The “Power of Appraisal” (Pouvoir D’Appreciation) of the Commission of the European Communities vis-à-vis the Powers of Judicial Review of the Communities’ Court of Justice and Court of First Instance

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Abstract

It is, therefore, clear that the Courts must test the soundness of the Commission’s appraisals. This means, however, that judges are obliged to examine the administrative file, thereby inevitably bringing themselves intellectually close to building their own bridge from the facts, via the legal framework of the case, to a legal outcome in casu. In some instances, it may prove almost impossible to disguise the conflict between the Court’s and the Commission’s assessments in the judgment, especially if annulment or damages is the outcome of the case. It is in this regard that an appropriate balance must be found between the Courts’ powers of judicial review and the Commission’s power of appraisal.

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I. THE DIFFICULTY WITH SEPARATION OF POWERS BETWEEN THE COURTS AND THE COMMISSION OF THE EUROPEAN COMMUNITIES

As the treaties establishing the European Communities spell out, the European Commission ("Commission") is, as principal administrative organ, entrusted with the task of ensuring "the proper functioning and development of the common market" and, more generally, of guaranteeing the attainment of the objectives set out in the Treaties, while the Court of Justice (or

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All opinions expressed in this Essay are personal to the authors.


2. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, art. 8, 261 U.N.T.S. 140, 151 [hereinafter ECSC Treaty], as amended by SEA, supra note 1, as
“Court”) “shall ensure that in the interpretation and application of [the Treaties] the law is observed.” Obviously, the Court’s mission extends, inter alia, to the Commission’s activities as the Court must ensure that the Commission, when discharging its responsibilities, “observes the law.”

The wording “shall ensure . . . that the law is observed” not only expresses an obligation, but also at the same time implies a prohibition that judicial rulings should not extend beyond the legal issues. The Commission’s choices and appraisals as to economic and other policy matters are not to be replaced by those of the Court of Justice. This limit to judicial power is especially relevant to the Court of First Instance (or “CFI”), which deals chiefly with actions for annulment and damages brought against the Commission.4

Although the institutional division of tasks is conveyed through both easy and accurate treaty terminology, the reality is that in many cases brought before the Court of Justice and the Court of First Instance (together, the “Courts”) with the aim of challenging a Commission’s decision, separation of powers requires careful attention. The underlying difficulty is certainly not unique to European law practice, but is surely of great intensity in that context. The difficulty, described in very brief terms, is that the administrative application of the law consists essentially of non-legal appraisal. A few examples may illustrate this point, for instance, according to Article 86 of the Treaty estab-

amended by TEU, supra note 1; see also Treaty establishing the European Atomic Energy Community, Mar. 25, 1957, art. 124, 298 U.N.T.S. 167, 204 [hereinafter Euratom Treaty], as amended by SEA, supra note 1, as amended by TEU, supra note 1.

3. See ECSC Treaty, supra note 2, art. 31, at 165; EC Treaty, supra note 1, art. 164, O.J. C 224/1, at 60 (1992), [1992] I C.M.L.R. at 684 (Article 164 of EC Treaty is renumbered as Article 220 of Consolidated EC Treaty); Euratom Treaty, supra note 2, art. 136, at 212.

4. The “Court of Justice,” as indicated throughout the treaties establishing the European Communities, in fact consists of two courts, both sitting in Luxembourg. They are the Court of Justice and the Court of First Instance, which is competent in some specifically defined categories of cases. Generally, it can be said that the Court of First Instance is competent to entertain direct actions of “individuals” (citizens and companies) against Community institutions. Therefore, a major portion of this Court’s work consists of handling direct actions brought by companies against administrative decisions of the Commission. Administrative decisions of the Commission can still be opposed by actions brought directly before the Court of Justice, but only by the Member States, the Council, the European Parliament, the Court of Auditors, and the European Central Bank. Most of such actions are brought by Member States against Commission decisions regarding State aid.
lishing the European Community ("EC Treaty"), "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." In the administrative practice of the Commission, the enforcement of this legal rule necessarily involves, in all its components, economic assessments. These assessments raise questions such as does the undertaking have a dominant position? If it does, is it abusing this position? If it is abusing its position, then does such abuse affect interstate commerce?

