JUDICIAL SCRUTINY OF MERGER DECISIONS IN THE EU, UK AND GERMANY

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Abstract The appropriate role of the courts in controlling the discretion of merger authorities has become one of the key issues in European merger law and policy in recent years. This article investigates judicial review of merger decisions, taking a comparative approach by examining cases from the EU, UK and Germany. We observe an apparent increase in the willingness of the EU and UK courts to scrutinize merger decisions, and a long-standing tradition of close scrutiny in Germany. In respect of the EU and UK, we consider agency theory offers a convincing explanation—that increased scrutiny is explained by the need to enhance the credibility of merger policy. In Germany, the constitutional basis of judicial review differs significantly, and the relatively close scrutiny exercised by the court is better explained by the very different constitutional context.

I. INTRODUCTION

Courts are often left out of institutional analysis. This is despite the fact that judicial decisions may have profound consequences for the way in which agencies exercise their powers.¹ Judicial review and the limits of the court's jurisdiction are matters for the court.² Moreover, the way in which the court exercises its supervisory jurisdiction, and the degree to which the court defers to the public body under scrutiny, is highly dependent upon context (the nature of the power, the rights affected by the decision, the type of error alleged to

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¹ A decision over the appropriate standard of proof which an agency must satisfy, for example, has consequences not merely for the decisional practice of the agency in question, but also the cases it selects, and its overall deployment of resources. A higher standard of proof implies more resources, and perhaps fewer cases.

² In the EU context, this has been termed 'Kompetenz-Kompetenz', see J Weiler and U Haltern, 'The Autonomy of the Community Legal Order—Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 41, 1.

have been made, and so on). For the purposes of this article, two contextual factors are of particular significance: the *legitimacy* and *expertise* of the court relative to the decision-maker. We explore these questions throughout, and this article has wider significance in terms of the judicial supervision of independent expert agencies.

The appropriate role of the courts in controlling the discretion of merger authorities has become one of the key issues in European merger law and policy in recent years. This article investigates judicial review of merger decisions, taking a comparative approach by examining cases from the EU,³ UK and Germany. We observe an apparent increase in the willingness of the EU and UK courts to scrutinize the substance of merger decisions. At first glance, this is a surprising observation. The principles underpinning merger law and practice are increasingly drawn from economics (the so-called ‘effects-based’ approach) which, in turn, requires increasingly demanding levels of expertise and specialization on the part of the competition agency. Given this, it would be reasonable to expect more, not less, deference being shown to agencies by reviewing courts. Exploring this apparent paradox is the central motivation for this article.

We argue that what we observe for the EU and UK is consistent with an agency perspective of judicial decision-making, whereby the court is focused upon the control of agency discretion in order to promote credible decision-making on the part of the agency. While having very different foundations in both theory and law, through judicial review the courts in these two jurisdictions attempt to strike a balance between agency autonomy on the one hand, and the need for credible decision-making, on the other. We contrast the position with Germany where there is a tradition of the courts exercising a high level of supervision over administrative agencies, especially in the merger area.

This article is organized as follows. In section II we set out the theoretical foundations of the article and our central hypothesis. Section III explains and compares the institutional context for merger control in each jurisdiction, and in particular the role of the reviewing courts. Given our theory, we think it essential to understand the constitutional context for judicial review in each country, which varies considerably, as we show. Section IV contains our comparative case law analysis.⁴ As a preliminary to our comparative analysis, we set out the different ways in which the reviewing court controls agency decision-making. The nature and extent of judicial review varies according to the nature of the question being addressed by the agency—be they questions of law, fact or decisions involving the exercise of discretion. Section V concludes.

³ We refer to the EU throughout (rather than the EC).

⁴ Hitherto there have been few genuine attempts to consider competition law in comparative perspective (rather than simply different chapters describing different national regimes). One exception is D Gerber, ‘Comparative Antitrust Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, Oxford, 2007).

