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What's in a Name? The Marginal Standard of Review of "Complex Economic Assessments" in EU Competition Enforcement

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Abstract. Judicial control of the Commission's complex economic appraisals in EU competition enforcement has long troubled both academics and practitioners. Despite the commonly shared feeling that the marginal standard of review, as applied by EU Courts, is not as deferential as one might fear, its operation remains shrouded in vagueness, due to difficulties in defining the notion of "complex economic evaluations" as the trigger for a less strict standard of control and due to the lack of a clear understanding as to the errors that may invalidate the Commission's analysis. This article sheds light on the judicial scrutiny of complex economic assessments, and demonstrates that (a) complex economic evaluations may come in different varieties and should not be seen as a uniform group, (b) the manifest error of assessment test is not an intangible formula of judicial scrutiny, contingent on one's subjective perception of "manifestness", but targets four specific defects in the Commission's analysis: failure to correctly assess the material facts of the case, failure to take into account a relevant factor, taking into account an irrelevant factor that distorted the analysis, and failure to satisfy the standard of proof, and (c) EU Courts have three "aces" up their sleeve that may enable them to diminish the Commission's margin of appreciation: economics, evidence review and Article 19(1) TEU.

1. Introduction

Matters of judicial review are not for the faint of heart. In the context of competition enforcement specifically, the question what standards of control the European Union (EU) Courts[1] apply – or should apply - when they scrutinize the decisions of the European Commission whereby the authority finds a violation of Article 101 and/or Article 102 TFEU[2] or declares a concentration compatible or incompatible with the common market,[3] has been the subject of considerable controversy. Recently, academic debates have focused on the fairness dimension of the problem. The increasing levels of antitrust fines, which are often classified as "criminal charges" in the meaning of Article 6(1) ECHR have given rise to concerns that the intensity of the control that the EU Courts exercise over the Commission's infringement decisions may fall short of the principle of effective judicial protection, as

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[1] Unless otherwise stated, in this article references to "EU Courts" or the "Courts" should be understood as reference to the General Court of the European Union (General Court) and the Court of Justice of the European Union (ECJ).

[2] O.J. 2008, C 115/47, Consolidated Version of the Treaty on the Functioning of the European Union (TFEU).

[3] O.J. 2004, L 24/1, Council Regulation 2004/139/EC of 20 Jan. 2004 on the control of concentrations between undertakings (EUMR – the Merger Regulation).

enshrined in Article 47 of the EU Charter of Fundamental Rights (CFR)[4] and inspired by the right to a fair trial.[5] Fairness considerations aside, however, the problem goes much deeper. In view of the core function of judicial review in any system predicated on the rule of law, the operation of inappropriate standards of judicial scrutiny may at best put the legitimacy of law enforcement into doubt and at worst threaten the balance of powers among the respective institutions and undermine their accountability. For this reason, judicial control has diachronically offered a salient topic for academic reflection.

Typically, the intensity with which EU Courts will examine the legality of the Commission's decision is indicated by the applicable standard of review.[6] In brief, there are two standards of scrutiny from which to choose: *full review* and *marginal review*.[7] In principle, full review is the prevailing threshold of judicial control with respect to questions of law and fact and represents the strictest form of scrutiny that EU Courts may exercise. By contrast, *marginal review* is engaged where the Commission's decision touches upon policy matters or entails complex economic assessments, and is thought to connote a more relaxed standard of control under which judicial intervention is confined to instances of "manifest errors of assessment" in the Commission's decision.[8] In relation to complex economic evaluations specifically, EU Courts have explained that their role is to verify "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 misuse of powers".[9] Therefore, there is a strong correlation between judicial deference and the margin of administrative appreciation: the less strict marginal review is, the more latitude the authority will enjoy in its decision-making.

Although the issue is far from settled, the possible justifications for judicial deference to administrative decision-making have been relatively well documented in the literature.[10] By

[4]O.J. 2000, C 364/1 (2000/C 364/01), Charter of Fundamental Rights of the European Union (CFR).
[5]See generally Talev, "ECHR implications in the EU competition enforcement" in *Due Process and Innovation in EU Competition Law*, Centre for European Policy Studies, Brussels, 16 Apr. 2010, pp. 49-51; Forrester, "A bush in need of pruning: The luxuriant growth of light judicial review" in Ehlermann and Marquis (Eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010); Bronckers and Vallery, "Fair and Effective competition policy in the EU: Which role for authorities and which role for the Courts after *Menarini*?" 8 *European Competition Journal* (2012), 297; Derenne, "The scope of judicial review in EU economic cases" in Merola and Derenne (Eds.), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 2012), p. 85; Siragusa, "Annulment proceedings in antitrust cases (Articles 101 and 102 TFEU) – Standard of judicial review over substantive issues" in Merola and Derenne, ibid., pp. 135-137. In the merger context: Cumming, *Merger Decisions and the Rules of Procedure of the European Community Courts* (Kluwer Law International, 2011), pp. 228-230; Chirita, "Procedural rights in EU administrative competition proceedings: Ex ante – mergers" in Cauffman and Hao (Eds.), *Procedural Rights in Competition Law* (Springer, 2015). This article will not focus on the fairness dimension of the issue.
[6]Bailey, "Scope of judicial review under Article 81 EC", 41 CML Rev. (2004), 1327-1360, at 1330; Prete and Nucara, "Standard of proof and scope of judicial review in EC merger cases: Everything clear after *Tetra Laval*?", 26 ECLR (2005), 692-704, at 693.
[7]See generally Türk, "Oversight of administrative rulemaking: Judicial review", 19 EL Rev. (2013), 126-142.
[8]As is well known, marginal review and the concept of the "manifest error of assessment" originates from French administrative law (see e.g. Vincent, "L'erreur manifeste d'appréciation", 142 *La Revue Administrative* (1971), 407-442.
[9]Case C-42/84, *Remia* v. *Commission*, EU:C:1985:327, para 34.
[10]See e.g. Arancibia, *Judicial Review of Commercial Regulation* (OUP, 2011), pp. 15-32.

contrast, the operation of the marginal standard of review in EU competition enforcement remains shrouded in vagueness, especially where complex economic evaluations are involved. Despite the plethora of articles on the topic, academics and practitioners alike are still struggling to grasp fully under what circumstances EU Courts are likely to take fault with the Commission's decision-making and what errors may strike a fatal blow to the lawfulness of its analysis. This haziness is particularly acute in relation to the content of the "manifest error of assessment" test. Indeed, the duty to state reasons, the obligation to comply with the relevant procedural rules and the requirement that the facts be accurately stated have not caused much worry, because – ironically enough – they are essentially subject to full control as questions of law and fact.[11] Consequently, the gist of marginal review appears to lie in the meaning of the "manifest error of appraisal" test. The latter, however, remains far from obvious, in part due to the somewhat ambiguous language of EU Courts and in part due to the fact that from time to time the intensity of their judicial scrutiny seems at variance with their promises.

Against this backdrop, the aim of the present article is to contribute to the academic efforts to understand marginal review in EU competition enforcement by investigating the operation of the "manifest error of assessment" test which underpins the judicial control of complex economic evaluations.[12] To this end, the article is structured as follows: section 2 offers a brief account of the historical evolution of the limited standard of review of complex economic appraisals in the case law of EU Courts. Taking note of this evolution, section 3 then considers the efforts that have been made so far to define, first, the concept of complex economic evaluations as the trigger for a less strict form of judicial control and, second, the criterion of "manifestness" as the threshold for judicial intervention. As will be explained,

[11]In this sense, the expanded version of marginal review in *Remia* is rather "self-repeating" and thus not very helpful. See Schweitzer, "The European competition law enforcement system and the evolution of judicial review" in Ehlermann and Marquis, op. cit. *supra* note 5, pp. 100-101.

[12]This article will not consider the operation of marginal review in relation to policy matters. The Commission's *appreciation* in relation to complex economic evaluations must not be confused with its *discretion* concerning policy choices, such as the design of its fining strategy (Case C-322/07 P, *Papierfabrik August Koehler and Others* v. *Commission*, EU:C:2009:500, para 112; also see Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation 1/2003, O.J. 2006/C 210/02, para 2), or the setting of enforcement priorities through the handling of complaints (Case T-193/02, *Piau* v. Commission, EU:T:2005:22, para 80; Case T-229/05, *AEPI* v. *Commission*, EU:C:2007:224, para 38), or the choice of its preferred enforcement tool (see e.g. DG Competition, "To commit or not to commit: Deciding between prohibition and commitments", 3 *Competition Policy Brief* (2014), 1). The conceptual difference between *discretion* and *appreciation* was clarified by A.G. Léger in his Opinion in Case C-40/03 P, *Rica Foods* v. *Commission*, EU:C:2005:93, paras. 45-49. As A.G. Léger explains, it is possible to distinguish between the "political discretion" that the institutions enjoy "where they act in their capacity as political authorities and, in particular, where they legislate in a given field or where they lay down guidelines for a Community policy", and the "technical discretion" that they are allowed "where they act in their capacity as 'administrative' authorities and, in particular, where they adopt individual decisions in competition or State aid matters, and also where they take specific protective measures against dumping". As he rightly observes, political discretion is justified "by the fact that the institutions must generally reconcile divergent interests and thus select options within the context of the policy choices which are their responsibility", whereas technical discretion is justified "by the complexity of the technical, economic and legal situations they have to examine and of the assessments which they have to make". See also Castillo de la Torre, "Evidence, proof and judicial review in cartel cases" in Ehlermann and Marquis, op. cit. *supra* note 5, pp. 390-391. Cf. Fritzsche, "Discretion, scope of judicial review and institutional balance in European law", 47 CML Rev. (2010), 361-403, 364. Hereafter, general references to marginal review must be understood as references to the marginal review of complex economic evaluations only.

these endeavours, albeit remarkable, have not been entirely successful in clarifying marginal review not only because positively defining complexity is an almost impossible feat, but also because the qualification of "manifestness" does not illuminate in itself what the problem is in the Commission's analysis. With this in mind, section 4 shifts the focus to two slightly different questions: first, rather than wrestling with the concept of "complexity", section 4.1 concentrates on identifying the stages of the Commission's analysis at which the performance of complex economic evaluations may be necessary for the authority to reach a decision on whether EU competition rules have been complied with. Second, instead of fiddling with the meaning of "manifestness", section 4.2 ponders on what may make for a "manifest error of assessment" and analyses the competition jurisprudence of EU Courts with a view to inferring what marginal review entails. For the sake of completeness, section 4.3 then gives some thought to the reverse question, i.e. what may *not* make for such an error according to the case law of EU Courts. As the article will demonstrate, complex economic evaluations may come in different varieties and thus it is misleading to think of them as a purely uniform group. Furthermore, far from being an intangible concept, the "manifest error of assessment" test has – as will be shown – a quite specific content and encompasses four distinct types of errors. In light of those remarks, section 5 turns its attention to EU Courts and explores the tools that they may make use of when they scrutinize the Commission's complex economic evaluations. As will be explained, EU judges have three important "aces" up their sleeve, which may enable them to shrink the Commission's margin of appreciation to the bare minimum: economics, evidence review, and Article 19(1) TEU. Section 6 concludes.