The same phenomenon is apparent whenever the Commission adopts measures based on non-economic public interest considerations. For example, when the Commission took emergency measures to protect against bovine spongiform encephalopathy ("BSE") (the so-called "mad cow disease"), it did so on the formal basis of a Council directive that allows the Commission to take such measures in the face of "diseases likely to constitute a serious hazard to animals or to human health," but also did so substantially on the basis of its own findings—supported by scientific reports—as to the presence of a risk to human health due to BSE.

In the aforementioned and many other administrative situations, the Commission's powers of policy-making and assessment, frequently invoked by the Commission itself as its pouvoir d'appréciation ("power of appraisal"), threaten to render both the Courts and, by the same token, those allegedly fallen victim to inappropriate or excessive appraisals and measures, powerless. The Courts, of course, are free to check whether typical procedural requirements, such as those concerning rights of the defense, have been fulfilled and are empowered to annul the contested decision on the basis of any infringement of a procedural rule. If the Commission has fully respected the procedural

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8. According to Article 175 of the EC Treaty, a Court can annul "on grounds of lack of competence, infringement of an essential procedural requirement, infringe-
rights of the concerned individual, but has made questionable assessments as to the contents of the administrative case at hand, however, then the Courts would, under a strict interpretation of separation of powers, find it difficult if not impossible to criticize the Commission’s work, let alone annul the decision or oblige the Commission to pay damages for its mistakes.

Such a narrow approach cannot lead to a satisfying relationship between the Courts and the Commission. Ultimately, in cases where the Commission is defendant, the Courts would be forced to declare non-procedural pleas of law (e.g. an erroneous application of Article 86 of the EC Treaty) inadmissible so as not to interfere with the Commission’s economic and public interest assessments or, in other words, with its “power of appraisal.” This declaration would amount to a denial of justice because pleas alleging infringement of treaty, regulation, or directive provisions, including the most market-related ones such as Articles 85, 86, 90, 92, and 93 of the EC Treaty and Articles 4, 65, and 95 of the Treaty establishing the European Coal and Steel Community ("ECSC Treaty") (Competition and State aid), self-evidently concern the application of "the law" and must, therefore, necessarily be examined by the Court.

It is, therefore, clear that the Courts must test the soundness of the Commission’s appraisals. This means, however, that judges are obliged to examine the administrative file, thereby inevitably bringing themselves intellectually close to building their own bridge from the facts, via the legal framework of the case, to a legal outcome in casu. In some instances, it may prove almost impossible to disguise the conflict between the Court’s and the Commission’s assessments in the judgment, especially if annulment or damages is the outcome of the case. It is in this regard that an appropriate balance must be found between the

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2. EC Treaty, supra note 1, arts. 85, 86, 90, 92, 93, O.J. C 224/1, at 29-31 (1992), [1992] 1 C.M.L.R. at 626-31 (Articles 85, 86, 90, 92, and 93 of EC Treaty are renumbered as Articles 81, 82, 86, 87, and 88 of Consolidated EC Treaty, respectively).

Courts' powers of judicial review and the Commission's power of appraisal.

II. THE COURTS LOOKING FOR THE RIGHT BALANCE: COMPREHENSIVE AND MARGINAL REVIEW

In searching for the right angle from which to approach pleas invoking law provisions with an economic or public interest undertone, the Court of Justice has held that issues relating to the common market and public interest should be divided into two categories. First, those subject to a "comprehensive review" of the Court and second, those subject to "marginal review" only. Pleas and arguments targeting the Commission's assessments of "complex matters" fall under the latter category. With regard to such assessments, the Court accepts that its review is limited "to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."\(^1\) Appraisal of all other matters involves a comprehensive review, and therefore constitutes the "general rule." In *Remia*, where the above-quoted statements of the Court can be found,\(^2\) comprehensive review was applied to the general question of whether or not the conditions for the application of Article 85(1) of the EC Treaty\(^3\) were met, while one specific argument of the plaintiff, according to which the Commission had wrongly determined the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking, was accorded merely a marginal review because its subject-matter was considered to be complex.\(^4\)