II. THE COURTS, AGENCY THEORY AND CREDIBILITY

We argue that the increased scrutiny exercised by the respective courts in the EU and UK is motivated by a perceived need on the part of the courts to enhance the credibility of merger control. We utilize principal-agent theory to describe the role of the court in this regard.⁵

First let us consider why delegation to an agency has occurred. Since merger decisions involve complex legal and economic analyses, delegation to an expert body is seen as functional from the principal's (legislature's) perspective; it neither has the resources nor the knowledge to implement the policy.⁶ Another key motivation for delegation to an independent agency is the need in certain policy areas to make credible, long term policy commitments. In the field of mergers, functional independence from the principal is viewed as being of crucial importance, with a high level of autonomy given to competition agencies, and few *ex post* controls.⁷ There is a general acceptance, and a move over time, to more transparent processes and decision-making based on sound economic principles, giving market players appropriate signals and incentives in respect to efficiency enhancing transactions.⁸

There are a number of risks to credibility. First, there are agency risks. Errors may result from a lack of resources and expertise. Rent-seeking behaviour on the part of firms may result in capture. Secondly, there are risks associated with the principal, due to an inherent problem in the political process of prioritizing short- over long-run policy preferences.⁹ Independence (or autonomy) of the agency will address the second type of risk. An increase in agency autonomy, however, brings with it the greater potential for shirking or

⁵ Principal-agent models have been adapted and applied by political scientists to the problems of delegation. They are used to identify and illuminate the phenomena of hidden information and hidden action with the hope that, in so doing, it will become possible to design mechanisms of control which will better align the actions of the delegatee (the agent) with the preferences of the delegator (the principal). For a detailed exposition see: R Elgie, 'The Politics of the European Central Bank: Principal Agent Theory and the Democratic Deficit' (2002) 9 *Journal of European Public Policy* 2, 186; M Thatcher and A Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1; M Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25 *West European Politics* 1, 125.

⁶ M Shapiro, 'Judicial Delegation Doctrines: the US, Britain and France' (2002) 25 *West European Politics* 1, 173, 175.

⁷ For a discussion in a different context see: G Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 2, 273; 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance' (2002) 2 *European Union Politics* 1, 103.

⁸ For a discussion in the context of antitrust law see S Breyer, 'Economic Reasoning and Judicial Review' (2009) 119 *The Economic Journal* F123-F135.

⁹ For example, at the EU level, delegation of merger review to the EU Commission has been explained as a method for avoiding strategic action on the part of Member States in promoting 'national champions' (for a discussion see M Harker, 'Cross-border Mergers in the EU: the Commission versus the Member States' (2007) 3 *European Competition Journal* 2, 503).

slippage on the part of the agency because it is likely to be granted more discretion and be subject to weaker *ex post* controls by the principal.¹⁰

Within this framework, how should we conceive of judicial review?¹¹ The courts may play an important role in these regards, both controlling discretionary powers and ensuring that decisions are made in a way consistent with the legislature's intentions.¹² The principal-agent framework is, however, too simplistic given the doctrines of institutional balance and separation of powers which inform the relationship between the legislature, the executive, and the courts. As Shapiro points out, in contrast to the administrative agency, the court is not an agent in the sense of being either normatively or empirically subordinated to the principal.¹³ From the normative perspective, within the constitutional traditions of Western democracies based on notions of the rule of law and the independence of the judiciary, the courts benefit from sources of legitimacy distinct from those of the legislature.¹⁴ Where the court's role is to ensure that powers are exercised in the manner intended by the legislature (as in the UK), courts can more appropriately be characterized as acting on behalf of the principal, whereas when the reviewing function stems more from ensuring that core constitutional precepts are followed (as in Germany), the linkage between the reviewing function and legislative intent becomes weaker.

So, credibility may require intense judicial scrutiny of expert decisions, especially where the agency is otherwise subject to weak *ex post* control. Intervention by the court, however, may increase the potential for error, thereby militating against the credibility of the policy, and undermining the very rationale for delegating in the first place; *in extremis* the court may simply replace agency discretion with judicial discretion.

