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SCOPE OF REVIEW: GENERAL PRINCIPLES

A. INTRODUCTION

This chapter of our report discusses on a general level the principles applied by the European Court of Justice and Court of First Instance in deciding the merits of cases brought before them. One should think of this discussion as a preliminary overview, recognizing that the principles described here acquire more concrete meaning in the context of the respective types of actions that the European Union courts entertain, such as actions for annulment, actions for preliminary reference, and damage actions. Our report will ultimately include descriptions of each of the major actions, in which the available grounds of review will be addressed at a more specific level.

Although the discussion in this chapter frequently refers for the sake of convenience to the "European Union," its purview is basically limited to the law of the European Community. The Treaty of Maastricht, which formed the European Union, rests on what are commonly known as "three pillars." The first pillar corresponds to the previously recognized European Community; the second pillar refers to a common foreign and defense policy, and the third pillar establishes cooperation regarding border and crime control. Judicial control of the latter two pillars is quite limited.[1] This chapter focuses on the first pillar, which stems from the E.C. Treaty and is the source of most of the case law of the Court of Justice.

Formally speaking, provisions of the Treaty offer a framework within which judicial review of the merits of an action can proceed. For example, in the case of the action for annulmentCthe most common type of action the Court hearsCArticle 230 of the E.C. Treaty sets forth four grounds of review that may be invoked: (1) lack of competence; (2) infringement of an essential procedural requirement; (3) infringement of the Treaty or any rule of law relating to its application; and (4) misuse of powers. In practice, however, the Article 230 criteria are often applied in other contexts as well.[2]

In any event, the Treaty standards are only a starting point. As is also true of the corresponding section of the Administrative Procedure Act in the United States,[3] the doctrinal inquiries that actually shape debate in a given case have been defined largely by case law. Indeed, "the European Court does not normally state which of the four formal grounds is involved when it

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[1]Henry G. Schermers & Dennis F. Waelbroeck, Judicial Protection in the European Union 6, 8 (6th ed. 2001).

[2]Commission v. Council (European Road Transit Authority), Case 22/70, 1971 E.C.R. 263; see Meroni v. High Authority, Case 9/56, 1958 E.C.R. 133 (same criteria used to adjudicate pleas of illegality, although the treaty provision applicable to those pleas appears narrower).

[3]5 U.S.C. ' 706.

annuls a measure."[4] The creativity of the Court's development of review criteria has been particularly evident in its resort to "general principles of law," a practice that has shaped much of the discourse on judicial review. Some of these principles, derived from Continental legal systems, have now become firmly established, freestanding doctrines in EU practice in their own right, perhaps overshadowing some of the formal grounds.

The topic at hand corresponds roughly to what would in U.S. parlance be termed the "scope of judicial review." However, the concept of deference to administrative authorities, which is central to American thinking, plays a much smaller role in EU jurisprudence. Thus, the inquiry goes primarily to the types of issues that the Court can examine, rather than to the "standards of review" by which those issues are to be resolved. The situation is evolving, however, and recent developments seem to be transforming the system in a manner that makes it resemble the American model more closely.

B. QUESTIONS OF LAW

A wide variety of legal questions can come before the Court of Justice. In annulment actions, these questions can be analyzed as arising under the third clause of Art. 230, which authorizes the Court to review any alleged "infringement of the Treaty or any rule of law relating to its application." Such rules of law may be found in Community acts, subsidiary conventions, binding acts taken by representatives of member states, treaties with third countries, or international law, as well as (non-textually based) "general principles of law."[5]

Observers agree that, in practice, the Court of Justice frequently takes an aggressive and creative approach to legal interpretation. That assertiveness might be considered surprising in light of the civil law tradition of many of the original member states of the Community. In the civil law tradition, the ideological premise that judges should not be lawmakers has historically commanded a good deal of allegiance, at least nominally (though not always faithfully observed in practice).[6] The Court has departed in significant ways from that tradition.[7] The Court's enunciation of "general principles of law" is one of the most conspicuous manifestation of this tendency. Another way in which the Court has diverged from the traditions of the civil law is in its acceptance of case law precedent. The classical view of the civil law was that a case law decision has no binding effect in its own right.[8] Whatever the continuing influence of this proposition in

[4]T.C. Hartley, The Foundations of European Community Law 414 (5th ed. 2003).

[5]Id. at 419.

[6]John Henry Merryman, The Civil Law Tradition 36, 46 (2d ed. 1985).

[7]Charles Koch, *Envisioning a Global Legal Culture*, 25 Mich. J. Int'l L. 1, 26 (2003) (commenting that, although "both the civil law model and the parliamentary model seek protection of democratic law making and implementing functions from an elite judiciary," nevertheless "the ECJ has been quite activist.").

[8]L. Neville Brown & Tom Kennedy, The Court of Justice of the European Community 368-69 (5th ed. 2000);

the national jurisdictions, it seems clear that the Court of Justice expects adherence to its precedents in much the same way as the American Supreme Court does.[9]

A partial explanation for the Community's acceptance of this assertiveness by its judicial branch is the public's recognition of the critical importance to the Union of the Court's lawmaking role. That role not only furthers the generalized social value in ensuring adherence to the rule of law by public and private entities alike, but also promotes uniform application of the rights and obligations prescribed by Community lawCan essential precondition for a common market. In some ways the Court's role in resolving conflicts resembles the U.S. Supreme Court's function of resolving conflicts among lower courts. The European Union, however, has no counterparts to the federal district courts and courts of appeals. Its law is implemented at the local level by national courts. Thus, a relatively large share of the responsibility to maintain the uniformity of Community law falls upon the Court of Justice, in the exercise of its preliminary reference jurisdiction.

1. Interpretation of Positive Law

Scholars have identified several styles or methods of interpretation that the Court of Justices uses in interpreting the Treaty, Community legislation, and other legal provisions.[10] These methods include the literal, the historical, the contextual, and the purposive or teleological. They also indicate that these methods do not differ significantly depending on whether the document being construed is the Treaty or Community legislation.[11] All of these methods should look fairly familiar to the American lawyer, although the following discussion will highlight a few divergences between the U.S. and EU approaches.

It has been said that the Court of Justice "attributes most importance to the text of the law itself," and thus literal interpretation "is and remains the main method of interpretation of Community law."[12] However, textualism has inherent limits in the Court's jurisprudence. One reason is that the Treaty and other Community documents are published in all of the different languages of the Community, and all of these languages are equally authoritative. Thus, multiple translations of a given provision may have different shades of meaning, and this circumstance

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Merryman, supra note 6, at 46-47; Koch, supra note 7, at 56.

[9]See Brown & Kennedy, supra note 8, at 369 (stating that the attitude of the Court of Justice toward precedent is similar to that of the English common law courts). The authors note, however, that the Court of Justice does resemble French courts more than Anglo-American courts in seldom acknowledging that it is departing from or modifying an existing precedent. Id. at 369-72.

[10]Id. at 321-44.

[11]Id. at 321.