The distinction between what is complex and what is not

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2. *Id.
3. Article 85(1) of the EC Treaty states: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . ." EC Treaty, *supra* note 1, art. 85(1), O.J. C 224/1, at 28 (1992), [1992] 1 C.M.L.R. at 626 (Article 85(1) of EC Treaty is renumbered as Article 81(1) of Consolidated EC Treaty).
4. *Id.*
may look somewhat arbitrary. Moreover, the word complex itself may not be an ideal adjective in this context, especially because the complex character of an economic or technical issue does not mean that the question is intellectually beyond the reach of the judges, who can at any time distill the required information from the administrative file of the case or from other sources. The distinction between comprehensive and marginal review, however, has great potential in practice. It rightly enables the Courts not to interfere with pure policy questions such as the one at hand in Remia (opting for a severe or lenient attitude towards non-competition clauses incorporated in an agreement for the transfer of an undertaking) or, generally, with common interest appraisals (regardless of whether these are based on scientific examination such as was the case with regard to BSE, or not). This distinction translates, in our opinion, into "the right balance." In so far as Commission decisions are based on genuine policy choices and common interest appraisals, they can be overturned by the Courts only when appearing to be so obviously inappropriate as to infringe the principle of proportionality ("manifest error of appraisal"). All other administrative applications of the law can and must be reviewed comprehensively by the Courts. 15 There is, therefore, no need to talk here of "manifest errors of appraisal." 16

15. This is also true when the contested decision has been taken by the Council instead of the Commission, as is the case, for example, with regulations imposing definitive antidumping duties.

16. This is the case except with respect to decisions relating to the coal and steel market, since Article 33 of the Treaty establishing the European Coal and Steel Community ("ECSC Treaty") provides, with regard to actions for annulment of Commission decisions relating to the Community's coal and steel market, that the Court "may not . . . examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decisions, . . . 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." ECSC Treaty, supra note 2, art. 33, at 167. For recent and at the same time typical examples of both comprehensive and marginal review in the sphere of the EC Treaty, respectively, compare Deutsche Bahn AG v. Commission, Case T-229/94, [1997] E.C.R. II-1689, II-1720-25, ¶ 77-93 (comprehensive review of question of whether Deutsche Bahn had indeed abused its dominant position, as Commission had stated), with Bergaderm v. Commission, Case T-199/96, slip op. at ¶ 62-67 (CFI July 16, 1998) (not yet reported) (marginal review of question of whether Commission had rightly decided to prohibit use of allegedly carcinogenic substance in sun lotions).
III. THE OBLIGATIONS OF REASONING AND SOUND ADMINISTRATION: “ALTERNATIVE” POWERS OF REVIEW

Under Article 15 of the ECSC Treaty, Article 190 of the EC Treaty, and Article 162 of the Treaty establishing the European Atomic Energy Community ("Euratom Treaty"), the Commission is obliged, whenever it takes a decision with legally binding effects, to state the reasons on which the decision is based.\(^\text{17}\) Fulfillment of this obligation is required in order to enable the Courts to exercise their powers of judicial review. As a result, well-established case law states that Community decisions attacked in Court "must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question, in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court of Justice and the CFI to exercise their supervisory jurisdiction."\(^\text{18}\) Inevitably, lack of reasoning leads to annulment of the decision.\(^\text{19}\)

Thus, instead of characterizing the link drawn by the Commission between facts and law as "erroneous," the Courts can, whenever they have doubts about the Commission’s decision-making, also choose to find, more neutrally, that the link is not sufficiently clear in the text of the decision, due to a deficient statement of reasons.\(^\text{20}\) In such cases, the judges do not have to make their comprehensive or, occasionally marginal, review of the merits of the Commission’s decision-making in order to annul the decision that they consider to be unconvincing because


\(^{19}\) If only part of the decision lacks reasoning, the Court can, of course, opt for a partial annulment of the decision.

reasoning is a purely procedural requirement. As a matter of fact, they cannot even review in such circumstances because the object of review (the Commission’s reasoning) is absent.