The exercise of judicial review brings to the fore the question of the relative legitimacy of the court and the authority under review. There are two possible sources of legitimacy. There is a distinction between a normativist perspective—the view that judicial review is primarily concerned with placing legal limits on governmental power—and functionalism—a broader conception of judicial review as a legal means for promoting and facilitating 'good government'.¹⁵ According to the normativist position, the appropriate level of

¹⁰ Shapiro (n 6) 82.

¹¹ With some notable exceptions, few attempts have been made to analyse the role of the court in controlling agencies from an agency theory perspective. For an example see MC Tolley, 'Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective' (2003) 31 *The Policy Studies Journal* 3, 421.

¹² That said, given the inherent complexity in implementing the policy, there are inevitably significant elements of uncertainty around the nature of the commitments made (A Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 *Western European Politics* 1 77, 86).

¹³ Shapiro (n 6) 175.

¹⁴ *ibid.*

¹⁵ For a review of the various different approaches see TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 6 *Cambridge Law Journal* 1, 87. For the functionalist perspective see, in particular, HW Arthurs,

scrutiny should be determined by the political legitimacy of judges *vis-à-vis* other decision-makers. This would mean *ceteris paribus* that the greater is the claim to democratic legitimacy of the agent, the greater will be the deference shown to it by the court. On the other hand, the functionalist perspective sees the appropriate degree of intensity as dependent on the institutional capacity of judges (ie, their relative expertise *vis-à-vis* the agent).¹⁶

Following the functional approach one would expect judicial deference to increase with the expertise of the agent. As an example of the latter perspective, Shapiro posits:

The more obvious it is that the judicial reviewer is second-guessing the administrative agency, and the more obvious it is that the guesses concern matters about which the agency knows far more than the judicial reviewer, the more the favourable legitimacy of the court is depleted. In the case of specialist tribunals, however, the expertise of the court is likely to be close to that of the administrative agency.¹⁷

Simple narratives of judicial deference do not account readily for such factors as the availability of other *ex post* mechanisms of control and the importance of credible policy implementation. The court increasing intensity of review according to the distance between the agent and the principal (the 'democratic deficit') may be explicable from a normativist perspective, but a different (perhaps opposite) result would follow from a functionalist one. Both perspectives require some form of oversight to prevent errors and perhaps agency escape. Furthermore, where the court exercising the reviewing function is specialist in nature, less deference is required, from both perspectives.

The following points emerge. Delegation to an agency can be an effective mechanism for making a long-term, credible policy commitment. The greater is the credibility problem the greater will be the autonomy ceded to the agency, and the weaker will be mechanisms of *ex post* control. The courts should not be seen, however, simply as surrogates of the principal, as this characterization of the judicial role seriously underplays the autonomy enjoyed by the courts resulting from both constitutional principle and institutional separation. While the reviewing function can be characterized as an *ex post* control mechanism, it is not equivalent to one which is controlled by the principal. As a consequence, there is a danger of the principal's intentions being subverted. This danger is particularly acute where the court adopts an interventionist approach to judicial review thereby frustrating the principal's attempt to ensure that decisions are made by an expert body rather than by a generalist judge. This is the conundrum that the reviewing court faces.

'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 Osgoode Hall LJ 1 and C Harlow and R Rawlings, *Law and Administration* (Butterworths, London, 1997) chs 2-5.

¹⁶ In the separate context of proportionality review see AJ Rivers, 'Proportionality and Variable Intensity of Review' 65 Cambridge Law Journal 1, 174.

¹⁷ Shapiro (n 6) 179.

III. INSTITUTIONAL SETTINGS FOR MERGER CONTROL AND THE ROLE OF THE COURTS

In this section, we describe briefly the institutions for merger control, placing the respective courts within those frameworks. We first explain the institutions involved in merger control and, at a more specific level, how the courts exercise judicial control over those institutions. We then explain at a general level the constitutional basis for, and underlying purposes of, judicial review in the three jurisdictions, which differ substantially. This is particularly the case for Germany, where the right to effective judicial control and the primacy given to the protection of individual rights has important implications for the levels of control exercised over administrative agencies. This sets the backdrop for more detailed comparison in Section IV of the case law and underlying principles of judicial review of merger decisions in the EU, Germany and the UK.

