in relation to the determination of the existence (or non-existence) of the fact without subverting the legal provision that imposes that factual condition upon the existence or exercise of the power: the irresistible conclusion is that that condition of fact forms part of the conditions for the legality of the exercise of the power and is therefore necessarily within the remit of the court exercising judicial control. The fact is, by its nature, objectively ascertainable even if the techniques used to identify its existence or non-existence involve a certain degree of subjective judgment as to the treatment of evidence and thereby create a risk of error. Further, since the decision-maker almost invariably operates on the basis of evidence rather than upon its own perception (by its senses) of the existence of a fact, the decision-maker is in no privileged position, by comparison with the court exercising judicial control: the decision-maker and the court exercising judicial control are equally able to evaluate the evidence and come to a reliable conclusion. More importantly, perhaps, the court exercising judicial control is able to employ a view of the facts that is untrammelled by the other considerations that the decision-maker necessarily has in mind when exercising a power and that can influence, or appear to influence, its approach to the facts and the evidence.

The case of technical facts (or facts ascertainable by means of specialist knowledge) is in principle no different; but there a new difficulty is encountered – the practical ability to exercise judicial control effectively. That difficulty can be overcome if the court exercising judicial control is equipped with the relevant expertise.⁹⁹ It is questionable if the difficulty can be overcome by the court obtaining further evidence in the form, for example, of an expert's report. In order to remove doubt on that point, it is necessary to decide whether the correct classification of the problem posed by technical facts is really as a practical problem when exercising judicial control or as a manifestation of the separation of powers. The case law is not clear on that point.

As to factual evaluations involving value judgments, those fall without any doubt within the sphere of the decision-maker.

(ii) Error of fact in the judicial control of legislation

Although error of fact is well established in EC law as a ground for controlling the legality of an exercise of public power, in the context of the exercise of a legislative power, it is rarely the case that what can be described as a simple error of fact, or an error of simple fact, will be sufficient to justify annulling a measure. The reason is that, as noted above, legislation, by definition, applies to factual situations that are defined generally or as general classes or types of situation. A specific factual situation rarely figures as the basis for a legislative act. Where it does, it is more likely than not that the supposed legislative act is really a bundle of individual decisions (as in the case of a regulation imposing anti-dumping duties).

⁹⁹ By that is meant that the court exercising judicial control is formed as a court with the relevant specialised knowledge. If the membership of the court exercising judicial control changes at some particular point in time to include an individual with relevant expertise, it does not follow that it is appropriate for the court to be more intrusive in its control of the exercise of power by the decision-maker than it would otherwise be. The creation of a body endowed with specialist expertise, for the purpose of exercising judicial control, indicates that the technical facts in question fall within the scope of judicial control and are not solely within the remit of the decision-maker.

Where a legislative power is conferred subject to conditions of fact, it is normally the case that a factually complex situation is envisaged. The legislator is then faced with the need, not to make a decision on a specific case, but to take a generalized view. Where the adoption of the contested act involves a complex economic assessment or a discretionary power requiring an exercise of judgment (as is typically the case in relation to a legislative power), the reviewing court's powers of review are, in general terms, limited to: (i) infringement of any procedural rules applicable in the course of the adoption of the act, including the obligation to give reasons; (ii) material error of fact; (iii) manifest error of assessment; and (iv) misuse of powers.¹⁰⁰

Due to the nature of legislative powers, it is rare to find a situation in which a true legislative act can be impugned because of an error of a primary or secondary fact (the position is different where the legislative act constitutes a bundle of individual decisions, in which case error of fact is a more likely potential ground of review); and, when considering the lawfulness of a legislative measure by reference to any appreciation of the facts made by the author of the measure, it is necessary to disentangle the purely factual aspects of the problem from the policy elements.

For example, in the *Northern Ireland Fish Producers' Organisation* case,¹⁰¹ a challenge was made to the allocation of fishing quotas between the Member States. Such an exercise takes place against the backdrop of diminishing fish stocks and the need to consider the often conflicting interests of fishing communities in different parts of the EC.

It was argued that the quotas at issue in that case could not lawfully have been granted without regard to scientific data concerning the fish stocks in question. The ECJ observed that: "When implementation by the Council of the Community's agricultural policy necessitates the evaluation of a complex economic situation, its discretion is not limited solely to the nature and scope of the measures to be taken but also, to some extent, to the finding of basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether there has been a manifest error or misuse of power or whether the authority in question has clearly exceeded the bounds of its discretion...".¹⁰² Further, in that case, the EC institutions were engaged in a balancing exercise and making a policy choice.¹⁰³

It is interesting that the discretion accorded to the legislator in terms of the facts is not a discretion to make an error of "basic fact" but a discretion to rely ("in particular") on "general findings" of fact. That reflects the reality of the exercise of a legislative power; but, as a result of moving the relevant facts into a level of generality, the degree of judicial control is necessarily limited.