2. The Evolution of the Marginal Standard of Review of Complex Economic Assessments

Before examining in closer detail the marginal standard of review of complex economic assessments, it is worthwhile recalling the "birth" of this concept and its evolution. The origins of this form of hands-off judicial scrutiny go as far back as the Treaty establishing the European Coal and Steel Community.[13] More specifically, Article 33(1) ECSC provided that a decision or recommendation of the High Authority could be contested on grounds of lack of competence, infringement of an essential requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Nevertheless, judicial scrutiny was subject to an important qualification: the Court could not examine "the evaluation of the situation resulting from economic facts or the circumstances in the light of which the High Authority took its decision or made its recommendation". In these circumstances, the Court was only allowed to check whether the High Authority had misused its powers or had manifestly failed to observe the provisions of the ECSC Treaty or of any rule of law relating to its application. When the Treaty of Rome was later adopted in 1957, the equivalent Article 173 featured the exact same four possible grounds for annulment of a Commission decision. However, references to "evaluations resulting from economic facts" or "the circumstances" in which decisions are made had been carefully deleted and no equivalent wording had been

[13]Treaty of Paris, Treaty Establishing the European Coal and Steel Community (1951).

inserted. The initial Article 173 of the Treaty of Rome survived essentially unscathed in all the Treaties that were to come, its latest version now being Article 263 TFEU.[14]

Nevertheless, the early exclusion from the text of the Treaties of any reference to "evaluations resulting from economic facts" as signposting a less intrusive form of judicial control made little difference. The seed had been already irrevocably sown and the replacement concept of "complex economic assessments" made its appearance in the case law. In its seminal *Consten and Grundig* ruling, the ECJ expressly accepted that "the exercise of the Commission's powers necessarily implies complex evaluations on economic matters".[15] The presence of complex economic assessments in the Commission's competition decision-making is not of a merely academic interest. On the contrary, it has a direct practical implication: where complex economic assessments are involved, the Commission enjoys a margin of appreciation, which in turn connotes a lower threshold of judicial scrutiny. In *Consten and Grundig* the Court explained that "a judicial review of [complex] evaluations [on economic matters] must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom".[16] Since then, the judicial approach has gradually shifted to a seemingly stricter model. In *Remia*, the Court elaborated that such review includes "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 misuse of powers".[17] Then, in *Tetra Laval*, the ECJ further elucidated that "whilst … 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 interpretation of information of an economic nature".[18] On the contrary, "not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether the 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".[19] Finally, *Microsoft* confirmed the relevance of this test – which came to be the standard formula of marginal review – not only for merger proceedings, but also for the control of Commission decisions concerning the application of Articles 101 and 102 TFEU.[20]

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[14]The first two paragraphs of this provision read: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of … the Commission …. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

[15]Case C-56/64, *Consten and Grundig* v. *Commission*, EU:C:1966:41, p. 347.

[16]Ibid.

[17]Case C-42/84, *Remia* v. *Commission*, para 34.

[18]Case C-12/03 P, *Commission* v. *Tetra Laval*, EU:C:2005:87, para 39.

[19]Ibid.

[20]Case T-201/04, *Microsoft* v. *Commission*, EU:T:2007:289, paras. 87-89.

3. The Elusiveness Surrounding the Marginal Review of Complex Economic Assessments

Admittedly, the marginal review of complex economic assessments seems to have incrementally progressed from childhood to maturity. Indeed, starting from what could be regarded as unconditional deference to the authority, EU Courts have gradually refined the initial crudeness of the limited review formula by setting out tighter criteria for their scrutiny. Nevertheless, although the test has become more sophisticated and elaborate, one cannot easily shed the nagging feeling that it remains as elusive as ever. If marginal review is the exception as the EU Courts' jurisprudence suggests, one should then be able confidently to identify what activates its operation or how this form of judicial control differs from the full scrutiny to which Commission decisions are usually held. Therefore, it is only sensible that endeavours have been made, on the one hand, to define "complex economic assessments" – since it is their presence that is claimed to trigger the operation of a marginal standard of control – and, on the other hand, to illuminate what makes an error of assessment "manifest" and hence different from the errors normally caught by full judicial control. As the following paragraphs will explain, however, these efforts – albeit highly valuable – have not fully succeeded in eliminating the feeling of elusiveness that surrounds the marginal review of complex economic appraisals.

3.1. In Search of a Definition: What Is a 'Complex Economic Assessment'?

In brief: complex economic assessments are said to function as a "neon sign" communicating that a hands-off scrutiny is to follow. Indeed, where complex economic evaluations come onto the scene, the threshold the Commission has to surpass automatically lowers: only manifest errors in its appraisals threatening the lawfulness of its decision. Therefore, it is hardly surprising that some scholars have wondered what a "complex economic assessment" is in an attempt to specify and narrow down the pool of appraisals that may activate marginal review.[21]

That said, however, it does not take much for one to realize that properly defining – let alone narrowing – the concept of "complex economic evaluations" is a task much easier said than done. No doubt, over the course of the years EU Courts have offered glimpses into their understanding of what a "complex economic appraisal" is. To name but a few, the definition of the relevant market,[22] a conclusion that an undertaking holds a dominant position,[23] a finding that a conduct amounts to an abuse of dominance,[24] the weighing-up exercise under Article 101(3) TFEU,[25] and ascertaining that a concentration "would significantly impede

[21]See e.g. Geradin, Layne-Farrar and Petit, *EU Competition Law and Economics* (OUP, 2012), pp. 386-387.
[22]Case T-301/04, *Clearstream* v. *Commission*, EU:T:2009:317, para 47; Case T-201/04, *Microsoft* v. *Commission*, para 482; Case T-151/05, *NVV and Others* v. *Commission*, ECLI:EU:T:2009:144, para 53.
[23]Case T-210/01, *General Electric* v. *Commission*, EU:T:2005:456, paras. 60-64 and 121.
[24]See e.g. regarding predatory pricing as a form of abuse, Case C-202/07 P, *France Télécom* v. *Commission*, EU:C:2009:214, para 7, and Case T-340/03, *France Télécom* v. *Commission*, EU:T:2007:22, para 129.
[25]Case T-168/01, *GlaxoSmithKline Services* v. *Commission*, EU:T:2006:265, para 244.

effective competition" in the common market[26] are all examples of assessments that, according to EU Courts, call for limited review.[27] Nevertheless, how helpful these indications are is debatable, to say the least. Based on these examples, one cannot escape the feeling that the notion of "complex economic assessments" is a nearly all-encompassing term. To some extent, this impression is due to the intrinsic links of competition law with economics; since economics is omnipresent in competition analysis, the evaluations that the Commission performs are – in a sense – always economic in nature. For this reason, clarifying the criterion of "complexity" has been thought to be a more promising way of capturing the definitional ambit of the "complex economic assessments" concept.

However, the criterion of "complexity" is immensely equivocal. To start with the "knowns", it is clear that the factual complexity of the case does not suffice to turn the Commission's appraisals into "complex economic" ones. For instance, in *Holcim (Deutschland)*, the General Court clarified that although *Cement* was a "particularly complex case" in factual terms, "the classification of the conduct of the undertakings concerned as constituting or not constituting an infringement for the purposes of Article [101(1) TFEU] fell … within the scope of the simple application of the law" and did not entail a complex economic assessment.[28] Along similar lines, Forwood accurately pointed out that complexity "refers more to the nature of the assessment", rather than its economic or technical aspects or its evidential implications.[29] Accordingly, the complexity of the evaluation should be distinguished from its difficulty: complex appraisals may be difficult, but difficult appraisals are not necessarily complex.[30]

Nevertheless, although these clarifications are most definitely valuable, they do not reveal what *affirmative* features an assessment must have to be classified as "complex". In an attempt to shed some further light on the issue, Fritzsche posited that economic evaluations are "complex" when "they can only be determined by interpreting multiple other simple and complex facts" and that complex economic appraisals are essentially "factual questions as a matter of law to be answered by using scientific evidence".[31] These definitions, however, are unsatisfactory in at least two respects. On the one hand, equating complex economic assessments with "factual questions" disregards not only the role that the law plays in their construction, but also their own role in the construction of the law – as will be expounded briefly.[32] On the other hand, the requirement for the use of scientific evidence not only leaves open the question what precisely "scientific evidence" may entail, but it also sits

[26]Joined Cases C-68/94 and C-30/95, *France and Others* v. *Commission* (*Kali & Salz*), EU:C:1998:148, paras. 223-224; Case T-342/07, *Ryanair* v. *Commission*, EU:T:2010:280, paras. 29-30; Case T-119/02, *Royal Philips Electronics* v. *Commission*, EU:T:2003:101, para 77.
[27]See also Bronckers and Valery, "Business as usual after *Menarini*?", 3 *MLexMagazine* (2012), 44-47, at 45.
[28]Case T-28/03, *Holcim (Deutschland)* v. *Commission*, EU:T:2005:139, paras. 95-115.
[29]Forwood, "The Commission's 'more economic approach' – Implications for the role of the EU Courts, the treatment of economic evidence and the scope of judicial review" in Ehlermann and Marquis, op. cit. *supra* note 5, p. 267.
[30]Ibid., 265. See also Geradin and Petit, "Judicial review in European Union competition law: A quantitative and qualitative assessment" in Merola and Derenne, op. cit. *supra* note 5, p. 49. Cf. Fritzsche, op. cit. *supra* note 12, at 377, who seems to be unsure about whether such complexity "can and should be an argument for discretion".
[31]Fritzsche, op. cit. *supra* note 12, at 398 and 396.
[32]See *infra*, sections 4.1 and 5.3.