[12]Schermers & Waelbroeck, supra note 1, at 11.

discourages judges from relying too heavily on subtle nuances suggested by the language of any one translation.[13] In this situation "the Court has more freedom to resort to one of the other methods of interpretation in order to reach the most appropriate rendering of the text. In general, the Court will rely on the interpretation which allows [it] best to achieve the objectives pursued by the decision in question."[14] Another factor militating against literalism is that the Treaty contains numerous open-ended terms and very few express definitions of these terms.[15]

Where the text is deemed to be ambiguous, the Court of Justice commonly turns to contextual considerations. For example, the preambles and introductory articles of the Treaties are sometimes consulted for guidance as to the purposes of the operative language.[16] The Court has apparently not developed as elaborate an array of canons of construction as American courts, but it does seem to adhere to a few such principles, such as the notions that a provision should be narrowly interpreted if it imposes criminal penalties[17] or if a broad reading would conflict with the Treaty.[18]

However, the role of legislative history in EU cases is small if not nonexistent, especially in interpretation of treaties. Generally speaking, the treaties are negotiated in secret, and negotiators generate no written record of their intentions other than the text of the provision itself. The working papers or *travaux préparatoires* are not released. Indeed, the typical treaty is negotiated after hard bargaining among the member states, and an account by any one negotiator would not be considered strongly probative of the expectations of the other parties to the negotiation. There are, to be sure, documents stemming from ratification debates in the various national parliaments, but they are seldom used.[19] Nor does the Court rely very often on parliamentary debates in construing Community legislation.[20] However, in construing regulations or directives, the Court will examine the Commission's initial proposal, changes made during the

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[13]Brown & Kennedy, supra note 8, at 322-23, 327.

[14]Schermers & Waelbroeck, supra note 1, at 13; see L. Neville Brown, *The Linguistic Regime of the European Communities: Some Problems of Law and Language*, 15 Val. U.L. Rev. 319, 341 (1981) ("In the event of a disparity of texts, [the Court of Justice] looks always behind the verbal symbols to the spirit and intention of the provision in dispute. It also leans in favor, as a general rule, of the more liberal version of variant texts."); Lisbeth Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Régime Linguistique in the Court of Justice of the European Communities*, 62 Nw. U.L. Rev. 701, 719-31 (1967) (discussing the Court's "practice . . . to consider the plurilingual treaty texts merely as a point of departure").

[15]Brown & Kennedy, supra note 8, at 325.

[16]Schermers & Waelbroeck, supra note 1, at 17.

[17]Id. at 16.

[18]Id. at 20.

[19]Brown & Kennedy, supra note 8, at 330-32; Schermers & Waelbroeck, supra note 1, at 16.

[20]Brown & Kennedy, supra note 8, at 332.

deliberative process, etc. (The Court also relies with some frequency on the preamble to a regulation in construing the regulation.[21] That practice, however, seems qualitatively different from other kinds of judicial reliance on legislative or administrative history, because a preamble is officially adopted by the issuing authority, and questions about its trustworthiness should be far less troublesome.)

The Court relies frequently on arguments that put individual Treaty provisions into the context of other provisions as well as the Treaty as a whole, so that the entire document may be read as a well-integrated scheme.[22] Regulations are read in a similar fashion.[23] The Court also draws freely on analogies to the laws of member states as an aid to interpretation. This interpretive method harmonizes with the Court's jurisprudence on "general principles of law," discussed below, although it is analytically distinct.[24]

Finally, the Court is strongly attracted to arguments that allow ambiguities to be resolved in favor of advancing the purposes that underlie the provision in question.[25] Europeans commonly describe this aspect of the Court's jurisprudence of interpretation as "teleological," although it seems very similar to what American lawyers would call a purposive approach.[26] Schermers and Waelbroeck note that "[t]eleological interpretation is generally used for three purposes: either (1) to promote the objective for which the rule of law was made, or (2) to prevent unacceptable consequences to which a literal interpretation might lead, or (3) to fill gaps which would otherwise exist in the legal order."[27] Another term in common use is "*effet utile*," which connotes a pragmatic emphasis: an interpretation that works, or that promotes the purposes of the contested provision (or another provision), is preferred over one that does not.

An illustrative recent example of a teleologically driven decision is *Pfeiffer v. Deutsches Rotes Kreuz*.[28] Ambulance drivers, paramedics, and other members of emergency road crews sued their employer, the German Red Cross, claiming to be entitled to compensation for working overtime. One question in the case was whether an EU directive regulating labor standards applied to these workers. By its terms the directive did not apply "where characteristics peculiar

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[21]Id. at 333.

[22]Id. at 334-36.

[23]Id. at 336-37.

[24]Id. at 337-39.

[25]Id. at 339-43.

[26]See D. Neil MacCormick & Robert S. Summers, Interpretation and Justification, in Interpreting Statutes: A Comparative Study 511, 514, 518-19 (1991).

[27]Schermers & Waelbroeck, supra note 1, at 21.

[28]Cases C-397/01 to C-403/01, 2004 E.C.R. ___.

to . . . activities in the civil protection services inevitably conflict with it." The Court of Justice concluded, however, that this exclusion was inapplicable. It had been adopted to facilitate the operation of essential services in a catastrophe "the gravity and scale of which are exceptional [and which] do not lend themselves to planning as regards the working time of teams of emergency workers." Even though the Red Cross did have to "deal with events which, by definition, are unforeseeable," its operations under normal conditions were "capable of being organised in advance," including the working hours of the staff members.[29] Similarly, although the directive also exempted workers employed in "air, rail, road, sea, inland waterway and lake transport," the incidental "road transport" aspect of the ambulance drivers' jobs did not deprive them of protection. The purpose of this latter exclusion was to accommodate an earlier directive that regulated working time for transportation workers but did not apply to the *Pfeiffer* plaintiffs.[30] A premise of the Court's decision was that, in light of the directive's purpose of protecting the health and safety of workers, "exclusions from its scope . . . must be interpreted restrictively."[31]

The hard question to address is the relative weight that the Court will give to the above methods of interpretation. Opinions vary. As already noted, one treatise argues that literal interpretation "is and remains the main method of interpretation of Community law."[32] According to this view, "[i]n principle, teleological interpretation is of a subsidiary nature."[33] Another treatise, however, indicates that "the dominant approaches of the Court of Justice are the contextual and teleological with increasing resort to the latter."[34] There seems, however, to be general agreement that much may depend on what kind of legal text is involved, even though, in the abstract, the same methods of interpretation apply to all. That is, the fundamental treaties of the Community are regarded as a de facto constitution[35] and are written in spacious terms that plainly invite judicial creativity. On the other hand, where a statutory scheme is detailed, the Court will have relatively little room to construe it narrowly in order to achieve desired policy outcomes; under these circumstances, the Court is more likely to have to reach the issue of whether

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[29]Id. && 55-60.

[30]Id. && 68-72.

[31]Id. && 52-54, 67.

[32]Schermers & Waelbroeck, supra note 1, at 11.

[33]Id. at 21.

[34]Brown & Kennedy, supra note 8, at 324; see also Brown, supra note 14, at 721-22 ("The Court of Justice commonly preferes a teleological or schematic interpretation of a provision of Community Law; the wording, of course, is not ignored, but primary importance is not given to '*les termes*.' The Court looks rather to '*l'objet, l'esprit, la nature'* or *'l'economie*' of the text under scrutiny.").

[35]Koch, supra note 7, at 25 n.104; see Parti Ècologiste "Les Verts" v. European Parliament, Case 294/83, 1986 E.C.R. 1365, & 23 (referring to EEC Treaty as "the basic constitutional charter" of the Community).

the statute, once construed in accordance with its evident meaning, is invalid because of conflict with the Treaty.[36]

One finds in the literature many pronouncements that a teleological approach cannot override the explicit language of the text.[37] Yet it is acknowledged that the Court does occasionally override "plain" meaning. In one case, for example, the Court held that civil servants did not have to resort to an administrative tribunal before appealing to the Court, despite a Staff Regulation that explicitly required exhaustion, because the tribunal had no power to review the decision in question.[38] Apparently, just as in the United States, there are enough contradictory pronouncements in the case law that advocates on both sides of this issue can find plausible precedential support for their positions.