The Community Courts’ case law of the 1990s has added still another “alternative” to outright review of the Commission’s findings. The Court of Justice notably transcended the routine review of Commission decision-making in 1991 in Technische Universität München.21 In this case, the university had applied for an exemption from customs duty on the import of a scientific instrument. The German customs authority refused the exemption on the basis of a Commission decision stating that in this individual case a duty-free importation would be inappropriate. The Court declared the Commission’s decision invalid. It held that “[w]here 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.”22 It then judged that in the case at hand all three of these “principles” had been infringed.23 The new element in the Court’s case law, the “duty to examine carefully and impartially,” was welcomed enthusiastically in European law practice and is now called upon often. The CFI has used it, inter alia, when reviewing a Commission decision granting an exemption pursuant to Article 85(3) of the EC Treaty.24

It should be kept in mind that the duties to examine carefully and impartially and to state reasons are alternative standards of review precisely because they focus solely on the presence of careful investigation and reasoning, making redundant the

22. Id. at I-5499, ¶ 14.
23. Id. at I-5499-502, ¶¶ 15-28.
24. Météropole Télévision SA and Others v. Commission, Joined Cases T-528, T-542, T-543, T-546/93, [1996] E.C.R. II-649, II-683-84, ¶¶ 93-96, [1996] 5 C.M.L.R. 386, 408-09. The Commission’s decision was annulled because the Commission had failed to examine carefully whether the restrictions of competition resulting from the practices and rules that it investigated were “indispensable” within the meaning of Article 85(3) of the EC Treaty (fulfillment of that criterion being required for an exemption to be granted).
question of whether the administrative issues have been correctly assessed and whether the Commission’s decision has been correctly reasoned. Previously in the Courts’ practice, it seemed that these different aspects were not consistently separated any longer. In one case, the Court of Justice went quite far in bringing form and substance together. In its judgment in this case, the Court concluded that a Commission decision refusing to grant an exemption was not adequately reasoned, having announced a few paragraphs earlier that “[t]his Court must . . . rule [as to whether the decision] was wrongly reasoned.” This apparent inconsistency was resolved by the Court when the Commission protested against the way the CFI had conducted its judicial review in the Sytraval case.

In that case, the CFI annulled a decision of the Commission rejecting the complaint of the Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (“Sytraval”) and of Brink’s France that the French Republic had infringed the EC Treaty provisions prohibiting State aid by granting aid to Sécuripost, a company that had, like Sytraval and Brink’s, interests in the business of transportation of moneys and valuables. More than two years after receiving the complaint, the Commission informed Sytraval and Brink’s that the matter appeared “particularly complex, necessitating extensive technical analysis of the ample documentation produced both by the complainants and by the French authorities.” Surprisingly, merely a few months after this declaration, the Commission adopted a decision in which it rejected the complaint. The Commission withdrew this decision soon afterwards, however, and reopened its inquiry that, eighteen months later, resulted in a decision rejecting the complaint once more. Strikingly, several incriminating elements raised by the complainants, such as the French authorities placing at the disposal of Sécuripost a post office premises at very favorable terms, and the cheap supply of fuel and maintenance for vehicles of Sécuripost, were barely analyzed in the Commission’s decision. Sytraval and Brinks qualified this omission as a lack of

reasoning and brought an action for annulment of the decision before the CFI. Apart from the plea based on Article 190 of the EC Treaty,\textsuperscript{28} (obligation to state reasons), which creates an obligation to state reasons, they also alleged, \textit{inter alia}, the existence of manifest errors of assessment. The CFI decided to examine these pleas jointly.\textsuperscript{29} It then found that, regarding several incriminating elements presented to the Commission by the complainants, the contested decision was vitiated by an inadequate statement of reasons, in that the reasons stated could not bear out the conclusion that the measures complained of by the complainants did not constitute State aid within the meaning of Article 92 of the EC Treaty.\textsuperscript{30}

The Commission brought an appeal before the Court of Justice.\textsuperscript{31} It submitted, \textit{inter alia}, that the CFI had carried out, under the guise of a review of the statement of reasons provided, a review of the assessments of the Commission, thereby treating the purely procedural requirement to state reasons as a matter concerning the substantive legality of the decision. The Commission felt that, on the basis of an alleged insufficiency of reasoning, the CFI had in fact criticized the Commission for having committed a manifest error of assessment attributable to inadequate investigation.