A. Merger Control Regimes

In all three jurisdictions, the merger control regime follows an administrative model rather than a court-based one, such as in the US.¹⁸ All three systems adopt a two stage approach to merger investigations, with broadly equivalent timetables. In the UK, however, there is a bifurcation of authority between the two stages. The phase one investigation is conducted by the Office of Fair Trading (OFT) whereas the more in-depth investigation at phase two is conducted by the Competition Commission (CC). In the EU, the Directorate General for Competition (DG COMP) of the European Commission conducts merger appraisals. The Commission can take a number of categories of decisions under the EU Merger Regulation (ECMR)¹⁹ which may be subject to review before the General Court (GC, formerly the Court of First Instance).²⁰ The Commission's role is often characterized as 'investigator, prosecutor, and adjudicator', and criticized on that basis, although similar criticisms could also be levelled against the UK and German systems.²¹ Some have claimed,

¹⁸ For a comparison of the US and EU see A Scott, 'Tweedledum and Tweedledee?: Regime Dynamics in US and EC Merger Control' in P Marsden (ed), *Handbook on Transatlantic Antitrust* (Edward Elgar, Cheltenham 2007) 77–108.

¹⁹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24 1–22.

²⁰ We refer to the General Court, rather than the Court of First Instance, reflecting the re-naming of the court under TFEU. At the court's discretion, and in cases of urgency, an application for judicial review may be heard via an expedited procedure: Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 [1991] OJ L 136. The rules have been amended on several occasions. For a consolidated version see <<http://curia.europa.eu/en/instit/txt/docfr/txtsenvigueur/txt7.pdf>> accessed 20 March 2009.

²¹ For a comprehensive discussion in the EU context see W Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201–224. The criticism is less apposite in respect of the UK to the extent that phase two decisions are taken by the CC which does not have any control over the cases referred to it by the OFT.

however, this is to misunderstand the situation since the Commission is subject to important checks and balances in the exercise of its powers, in particular, judicial review by the GC.²²

In Germany, the Federal Cartel Office (Bundeskartellamt (BKartA)) has jurisdiction over mergers under the Act Against Restraints of Competition (ARC).²³ Where the merging parties (or other interested parties) make a complaint against a merger decision, in the first instance the complaint is filed with the BKartA (within one month of the decision).²⁴ Upon doing so the complaint is also automatically pending before the Oberlandesgericht Düsseldorf (OLG). The BKartA is still allowed to review and amend the challenged decision (although this is not a formal procedure).

The procedural and institutional framework underpinning the UK's merger regime underwent considerable reform with the enactment of the Enterprise Act 2002. Apart from exceptional cases, mergers are assessed by independent agencies against a strict effects-based test. In contrast to the EU and Germany, there is no compulsory notification of mergers, although transactions meeting the relevant jurisdictional thresholds may, subject to a limitation period, be subject to an *ex post* investigation.²⁵ Judicial review cases are heard generally by the Administrative Court but, uniquely for merger decisions, the Competition Appeal Tribunal (CAT) has jurisdiction to hear challenges to merger decisions of both the OFT and CC.

With the recent changes in the UK, there is now a limited role for political intervention across all three jurisdictions, and the merger agencies are, therefore, all functionally independent. Some important qualifications need to be made. In the EU, while DG COMP conducts the substantive assessment of the mergers, formally the final decision on whether to authorize or prohibit a merger is taken by the College of Commissioners.²⁶ Furthermore, the Commission is required to liaise with Member States' respective competition authorities through the Advisory Committee.²⁷ In limited circumstances, Member States may intervene in a clearance decision where their 'legitimate interests' are affected by the merger (notwithstanding the Commission's exclusive competence over mergers meeting the relevant turnover thresholds).²⁸ In the UK, the Secretary of State has limited powers to intervene in respect of

²² See in particular B Vesterdorf, 'Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement' (2005) 1 Competition Policy International 1, 3–27.

²³ Except, of course, those with a Community dimension which fall within the exclusive competence of the EU Commission. The same applies in respect of the UK.

²⁴ It is also possible to complain directly to the court within the deadline.