uncomfortably with now settled case law according to which economic analysis need not be conducted on the basis of economic evidence.[33]

Probably more orthodox, but still controversial, is Jaeger's understanding of "complex economic assessments". In his view, the attribute of complexity should be accredited only to assessments involving "elements of economic policy", which call for some degree of "value judgement" on part of the Commission – such as the balancing of anticompetitive effects and efficiencies.[34] According to Jaeger, all other economic evaluations – for instance, market definition or the existence of dominance – should be subject to full review as non-complex appraisals. This definition and examples strongly bring to mind Bellamy's distinction between "facts of an economic nature" and "facts that are entering the question of policy".[35] Neither demarcation, however, is as clear as one would wish. For a start, speaking of market definition or dominance as "facts of an economic nature" again demotes the contribution of the law in the performance of those evaluations. Indeed, market definition, for instance, is not merely a factual assessment; to define the market, the Commission is required to take into account a range of legal criteria as established by EU Courts. Although this does not necessarily turn assessments of this kind into "complex" ones for the purposes of marginal review, it does not allow their reduction to purely factual questions either. Even more problematic, however, is the idea that economic appraisals should be considered as "complex" when they are policy-related, as allegedly in the case of the balancing of the anticompetitive and procompetitive effects of the conduct in question. The strongest criticism against this proposed distinction derives from the fact that it equates *complexity* with *discretion*. Although value judgements may well be complex, complex economic evaluations do not necessarily entail value judgements.[36] To take the balancing of the anticompetitive and procompetitive effects of a conduct as an example, this exercise certainly involves some degree of estimation, for the effects of the conduct may not be easy to discern, quantify and weigh.[37] At the case-specific level, however, it does not require *ipso facto* a choice between different public interests or goals and thus a "value judgement".[38] Rather, its "complexity"

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[33]Case T-210/01, *General Electric* v. *Commission*, EU:T:2005:456, paras. 296-297 and 299; Case T-342/07, *Ryanair* v. *Commission*, paras. 132 and 136; Case T-175/12, *Deutsche Börse* v. *Commission*, EU:T:2015:148, paras. 131-136.

[34]Jaeger, "The standard of review in competition cases involving complex economic assessments: Towards the marginalisation of the marginal review?", 2 JECL&Pract. (2011), 295-314, at 310.

[35]Bellamy, "Standards of proof in competition cases" in *Judicial Enforcement of Competition Law* (OECD Competition Policy Roundtable, 1996), p.106.

[36]It should be noted that the role of value judgements in economics has been long debated in a wealth of literature with views among authors diverging significantly. See, generally, Robbins, *An Essay on the Nature and Significance of Economic Science* (Macmillan, 1932); Boulding, "Economics as a moral science", 59 *The American Economic Review* (1969), 1–12; Ng, "Value judgements and economists' role in policy recommendation", 82 *The Economic Journal* (1972), 1014-1018; Mongin, "Value judgements and value neutrality in economics", 72 *Economica* (2006), 257–286.

[37]E.g. the Court explained in Case T-168/01, *GlaxoSmithKline Services* v. *Commission*, para 244, that the Commission must weigh up "the advantages expected from the implementation of the agreement and the disadvantages which the agreement entails for the final consumer, owing to its impact on competition" (see also para 248).

[38]This is not to say that value judgements may never be part of the balancing exercise. The role that the goal of market integration has played in the application of the EU competition rules constitutes probably the strongest evidence of the opposite (see, in this regard, Case C-56/64, *Consten and Grundig* v. *Commission* and Case C-501/06 P, *GlaxoSmithKline Services* v. *Commission*, especially paras. 59-61). Moreover, one must not ignore the

usually derives from the fact that the authority must take into account a multitude of relevant factors, whose systemic interaction may often be abstruse and may require a solid understanding of economics.[39] Therefore, it is submitted that any description of complexity must be detached from the notion of discretion.[40]

In any event, irrespective of one's definitional preference, in principle the complexity of an economic evaluation should be established *ad hoc*. Regrettably, the practice of EU Courts so far has been to take its existence for granted. To some extent, this has exacerbated the elusiveness of the concept for the simple reason that certain economic evaluations may indeed be prone to "complexity" but in the circumstances of a given case they may not be complex at all. This will be particularly so where the method of constructing a complex economic evaluation has been consolidated over the years into more or less specific guidance. For instance, decades of enforcement and case law have generated specific scripts for the Commission to follow when it defines the market or finds that an undertaking holds a dominant position.[41] As a result, market definition and dominance are now thought of as not-as-complex appraisals – compared, say, to the balancing of anticompetitive and procompetitive effects.[42] Therefore, a static approach to the notion of complex economic evaluations seems unfit.

3.2. A Rather Unhelpful Question: What Errors of Assessment Are "Manifest"?

At any rate, the elusiveness of the marginal review of complex economic appraisals is reinforced by the ambiguous content of the "manifest error of assessment" test.[43] At first

ongoing debates over the goals of EU competition law either. This conversation, however, is primarily targeted at identifying what aims EU competition law should pursue in the first place, not how different public interests must be balanced in the context of the application of the EU competition rules (see e.g. Zimmer (Ed.), *The Goals of Competition Law* (Edward Elgar, 2012)). As such, its relevance to the issues analysed in this article is far more limited than what one may initially think.

[39] See also Opinion of A.G. Léger in Case C-40/03 P, *Rica Foods* v. *Commission*, paras. 45-49.

[40] See op. cit. *supra* note 12. This is important for a further reason: the marginal review of policy matters is not of the same kind as that of complex economic evaluations (see also Opinion of A.G. Léger in Case C-40/03 P, *Rica Foods* v. *Commission*, para 49). Policy choices are usually controlled for their compliance with general principles of law, fundamental rights and proportionality (see e.g. Case T-170/06, *Alrosa* v. *Commission*, EU:T:2007:220 (on appeal: Case C-441/07 P, *Commission* v. *Alrosa*, EU:C:2010:377) and Case T-133/07, *Mitsubishi Electric Corp* v. *Commission*, EU:T:2011:345, para 269. See also Opinion of A.G. Kokott in Joined Cases C-628/10 P & C-14/11 P, *Alliance One International and Others* v. *Commission* (Spanish tobacco), EU:C:2012:11, para 48). By contrast, complex economic evaluations are scrutinized on the basis of the *Tetra Laval* formula as described earlier (see *supra* note 18).

[41] See e.g. Commission Notice on the definition of relevant market for the purposes of Community competition law, O.J. 1997, C 372/5, or Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/7, paras. 9-18.

[42] E.g. although market definition is typically classified as a "complex economic appraisal", on a number of occasions EU Courts have not hesitated to review the Commission's definition of the market very closely and either uphold or dismiss it. See Case T-57/01, *Solvay* v. *Commission*, EU:T:2009:519; Case T-321/05, *AstraZeneca* v. *Commission*, EU:T:2010:266; Case T-427/08, *CEAHR* v. *Commission*, EU:T:2010:517.

[43] The concept of the manifest error of assessment has been discussed at great length in the legal scholarship. See e.g. Van der Esch, *Pouvoirs Discrétionnaires de l'Exécutif Européen et Control Juridictionnel* (Dalloz, 1968); Ritleng, "Le juge communautaire de la légalité et le pouvoir discrétionnaire des Institutions communautaires", 9 *L'Actualité Juridique: Droit Administratif* (1999), 645-657; Molinier, "Le contrôle juridictionnel et ses limites: À propos du pouvoir discrétionnaire des institutions communautaires" in Rideau (Ed.), *De la Communauté de*

glance, the qualification of "manifestness" creates the impression that EU Courts will intervene only in exceptional circumstances, that is, when the Commission's conclusions are manifestly incorrect.[44] This feeling would not be entirely unwarranted in light of the early definition of "manifestness" provided in *RJB Mining*. Albeit in the context of the ECSC Treaty, the Court clarified that "the term 'manifest' … presupposes that the failure to observe legal provisions … appears to arise from an *obvious* error in the evaluation".[45] Arguably, one might take the view that from a purely linguistic perspective an "obvious error" threshold signifies a *prima facie* higher bar for the Commission to surpass, compared to the "manifest error" wording. Nevertheless, the question remains: what errors in the Commission's evaluations are "obvious" and how can these be distinguished from other non-obvious mistakes?

In this regard, the approach taken in *Ufex and Others* appears slightly more helpful. As the General Court explained, an error of assessment is not manifest and would not suffice to warrant annulment of the contested Commission decision, "if, in the particular circumstances of the case, it could not have had a decisive effect on the outcome".[46] Following this clarification, errors of assessment can be said to be "manifest" when they could have led the authority to a different conclusion. By contrast, EU Courts are indifferent to errors that are not capable of modifying the outcome of the Commission's analysis. This clarification is certainly valuable, insofar as it sheds some light on the judicial understanding of what "manifestness" entails. Nevertheless, one cannot but observe that abstractly defining the notion of "manifestness" is of limited practical value. Indeed, the "obvious error" language suffers from the same vagueness as the "manifest error of assessment" formula, whereas both these formulations fail to expose *why* a given Commission appraisal may be problematic and judicial intervention is thus warranted.

4. "Complex Economic Appraisals" and Marginal Review in EU Competition Enforcement: A Look under the Surface

The efforts to define the concept of "complex economic assessments" and determine what makes an error of assessment "manifest" have certainly gone some way towards illuminating the specifics of marginal review in EU competition enforcement. However, they have not fully elucidated its operation. This article seeks to contribute to the endeavours to understand

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Droit à l'Union de Droit (LGDJ, 2000), pp. 77-98; Bouveresse, *Le Pouvoir Discrétionnaire dans l'Ordre Juridique Communautaire* (Bruylant, 2010).

[44] See e.g. Derenne, "The scope of judicial review in EU economic cases" in Merola and Derenne, op. cit. *supra* note 5, p.85: "One can wonder why it is still acceptable and compatible with a satisfactory level of 'justice' for the Court to decide that a contested act is 'not manifestly incorrect."

[45] Case T-156/98, *RJB Mining* v. *Commission*, EU:T:2001:29, para 87 (emphasis added).