Although, in its judgment rendered on appeal on April 2, 1998, the Court of Justice confirmed that the Commission's decision was inadequately reasoned and therefore upheld the CFI's judgment,\textsuperscript{32} it also expressed its disagreement with the approach followed by the CFI. It considered that in the CFI's judgment, the findings of insufficient reasoning, insufficient examination, and manifest error of assessment had been too intermingled. The following components of the Court of Justice's judgment in \textit{Sytraval} have, in our opinion, value as precedent.

The question of careful and impartial examination should, in the Community Courts' practice, be strictly separated from

\textsuperscript{28} \textit{EC Treaty, supra} note 1, art. 190, O.J. C 224/1, at 67 (1992), [1992] 1 C.M.L.R. at 697 (creating obligation to state reasons) (Article 190 of EC Treaty is renumbered as Article 253 of Consolidated EC Treaty).  
\textsuperscript{30} \textit{Id.} at II-2671-78, \textsuperscript{62} 80, [1995] 2 C.E.C. (CCH) at 572-76.  
\textsuperscript{31} Judgments of the Court of First Instance can be appealed within two months on points of law only.  
the issue of reasoning. In order to allow this separation to happen, the Court has given its Technische Universität München child a name—the "obligation of investigation." According to our reading, the Court has also expressly set forth the legal basis of this obligation as the principle of sound administration. Hitherto, infringement of this principle, which is of course known in the legal orders of the Member States of the European Union and therefore deserves the status of general principle of Community law, has rarely been invoked by litigants as an independent plea.

By the same token, the obligation to state reasons should always be distinguished from manifest error of assessment. In Sytraval, the Court has set a clear and, we assume, definitive borderline, finding that pleas alleging infringement of Article 190 of the EC Treaty and manifest error of assessment are "distinct pleas" and should be treated as such. In that regard, the Court quoted a series of findings that were made by the CFI under the ambit of Article 190 of the EC Treaty, but were rather seeking to tell the Commission which types of examinations it should have undertaken in order to come to a more solid reasoning and convincing decision.

The Court did not explicitly state that the Commission's obligation of investigation must also be separated from the Commission's assessments as such. The distinction is, however, implicit in the judgment, precisely because the obligation to investigate was classified under the principle of sound administration, which is obviously related to the way administrative decisions are made and not to the contents of these decisions. The qualification of the obligation of investigation as a matter of sound administration will undoubtedly prove to be very useful, because in earlier case law lack of careful examination happened to be

33. See the clear distinction between paragraphs 61 and 62 of the Court's judgment on the one hand and paragraph 63 on the other hand. Id. at 1-1770, ¶¶ 61-63.
34. Id. at 1-1770, ¶ 61.
35. Literally, the Court states that "[t]he Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint." Id. at 1-1770, ¶ 62.
38. Id. at I-1771-72, ¶¶ 68-71.
equated with error of appraisal.\textsuperscript{39}

\textbf{IV. THE ADVANTAGE OF COMPREHENSIVE REVIEW COMPARED TO THE "ALTERNATIVE" STANDARDS OF REVIEW}

As suggested throughout the preceding paragraphs, all parts of the Commission's decision-making process can, as soon as a final decision has been adopted, be contested in direct actions before the CFI or the Court of Justice: the Commission's assessment of the facts (plea alleging "error of factual appraisal"); its assessment of the applicable law and the application of the law itself (plea alleging "error of legal appraisal"\textsuperscript{40}); the presence as such of careful examination (plea alleging infringement of the "obligation of investigation" or of the "principle of sound administration"); and the drafting quality of the decision (plea alleging infringement of the "obligation to state reasons"). So far, we focused our efforts on outlining and distinguishing the object and justification of these different means of challenging the Commission's decision-making in Court. It is time now to express some thoughts about the true potential of these instruments of judicial review, by pointing at possible advantages and drawbacks of verifying the absence of factual and legal errors on the one hand and of infringements of the obligation of investigation and of the obligation to state reasons on the other hand. We think that, generally speaking, it is safe to say that, for a specific legal reason, pleas alleging errors of assessment and the thereto applicable comprehensive review enjoy preference over the "alternative" standards of review (sound administration and reasoning).