The remaining parts of this section concern judicial control otherwise than in the context of legislative powers.

(ii) Judicial control in relation to non-technical primary facts

It is well-established that judicial control of legality extends to non-technical primary facts and does not admit of the existence of a margin of appreciation even where

¹⁰⁰ The grounds listed in the text are not the same as those stated in, for example, paragraphs 24-25 of the judgment in *Matra* (above): the case law exhibits a certain degree of variation in the listing of the grounds.

¹⁰¹ Above.

¹⁰² Paragraph 42 of the judgment. See the similar formulation in other cases, such as *Omega Air* (above), paragraph 65 (p 2622).

¹⁰³ See paragraphs 46-54 and 61 of the judgment.

there is room for debate about how exactly some piece of evidence is to be evaluated.¹⁰⁴ The best illustrations appear in the context of EC competition law. By way of example, in Cases 100 to 103/80 *Musique Diffusion Francaise SA and others v Commission*,¹⁰⁵ the ECJ heard oral evidence from a witness for the purpose of exercising judicial control of certain primary facts found by the Commission.

(iii) Judicial control in relation to technical facts (primary and secondary)

A margin of appreciation is recognized where the decision-maker makes a finding that is technical in nature, that is, one concerning a matter of fact involving specialist knowledge. By way of example, Case C-269/90 *Hauptzollamt Muenchen-Mitte v Technische Universitat Muenchen*¹⁰⁶ concerned a Commission decision that a particular piece of scientific apparatus (a microscope) could not be imported into the Community free of customs duties because it did not benefit from an exemption from customs duties for scientific instruments. The exemption was available where equivalent apparatus could be obtained in the Community. The Commission's finding was that equipment of equivalent scientific value, capable of being used for the same purpose, was being manufactured in the Community. A reference for a preliminary ruling on the validity of the Commission decision was made by the Bundesfinanzhof, which took the view that the requirement of legal protection was not affected by the fact that the comparative examination of the equivalence of the scientific apparatus in question performed by the Commission was "mainly technical".

Depending upon the circumstances, determining whether or not two scientific apparatus are of equivalent scientific value may be a relatively simple exercise, involving a comparison of specifications only, or a relatively complex exercise involving a value judgment or a subjective evaluation; and a layperson is in no position to judge how difficult or easy the exercise may be or what the correct result of the comparison should be. It is not clear from the report of the case how difficult the matter actually was (from the perspective of someone with the relevant specialist knowledge). It suffices to note that the ECJ's previous case law had simply accorded a margin of appreciation to the Commission on the ground that the examination to be carried out was "technical" in character;¹⁰⁷ and, in the *Technische Universitat Muenchen* case itself, the ECJ described the procedure followed by the Commission, in general terms, as one involving "complex technical evaluations", without stating whether or not the comparison in that case had been a complex evaluation (although it was certainly a technical one).

The judgment can therefore be taken to indicate the correct approach in relation to facts of a technical nature, or requiring specialist knowledge, whether or not, from an informed perspective, the fact in question is a simple, albeit technical, fact or can be ascertained only by means of a complex evaluation or a value judgment.¹⁰⁸

¹⁰⁴ That is, of course, one of the reasons for the creation of the CFI. The extent of judicial control over fact finding can also be derived from the pronouncements in the case law concerning the margin of appreciation, which invariably refer to control of the finding of the basic facts informing the decision-maker's evaluation. In that context, there is a variation in the formulations used: some refer to "manifest" error of fact whereas others do not; the context often explains the difference in usage but, in some instances, there appear to be mistranslations in the different language versions of the judgments.

¹⁰⁵ [1983] ECR 1825.

¹⁰⁶ [1991] ECR I-5469: see paragraphs 13-14 and 20-22 of the judgment (pp 5499-5501).

¹⁰⁷ E.g. Case 303/87 *Universitat Stuttgart v Hauptzollamt Stuttgart-Ost* [1989] ECR 705, paragraph 20 of the judgment (p 720).

¹⁰⁸ Cf. [1991] ECR I-5483: "there are, in my view, sound reasons of legal policy why the Court should be reluctant to interfere with a decision taken in a technical domain in accordance with the recommendations of a group of experts. A momentary glance at the documents placed before the Court

The ECJ's previous case law had indicated that a decision of the sort in question in *Technische Universität München* was subject to judicial control on the grounds of error of law, misuse of powers and manifest error of appreciation.¹⁰⁹ In *Technische Universität München*, the ECJ went on to state the following: "where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present".

In that case, the ECJ was not satisfied that the group of experts who had evaluated the apparatus in question, and on whose recommendation the Commission had acted, had had the necessary technical knowledge to perform their function properly. There were, in addition, other errors (failure to respect the University's right to be heard and failure to give an adequate statement of reasons). Accordingly, the decision was held to be invalid.