[46] Case T-60/05, *Ufex and Others* v. Commission, EU:T:2007:269, para 77. See also Case T-126/99, *Graphischer Maschinenbau* v. *Commission*, EU:T:2002:116, paras. 48-49 (albeit in the context of State aid), and Joined Cases C-553 & 554/10 P, *Commission* v. *Editions Odile and Lagardère*, EU:C:2012:682, para 37. It is interesting to note that the EU Courts' understanding of "manifestness" echoes settled case law according to which violations of procedural guarantees may result in the annulment of a Commission decision only where the outcome of the administrative proceedings might have been different in the absence of the procedural defect; see Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, *Suiker Unie and Others* v. *Commission*, EU:C:1975:174, para 91.

the limited control of complex economic evaluations by looking at the topic from a different perspective. First of all, instead of focusing on *what* a complex economic appraisal is, it strives to understand *when* "complex economic assessments" may be made as part of the intellectual process that the Commission must go through in order to reach a decision on whether a conduct violates Articles 101 and 102 TFEU or a merger is incompatible with the common market. In this way, the article avoids getting carried away in the somewhat abstract pursuit of a workable definition of "complex economic appraisals", whilst, at the same time, it takes a deeper look at the precise need for such appraisals in the Commission's analysis. Secondly, instead of trying to decipher the notion of "manifestness", the present article adopts an inferential approach to the content of marginal review and examines the competition case law of the EU Courts with a view to identifying what may make for a "manifest error of assessment". The value of this deliberate shift in the question lies in its capacity to avoid the assumption that the marginal review of complex economic appraisals is concerned with errors of a single kind and quality. Then, for the sake of completeness, the article engages in the reverse exercise and contemplates what may *not* make for a "manifest error of assessment".

4.1. The Making of Complex Economic Assessments

Rather oddly – if one recalls the allegedly exceptional nature of marginal review - EU Courts have brought a diverse assortment of assessments under the "complex economic evaluation" label. As mentioned earlier, the finding of dominance, the definition of the relevant market, the existence of an abuse in the meaning of Article 102 TFEU, the balancing of the anticompetitive and procompetitive effects of a conduct, the conclusion that a concentration would or would not significantly impede effective competition in the common market if allowed to proceed, are all examples of appraisals that in principle qualify for marginal review and are to be scrutinized under the "manifest error" formula.[47] Nevertheless, one should not jump to conclusions. To understand how complex economic evaluations are reviewed by EU Courts, it is necessary to move beyond the "finished product" and contemplate the context of their production.

In this regard, it is critical to appreciate that complex economic appraisals are not performed in the abstract. Rather, they form part of the intellectual process that the Commission goes through when it makes a decision on whether the conduct in question complies with EU competition rules or not. In brief, this intellectual process unfolds into three levels, which are top-down the following. At the first level, the authority must select the proper legal basis for its enforcement action. In simple words, this means deciding whether to proceed on the basis of Article 101 TFEU and/or Article 102 TFEU, or under the Merger Regulation (EUMR). However, the legal rules encapsulated in these provisions are drafted in an open-textured manner. As a result, they are of little meaning without further specification. Indeed, the legal prohibitions on "restrictions of competition", "abuses of dominance" and "concentrations that would significantly impede effective competition on the common market" are too vague to be operational as such. Therefore, they need to be interpreted and further specified into concrete legal tests. This exercise reflects the second level of the

[47] See *supra* notes 22-27.

Commission's analysis. In practice, it means that the authority must consider what combination of conduct, conditions and outcome may bring a practice within the prohibitive scope of Article 101 TFEU or Article 102 TFEU or the EUMR. Finally, having identified the relevant legal test, at a third level, the Commission must examine whether the behaviour under investigation satisfies its elements and should thus be prohibited.

Obviously, real-life enforcement is not as neat as this framework implies. Notwithstanding, breaking down the different levels of the intellectual process the Commission goes through in its decision-making offers a useful starting point for us to understand when complex economic appraisals may be necessary. With this in mind, one may distinguish the following two situations that may call for the performance of complex economic assessments.

First of all, complex economic evaluations are sometimes necessary at the second level of the Commission's analysis, that is, when the authority specifies the applicable legal rule and selects the relevant legal test. Indeed, the boundaries of EU competition provisions are shaped case by case. In consequence, there is no exhaustive "database" of legal tests for the authority to choose from. Although decades of enforcement have confirmed the merits and specifics of antitrust intervention in relation to a wide range of practices, such as, for instance, cartels or predatory pricing, the proper legal treatment of other economic activities, such as rebates offered by dominant firms, may be less clear or even vigorously disputed. Furthermore, markets and technology are constantly evolving. As a result, new business practices may make their appearance and novel legal issues may emerge. In these circumstances, the Commission may sooner or later find itself confronted with a difficult dilemma: is the conduct at hand of the kind that triggers the application of EU competition rules or not? If so, under what conditions should it be prohibited? More likely than not, the answer to these questions will require a complex economic evaluation. In addition to scanning the EU Courts' jurisprudence in search for potentially transposable precedents, the authority will have to look into contemporary economic theory in order to identify the possible ways in which the behaviour in question may harm or – conversely – benefit consumers. Furthermore, it may also have to guesstimate the potential of the one or the other legal test to chill future procompetitive behaviour or encourage anticompetitive action. The ongoing *Google* investigation offers a prime example of the challenges that the Commission may have to overcome at this level of its analysis, as well as of the complex economic appraisals that it may need to perform.[48]

[48]Case COMP/AT.39740, *Google Search*. As is well known, for the last 5 years the Commission has been investigating Google for allegedly engaging in a number of potentially abusive practices, including the way in which the company displays specialized search services, its use of content from competing specialized search services and the imposition of exclusivity requirements and other allegedly undue restrictions on advertisers. Recently and after three failed attempts at resolving the matter through commitments, the Commission sent Google a Statement of Objections expressing concerns about the company's systematic favouring of its own comparison shopping services, whereas the investigation is still pending in relation to the remaining 3 practices (see <www.ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740>). Irrespective of the outcome of the proceedings, however, the vigorous debates over whether Google's practices should be classified as "abusive" in the meaning of Art. 102 TFEU illustrate already the kind of questions the Commission must ask

Secondly, complex economic evaluations are often part of the analysis that the authority undertakes at the third level, that is, when it considers whether the conduct under investigation fulfils the elements of the relevant legal test. To answer this question, the Commission must embark on a double task. On the one hand, it must ascertain what happened or is happening in the market.[49] On the other hand, it must conclude whether the factual picture in front of it can be legally qualified as a "restriction of competition", "abuse of dominance" or "significant impediment to effective competition" in light of the applicable legal test. At this stage, the Commission's analysis very much resembles assembling a puzzle: the authority seeks to gather the relevant information and integrate it into a meaningful picture. However, not all puzzles are created equal: some are easy to put together, others are doable, but more complicated, whereas sometimes a puzzle may be impossible to complete, for example because important pieces are missing or because it is just too large and intricate for the person who tries to assemble it. By analogy, not all legal qualifications are equally demanding. Sometimes, this exercise will be straightforward, other times it will be difficult, and from time to time it may require complex economic appraisals. The latter will most likely be the case the less accepted or more novel the economic theory on which the authority relies, the greater the number of relevant factors that it must integrate in its analysis, the more uncertain their interaction is, the more specialized the knowledge that the analysis requires and the more elaborate the argument the authority wishes to advance.

The above account already reveals that complex economic assessments are not as homogeneous a group as one might initially assume. Although they are collectively grouped together under the same label, in reality they come in different shapes, sizes and hues – largely depending on the level of the Commission's analysis at which they are performed. In any event, one must not forget that complex economic evaluations are not made out of thin air, nor do they have mystical properties making them completely inaccessible to EU judges. Rather, they are a mix of facts and law moulded together into a meaningful construct through economics. Bearing this in mind is critical in order to understand how complex economic appraisals are scrutinized by EU Courts.

4.2. What Makes for a "Manifest Error of Assessment"?

At the heart of the marginal review of complex economic appraisals lies the "manifest error of assessment" test. Therefore, any effort to illuminate marginal review requires considering what this test entails. As explained earlier, the "manifestness" qualification is of little help insofar as it does not unmask the reasons why a complex economic appraisal may be

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itself when it investigates a potential violation of EU competition rules. See e.g. Nazzini, "Google and the (ever-stretching) boundaries of Article 102 TFEU", 6 JECL&Pract. (2015), 301-314; Lang, "Comparing *Microsoft* and *Google*: The concept of exclusionary abuse", 39 World Comp. (2016), 5-28.

[49] In this context, the Commission faces a number of factual questions, e.g.: Which companies operate in the industry? What products do they market? What are their costs? What are their market shares? How do they distribute their products? What communication do market participants have with each other or had they in the past? What is or was the subject of their communication? Are there intellectual property rights registered under the name of the investigated firm or its competitors? Does one or the other market operator offer rebates to its distributors? What are the conditions of this rebate scheme? What is the internal strategy of company A or B? Can products X and Y be used for the same purpose? Have new firms entered the market in the past years? etc.

"erroneous". Accordingly, a more meaningful question to ask is *why* a complex economic evaluation may fail judicial scrutiny. With this in mind, the following paragraphs look into the competition case law of EU Courts in order to infer the vices that may taint a complex economic appraisal and make it "manifestly erroneous". Based on the way in which the "manifest error of assessment" test has been applied by EU judges, it appears that four types of errors may cause the annulment of the Commission's decision where a marginal standard of scrutiny is applied.

First of all, the Commission's complex economic evaluations will not withstand judicial scrutiny where the authority has failed to assess correctly the material facts underpinning its analysis. For example, in *AKZO*, the ECJ held that the Commission was wrong to find that AKZO had engaged in an abusive policy of discrimination by quoting to customers of its competitor prices that were more advantageous than those it charged customers of its own.[50] As the Court explained, contrary to the Commission's finding, the two categories of customers were not in fact comparable and thus the authority's conclusion could not be sustained.[51] Similarly, in *Impala*, the General Court took issue with the Commission's finding that the market was not sufficiently transparent for collective dominance to exist.[52] Indeed, the authority had eventually allowed Bertelsmann and Sony to merge their global recorded music businesses, among other reasons, on the ground that campaign discounts were rendering the market opaque. Scrutinizing, however, the Commission's decision, the Court took the view that not only was its reasoning insufficient and inconsistent, but also it was not supported by the evidence that suggested that the relevant market was rather transparent.[53] Consequently, the authority's subsequent economic analysis was predicated on a factually incorrect premise.