When the Court annuls a contested decision on the basis of an error of assessment, it is likely that the successful applicant


\textsuperscript{40} Pleas alleging error of legal assessment are often presented as pleas alleging infringement of a provision of a treaty, directive, or regulation. If, for example, a company pleads that Article 86 of the EC Treaty has been infringed because the Commission wrongly interpreted the term "monopoly" in that article, the Court of First Instance can easily requalify and handle this plea as one alleging error of legal assessment. The same goes for pleas alleging errors of factual assessment, for example, where the plaintiff does not dispute the Commission's understanding of the notion "monopoly," but argues that it has been erroneously looked at by the Commission as holding a monopoly.
will subsequently obtain the decision it would have preferred to the one being annulled. The Commission is required to give effect to the Court’s judgment in good faith, and is, in principle, expected to do so by adopting a new decision with contents corresponding not only to the operative part of the judgment, but also to the reasoning that forms the essential basis of the judgment. If adoption of a new decision proves to be impossible in practice, then the Commission is still required to take the initiative by compensating for the damage caused by its void decision.

None of these favorable legal consequences of annulment are guaranteed when the Commission’s decision is annulled on the basis of insufficient investigation or reasoning. In the latter case, the Court’s judgment is faithfully implemented if the Commission adopts a new decision after having reopened and refocused its inquiry and/or after having stated its reasoning in a more comprehensible way. In other words, the successful applicant will obtain a new decision from the Commission, but not necessarily a more favorable decision. The risk of Pyrrhic victory looms for those who focus on sound administration. The Commission is not reluctant to bring about disappointment after a lost battle in Court. This fact was recently well-illustrated when the Commission once again decided that State aid in favor of Air France in the form of a FF20 billion capital increase was compatible with the common market by virtue of Article 92(3)(c) of the EC Treaty, after the CFI had annulled a first decision to exactly the same effect. The Court had not stated that the final out-

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41. See ECSC Treaty, supra note 2, art. 34, at 167; EC Treaty, supra note 1, art. 176, O.J. C 224/1, at 62 (1992), [1992] 1 C.M.L.R. at 688-89 (Article 176 of EC Treaty is renumbered as Article 233 of Consolidated EC Treaty); Euratom Treaty, supra note 2, art. 149, at 215.


44. Article 92(3)(c) of the EC Treaty states: “The following may be considered to be compatible with the common market . . . : aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.” EC Treaty, supra note 1, art. 92(3)(c), O.J. C 224/1, at 30 (1992), [1992] 1 C.M.L.R. at 630 (Article 92(3)(c) of EC Treaty is renumbered as Article 87(3)(c) of Consolidated EC Treaty).

come reached by the Commission was wrong, but explained that the decision suffered "from insufficient reasoning on two points . . . of crucial importance within the general scheme of the contested decision." 46

V. CONCLUSIONS

When authorities exercising policy-making powers and judicial authorities are brought together in a functional relationship, as is the case with the Commission and the Courts of the European Communities, "marginal review" is an attractive notion. It is an almost natural response to the difficulty inherent in separation of administrative and judicial powers. In its primitive form, the idea behind the marginal review approach is more or less that: the Courts must not redo the Commission's work, but must nevertheless do something, so they solely check for manifest mistakes in the Commission's assessments, thereby cutting the separation of powers knot nicely through the middle.

In this Essay we have tried to show, in the first place, why marginal review is not the whole story and deserves a refined and selective application. Marginal review exists in order to safeguard policy freedom, but the Commission is not making policy choices all the time. As a matter of fact, it very often operates as a consolidating and enforcing authority, applying to individuals legal provisions, conditions, and criteria that either itself, the Council, or the founding fathers of the Communities had defined in earlier days. As has been explained, we think that comprehensive review is the rule 47 and that marginal review should be applied only to those Commission decisions in which the Commission expresses genuine policy choices or makes typical public interest appraisals. Large portions of the Commission's administrative decision-making, including several crucial components of the decisions based on Articles 85, 86, 90, 92, and 93 of the EC Treaty, 48 do not fall into this category. Although the ap-