The case is particularly interesting because of the first reason given by the ECJ (the failure by the Commission to have the evaluation carried out by properly qualified persons). It is obvious (but often seems to be overlooked) that, if the law empowers (or obliges) a Community institution to act in a particular way when a fact of a technical nature exists (or does not exist), the institution must equip itself with the necessary expertise in order to determine the existence (or non-existence) of the fact.

(iv) Judicial control in relation to secondary facts (purely factual inferences)

Apart from when a secondary fact is of a technical nature, requiring specialized knowledge, in which case there is a margin of appreciation, the judicial control of legality applies to secondary facts (or inferences) just as it does to primary facts. For example, Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines SA (CRAM) and Rheinzink GmbH v Commission*¹¹⁰ concerned an action for the annulment of a Commission decision imposing a fine on two undertakings because, the Commission found, those undertakings had taken concerted action, contrary to what is now Article 81 of the EC Treaty, to prevent parallel imports. The Commission's finding was an inference drawn from certain primary facts, the Commission's case being that those facts could not be explained otherwise than by the existence of concerted action by the two undertakings.

The ECJ held that, in the circumstances, "it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one

in the present proceedings reveals questions that lie well beyond the ordinary capacities of a court of law" (Advocate General Jacobs). See also the comments of the CFI in Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, paragraph 89 of the judgment (p 3649).

¹⁰⁹ Note the comments made by Advocate General Jacobs in paragraphs 13-14 and 16 of his Opinion (pp 5483-5484) and see also footnote 102 above.

¹¹⁰ [1984] ECR 1679, paragraphs 14-23 of the judgment (pp 1701-1703).

adopted in the contested decision”.¹¹¹ The applicants succeeded in doing so, in part by producing to the ECJ documents that had not been known to the Commission.¹¹²

It should be noted that, in the context of Article 81, it is common, and permissible in law, to draw an inference that an agreement or concerted practice has come into existence from exiguous evidence such as contacts between the undertakings concerned, followed by similar behaviour on their part. On the face of it (and, more particularly, on the face of the evidence as it was known to the Commission on the date when it adopted the contested decision), the primary facts justified the finding of the secondary fact. The overturning of the Commission decision by reference to evidence produced only at the time of the proceedings before the ECJ is a forceful indication of the extent of judicial control: in the case of objectively ascertainable facts, it is the fact, as objectively ascertained, that is relevant to the exercise of power, not the decision-maker's relative and subjective appreciation of the fact.

(v) Judicial control in relation to future secondary facts

A future fact is non-existent and, for that reason, is not objectively ascertainable. A determination relating to a future fact is therefore an inference from primary facts that can be made only by applying a subjective judgment or appreciation to the known facts. It is a commonplace observation that predicting the future is fraught with doubt. Some predictions (such as a winning lottery number) are entirely speculative; others may have more substance in them (weather forecasts).¹¹³ In all cases, there is inevitably room for a margin of error but, more importantly, the finding of a future secondary fact is difficult to control because it is not, by its nature, objectively ascertainable unless and until it comes into existence (if it does). In the nature of things, reasonable people acting reasonably can disagree on the question whether or not a future fact will come into existence (and, if so, when).

The finding of a future secondary fact therefore involves a subjective evaluation or value judgment and clearly falls within the remit of the decision-maker. As is generally the case where the decision-maker is called upon to exercise a discretion, judicial control is exercised by reference to the following: (i) infringement of any procedural rules applicable in the course of the exercise of the discretion, including the obligation to give reasons; (ii) material error of fact; (iii) manifest error of assessment; and (iv) misuse of powers.

So far as the factual aspects are concerned, the nature of judicial control in such cases can be illustrated by Case C-12/03P *Commission v Tetra Laval BV*,¹¹⁴ which concerned a Commission decision finding that (in brief) a conglomerate concentration would significantly impede competition in the common market. The future fact (or cluster of facts) was the anticipated effect of the concentration.

After noting that what was involved was an assessment of an economic nature in which the Commission had a margin of appreciation (referred to in the judgment as a “margin of discretion”), the ECJ stated: “Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's

¹¹¹ Paragraph 16 of the judgment.

¹¹² See pp 1692-1693, in which the Commission is recorded as pointing out that the evidence in question had not been known to it beforehand.

¹¹³ Weather forecasts, of course, vary as to their (un)reliability depending upon how detailed they are and whether they are short or long term.

¹¹⁴ [2005] ECR I-987. The ECJ upheld the decision of the CFI in Case T-5/02 *Tetra Laval BV v Commission* [2002] ECR II-4381 although it disagreed with one aspect of the CFI's judgment (see paragraphs 71-89 of the ECF's judgment – pp 1085-1090).

interpretation of information of an economic nature. Not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect”.