Secondly, complex economic evaluations will fail to pass the "manifest error of assessment" test where the authority has not taken into account key relevant factors. For instance, in *United Brands* the Court reprimanded the Commission for concluding that UBC had abused its dominance by charging its customers unfair prices without taking into account UBC's production costs when determining whether its prices were excessive in relation to the economic value of the product.[54] Similarly, in *Airtours* the Commission's finding that the market was conducive to tacit collusion due, among other reasons, to the stability of historic market shares, was dismissed by the General Court as "manifestly erroneous" on the ground that the authority had failed to take into account growth by acquisition when assessing the volatility of market shares.[55] Along similar lines, in *Schneider* the General Court criticized the Commission's analysis on the ground that the authority failed to consider the effects of the concentration in each national market separately, but rather based its findings on the transnational effects of the merger.[56] Last but not least, in *Tetra Laval* the General Court

[50] Case C-62/86, *AKZO* v. *Commission*, EU:C:1991:286.
[51] Ibid., paras. 116-121.
[52] Case T-464/04, *Impala* v. *Commission*, EU:T:2006:216.
[53] Ibid., paras. 364-390.
[54] Case C-27/76, *United Brands* v. *Commission*, EU:C:1978:22, paras. 252-256.
[55] Case T-342/99, *Airtours* v. *Commission*, EU:T:2002:146, paras. 109-119.
[56] Case T-310/01, *Schneider Electric* v. *Commission*, EU:T:2002:254, paras. 153-191.

reproached the Commission for its failure to take into account the behavioural commitments offered by Tetra when assessing the likelihood that the merged entity would indeed engage in anticompetitive leveraging practices.[57]

Thirdly, a complex economic appraisal may be found "manifestly erroneous" where the authority has based its analysis on an irrelevant factor. Understandably, examples of this type of "manifest error of assessment" are not very common. Nevertheless, they do exist. For instance, in *Airtours*, the General Court took issue with the Commission's conclusion that the foreseeable reactions of current and future competitors would not jeopardize the results expected from the larger tour operators' common policy on the ground that it was based on the difficulties that smaller tour operators would have in reaching the minimum size at which they are capable of competing effectively with the four large operators.[58] According to the General Court, however, these arguments were "immaterial"; the authority should have instead assessed the ability of smaller operators and new entrants to increase capacity in order to take advantage of the opportunities afforded by product shortages, which would allegedly arise if the operation were approved.[59] A similar, albeit slightly different, error was committed by the Commission in *Impala*, where the General Court reproved the authority for basing its assessment of market transparency on campaign discounts without paying any thought to the pertinence of this criterion.[60]

Fourthly, a complex economic evaluation may be "manifestly erroneous" where the supporting evidence fails to satisfy the standard of proof. This is probably the most common form a "manifest error of assessment" may take. While it is often confused with the faults described so far, a failure to meet the standard of proof may be a vice in its own right. Indeed, even where the Commission has not made erroneous factual findings and has taken into account all the pertinent factors or has not based its analysis on irrelevant parameters, its complex economic evaluations may still fail marginal review where the authority has not produced sufficient evidence. In these circumstances, the Commission has not necessarily "got it wrong". However, it has not convincingly demonstrated that it has "got it right" either. Examples of this kind of "manifest error of assessment" abound in the case law of EU Courts. For instance, in *United Brands*, the Court held that the Commission should not have concluded that UBC abused its dominance by imposing unfair prices for the sale of Chiquita bananas on its customers in BENELUX, Denmark and Germany, among other reasons, because it had not produced sufficient evidence to demonstrate that the prices charged in Ireland were indeed representative before using them as benchmark for finding that the prices in the other Member States were excessively high.[61] Similarly, in *General Electric*, the General Court concluded that the Commission's finding that the foreseen conduct was of a

[57] Case T-5/02, *Tetra Laval* v. *Commission*, EU:T:2002:264, para 161 (upheld on appeal: Case C-12/03 P, *Commission* v. *Tetra Laval*, EU:C:2005:87, paras. 85-89). See also Case T-210/01, *General Electric* v. *Commission*, paras. 309-312.
[58] Case T-342/99, *Airtours* v. *Commission*, paras. 211-215.
[59] Ibid., para 214.
[60] Case T-464/04, *Impala* v. *Commission*, paras. 437-458, particularly para 449.
[61] Case C-27/76, *United Brands* v. *Commission*, paras. 235-268 (the reason for this was that there was evidence suggesting that the prices charged in Ireland had actually produced loss for UBC, and although that evidence was not very reliable, it was still for the Commission to prove the issue since it bore the burden of proof).

strategic nature did not satisfy the standard of proof, insofar as the authority failed to produce evidence as to the likelihood that General Electric would adopt the contemplated conduct.[62] Likewise, in *Airtours*, the Commission failed to satisfy its burden of proof insofar as it failed to demonstrate that the result of the transaction would be to alter the structure of the relevant market in such a way that the leading operators would no longer act as they have in the past and thus a collective dominance would be created.[63] Last but not least, in *CEAHR*, the General Court took issue with the Commission's market definition on the ground that the authority had not satisfied the standard of proof when taking the view that a price increase in the market for spare parts for luxury watches would have led consumers to switch to other spare parts or to other primary products.[64]

Therefore, a closer analysis of the EU Courts' case law confirms that thinking of "manifest errors of assessment" as comprising mistakes of a single quality is inaccurate. Indeed, different flaws appear to have been subsumed within the rather generic concept of "manifest error of assessment". Interestingly enough, these flaws are at heart errors of *fact* – where the factual basis of the Commission's "complex economic appraisal" is at odds with "reality" as judicially ascertained, or has not been sufficiently established by the authority, and errors of *law* – where the Commission's legal characterization of the facts has not been performed on the basis of all relevant factors or has been premised on an immaterial consideration that has vitiated its overall analysis.[65] This finding accords with the earlier remark that the main ingredients of complex economic assessments are fundamentally facts and law.

4.3. What Does not Make for a "Manifest Error of Assessment"?

Having considered the possible deficiencies in the Commission's complex economic appraisals that may amount to a "manifest error of assessment", it is appropriate to give some thought to the reverse question, i.e. what does *not* make for a "manifest error of assessment". This will allow us to better identify the outer boundaries, on the one hand, of the Commission's margin of appreciation and, on the other hand, of the EU Courts' power of review.

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[62] Case T-210/01, *General Electric* v. *Commission*, paras. 470-473.

[63] Case T-342/99, *Airtours* v. *Commission*, para 293.

[64] Case T-427/08, *CEAHR* v. *Commission*, paras. 94-96 and 119.

[65] It is worth noticing that the approach of EU Courts in State aid and trade defence proceedings reveals a similar understanding of the content of the "manifest error of assessment" test. EU Courts have found that the institution in question has committed a "manifest error of assessment" where it has failed to take into account a relevant factor (e.g. Case C-73/11P, *Frucona Košice AS* v. *Commission*, EU:C:2013:32, paras. 100-107; Case T-473/12, *Aer Lingus* v. *Commission*, EU:T:2015:78, paras. 97-103; Joined Cases T-115 & 116/09, *Electrolux and Whirlpool Europe* v. *Commission*, EU:T:2012:76, paras. 61-72; Case T-565/08, *Corsica Ferries France* v. *Commission*, EU:T:2012:415, para 131), or it has failed to produce sufficient evidence (e.g. Case T-412/13, *Chin Haur Indonesia* v. *Council*, EU:T:2015:163, para 104; Case T-565/08, *Corsica Ferries France* v. *Commission*, paras. 76-108), or it has based its analysis on an incorrect assessment of material facts (e.g. Joined Cases T-115 & 116/09, *Electrolux*, paras. 47-55; Case T-565/08, *Corsica Ferries France*, para 147; Case T-158/10, *Dow Chemical Company* v. *Council*, EU:T:2012:218, para 59; Case T-107/04, *Aluminium Silicon Mill Products* v. *Council*, EU:T:2007:85, paras. 65-66).

In this regard, it is first of all important to recall the wording of Article 263 TFEU, which confines the scrutiny of EU Courts to a review of the *legality* of the Commission's decisions. In practice, this means that EU Courts may not annul the authority's complex economic assessment on the ground that another possible approach to the matter was in their view "better", nor can they provide an incorrect Commission decision with different grounds and uphold it.[66] As the General Court elaborated in *GSK Services*, "it is not for the Court to substitute its own economic assessment for that of the institution which adopted the decision"; it may only review its lawfulness.[67] This constraint is crucial for demarcating the limits of marginal review. Indeed, where complex economic assessments are involved, there may be more "correct" ways of approaching an issue, from which the authority is in principle entitled to choose as the first instance decision-maker.[68] For example, the same concentration may give rise to both unilateral and coordinated effects. If the Commission opts to proceed on the basis of the unilateral effects theory only, the EU Courts may not find a "manifest error of assessment" on the ground that in their view the alternative theory was more convincing or appropriate. To put it differently: the mere fact that the authority pursued a line of analysis that EU Courts would not have favoured had they been the first instance decision-maker is insufficient to give rise to a "manifest error of assessment".

In any event, the Commission's margin of appreciation is not exhausted in choosing a theory of harm, but may extend to the very performance of the complex economic appraisals. An illustrative example of this situation may be found in *John Deere*.[69] In this case, the Commission took issue with the information exchange system operated by UK tractor manufacturers on the ground that it increased transparency on a highly concentrated market and raised barriers to entry by enabling members to identify each competitor's sales as well as the sales made by their dealers, where the total volume of sales for a given product and period on the territory was less than ten units. Challenging the decision, John Deere contested the threshold of ten units below which individualization of information was possible as "incomprehensible".[70] However, neither the General Court nor the ECJ shared its view. Taking account of the characteristics of the market, the kind of information exchanged and the fact that the disseminated information was not sufficiently aggregated, the General Court held that "the Commission, … without committing any manifest error of assessment, was

[66] Case T-210/01, *General Electric*, para 312; Opinion of A.G. Mengozzi in Joined Cases C-247 & 253/11 P, *Areva* v. *Commission* and *Alstom and Others* v. *Commission*, EU:C:2013:579, para 50.