46. Id. at II-2564, ¶ 454, [1998] 3 C.M.L.R. at 537.
47. The exception being, most notably, the Commission's administration of the Community's coal and steel market, with respect to which the founding fathers granted only marginal review powers to the Court of Justice. See ECSC Treaty, supra note 2, art. 33, at 167.
48. EC Treaty, supra note 1, arts. 85, 86, 90, 92, 93, O.J. C 224/1, at 29-31 (1992), [1992] 1 C.M.L.R. at 626-31 (Articles 85, 86, 90, 92, and 93 of EC Treaty are renumbered as Articles 81, 82, 86, 87, and 88 of Consolidated EC Treaty, respectively).
plication of these provisions coincides, to some degree, with the Commission’s choice of approach as a policy power (such as the choice to impose severe sanctions on a particular industry or sector for one reason or another, or the decision whether a State aid measure qualifies to be considered as not adversely affecting trading conditions “to an extent contrary to the common interest”\textsuperscript{49}), nothing prevents the Court from examining comprehensively whether there was indeed an agreement or practice distorting competition, whether there was abuse of dominant position in the form of unfair trading conditions, or whether there was indeed State aid within the meaning of the Treaty, etc.

The Court of Justice’s judgment in \textit{Remia}, which is quoted above, fully supports this line of reasoning. Pending any further development, we still draw a few other related conclusions from the preceding chapters.

In particular, on the basis of the dividing line between comprehensive and marginal review that we have suggested, it appears to us that the frequently invoked \textit{pouvoir d’appréciation} is never in itself decisive. It is obvious that the Commission enjoys power of appraisal, but this power does not, as such, indicate anything with respect to the nature of the power of review exercisable by the Court of Justice or CFI in a given case. “Power of appraisal” as a finding may be followed by comprehensive review in one case and by marginal review in another, and both can be fully correct. On the contrary, the less frequently used term “discretionary power” (\textit{pouvoir discrétionnaire}) is unambiguously linked to marginal review,\textsuperscript{50} and may, therefore, be better suited for a role in case law, even though the word “discretionary” comes, to our taste, too close to the image of administrative decision-making free from any review whatsoever. In our opinion,

\textsuperscript{49} \textit{Id.} art. 92(3)(c), O.J. C 224/1, at 30 (1992), [1992] 1 C.M.L.R. at 650 (Article 92(3)(c) of EC Treaty is renumbered as Article 87(3)(c) of Consolidated EC Treaty).

\textsuperscript{50} See, for example, the Court of Justice’s judgment regarding the previously quoted Commission’s measures against BSE, \textit{United Kingdom v. Commission}, Case C-180/96, [1998] E.C.R. I-2265, I-2297, ¶ 97: “With regard to judicial review of compliance with the above-mentioned conditions, in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 to 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.” \textit{Id.}
the terms "margin of discretion" or "wide discretion" are more accurate.

Finally, we conclude from the foregoing chapters that comprehensive review does not go together with finding that the reviewed decision lacks reasoning or that the Commission did not carefully examine the case. Undoubtedly, error of assessment, infringement of the obligation to state reasons, and infringement of the obligation of investigation can all be invoked before the Court in one single action, and the Court can find that one part of the decision is not adequately reasoned, that another is based on insufficient investigation, and that still another part is erroneous in fact or law. These very different findings should not, however, overlap. In so far as the Court considers that the obligation to state reasons is infringed, it is saying that it finds itself unable to review the merits of the Commission's decision and, if it finds that the obligation of investigation is infringed, it gives the Commission the opportunity to reopen its inquiry, gather more information, and formulate a more cogent decision. If, on the contrary, the Court reviews the Commission's reasoning on its merits, this should imply that it holds this reasoning to be present and to be based on information and investigation.

In theory, these "Sytraval distinctions" sound even too obvious to be mentioned here. In practice, however, the question of whether a decision is reasoned and is based on careful investigation is easily believed to require a first review of the merits of the case. In order to move in line with Sytraval, case law would ultimately benefit from a strictly literal, that is, purely procedural, understanding of the obligation to state reasons and the obligation of investigation: "have reasons been stated"? (presence of reasons instead of sufficiency of the reasons as to the contents) and "has a careful and impartial investigation taken place"? (regardless of whether the Commission investigated according to correct criteria). The most recent case law seems to show such a development. All in all, this development is positive for the

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53. Where the Court feels able to review the Commission's decision, since the lat-
plaintiffs, and thus for judicial protection because there is, as we have also argued, a greater advantage in winning a case on the basis of comprehensive review than on the basis of procedural pleas.

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