2. General Principles of Law

The European Court has announced and applied a variety of "general principles of law" that have no obvious textual source in the Treaty but that function as a freestanding body of authoritative legal principles. The jurisprudential foundations of this kind of lawmaking have frequently remained obscure. At various times, the Court has explained particular "general principles of law" as being based on various Treaty provisions that arguably contemplate them; or on unwritten norms that supposedly are embedded within the Treaty itself; or on "inspiration" from national legal systems. Realistically, however, as Hartley has observed, "[t]he general principles of law are . . . an independent source of law and there can be little doubt that the Court would have applied them even if none of the Treaty provisions [cited to justify them] had existed."[39] Some of these principles can be seen as efforts to give effect to the "common denominator" of principles that are observed in the respective member states and thus could be expected to prove acceptable to those states. In any event, some legal rules that originally entered the jurisprudence of the Court of Justice as general principles of law have subsequently been codified and now stand on a firmer jurisprudential footing than they did originally.[40]

In light of the Court's propensity to draw "inspiration" from national systems of the Community, its general principles frequently resemble doctrines applied in those systems. The

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[36]Brown & Kennedy, supra note 8, at 329-30.

[37]Schermers & Waelbroeck, supra note 1, at 21.

[38]Von Wüllerstorff und Urbair v. Commission, Case 7/77, 1978 E.C.R. 769, && 6-8, cited in Schermers & Waelbroeck, supra note 1, at 23.

[39]Hartley, supra note 4, at 135.

[40]See, e.g., Treaty Art. 253 (duty to give reasons); Jürgen Schwartze, *Judicial Review of European Administrative Procedure,* 68 L. & Contemp. Prob. 85, 87 n.11 (Wint. 2004) (citing unwritten procedural rights that have been subsequently been recognized in regulations).

borrowing has been sporadic, however, and one should never take for granted that any given doctrine applied at the national level has in fact found its way into Community law. Indeed, it has been argued that, because the Court of Justice has been quite selective about endorsing principles that are widely observed in European legal systems, the term "general principles of *Community* law" might be a preferable term to signify those principles that the Court does recognize.[41] Although this reasoning seems logical, the following discussion adheres to the more conventional phrase "general principles of law."

The basic purpose of the following discussion is to summarize and analyze the main general principles that the Court has recognized to date. The Court has not indicated that these principles constitute a closed set. Thus, new ones may well emerge in the future.

a. Proportionality

The Court of Justice borrowed the doctrine of proportionality from the German constitutional principle *Verhältnismässigkeit.* The issue of whether a provision of Community law complies with this principle turns on "whether the means which it employs are suitable for the purpose of achieving the described objective and whether they do not go beyond what is necessary to achieve it."[42] In other words, the question is whether a Community institution resorted to an extravagant means of achieving its objective. The principle of proportionality has recently been codified; thus, its authority no longer rests exclusively on its status as one of the "general principles of law."[43]

The doctrine has no exact counterpart in U.S. law. It does bear at least some resemblance to a strand of American constitutional law under which the government, in order to survive "strict scrutiny," must demonstrate that the provisions of a statute are "narrowly tailored," or, in other words, that the government could not have achieved the same result using a "less restrictive means."[44] But there is a vital difference: The European concept is at least mildly pejorative. It suggests that the contested decision went overboard in relation to the problem it supposedly was designed to address. In contrast, the American concept is more morally neutral. Its main function is to limit governmental intrusions on certain protected rights, such as the right to free speech or to freedom from discrimination. Thus, when an American court says that a governmental action is not "narrowly tailored," it does not necessarily mean that the action is inherently bad, but only that it makes an unnecessarily broad incursion on the primary protected right.[45] For the same reason,

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[41]Brown & Kennedy, supra note 11, at 349 (emphasis added).

[42]United Kingdom v. Council (Working Time Directive), Case C-84/94, 1996 E.C.R. I-5755.

[43]See Treaty on European Union Art. 5 [3b] ("Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.").

[44]See Brown & Kennedy, supra note 11, at 351 (suggesting this comparison).

[45]To be sure, one could argue that the European concept of proportionality enforces the Community's

the European Court's concept of proportionality differs significantly from the recent developed American line of cases holding that a federal law cannot be enforced against state governments because it lacks "congruence and proportionality" with the constitutional right that it purports to enforce.[46] These cases, too, are basically intended to prevent disproportionate intrusions on state autonomy and do not rest upon any tacit conclusion that the act in question is intrinsically troubling to the judicial conscience.

A closer analog in American law is the administrative law inquiry into whether an agency abused its discretion. That inquiry has been said to turn in part on whether the agency "failed, without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action."[47] However, even this analogy is weakened by the fact that abuse of discretion review usually rests, at least in part, on the agency's failure to *explain* its selection of the more onerous alternative at the time of its action. The agency normally gets a chance to try to rehabilitate its decision by offering a better explanation on remand in light of the court's critique. Proportionality review entails a more assertive judicial role, in which the Court can actually enter judgment on the basis of its own view that the decision under review was excessive in some respect.

A few examples may clarify the operation of the European Court's proportionality doctrine. In *Commission v. United Kingdom*,[48] "[t]he United Kingdom had established the system of import licence to prevent milk from diseased cattle entering the country. The issue of such licences depended upon administrative discretion and therefore created uncertainty for traders. The European Court held that public health could have been equally served if the authorities had obtained the relevant information by means of declarations signed by importers and, if necessary, accompanied by the appropriate certificates."[49] Similarly, in *Mignini SpA v. AIMA*,[50] subsidies for producers of soya beans had been made contingent on an applicant's possession of on-site storage facilities. The Court of Justice ruled that, although inspection of facilities was necessary to prevent fraud, the requirement that those facilities must be on the applicant's premises was unnecessary and could deter participation in the program. Thus, that condition violated the principle of proportionality.[51]

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commitment to free movement of goods and services across national borders, just as the American doctrine of strict scrutiny protects constitutional values in the United States. However, the fact that the Court of Justice borrowed its principle from national legal systems casts doubt on the centrality of this justification for the principle.

[46]Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[47]ABA Section of Administrative Law & Regulatory Practice, A Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 1, 43 (2002).

[48]Case 124/81, 1983 E.C.R. 203.

[49]Robert Thomas, Legitimate Expectations and Proportionality in Administrative Law 82 (2000).

[50]Case 256/90, 1992 E.C.R. I-2651.

[51]Thomas, supra note 49, at 81.

The Court sometimes invokes proportionality in combination with other general principles of law, such as by remarking that a member state should not interfere *unnecessarily* with fundamental rights.[52] In *Bela-Muhle*, the skimmed-milk powder case discussed below as an illustration of the equality principle, the Court argued not only that the challenged regulation operated in a discriminatory fashion (as will be explained shortly), but also that the Council could have achieved its objective in a different manner, by inducing a reduction in the production of skimmed-milk powder. Thus, the regulation also violated the proportionality principle.[53] Similarly, in *Mignini*, discussed in the preceding paragraph, the Court found volations of both proportionality and equality norms. The latter principle was involved because the restriction on soya bean producers had not been applied to subsidies for other industries such as oil producers.

At least some of the time, the Court of Justice has indicated that it will apply the doctrine of proportionality with restraint, so that the disproportional nature of a measure must be "manifestly inappropriate" before the Court will intervene.[54] Thus, the cases already described should be compared with other decisions in which the Court of Justice has declined to find a breach of the principle of proportionality because the Commission, in making policy choices, had not committed a "manifest error or misuse of powers," nor "manifestly exceeded the limits of its discretion."[55]

Even with this deferential standard of review in place, one could question whether judges have the knowledge, expertise, and legitimacy to engage in the kind of policy determinations that the proportionality doctrine requires. Thomas responds to this critique by arguing that the Court, in applying the doctrine, accepts the ends sought by the political branches and questions only the means chosen to advance those ends. "The Court does not examine the expediency of an administrative purpose, but considers whether it could have been satisfactorily obtained by a better-designed and less-onerous measure." In this sense, "[t]he Court does not seek to impose its own set of values on what the administration ought to be doing."[56] One might be skeptical about the coherence of any effort to separate means from ends in this fashion. Nevertheless, insofar as the Court does accept Thomas's conception of proportionality, that limitation can be expected to constrain the judges of the Court in at least some cases.