²⁵ With the risk to the parties that the transaction may be unwound or, more probably, a remedies package be imposed subsequently as occurred in the *Somerfield* case (discussed below).

²⁶ By convention, a phase one decision is taken by the Competition Commissioner.

²⁷ ECMR, art 19.

²⁸ ECMR, art 21(4). The non-exhaustive grounds for so intervening include public security, media plurality and prudential rules.

the public interest, and where he does so, his decision is determinative (although informed by investigations conducted by the agencies).²⁹ In Germany, on the application of the parties, the Minister of Economics may allow a merger that was prohibited by the BKartA where the restraint of competition is outweighed by advantages to the economy as a whole or other overriding public interest grounds.³⁰

So at an institutional level, we see substantial convergence in the design of agencies, all of whom are generally independent and expert decision-makers. We now turn to the nature of judicial review in each jurisdiction.

B. Judicial Review in Constitutional Context

Judicial review in the EU is concerned primarily with the objective protection and observance of EU law, rather than protection of individual rights per se.³¹ Article 19 TFEU, the central rule on legal protection, is framed in objective terms, providing that the court 'shall ensure that in the interpretation and application of the Treaties the law is observed.'

The guiding principle of judicial review is the checking of the legality of acts of the European institutions, including the EU Commission. In addition to individuals with standing, actions can be brought by another Community institution or a Member State, underlining the Community Courts' role in promoting the legitimacy of EU policy-making, and the balance between the institutions. There is no distinction between constitutional and administrative review. While judicial review does provide for the effective protection of individual rights, the justification for doing so stems from the need to pursue the underlying goals of the Treaty.

The modern administrative law in Germany has been referred to as 'constitutional law in concrete form',³² with the protection of individual rights

²⁹ For a detailed explanation see A Scott, M Hviid and B Lyons, *Merger Control in the United Kingdom* (OUP, Oxford, 2006) chs 19–21. Such grounds include media plurality and national security, but the Secretary of State may by Order determine further such grounds.

³⁰ ARC, s 42(1).

³¹ J Schwarze, 'Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation' (2002) 51 ICLQ 17–33, which also draws on German law; J Schwarze, *European Administrative Law* (rev edn Sweet and Maxwell, London 2006) clv. This is in line with the French approach where the main objective of the administrative courts is seen as the objective control of the administration (ibid, clv–clvi). To illustrate the point, the CJEU has held that while the principle of legitimate expectation is common to the laws of both the Community and Germany, the balancing of the interests of the individual against the public interest (in this case the interests of the Community) cannot preclude the application of State Aid rules requiring the revocation of such aid (save for exceptional circumstances) (Case C-5/89 *Commission v Germany* [1990] ECR I-03437). The case demonstrates the EU law imperative of protecting the EU interest at the expense of individual rights.

³² Schwarze, *European Administrative Law* (n 31) 117; G Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 *Modern Law Review* 2, 191–212, 201. The quote is accredited to the President of the German Federal Administrative Court, F Werner, writing in 1959.

being first and foremost the purpose of judicial supervision of the executive.³³ The constitutional basis for the work of the courts and for all functions of the State is the Basic Law (*Grundgesetz*). It heavily influences decision-making and the application of law, laying down the guiding constitutional principles such as the catalogue of directly applicable Basic Rights (*Grundrechte*) and the rule of law (*Rechtsstaatsprinzip*). The principle of legality obliges the executive not to act against the law (primacy of law), and permits interference with individual rights only insofar as the law permits. Any individual that suffers from an unjustified intrusion into his basic rights by public power has the right to effective judicial protection.³⁴

It has been observed that German administrative law has had a significant influence on the development of European administrative law³⁵ on the one hand, while in respect of the theory and practice of control of judicial discretion, the German system diverges significantly from the other administrative law systems of the EU, including that of EU law.³⁶ Indeed, no other European country has principles governing discretion of this depth and complexity.³⁷ There are several reasons why German law employs such a strong model of judicial review in the control of discretion.³⁸ The right to judicial review, contained in article 19(4) of the Basic Law, has been interpreted to mandate expansive judicial intervention. In contrast to the EU and UK, the theory underpinning judicial supervision of the executive will admit there is only one correct answer in the exercise of discretion; it is precisely where there is room for two views that judicial review is mandated.³⁹