The ECJ upheld the CFI’s view that the exercise carried out by the Commission required a precise examination supported by convincing evidence and went on to say: “A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of event which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted...(T)he prospective analysis...makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely...That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important...”¹¹⁵

(vi) Judicial control in relation to complex and economic evaluations

The case law is unclear about what exactly amounts to a complex evaluation or, indeed, what is an economic evaluation.¹¹⁶ On one view, those phrases have been used too freely in the case law. On the face of it, there is an important distinction between the use of either expression to describe the inference of a secondary fact from a number of primary facts (or indeed, inferences drawn from groups of facts that include secondary as well as primary facts) and their use to describe a genuine value judgment or a complex *conclusion* that is of a factual nature. In that respect, the terminology used is not helpful because terms such as “assessment”, “appreciation”, “appraisal” and “evaluation” can refer just as much to the *process* followed as to the *result* of the process.¹¹⁷

The process of finding a primary fact can be complex, yet is commonly conducted by courts in the normal exercise of their competences. The better view therefore seems to be that references to “complex” and “economic” “evaluations” ought to be limited to conclusions of a judgmental nature that require the delicate balancing of a wide number of different factors (complex evaluations) or factors of an economic nature that are difficult to pin down with exactitude (economic evaluations).

At all events, the key element in an evaluation is the need for the application of informed judgment; and it is that factor that justifies acknowledgement of a margin of appreciation. Case T-201/04 *Microsoft Corp. v Commission*¹¹⁸ indicates the general approach and is an illustration of a situation in which the margin of appreciation applies only to parts of the exercise of discretion. The CFI held in that case that, although Commission decisions finding that there has been an infringement of the EC competition rules (*in casu*, Article 82 of the EC Treaty) are subject to a “comprehensive review”, the complex economic appraisals made by the Commission

¹¹⁵ See paragraphs 38-45 of the ECJ’s judgment (pp 1068-1071).

¹¹⁶ The phrase “complex economic evaluation” also appears in some of the cases.

¹¹⁷ For example, in the *Technische Universität München* case (above), one cannot help thinking that the ECJ’s reference to a “complex technical evaluation” referred to the process rather than to the conclusion.

¹¹⁸ [2007] ECR II-3601, in particular paragraphs 87-89 of the judgment (pp 3648-3649).

in the course of exercising its power are subject to judicial control only on the following grounds: (i) compliance with the relevant procedural rules; (ii) compliance with the obligation to state reasons; (iii) the accuracy of the *facts* relied on; (iv) manifest error of assessment; and (v) misuse of powers. However, it should be noted that, in line with the earlier case law, the CFI expanded on the scope of judicial control by pointing out that the facts underpinning the Commission's appraisal must not only be accurate but also reliable, consistent, complete and capable of substantiating the conclusions drawn from them.

In that case, the CFI followed that approach in relation to: (i) the question of the degree of interoperability necessary to allow designers of competing operating systems to remain viable on the market; (ii) the definition of the relevant market; and (iii) the Commission's conclusion that a refusal to supply risked eliminating all effective competition.¹¹⁹ The first was a matter of technical fact and, like the third, involved an inference about a future fact (both are therefore covered by preceding parts of this section). As to the second (relevant market), a (correct) finding as to the relevant market is a fundamental part of the application of Article 82 of the EC Treaty. However, what is the relevant market is not a fact. It is a judgment drawn about competitive relationships and is a good illustration of an evaluation that is not simply the inferring of a secondary fact..

Conclusions

The nature of judicial control in EC law reflects an understanding of a general view widely held within the Member States that, unless a legislative (or constitutional) provision states otherwise, the function of judicial control is to control the legality of the exercise of public powers and to leave to the person or body entrusted with the exercise of the power a discretion to be exercised within the legal limits of the power. In discretionary matters, where the margin of appreciation is engaged, judicial control shifts its focus to a group of considerations (such as respect for procedural rules, the right to be heard, the correct finding of the material facts underpinning the exercise of discretion, the use of relevant expertise) that are directed at ensuring that the discretion was exercised on a properly informed basis, leaving a residual form of control on the basis of misuse of powers and manifest error of assessment. Manifest error of assessment and the principle of proportionality are the closest that judicial control comes to a control of the exercise of discretion itself. Manifest error of assessment applies in the very extreme situation of an exercise of power that is so outlandish that it gives rise to the inference that an error of law has occurred. The principle of proportionality is concerned with reining in the exercise of the power so that it conforms to the underlying purpose of the legal provision creating and defining the power.

¹¹⁹ See paragraphs 379, 482 and 564 of the judgment (pp 3741, 3770-3771 and 3794-3795).