In a variant on the above uses of the proportionality doctrine, the Court of Justice sometimes uses the doctrine to overturn penalties that have been imposed on individual enterprises

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[52]Wachauf v. Bundesmat Für Ernährung und Forstwirtschaft, Case 5/99, 1989 E.C.R. 2609.

[53]Thomas, supra note 49, at 81.

[54]R. v. Ministry of Agriculture, Fisheries & Food, ex parte Fedesa, Case C-331-88, 1990 E.C.R. I-4023.

[55]Working Time Directive, supra note 42; Germany v. Council (Bananas), Case 208/93, 1994 E.C.R. I-4973.

[56]Thomas, supra note 49, at 83-85.

if it believes that these penalties are disproportionate to the gravity of the individual's offense.[57] It has been argued that this kind of use of the proportionality doctrine is, appropriately, relatively intensive, because the Court's decision is individualized and does not require "an overall assessment of the economic situation."[58]

This latter line of authority is directly comparable to a line of American cases in which reviewing courts will sometimes set aside an administrative sanction as "greatly out of proportion to the magnitude of the violation."[59] To be sure, the U.S. Supreme Court has cautioned that this power should be used sparingly, out of respect for the primacy of the agency in determining the proper size of a penalty.[60] Present research does not make clear the extent, if any, to which the Court of Justice takes a more assertive view than American courts do.

b. Legal certainty, non-retroactivity, and legitimate expectations

The Court of Justice has endorsed a variety of doctrines that recognize circumstances in which private entities have acquired a stake in the status quo that a given Community action cannot fairly displace. The term "legal certainty" is sometimes used to refer to this entire group of doctrines.[61] "This principle posits, within limits of course, that the political institutions may not act unilaterally to disturb settled legal relationships."[62]

i. Retroactivity

The Court has enunciated several doctrines that prohibit or discourage retroactive application of Community acts.[63] More specifically, the principle of legal certainty "has prevented penal statutes having retroactive application and requires that non-penal statutes are generally

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[57]R. v. Intervention Board for Agricultural Produce, ex parte Man, Case 181/84, 1985 E.C.R. 2889 (forfeiture of , 1.67 million deposit was a disproportionate penalty for trader that missed by four hours the application deadline for a license to export sugar); Buitoni v. Fonds d'orientation et de régularisation des marchés agricoles, Case 122/78, 1979 E.C.R. 677 (importer of tomato concentrate who had failed to apply promptly for a refund of a security deposit could not, consistently with principles of proportionality, be required to forfeit the deposit, because failure to import at all, a graver offense, would have been punished just as severely).

[58]Thomas, supra note 49, at 82.

[59]ABA Blackletter Statement, supra note 47, at 43; Excel Corp. v. USDA, 397 F.3d 1285, 1298-99 (10th Cir. 2005).

[60]Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973).

[61]George A. Bermann et al., Cases and Materials on European Union Law 182 (2d ed. 2002 & Supp. 2004).

[62]Id.

[63]Hartley, supra note 4, at 148.

precluded from taking effect from a point of time before their publication except where the purpose of the measure requires otherwise, and the legitimate expectations of those concerned are respected."[64]

The first of these propositions, pertaining to penal measures, is of course directly comparable to the prohibition on ex post facto laws in the U.S. Constitution.[65]. The second proposition is analogous to a balancing test that American courts have adopted in administrative law cases. Under that test, an administrative agency may sometimes adopt a new policy in an adjudicative case and apply it to parties whose actions predated the announcement of the policy, but only if the public purposes that militate in favor of that choice outweigh the unfairness and hardships that would result from such retroactive application.[66] Of course, U.S. law also imposes a variety of other constraints on retroactivity in legislation and administration, which may prove helpful to understanding analogous principles of European Union law.[67]

An illustration of the application of the second principle by the Court of Justice C albeit an illustration in which the objection to retroactive effect failed C is *Amylum v. Council*.[68] In this case the Court of Justice annulled a regulation that imposed quotas and levies on producers of isoglucose, because the Council had failed to consult with Parliament. The Council then engaged in the required consultation and issued a new regulation, making it retroactive to the period that the old regulation would have covered if it had survived. The Court of Justice upheld the new regulation, concluding that its retroactive coverage was not unfair, because the Council's intentions had been readily foreseeable, and was important to the Council's objective of putting sugar and isoglucose producers on an equal plane. This result may be particularly interesting for American lawyers, because such "curative" regulations (which reinstate, with retroactive effect, an earlier rule that had been struck down) have sometimes elicited highly dubious reactions from jurists in the United States.[69]

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[64]Thomas, supra note 49, at 45, citing, respectively, R. v. Kent Kirk, Case 63/83, 1984 E.C.R. 2689, and Firma A. Racke v. Hauptzollamt Mainz, Case 98/78, 1979 E.C.R. 69.

[65]Art. I, ' 9, cl. 3.

[66]SEC v. Chenery Corp., 332 U.S. 194, 201-03 (1947); Consolidated Edison Co. v. FERC, 315 F.3d 316, 323 (D.C. Cir. 2003); Retail, Wholesale & Dep=t Store Clerks Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

[67]See generally Daniel E. Troy, Retroactive Legislation (1998). According to a recently emergent body of cases in the United States, due process precludes the imposition of sanctions on persons who did not have fair notice of a recently adopted administrative policy. See, e.g., Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000); United States v. Chrysler Corp., 158 F.3d 1350 (D.C. Cir. 1998). The foundational case in this line of authority is General Electric Co. v. USEPA, 53 F.3d 1324 (D.C. Cir. 1995).

[68]Case 108/81, 1982 E.C.R. 3107.

[69]See Bowen v. Georgetown University Hospital, 488 U.S. 204, 225 (1988) (Scalia, J., concurring), and the opinion of the court below in the same case, Georgetown Univ. Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987). The Supreme Court majority in *Georgetown* did not squarely address this issue.

Supplementing these substantive safeguards against retroactivity in EU practice is a canon of construction: The Court of Justice has stated that Community legislation and regulations should not be construed as having retroactive effect unless it is clearly intended to have that effect.[70] American law is quite similar.[71]

ii. Legitimate expectations

The Court of Justice has established the principle that the "legitimate expectations" of the individual must be respected in the absence of an overriding public interest.[72] This doctrine is drawn from the German principle called *Vertrauensschutz*, or "protection of trust." As that name suggests, the principle rests primarily on the ideal that trust in the legal order must be respected.[73] It should be noted that a finding that a Community act defeated legitimate expectations does not automatically result in annulment of that act. Rather, it sometimes leads only to relief for the affected individual.[74]

A frequently cited example of the legitimate expectations principle is the decision in *Mulder v. Minister van Laudbouw en Visserij*[75] The applicant was a farmer who was threatened with having to pay a "super-levy" on his milk production in 1984, because he was unable to point to a "reference quantity" of milk that he had produced in 1983. But the reason he had no reference quantity for 1983 was that he had foregone milk production in that year in order to cooperate with a moratorium sponsored by the Community itself. The Court of Justice concluded that he could legitimately have expected to be able to resume milk production without having his participation in the prior program used against him. Another frequently mentioned illustration is the *Staff Salaries* case.[76] The Council, which was responsible for setting salaries for staff members of the Commission, reached a negotiated agreement with the employees for pay levels that were to last

[70]Openbaar Ministerie v. Bout, Case 21/81, 1982 E.C.R. 381, 390; Hartley, supra note 4, at 148.