[67] Case T-168/01, *GlaxoSmithKline Services* v. *Commission*, para 243. See also Joined Cases T-68, 77 & 78/89, *Società Italiana Vetro (SIV) and Others* v. *Commission*, EU:T:1992:38, para 160: "It is not for the Court to carry out its own analysis of the market but that it must confine itself to verifying, as far as possible, the *correctness* of the findings in the decision which were *essential* for the assessment of the case." (emphasis added); and Case T-210/01, *General Electric* v. *Commission*, para 312: "It is not for the Court to substitute its own appraisal for that of the Commission, by seeking to establish what the latter would have decided if it had taken into account the deterrent effect of Article 82 EC." As the ECJ indicated in Case C-67/13 P, *Groupement de Cartes Bancaires* v. *Commission,* EU:C:2014:2204, para 46, "the General Court must not substitute its own economic assessment for that of the Commission" because the latter "is institutionally responsible for making those assessments".

[68] Laguna de Paz, "Understanding the limits of judicial review in European competition law" 2 *Journal of Antitrust Enforcement* (2014), 203-224, at 217-218. See also Loozen, "The requisite legal standard for economic assessments in EU competition cases unravelled through the economic approach", 39 EL Rev. (2014), 91-110, at 104.

[69] Case T-35/92, *Deere* v. *Commission*, EU:T:1994:259.

[70] Ibid., para 90.

entitled to set at ten units the number of vehicles sold in a given dealer territory as the figure below which it is possible to identify sales made by each of the competitors".[71]

The same position was endorsed by the ECJ on appeal. Recalling that "complex economic appraisals" are subject to limited review, the Court explained that "the setting of the criterion preventing exact identification of competitors' sales is based on a complex economic appraisal of the market" and thus the General Court was right to undertake a limited review only and find that the Commission had not committed any manifest error in using the criterion of ten units sold.[72] A comparable conclusion may be found in the ECJ's earlier judgment in *Remia*. Examining Remia's challenge that the Commission's decision to reduce the non-compete clause from ten to four years was based on an incorrect appraisal of the specific circumstances of the case, the ECJ recalled that "complex economic evaluations" are subject to limited review. Having then regard to the criteria examined by the Commission when determining the proper duration of the non-compete clause, the Court concluded that there was nothing to suggest that the authority had committed a manifest error of assessment.[73] Therefore, one may infer that where a "complex economic appraisal" requires setting a numerical threshold, some scope for calibration appears to be part and parcel of the Commission's margin of appreciation.

That said, a final remark is critical. The operation of the "manifest error of assessment" test – as described earlier - reveals that the Commission may not shield behind its margin of appreciation, where it has failed to assess the key facts of the case correctly or sufficiently, or to consider a materially relevant factor, or where it has based its analysis on an irrelevant factor that has vitiated its conclusions. By contrast, errors in non-material factual findings or a failure to take into consideration factors that are not substantially relevant will *not* make for "manifest errors of assessment". This sits very well with the General Court's position in *Ufex and Others*, where it was clarified that the "manifest error of assessment" test may only cover errors which could have had a "decisive effect on the outcome".[74] By definition, mistakes in supplementary or peripheral factual findings and omissions relating to parameters that are not key to performing the "complex economic evaluation" in question may not modify the outcome of the Commission's analysis. Therefore, *ineffective* deficiencies in the authority's analysis will not warrant its annulment.

5. The Three Aces up the EU Courts' Sleeve

The analysis of the EU Courts' case law revealed that the "manifest error of assessment" test encompasses specific defects that may cause the annulment of the Commission's decision, whether independently or in combination. This finding is important because it confirms that the marginal review of complex economic evaluations in EU competition enforcement is not an intangible standard of judicial scrutiny nor is its operation contingent on an abstract – and potentially arbitrary – perception of "manifestness". Nevertheless, this conclusion does not

[71] Ibid., para 92.
[72] Case C-7/95 P, *Deere* v. *Commission*, EU:C:1998:256, paras. 34-36.
[73] Case C-42/84, *Remia* v. *Commission*, paras. 25-36.
[74] See *supra* note 46.

fully explain away the feeling which is commonly shared among academics, that is, that marginal review is in practice far less marginal than its name implies – especially in the field of merger control.[75] To understand this widespread sentiment, it is necessary to pay some thought to the tools that EU Courts may engage when they scrutinize the Commission's decision-making: economics, evidence review and Article 19(1) TEU. As will be explained, these three "aces" up the EU judges' sleeve may enable them practically to shrink – if not entirely eliminate – any margin of appreciation the Commission is thought to enjoy.

5.1. Ace One: Economics

Judicial deference to the Commission's complex economic assessments is typically explained on efficiency grounds. Indeed, over the course of the years the Commission has improved the quality of its decision-making by introducing internal checks and balances and has increased its capacity in economics by establishing a special department headed by the Chief Economist and run with the help of a group of highly-qualified economists.[76] Unsurprisingly, this has strengthened the authority's capacity to perform complex economic evaluations and double-check their soundness. Comparing the Commission's nature as a specialized agency with the EU judges' generalist background, it makes sense – as the argument goes – to allow it a degree of leeway in its appreciation.[77] Without any intention to contest the merits of this efficiency rationale, the present article rather wishes to make a different – and somewhat underestimated – point: that irrespective of any "comparative advantage" that the Commission may enjoy in terms of "expertise" and experience, economics is not the Commission's sole prerogative; rather, in the context of marginal review it may actually serve as a double-edged sword.[78]

Indeed, economics may provide the Commission with a strong foundation for the exercise of its margin of appreciation. At the policy level, soft-law instruments published by the authority offer an illustrative example of this. Drawing, among others, upon contemporary

[75] Valcke and Todorov, "Judicial review of merger control decisions in the European Union", 51 *Antitrust Bulletin* (2006), 340; Davies and Schlossberg, "'Once more unto the breach, dear friends': Judicial review of antitrust agency merger clearance decisions", 21 *Antitrust* (2006-2007), 21; Killick, "Case comment: The *GE/Honeywell* judgment - In reality another merger defeat for the Commission", 28 ECLR (2007), 60; Harkera, Peyera and Wright, "Judicial scrutiny of merger decisions in the EU, the UK and Germany", 60 ICLQ (2011), 117. Cf. the early approach of the Courts as presented by Brown, "Judicial review of Commission decisions under the merger regulation: The First cases", 15 ECLR (1994), 305; Kim, Vallery and Waters, "Judicial review of mergers", 10 *European Antitrust Review* (2005), 42. In the antitrust context, see De la Torre, "Evidence, proof and judicial review in cartel cases" in Ehlermann and Marquis, op. cit. *supra* note 5, p. 390: "The 'manifest' error standard in fact captures much more than decisions that are facially or self-evidently wrong."; Prek and Lefèvre, "Competition litigation before the General Court: Quality if not quantity?", 53 CML Rev. (2016), 65-90, at 71-74.

[76] Röller and Buigues, *The Office of the Chief Competition Economist at the European Commission* (2005), <www.ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf> (last visited 10 Apr. 2016).

[77] Cf. Baye and Wright, "Is antitrust too complicated for generalist judges? The impact of economic complexity and judicial training on appeals",54 *Journal of Law and Economics* (2011), 1-24; Wright and Diveley, "Do expert agencies outperform generalist judges? Some preliminary evidence from the Federal Trade Commission", (2013) *Journal of Antitrust Enforcement*, 82-103, also available <papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034>.

[78] Generally, on the use of economics in EU competition enforcement, see Decker, *Economics and the Enforcement of European Competition Law* (Edward Elgar Publishing, 2009)

economic theory, these documents set out the authority's enforcement priorities and expound its approach to various types of potentially harmful market conduct.[79] Furthermore, economics often comes to the Commission's defence at a case-specific level, too. For instance, in *Deutsche Börse*, the General Court upheld the Commission's finding that the trading of derivatives similar to exchange-traded derivatives (EDT look-alikes) was a relatively limited phenomenon not only on the basis of the available factual evidence indicating that EDT lookalikes did not have the significance alleged by Deutsche Börse, but also in view of the fact that the economics of replicating an exchange-traded contract in the over-the-counter environment provided little justification for such a strategy.[80] Likewise, in *Der Grüne Punkt*, the General Court agreed that the Commission rightly took into account considerations of spatial economics – in addition to collection logistics and traditions of waste collection, when assessing the conditions under which systems for the regular collection of used sales packaging from consumers could gain access to the latter..[81] Last but not least, in *Atlantic Container Line*, the General Court acknowledged that according to economic theory the contestability of the liner shipping market was a "very controversial topic" and therefore the Commission should be granted a broad margin of appreciation in assessing the degree of contestability of the market in containerized liner shipping on the transatlantic route.[82] In this light, the Commission's conclusion that potential competition was insufficient to prevent the Trans-Atlantic Agreement from affording its members the possibility of eliminating competition within the meaning of Article 101(3) TFEU was not vitiated by a manifest error of assessment.[83]

Nevertheless, the Commission's reliance on economics may sometimes backfire. *General Electric* provides a clear example. In prohibiting the GE/Honeywell concentration as incompatible with the common market on account of its allegedly anticompetitive conglomerate effects, the authority found that the merged entity would have had an incentive to engage in mixed-bundling post-merger. This conclusion was based, among other things, on the "Cournot effect" of bundling, an economic theory which explains the advantages that a firm with a wide range of products may derive if it offers discounts on all the products in the range, where its competitors' range is more restricted. Taking into account the produced expert economic evidence, the General Court observed that the question where the Cournot effect would have given the merged entity an incentive to engage in mixed bundling was a

[79]See, e.g. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/02; Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2004, C 31/5; Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2008, C 265/6. Note, however, Witt, "From *Airtours* to *Ryanair*: Is the more economic approach to EU merger law really about more economics?", 49 CML Rev. (2012), 217-246, at 230-231, who remarked that the economic principles set out in the Commission's guidelines are not "of impenetrable complexity", nor has the authority's decisional practice "become permeated with complex theories of modern industrial economics".
[80]Case T-175/12, *Deutsche Börse*, paras. 80-83.
[81]Case T-289/01, *Der Grüne Punkt - Duales System Deutschland* v. *Commission*, EU:T:2007:155, paras. 108-110.
[82]Case T-395/94, *Atlantic Container and Others* v. *Commission*, EU:T:2002:49, para 348.
[83]Ibid.