[71]Landgraf v. USI Film Products, 511 U.S. 244 (1994); *Georgetown University Hospital*, 488 U.S. at 208 (opinion of the Court).

[72]Hartley, supra note 4, at 149.

[73]Thomas, supra note 49, at 44-45.

[74]Brown & Kennedy, supra note 11, at 184. American courts have reached similar conclusions in analogous circumstances. Marrie v. SEC, 374 F.3d 1196 (D.C. Cir. 2004); McDonald v. Watt, 653 F.2d 1035, 1041-46 (5th Cir. 1981).

[75]Case 120/86, 1988 E.C.R. 2321.

[76]Commission v. Council, Case 81/72, 1973 E.C.R. 575.

three years. When the Council departed from that agreement after only nine months, the Court of Justice found that the legitimate expectations of the employees had not been honored.[77]

One commentator asserts that the legitimate expectations doctrine is technically different from the principle of legal certainty (by which he means the retroactivity principle discussed in the preceding subsection). "Legal certainty is an objective value which places substantive limits on Community acts, whereas legitimate expectations arise as a result of administrative conduct and operate only in the context of a specific relationship between an individual, or a specific class of people, and the administration."[78] Nevertheless, the two doctrines plainly overlap. In cases where either might plausibly be invoked, legitimate expectations seems to be more widely applied, perhaps because it is more familiar to the Court and counsel.

The legitimate expectations doctrine has no close analog in U.S. law. American lawyers might notice a resemblance to the law of regulatory takings, which turns in part on whether the government has interfered with a property owner's " reasonable investment-backed expectations."[79] English writers have also discerned an "affinity" with the law of equitable estoppel.[80] Actually, however, as discussed below, the doctrine diverges significantly from the path that a straightforward application of estoppel would suggest.

The Court of Justice has identified a number of limitations that circumscribe the legitimate expectations doctrine, including the following:

First, the expectation must have been *induced* by a Community institution. Expectations that have merely "arisen as a result of the individual's subjective hopes" do not qualify for protection.[81] Thus, in a case arising from the same factual setting as *Mulder*, an applicant was denied relief, because his lack of a reference quantity was attributable not to his participation in an earlier Community program, but instead to his own ill-advised decision to lease his farm to tenants who mismanaged the property.[82] This limitation seems logical, because the fundamental purpose of the legitimate expectations doctrine is to uphold trust in public institutions. However, the constraint does not seem to be a strong one. An applicant can sometimes meet this burden by demonstrating that a Community entity was aware of and acquiesced in the applicant's conduct for a lengthy period, or waited too long to commence enforcement action.[83]

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[77]Brown & Kennedy, supra note 11, at 353-54.

[78]Thomas, supra note 49, at 45-46.

[79]Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[80]Brown & Kennedy, supra note 11, at 355; see Thomas, supra note 49, at 50.

[81]Thomas, supra note 49, at 53.

[82]Kuhn v. Landwirtschaftskammer Weser-Ems, Case C-177/90, 1992 E.C.R. I-35.

[83]Thomas, supra note 49, at 54.

Second, the applicant's expectation must have been reasonable. A change of government policy that a prudent business person would have foreseen is unlikely to qualify.[84]

Third, the claimed frustration of expectations must not have resulted from an effort by the applicant to exploit a weakness in Community policy for his own gain. In *EVGF v. Mackprang*,[85] a grain dealer bought wheat in France with the intention of reselling it to a price support agency in Germany, where prices were more generous because of currency exchange rates. The Commission's action forbidding such transactions was issued while the dealer's grain was already in transit. Nevertheless, his losses resulting from the ban were not compensable, because his expectation of making a profit through speculation was not "legitimate."

Fourth, the doctrine does not protect an expectation that was induced by a public authority if its position was actually beyond the legal power of the authority.[86] This proposition is directly comparable to U.S. law holding that the United States can never, or virtually never, be estopped by the conduct of its agents.[87] The strict position of the Court of Justice may be justified by the rationale that member states, which the Community has limited power to control, should not be able to undermine Community policy by misdescribing it to their citizens. This stance can, however, be contrasted with the more lenient view taken by German and Dutch authorities,[88] as well as by some of the states of the United States, which hold that public entities should be subject to the same kinds of principles of "apparent authority" that would apply to private entities.

Fifth, and crucially, even a reasonable expectation that meets all the foregoing criteria can be overridden by the public interest. Thus, while the legitimate expectations doctrine requires the Court to engage in detailed consideration and balancing of individual and collective interests, the applicant's burden is not easily carried. "It is clear that if the public interest would be undermined by extending protection to the expectation then it must be overridden. . . . The purpose of the review exercised by the European Court is not to substitute its view of the desired public interest for that of the administrator, but to determine whether the disappointment of an expectation was indispensable for the attainment of that objective."[89] For example, in *Comptoir National Technique Agricole SA v. Commission*,[90] the Commission granted a trader an export license for

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[84]Id. at 55.

[85]Case 2/75, 1975 E.C.R. 607.

[86]Thomas, supra note 49, at 56-57 (citing, e.g., Hauptzollamt Krefeld v. Maizena GmbH, Case 5/82, 1982 E.C.R. 4601).

[87]OPM v. Richmond, 496 U.S. 414 (1990).

[88]See Thomas, supra note 49, at 56-57.

[89]Id. at 63.

[90]Case 74/74, 1975 E.C.R. 533.

colza seeds. While the trader's deliveries were in progress, however, the Commission abolished a system of payments that were designed to offset the impact of currency fluctuations. The Court of Justice ruled that the Commission should have adopted transition measures to protect the trader's reasonable expectation that the payments would remain available. On the other hand, in *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*,[91] the Commission imposed a temporary suspension of imports of Chilean apples, making no provision for transition measures to protect traders with goods in transit. The Court ruled that the traders' reasonable expectations had to be overridden, because any transition measures would have undermined the effectiveness of the suspension. In short, a claim based on legitimate expectations "will prevail only if there is a clear case of unreasonable treatment and the administration grossly misjudged the protection of the individual's expectations."[92]

c. Fundamental human rights

The Court of Justice arrived in a somewhat oblique fashion at the proposition that fundamental human rights are among the general principles of law that it can enforce.[93] Apparently, this development had as much to do with the Court's effort to maintain its authority as with idealism. The Court has strongly maintained that Community law supersedes the laws of member states in the event of a conflict C a proposition that is directly analogous to the thrust of the supremacy clause of the U.S. Constitution. During the 1960s, the German courts, while accepting this proposition as a general matter, resisted it insofar as it implied that Community law could infringe on fundamental human rights such as those guaranteed in the *Grundgesetz*. The European Court of Justice finessed this impending rebellion by ruling in *Stauder v. City of Ulm*[94] and subsequent cases that Community law also would recognize fundamental human rights as among the general principles of law that would inform its decisions. This move ultimately achieved the desired effect. After a period of controversy as to who would have the final say in determining the meaning of these rights, the German Constitutional Court announced in 1986 that it would leave decisions about whether Community actions violated fundamental human rights to the European Court.[95]

Ironically, however, Europe does have a "Supreme Court-level" judicial body that can exercise leadership on human rights issues: the European Court of Human Rights (ECHR), which is based in Strasbourg and is charged with implementing the European Convention on Human

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[91]Case 112/80, 1981 E.C.R. 1095.

[92]Thomas, supra note 49, at 46.

[93]Brown & Kennedy, supra note 11, at 357-60; Hartley, supra note 4, at 135-38.

[94]Case 29/69, 1969 ECR 419.

[95]Brown & Kennedy, supra note 11, at 359; Hartley, supra note 4, at 142.

Rights. The Court of Justice does sometimes draw on ECHR case law,[96] but it also draws "inspiration" from the convention on its own.[97] Because the Court of Justice is not formally charged with responsibility to enforce the convention, its reliance on that document occurs on an informal level.

When it using its own judgment to determine the scope of human rights, the Court of Justice draws "inspiration" from the legal systems of member states, as well as from international treaties, although the Court does not consider itself bound by any of these sources of authority.[98] The human rights that the Court of Justice determines are within the general principles of Community law are protected against infringement by actions of Community institutions. Member states are also prohibited from infringing these rights, but the prohibition extends only to matters that fall within the scope of Community law, not to matters that would otherwise be left to the individual states.[99]

In practice, the Court has invoked the concept of fundamental human rights most often as a basis for incorporating procedural norms into the administrative process.[100] This line of argument may not be very different from simply declaring the procedural right to be one of the "general principles of law." Substantive invocations of fundamental human rights tend to be confined to isolated, minor cases. The Court generally does not use the concept to invalidate significant Community legislationCalthough parties do argue for such a result and may thereby induce the Court to decide a case their way on other grounds.

d. Equality

"Several provisions of the EC Treaty, and many provisions of Community legislation, prohibit specific forms of discrimination. . . . However, the Court of Justice has taken the view that, beyond those specific provisions, the guarantee of equal treatment or the prohibition of discrimination, is a general principle of law that must be observed in the whole field of Community law."[101]

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[96]See Connolly v. Commission, Case C-274/99 P, 2001 E.C.R. I-01611, && 37-39 (upholding freedom of speech for EU officials on the basis of ECHR case law).

[97]See Mannesmannröhren-Werke AG v. Commission, Case T-112/98, 2001 E.C.R. II-729, && 59-60 (recognizing qualified right not to answer questions that would admit to liability).

[98]Hartley, supra note 4, at 138-39.

[99]Id. at 146.

[100]See Schwartze, supra note 40, at 88-89 (citing several such applications of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on December 7, 2000).

[101]Brown & Kennedy, supra note 11, at 352-53, citing Frilli v. Belgium, Case 1/72, 1972 E.C.R. 457.

For example, in *Bela-Muhle Josef Bergmann KG v. Grows-Farm GmbH*,[102] a Council regulation sought to reduce surplus stocks of skimmed-milk powder by requiring animal feed producers to purchase substantial quantities of the powder at high prices. The Court of Justice found that the regulation was fatally discriminatory, because the measure unnecessarily imposed a disproportionate economic burden on those producers, as compared with other agricultural sectors. On the whole, however, the Court of Justice does not appear to have made broad use of the equality principle C at least in comparison with the multitude of equal protection cases in U.S. law. It is, therefore, difficult to generalize about the scope of this principle within the European Community.

C. QUESTIONS OF FACT AND DISCRETION

1. The Emergence of Judicial Restraint

The Treaty provisions that authorize judicial review, such as Art. 230, do not list errors of factfinding as a basis for review. This does not mean that challengers cannot rely on such errors as a basis for contesting administrative decisions. Rather, it means that they will have to show that the error resulted in a violation of law or a misuse of powers.[103] American lawyers will find this reasoning relatively understandable if they think about the role of factual controversies in American constitutional law, as opposed to garden-variety administrative law cases.

Formally speaking, there is no rule of judicial deference on fact issues. The Court can make its own factual determinations and is not limited to reviewing a legislative or administrative record. Interestingly, however, the Court of Justice has developed a policy of "restraint" C actually self-restraint C as a prudential matter, causing its jurisprudence to shift in the direction of American-style thinking. This came about because in a series of cases the Court found itself faced with a number of propositions relevant to legality that were arguably "factual," but that were actually what would in U.S. terminology be called "legislative facts" or even "ultimate facts." That is to say, they were characterizations of reality that entailed a strong element of policy determination, such as "economic difficulties" or "serious disturbances" to a market.[104] If the Court of Justice were to second-guess the Council or Commission on such matters, it would in effect be making policy judgments on matters as to which the political institutions have greater expertise and political legitimacy.

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[102]Case 114/76, 1977 E.C.R. 1211.

[103]Koen Lenaerts & Dirk Arts, Procedural Law of the European Union 197 (Robert Bray ed. 1999); Hartley, supra note 4, at 426, 429.

[104]Hartley, supra note 4, at 426.

Thus, after a period of time in the 1960s in which the Court of Justice actually pressed its factfinding powers to the limits of its logic, by exercising independent judgment on matters such as these,[105] the Court decided that such supersession of the political institutions of the Community would not do. The Court's decisions indicated that it would not displace the Commission's findings on such policy-laden fact issues unless they were clearly wrong.[106] In this indirect fashion, the Court in substance worked its way toward a regime in which its review of policy determinations, and of factual findings that are incident to those determinations, would be less intense than its review of recognizably "legal" issues. A common formulation was that "even though a discretion has been conferred on the Commission in the matter at issue, the Court is required to verify whether or not it . . . has committed manifest errors in its assessment of the facts. . . ."[107] The "manifest error" doctrine seemed to confirm that the judicial branch of the Community would engage in little or no second-guessing of factual and policy determinations as a basis for discerning supposed errors of law.

A curious aspect of this institutional history is that Art. 33 of the ECSC Treaty actually did embody a deferential review posture like the one under discussion:

> The Court may not . . . examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

No such formula was included in the EC Treaty. As observers have noted, however, the case law developments just mentioned effectively brought the Court of Justice around to approximately the same point as Art. 33 had prescribed.[108]

2. A New Era of Intrusive Review?

The above understanding of the "manifest error" standard may still be the law in many areas of Community judicial review practice. At least in the area of competition law, however, the pendulum has recently swung sharply in the direction of more active judicial review—indeed, review that is not unlike the kind of "hard look" review that American courts routinely provide in

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[105]Id. at 427-28.

[106]Id. at 428-29, citing, e.g., Westzucker GmbH v. Einfuhr und Vorratsstelle fur Zücker, Case 57/72, 1973 E.C.R. 321; Lenaerts & Arts, supra note 103, at 198.

[107]EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commission, Case 187/85, 1988 E.C.R. 4155, & 6.

[108]Bermann, supra note 61, at 171; Hartley, supra note 4, at 429.

regulatory cases. This development is crystalized in *Commission v. Tetra Laval BV*,[109] decided by the Court of Justice in 2005. The evolving law in this area is too new to have been discussed in the treatises, but it has been the subject of much discussion among practitioners. An extended analysis of *Tetra Laval* is therefore in order.[110]

The background for this development is a trio of merger cases decided by the Court of First Instance (CFI) in 2002. (As discussed more fully below, the CFI now serves as the point of entry for judicial review of the Commission's merger decisions and as the primary reviewer of factual controversies in such judicial review proceedings.) The *Tetra Laval* case itself concerned a proposed merger between two producers of containers for liquid food products such as milk and juices. Tetra was a dominant firm in the market for cartons. It planned to acquire Sidel, a significant but not dominant firm that manufactured "stretch blow moulding" machines, which are used to produce plastic jugs. The Commission prohibited the merger, contending that Tetra's dominant position in the carton market would enable it to engage in "leveraging," by tying sales of plastics packaging equipment to sales of cartons, and also by pressuring its customers that might be tempted to switch to plastics to choose Sidel products, so that Sidel would be able to acquire a dominant position in the plastic containers market. In addition, the Commission thought that the merger would fortify Tetra's dominance in the cartons market. As a matter of competition law, this case was a significant test of the legality of a "conglomerate merger."