"matter of controversy" and, therefore, the Commission was not entitled to infer such an incentive as a "direct and automatic consequence" of that theory.[84]

Airtours provides another illustrative example of how economics may be employed by the EU Courts for the purposes of scrutinizing the Commission's decision-making. In finding that the merger would result in the creation of a collective dominant position, the authority took the view that, although demand volatility generally makes the creation of such a position more difficult, in the circumstances of the case that fact was not relevant, as the major operators tended to adopt a "wait and see" approach to capacity planning in order to protect themselves against any volatility.[85] Reviewing the Commission's analysis, however, the General Court held that the authority was not entitled to rely on the tour operators' allegedly cautious approach to capacity decisions "for the purpose of denying the relevance in this instance of a factor which is significant as evidence of oligopolistic dominance, such as the degree of market stability and predictability",[86] and eventually concluded that the Commission had "failed to establish that economic theory was inapplicable in the present case and that it was wrong in concluding that volatility of demand was conducive to the creation of a dominant oligopoly …."[87]

More generally, the double function of economics in the context of the marginal review of "complex economic appraisals" derives from the key role that economic theory plays in shaping our perception of "economic normality".[88] Indeed, economics in competition enforcement often serves as the rough equivalent of "common sense" in everyday life. As such, it may shape judicial preconceptions, whilst at the same time offering a useful benchmark with which the "existing" situation, as factually established, may be compared.[89] This exercise is not always conscious, but it is certainly visible in the scrutiny to which EU Courts subject the Commission's analysis. *Tetra Laval* exemplifies this point quite vividly. Annulling the Commission's prohibition of the Tetra Laval/Sidel concentration as incompatible with the common market, the General Court stressed that "the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognized in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings".[90] Accordingly, it underlined that "the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects".[91]

[84]Case T-210/01, *General Electric* v. *Commission*, paras. 450-462, especially paras. 456 and 462.
[85]Case T-342/99, *Airtours*, paras. 139-141.
[86]Ibid., para 142.
[87]Ibid., para 147.
[88]Sibony, *Le Juge et le Raisonnement Economique en Droit de la Concurrence* (Librairie Générale de Droit et de Jurisprudence, 2008), p. 746.
[89]See also the interesting work of Maggiolino, "Plausibility, facts and economics in antitrust law", 7 *Yearbook of Antitrust and Regulatory Studies* (2014), 107-127.
[90]Case T-5/02, *Tetra Laval*, para 155.
[91]Ibid.

5.2. Ace Two: Evidence Review

In any event, apart from economics, EU Courts have a second ace up their sleeve: evidence review. Indeed, the Commission's margin of appreciation by no means dismisses EU Courts from their obligation to *fully* review the evidence supporting its conclusions. As Advocate General Kokott emphasized in her Opinion in *Impala II*, "the correctness, completeness and strength of the factual material which underpins a decision must be liable to judicial review".[92] This is critical because "without such a review of the factual basis for a decision it would not be possible to assess, in a meaningful way, whether the Commission had stayed within the limits of the discretion allowed to it or had committed manifest errors of assessment".[93] This approach is consistent with the principle of unfettered evaluation of the evidence. As the General Court has itself confirmed, "it is incumbent on it … to check the nature and import of the evidence taken into consideration by the Commission".[94] Nevertheless, EU Courts have taken evidence review a step further: not only will they seek confirmation as to whether the evidence is factually accurate, reliable and consistent, but they will also verify whether it 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.[95] [96]

The potential reach of the evidence-qualification of the "manifest error of assessment" test should not be underestimated. Indeed, evidence review in the context of marginal scrutiny has armed EU Courts with the perfect Trojan horse. On the one hand, it enables EU judges to evade potential allegations that they have unduly interfered with the Commission's margin of appreciation – after all, all they do is merely review the evidence that the authority has produced. At the same time, however, the *Tetra Laval* formula has the capacity to turn marginal control into a much stricter form of judicial scrutiny, which may sometimes come very close to almost entirely eliminating any "margin of appreciation" that the Commission is said to enjoy.[97] The reason for this is twofold. Firstly, the evidence-qualification of the

[92]Opinion of A.G. Kokott in Case C-413/06 P, *Bertelsmann and Sony Corporation of America* v. *Impala* (*Impala II*), EU:C:2007:790, para 179

[93]Ibid.

[94]Joined Cases T-68, 77 & 78/89, *SIV and Others* v. *Commission*, EU:T:1992:38, para 95.

[95]Case C-12/03 P, *Commission* v. *Tetra Laval*, para 39. See also Venit, "The scope of EU judicial review of Commission merger decisions" in Lowe and Marquis (Eds.), *European Competition Law Annual 2010: Merger Control in European and Global Perspective* (Hart, 2013) pp.123-125.

[96]It is interesting to note that the EU Courts' understanding of marginal review in competition cases seems to have influenced to some extent their approach in State aid and trade defence proceedings too. Indeed, over the last 5 or 6 years EU Courts have started employing the *Tetra Laval* wording in State aid and trade defence judgments as well – albeit with considerable caution (according to the results retrieved from the Curia website on 4 July 2016, the *Tetra Laval* formula has been endorsed in only 18 State aid and 3 anti-dumping judgments). Nevertheless, the implications of that formula in State aid judgments remain somewhat ambiguous, since the EU Courts have occasionally employed it in order to elaborate on the content of "comprehensive review" rather than to qualify "marginal review" (e.g. see Case T-565/08, *Corsica Ferries France* v. *Commission*, para 88).

[97]As remarked by Virpi and Vanhamme, "The 'power of appraisal' (pouvoir d'appréciation) of the Commission of the European Communities vis-à-vis the powers of judicial reeview of the Communities Court of Justice and Court of First Instance", 22 *Fordham International Law Journal* (1998), 885-901, at 888, by reviewing the administrative file, the Courts inevitably bring themselves "intellectually close to building their own bridge from the facts". See, however, the concerns expressed by Legal, "Le contentieux Communautaire de la concurrence entre contrôle restreint et pleine juridiction", (2005) *Concurrences*, 1-2.

"manifest error of assessment" test confirms that the Commission's *exercise*[98] of its margin of appreciation is subject to an important caveat: although the authority does possess "a degree of latitude regarding the choice of the econometric instruments available to it and the choice of the appropriate approach to the study of any matter",[99] it is nevertheless legally required to demonstrate that its chosen approach is *justified* and thus among the "correct" ones.[100] Secondly, the *Tetra Laval* formula suggests that EU Courts remain the ultimate arbiters of the factors that *must* be taken into account in order to assess a complex situation. This is important because, as mentioned earlier, a failure to take into consideration parameters that are not substantially relevant will *not* make for a "manifest error of assessment". In view of its margin of appreciation, one would expect that the Commission would have a strong say in determining what is "relevant" and what is not. Interestingly, however, EU Courts have employed evidence-related wording to retain this role for themselves.[101]

Obviously, whether EU Courts actually deliver on their promise and do carry out an in-depth scrutiny of the evidence is a different issue.[102] Furthermore, in view of their generalist background, their ability to scrutinize complex economic evidence produced either by the Commission or the undertakings has been - unsurprisingly - questioned.[103] However, this empirical question and practical difficulties do not detract from the theoretically far-reaching

[98] Rather than its *existence*.

[99] See e.g. Case T-212/03, *MyTravel v. Commission*, EU:T:2008:315, para 83: "It must also be borne in mind that the Commission enjoys a discretion in maintaining control over Community competition policy, which means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it, and, as a corollary, that it enjoys a degree of latitude regarding the choice of the econometric instruments available to it and the choice of the appropriate approach to the study of any matter provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied consistently." It is worth noting that a similar – albeit less eloquently articulated – approach has been adopted in State aid and trade defence cases, too (e.g. Joined Cases C-341 & 342/06 P, *Chronopost and La Poste* v. *UFEX and Commission*, EU:C:2008:375, paras. 149-155; Case C-290/07 P, *Commission* v. *Scott*, EU:C:2010:480, paras. 68-84; Case T-310/12, *Yuanping Changyuan Chemicals* v. *Council*, EU:T:2015:295, para 194).

[100] See the language used by the ECJ in Case C-510/11 P, *Kone and Others* v. *Commission*, EU:C:2013:696, para 27; Williams, "When is an error not an error? Reform of jurisdictional review of error of law and fact", (2007) *Public Law* 793, at 798. See also Lasok, "The nature of judicial control" in Conference proceedings: "Celebration of 20 years of the Court of First Instance of the European Communities" , 25 Sept. 2009 (*De 20 ans à l'horizon 2020: Bâtir le Tribunal de demain sur de solides fondations* (CJEU, 2011)), at p. 34, who observes that the Commission's latitude is confined to the outcome, rather than the process, of its decision-making. This also resolves the conundrum surrounding the interaction between the standard of proof and the marginal standard of review. Indeed, the wording used by EU Courts has generated the inaccurate impression that the standard of proof and the "manifest error of assessment" test ultimately coincide; see e.g. Craig, *EU Administrative Law* (OUP, 2012), p. 434; Legal, "Standards of proof and standards of judicial review in EU competition law" in Hawk (Ed.), *International Antitrust Law and Policy: Fordham Corporate Law* (Juris, 2006), pp. 111-112.

[101] Albeit in the US context, see Shapiro, "Appeal", 14 *Law & Society* (1979-1980), 629, 649-650.

[102] Several factors may play a role in this; e.g. it is not unreasonable to think that the prospective nature of the Commission's analysis may make it more challenging for EU Courts to identify "manifest errors of assessment" in merger cases than in Arts. 101 and 102 TFEU cases where enforcement takes place *ex post*. Nevertheless, whether the *ex ante* or *ex post* nature of the enforcement or other parameters affect the ability of EU Courts to scrutinize the evidence, and to what extent, is an empirical question that calls for further examination and does not affect *per se* the content of judicial review, i.e. what errors EU judges will look for in the Commission's analysis.