Tetra initiated an annulment action, and in 2002 CFI invalidated the Commission's order, concluding that the Commission had committed "a manifest error of assessment in prohibiting the modified merger on the basis of the evidence relied on."[111] At around the same time, the CFI also handed down two similar decisions in merger cases. In *Airtours*, the court ruled that the Commission's opposition to a merger among tour operators "is vitiated by a series of errors of assessment as to [fundamental] factors."[112] And in *Schneider Electric*, which concerned a merger involving distributors of electrical equipment, the CFI discerned a variety of analytical errors that "deprive[d] of probative value the economic assessment of the impact of the concentration which forms the basis for the [Commission's] declaration of incompatibility."[113] These three decisions in 2002 were the first cases in which the CFI had annulled Commission prohibitions in merger cases under the merger control regulation. Thus, the Commission's appeal in the *Tetra Laval* proceeding effectively became a major test of the viability of the new level of intrusiveness that the CFI had begun to display.

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[109]Case C-12/03, 2005 E.C.R. ____.

[110]For a readable summary of this important case, in greater detail than is possible here, see Ivo Van Bael & Jean-François Bellis, *Court of Justice upholds Tetra Laval/Sidel judgment*, European Competition Law, April 2005, at 1.

[111]Case T-5/02, 2002 E.C.R. II-4381, & 366.

[112]Airtours Plc v. Commission, Case T-342/99, 2002 E.C.R. II-2585, & 294.

[113]Schneider Electric SA v. Commission, Case T-310/01, 2002 E.C.R. II-4071, & 411.

In its decision, the Court of Justice made a variety of pronouncements that favored each side in the dispute, but in the last analysis it upheld the CFI's approach. The Court reaffirmed the applicability of the "manifest error" standard of review in merger cases, acknowledging that the provisions of the Regulation on competition law "confer on the Commission a certain discretion, especially with respect to assessments of an economic nature."[114] Nevertheless, the Court continued, "the Community Courts [must not only] establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."[115] In this instance, the Court said, the CFI had performed its functions properly, because it had "explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence."[116]

A look at the way in which the Court applied these broadly stated propositions to particular areas in dispute provides further perspective. Tetra had presented two affirmative defenses to negate the Commission's position that the merger would result in leveraging. It argued that such anticompetitive tendencies were not likely to be forthcoming because (a) the leveraging tactics that the Commission feared, such as loyalty rebates and predatory pricing, were already illegal under Art. 82 of the Treaty, and (b) Tetra had entered into certain "behavioral commitments"Cnamely, to keep its Tetra and Sidel operations separate for ten years and to refrain from making joint offers for both operations' products. The CFI had rejected both defenses. The Court of Justice sided with the Commission on the former issue. Although the Commission did have to consider the likelihood of leveraging, including various incentives and disincentives to engage in it,[117] the CFI had been wrong to demand a detailed explication of "the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue."[118] To require the Commission to conduct such an inquiry for each proposed merger would call for too much speculation and would defeat the protective purpose of the Regulation.[119]

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[114]*Tetra Laval*, & 38 (citing France v. Commission (Kali & Salz), Joined Cases C-68/94 and C-30/95, 1998 E.C.R. I-1375, && 223-24).

[115]Id. & 39.

[116]Id. & 48.

[117]Id. & 74.

[118]Id. & 56 (quoting & 159 of the CFI's decision below).

[119]Id. && 75-78.

Regarding the second affirmative defense, however, the Court of Justice sided with the CFI. The Commission had been too quick to discount the possible significance of Tetra's behavioral commitments. Indeed, the Court said, the agency had basically refused on principle to take them seriously.[120]

The juxtaposition of these two holdings highlights some uncertainties about the Court's approval of the CFI's newfound intrusive review. The Court's distinction between the two Commission rulings seems thin indeed. The Court seems to be saying that a failure to give *any* consideration to an affirmative defense is a "manifest error of assessment," but detailed analysis is not required. But the two passages in the Commission's decision are not actually very different. In each instance, the Commission briefly alluded to Tetra's argument; such brevity was sufficient for purposes of one defense, but not for the other. Perhaps they can be reconciled on the basis of competition lawCi.e., as an indication that the Court regards the illegality defense as inherently weak under antitrust principles, so that the Commission need not say very much in order to reject it. Nevertheless, it seems fair to conclude that, although the Court has certainly endorsed the general thrust of the CFI's intrusive review of the facts and reasoning underlying the Commission's merger decisions (and potentially other kinds of cases, although that has not happened yet), the Commission's exposure to reversal in any specific situation may remain difficult to predict for a long time to come.

After the CFI's decisions in 2002, it was widely reported that the President of the Commission had ordered his agency to upgrade the quality of its written decisions in order to try to avoid similar embarrassments in the future. It seems likely that the CFI's substantial vindication in the Court of JusticeCat least in its overall approach, though not in all applications of itCwill fortify that intention. How much analysis will prove to be enough is bound to remain uncertain, however, both because of the current newness of this jurisprudence and because of the inherent ambiguities in the manifest error test. Opportunities for credible challenges to future Commission decisions on factual grounds thus seem plentiful, although one must assume that the Court will at some point disavow the most sweeping implications of the opinion and revert to deference.

3. Review by the Court of Justice of CFI Fact Findings

Because of a jurisdictional limitation, the Court of Justice was not in a good position to speak at much length in *Tetra Laval* about the manner in which the CFI should perform its factual review function. Under the Treaty, the Court of Justice may review CFI decisions only for errors of law.[121] In that respect, the Court's function seems similar to that of the courts of cassation or revision in several continental nations. Indeed, in several passages in *Tetra Laval*, the Court of Justice rejected various of the Commission's assaults on the CFI's annulment decision, declaring

[120]Id. && 85-89.

[121]Treaty Art. 225; John Deere v. Commission, Case C-7/95, 1998 E.C.R. I-3111, && 21-22.

that it would not consider attacks on the CFI's evaluation of the evidence.[122] Thus, the Court of Justice made clear that the probing of the factual premises of Commission merger decisions is basically a job for the CFI, not itself.

This division of responsibility is somewhat analogous to the American practice. The Supreme Court seldom grants certiorari to review the factual controversies presented on judicial review of agency action, because "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."[123] However, that analogy is imperfect, because the Supreme Court's avoidance of reviewing the factual underpinnings of agency action is basically a matter of self-restraint. The Court does not regard these matters as beyond its jurisdiction, and, indeed, it does occasionally take up such controversies. A closer analogy in American law is the present arrangement for review of veterans benefit claims, in which the Court of Veterans Appeals reviews decisions of the Department of Veterans Appeals on all controversies, including substantial evidence review of fact findings, and further appeal to the Federal Circuit is limited to legal issues.[124]

One should not conclude, however, that the Court of Justice intends to remain aloof from controversies that have a substantial factual componentCwhat in American parlance are sometimes called "mixed questions of law and fact." In *Tetra Laval*, the Court responded to several such controversies by initially considering objections that could be characterized as implicating an issue of law. For example, the Court rejected the Commission's claim that Tetra's dominance in the cartons market was sufficient by itself to show that the elimination of Sidel as a potential competitor would strengthen Tetra's position in that market. Instead, the Court said, the CFI had properly concluded that the risks of such increased dominance must be determined in light of evidence about the probable reactions of Tetra's competitors.[125] Only then did the Court add that the CFI's assessment of the evidence regarding the effect of the merger on carton prices was not subject to review by the Court of Justice.[126] Similarly, the Court indicated in *Tetra Laval* that its limited review function does not keep it from satisfying itself that the CFI, in assessing the facts, took full account of the Commission's arguments[127] and applied the correct standard of review.[128]

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[122]*Tetra Laval*, && 47-48, 104, 131.