[103] There is an abundance of literature on the use and evaluation of expert evidence in EU competition enforcement. See, indicatively, Lianos, "'Judging economists', economic expertise in competition litigation: A European view" in Lianos and Kokkoris (Eds.), *Towards an Optimal Competition Law System* (Kluwer International, 2009).

potential of evidence review, as the perfect "cover" for performing a thorough inspection of the Commission's analysis without – seemingly – impinging on the authority's margin of appreciation.[104]

5.3. Ace Three: Article 19(1) TEU

Finally, EU Courts have a third powerful ace up their sleeve: Article 19(1) TEU. According to Article 105 TFEU, the Commission shall safeguard the application of EU competition rules. Nevertheless, this does not eliminate the EU Courts' responsibility – but also power – to "ensure that in the interpretation and application of the Treaties the law is observed". The fact that EU Courts are entitled to ensure that "the law is observed" has very significant connotations for the judicial review of the Commission's complex economic appraisals, which have not been fully appreciated so far. Indeed, it is usually assumed that *all* complex economic evaluations are subject to marginal control. Interestingly, however, the case law of the EU Courts provides little to no support for this assumption. Rather, the settled position seems to be that any margin of appreciation that the Commission potentially enjoys is confined to the *application* of the competition rules. By contrast, complex economic appraisals relating to their *interpretation* are treated as "pure" questions of law and are thus subject to full review.[105]

To understand this distinction, it is necessary to recall the three stages of the intellectual process which the Commission must go through in order to decide on whether the EU competition rules have been complied with. As explained earlier, these are, firstly, the *identification* of the relevant legal basis; secondly, the *interpretation* of the relevant legal basis through its specification into a concrete legal test; and thirdly, the *application* of the specified legal test to the facts of the case. Complex economic appraisals may be necessary both at the second and the third level of the authority's analysis. Therefore, one might well assume that EU Courts apply a marginal standard of review to both "varieties" of complex economic evaluations. Such an assumption would be far from absurd – especially if one recalls the Commission's nature as a specialized administrative agency, which arguably makes it well-equipped to take the lead on how the concepts "restriction of competition",

[104] This remark is important from a fairness perspective too. Judicial deference is received with considerable scepticism, largely because of concerns that in view of the administrative model of EU competition enforcement, a marginal standard of review falls short of the ECtHR's requirement for "full jurisdiction" as entailing the power to "quash in all respects, on questions of fact and law, the challenged decision" (See ECtHR, Application No. 34619/97, *Janosevic* v. *Sweden*, Judgment of 21 May 2003, para 81) and fails to provide undertakings participating in infringement and merger proceedings with effective judicial protection. However, the evidence-qualification of the "manifest error of assessment" test has the potential to bring EU competition enforcement in line with the principle of effective judicial protection. In the merger context, Fountoukakos remarked that "apart from ensuring that procedural rules for the respect of the rights of defence are adhered to, arguably the greatest contribution of the Community Courts to the fairness of the Commission's administrative procedure is through the imposition of evidentiary standards": Fountoukakos, "The CFI's contribution to a fairer system of merger control" in Baudenbacher and Others (Eds.), *Liber Amicorum en l'Honneur de Bo Vesterdorf* (Bruylant, 2007), p.529.

[105] See also Vesterdorf, "Standard of proof in merger cases: Reflections in the light of the recent case law of the Community Courts", 1 *European Competition Journal* (2005), 3-33, at 12.

"abuse of dominance" or "significant impediment to effective competition" should be interpreted.[106]

At this point, it should be noted that the question whether – and, if so, under what circumstances – courts must defer to the administrative authorities' *interpretation* of the law is not new. This issue emerges all the more forcefully in regulatory contexts, such as competition enforcement, where the meaning of the substantive law often rests on the current state of knowledge in other disciplines, such as economics, as well as on difficult predictions about the potential impact of the one or the other legal test on market conduct. In this light, it is hardly surprising that different jurisdictions have addressed the matter in different – sometimes diametrically opposite – ways.[107] In the US, for instance, the Supreme Court has long endorsed the *Chevron* formula, which prescribes that if the Congress has not directly spoken to the precise question at issue and the statute is silent or ambiguous, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute".[108] By contrast, matters of statutory interpretation in the UK appear to fall within the remit of the English courts, which may substitute their judgment for that of the agency.[109]

Examining the position of EU Courts, there is nothing in the case law to support the assumption that the Commission enjoys a margin of appreciation in matters of law interpretation – even where complex economic evaluations may be involved. On the contrary, the *meaning* and *scope* of the EU competition rules have been invariably off-limits to the authority. Indeed, on several occasions EU Courts have confirmed that as a general rule they will undertake a comprehensive review of whether or not the conditions for the application of EU competition rules are met.[110] Furthermore, they have repeatedly emphasized that in carrying out such a review, they "cannot use the Commission's margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conduct of an in-depth review of the law and of the facts".[111] In practice,

[106]E.g. as mentioned in *supra* note 48, one of the questions that the Commission has to consider in the ongoing *Google* investigation is whether Art. 102 TFEU must be interpreted as prohibiting the use by a dominant firm of content from competing specialized search services. The answer to this question requires assessing the potential harmful effects and efficiencies that this practice may generate, with a view to deciding on whether it should be regarded as an "abuse of dominance".

[107]For a brief comparative analysis of the question, see Craig, "Judicial review and questions of law: A comparative perspective" in Rose-Ackerman and Lindseth (Eds.), *Comparative Administrative Law* (Edward Elgar Publishing, 2010).

[108]*Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), p. 467. For more on the topic, see Mashaw, "Norms, practices, and the paradox of deference: A preliminary inquiry into agency statutory interpretation", 57 *Administrative Law Review* (2005), 501-542; Pierce, "How agencies should give meaning to the statutes they administer: A response to Mashaw and Strauss", 59 *Administrative Law Review* (2007), 197-206; Mashaw, "Agency-centered or court-centered administrative law? A dialogue with Richard Pierce on agency statutory interpretation", 59 *Administrative Law Review* (2007), 889-904.

[109]Cf. Daly, "Deference on questions of law", 74 MLR (2011), 694-720 and Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012).

[110]Case C-42/84, *Remia*, para 34; Case C-382/12 P, *MasterCard and Others* v. *Commission*, EU:C:2014:2201, para 155.

[111]Case C-382/12 P, *MasterCard*, para 156; Case C-389/10 P, *KME Germany and Others* v. *Commission*, EU:C:2011:816, para 129; Case C-386/10 P, *Chalkor* v. *Commission*, EU:C:2011:815, para 62. See also the Opinion of A.G. Mengozzi in Case C-382/12 P, *MasterCard*, EU:C:2014:42, para 119, where he observed that

this means that the Commission's *interpretation* of the EU competition rules – and therefore any complex economic appraisals that it may perform in that context – is always subject to full, rather than marginal review. The greatest proof of this is probably the striking lack of any deferential wording in those parts of the judgments that set out the constituent elements of the infringement. For instance, in *Intel*, the General Court considered in detail the proper legal treatment of rebates offered by dominant firms without making any reference to the Commission's view on the matter or margin of appreciation, although one might well argue that this question entailed complex economic evaluations *par excellence*.[112] Therefore, one may safely infer that any deference to the Commission is confined to the complex economic evaluations that the authority may perform at the stage of the *application* of the EU competition rules, their *interpretation* being the sole prerogative of the EU Courts in line with the mandate of Article 19(1) TEU.

6. Conclusion

Few topics in competition enforcement have troubled academics and practitioners alike as much as the marginal standard of review to which the Commission's complex economic evaluations are subject. Although the "manifest error of assessment" test progressively became boilerplate in the judgments of EU Courts, its operation remains by and large wrapped in a cloud of elusiveness, in part due to the difficulties in defining the notion of complex economic appraisals and in part due to the somewhat "sibylline" description of marginal review by the European judges.

Against this backdrop, the aspiration of this article was to contribute to academic endeavours to illuminate marginal review in EU competition enforcement by examining more closely the "manifest error of assessment" test that underpins the control of the Commission's complex economic appraisals. In this light, the focus was placed on better understanding when such evaluations may be performed as part of the intellectual process that the Commission must go through in order to decide whether the EU competition rules have been complied with, and what errors in the authority's analysis may make for a "manifest error of assessment" according to the case law of the EU Courts. As the article demonstrated, although complex economic appraisals are collectively grouped under the same label, they are not indistinguishable; rather, they come in different varieties which may in turn inform the kind of scrutiny that EU Courts exercise. Furthermore, the examination of the case law revealed that first impressions sometimes lie. Despite the apparent nebulousness of its wording, the "manifest error of assessment" test is not an intangible formula of judicial scrutiny, contingent on an abstract – and perhaps arbitrary – perception of "manifestness". Rather, the marginal review of complex economic evaluations appears to target four specific defects that may – independently or in combination – invalidate the Commission's analysis: failure to assess correctly the material facts of the case, failure to take into account a relevant

this dictum "has in itself the potential to neutralize de facto the very principle of the recognition of a margin of economic assessment to the Commission".

[112] Case T-286/09, *Intel* v. *Commission*, EU:T:2014:547, paras. 72-94.

factor, taking into account an irrelevant factor that distorted the analysis and failure to satisfy the standard of proof.

These findings already confirm that the manifest error of assessment test entails a far more thorough form of judicial scrutiny than what one might expect – or fear – based on the seemingly deferential language of the EU Courts. A closer look at the three tools that the EU Courts have employed to scrutinize the Commission's complex economic appraisals, i.e. economics, evidence review and Article 19(1) TEU, offers further support for this conclusion. Indeed, although the Commission surely possesses a degree of sophistication in economics, the latter is not its sole prerogative. Rather, EU Courts have routinely relied on economic theory either to confirm the authority's complex economic analysis or find fault with it. Moreover, the evidence-qualification of the "manifest error of assessment" test, as now entrenched in the case law, has provided EU Courts with the perfect Trojan horse. Under the cover of evidence review – which falls within their entitlement - EU judges have been able not only to retain the final say on whether the facts have been correctly and sufficiently established, but also – and most importantly – to remain the ultimate arbiters of what is "relevant" and what is not. Finally, in line with the mandate of Article 19(1) TEU, EU Courts have traditionally confined any deference to the Commission to the *application* of EU competition rules. By contrast, complex economic evaluations as part of their *interpretation* are subject to full review as pure questions of law.

In conclusion, thinking of the judicial scrutiny of complex economic evaluations in EU competition enforcement in abstract or generic terms does not do justice to the nuanced approach of EU Courts. Unsurprisingly, there is more to it than meets the eye.