[123]Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[124]38 U.S.C. ' 7292.

[125]*Tetra Laval*, && 125-30.

[126]Id. && 131-32.

[127]Id. & 102.

[128]Id. && 131-32.

American lawyers know from their own domestic experience that the dividing line between law and fact can be highly malleable.[129] Through imaginative use of the ambiguities inherent in that distinction, a court can often decide the issues that it wants to resolve (treating them as "legal") , while also avoiding issues about which it prefers not to take direct responsibility (treating them as "factual"). To judge from *Tetra Laval*, the Court of Justice is well aware of the leeway available to it in this regard.

C. QUESTIONS OF PROCEDURE

A decision by the European Commission, like an action by an American administrative agency, can be challenged and invalidated for procedural error. The Court of Justice enforces procedural norms derived from various sources. Some are codified in the Treaty itself, such as the duty to provide reasons for an administrative decision.[130] A claim of procedural error can also be based on the Commission's Rules of Procedure.[131] Indeed, the claim does not necessarily have to rest on positive law at all. In *Transocean Marine Paint Ass'n v. Commission*,[132] the Court annulled an action because of the Commission's failure to allow the addressee of the action to be heard in opposition to it. The right to be heard was considered to be among the "general principles of law." The Court reached this conclusion by borrowing from the English principle of natural justice, which is functionally comparable to the American concept of due process.

A possible divergence from American practice can be seen in the language of Art. 230, which authorizes the Court to grant annulment if the Commission has infringed "an essential procedural requirement." Lenaerts and Arts have read this language to imply that the Court will distinguish between essential and non-essential requirements on a categorical basis, i.e., in terms of whether the failure to follow the procedure in question would *in general* be important to the fairness of the proceeding: "An essential procedural requirement is a procedural rule intended to ensure that measures are formulated with due care, compliance with which may influence the content of the measure; essential procedural requirements enable the legality of an act to be reviewed or may express a fundamental institutional rule."[133] Hartley suggests, however, that in practice the Court's inquiry is more contextual than this. He notes that in the *Tariff Preferences* case[134] "the Court held that failure to refer to a precise provision of the Treaty is not necessarily an

[129]See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 23-29 (1985).

[130]E.C. Treaty Art. 253.

[131]United Kingdom v. Council, Case 68/86, 1988 E.C.R. 855 (adoption of a measure without a hearing, over a member state's objection, resulted in annulment, because a Rule of Procedure required unanimity).

[132]Case 17/74, 1974 E.C.R. 1063.

[133]Lenaerts & Arts, supra note 103, at 189.

[134]Commission v. Council, Case 45/86, 1987 E.C.R. 1493.

infringement of an essential procedural requirement if it is possible to determine from other parts of the measure what its legal basis is. Where, however, the parties and the Council would otherwise be uncertain as to its precise legal basis, an explicit reference is . . . 'indispensable.'"[135] Schwartze appears to agree with this contextual approach and cites considerable case authority to support it. He generalizes that "[w]hether an infringement is essential or unessential depends on the impact that failure to respect the requirements has on the ultimate administrative outcome or on individual rights."[136] This amounts to saying that the word "essential" in Art. 230 really means "material." So construed, the qualifier seems analogous to the American principle of harmless error.

In his recent article on judicial review of European administrative procedure, Schwartze also provides a catalogue of the various "rights of defense" that the Court of Justice has recognized, including the right to be heard, the right of access to information in the Commission's files, the right to a statement of reasons for administrative action, the right to receive a decision within a reasonable time, and a limited attorney-client privilege.[137] This chapter will not review these procedural requirements in detail, as they will be examined in detail in other reports in the Section's EU project.

The Commission's obligation to explain its decision warrants further comment, however, because of its distinctive relationship to the process of judicial review. Findings and reasons are essential if the Court is to perform its function of determining whether the Commission infringed any rule of law or misused its powers.[138] This is not to say that the explanation must be expressed in full at the time of the challenged action. The prohibition in American practice on judicial consideration of "post hoc rationalizations" is applied less firmly in the Court of Justice. Because judicial deference to the administrative agency plays a smaller role in European practice, the Court of Justice is not categorically prohibited from relying on counsel's explanations or from reading between the lines of a Commission decision. Nevertheless, the basic reasons for a decision must be spelled out in the Commission's own opinion.[139]

As in the instance of factual issues, the Court of First Instance has been particularly aggressive in enforcing procedural rights such as the reasons requirement, the right to be heard, and the right of access to information. This assertiveness is important from a practice standpoint.

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[135]Hartley, *supra* note 4, at 417.

[136]Schwartze, supra note 40, at 97-98 & nn. 63-65.

[137]Id. at 91-94.

[138]Société Francaise des Biscuits Delacre SA v. Commission, Case 350/88, 1990 E.C.R. I-395, & 15; Schwartze, supra note 40, at 93.

[139]Michel v. Parliament, Case 195/80, 1981 E.C.R. 2861, & 22 ("a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court"); see Italy v. Commission, Cases 15/98 and 105/99, 2000 E.C.R. I-8855, & 65.

A case may be easier to win in the CFI on procedure than on substance. The above discussion of *Tetra Laval* illustrates the critical importance of Commission findings. Another illustration of this point occurred in *Schneider Electric*, one of the other cases in 2002 in which the CFI rejected a Commission merger decision. An important factor in that case was the CFI's determination that the Commission had not given Schneider an adequate disclosure of its position and an adequate opportunity to put on a defense.[140]

D. MISUSE OF POWERS

The concept of "misuse of powers" is derived from the French concept of *détournement de pouvoir*. It refers to "the exercise of a power for a reason other than that for which it was granted."[141] It is considered "subjective" because it turns on the actual intentions of the authority that exercised the power C although these intentions are commonly established through circumstantial evidence rather than overt declarations by the authority.[142]

It should be apparent to American readers that misuse of powers is, roughly speaking, a counterpart to the concept of "abuse of discretion" in U.S. administrative law. Indeed, one object of attention in American practice is whether an agency acted on the basis of "relevant factors."[143] However, the two doctrines diverge insofar as U.S. law focuses in almost all cases on the agency's *stated* reasons for taking action. These reasons are accepted at face value unless the challenger makes a "strong showing of bad faith or improper behavior"[144]Ca burden that is almost never carried or even attempted. Thus, the American abuse of discretion test bears a closer resemblance to the EU concept of proportionality, discussed above, because proportionality is directed at the objective discrepancy between what an authority purports to be trying to achieve and what it actually did, rather than at allegedly undisclosed motives.[145] But even that analogy is imperfect, because, as noted above, American-style abuse of discretion review turns on the agency's *contemporaneously stated* reasoning, whereas proportionality review in the Court of Justice is not similarly confined.

Hartley notes that the Court of Justice will not find a misuse of powers if the authority had an incorrect purpose but would inevitably have taken the same action if pursuing the correct purpose.[146] Overall, he reports, misuse of powers "is only rarely established in practice."[147] The

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[140]Schneider Electric SA v. Commission, Case T-310/01, 2002 E.C.R. II-4071, && 453-62.

[141]Hartley, supra note 4, at 420.

[142]Id. at 420-21.

[143]Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[144]Id. at 420.

[145]See Hartley, supra note 4, at 421 (contrasting proportionality with misuse of powers).

[146]Id. at 422, citing Fédéchar v. High Authority, Case 8/55, 1956 E.C.R. 292.

wide applicability of other grounds of review, as discussed above, may help to account for this fact.

[147]Id. at 420.