The delegation of discretionary authority is strictly controlled in Germany. First, as a general proposition, discretion is only recognized where it is expressly granted by statute.⁴⁰ This requires the use of permissive language; where such language is not used there is generally held to be only one correct

³³ Schwarze *European Administrative Law* (n 31) 125; Nolte (n 32) 205; Y Arai-Takahashi, 'Discretion in German Administrative Law: Doctrinal Discourse Revisited' (2000) 6 *European Public Law* 1, 69–80, 70.

³⁴ The same applies to domestic artificial persons to the extent that the nature of such rights permits (Article 19(3) of the Basic Law).

³⁵ For a discussion of the influences of national administrative law on Community administrative law see J Schwarze, 'Developing Principles of European Administrative Law' [1993] *Public Law* 229.

³⁶ See generally Arai-Takahashi (n 33) and Schwarze *European Administrative Law* (n 31) 114–127.

³⁷ Before the Second World War, in the positivist tradition there was a very strong scepticism in Germany over the efficacy of judicial review. The courts were merely concerned with ensuring that the strict requirements and bounds of the law were respected, without any pleas to substantive concepts such as fundamental rights or substantive justice. On the historical development of German judicial review, on which the paper draws, see Nolte (n 32) 198–205 and Schwarze *European Administrative Law* (n 31) 114–116.

³⁸ ³⁹ Nolte (n 32) 208.

⁴⁰ *ibid* 196.

answer to a question, irrespective of how imprecise or ambiguous is the relevant legal norm.⁴¹

In contrast to the EU and Germany, the UK has a relatively weak model of judicial review. Being unwritten, the UK Constitution is organized around the doctrine of the legislative supremacy of Parliament.⁴² The courts have developed a body of law, centred around the doctrine of *ultra vires*, which is used to ensure that public bodies who exercise statutory powers do so in a way which is consistent with the enabling Act. This is commonly understood to be the central organizing principle of judicial review and it clearly resonates with principal-agent theory. In theory, when deciding a case, it is the intentions of the legislature that are determinative, there being no higher order law to which the courts can turn.⁴³

C. The Role of the Reviewing Courts

Judicial review of the decisions of Community institutions is carried out by the GC, with appeal on points of law only to the Court of Justice of the European Union (CJEU).⁴⁴ The legal basis for direct judicial review of an EU institution is article 263 TFEU—actions for annulment—which enumerates the grounds of review as being lack of competence, the infringement of an essential procedural requirement, the infringement of the Treaty or of any rule of law relating to its application and the misuse of powers.

In actions for annulment, the Community Courts review the legality of the institution's decision, but they do not have full jurisdiction on the merits of the case.⁴⁵ Unlike an appeal, the Community judges are neither competent to

⁴¹ *ibid.* Legal doctrine maintains a sharp distinction between three elements of administrative action. First, the interpretation and determination of *Tatbestand* (the constituent elements or definition of a provision). Second, the application of the interpreted legal norm to concrete facts (*Subsumtion*). Thirdly, the appraisal and determination of a certain legal effect (*Rechtsfolge*). In strict terms, the operation of administrative discretion is limited to the third element only, with the courts having full control over the first and second. For a full explanation, on which this article draws, see Arai-Takahashi (n 33).

⁴² As a consequence that the courts are incompetent generally to question the validity of an Act of the UK Parliament, subject to the limited exception where there is a conflict with EU law: see Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433 (CJEU) and *R v Secretary of State for Transport, ex parte Factortame (No. 2)* [1990] 3 WLR 856 (HL).

⁴³ Although regard should be had to the Human Rights Act 1998 which provides that statutes should be construed so far as is possible in a manner consistent with Convention rights (s 3).

⁴⁴ According to art 58 of the Statute of the Court, an appeal lies on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant, or the infringement of Community law by the General Court. On appeal the CJEU's judgment may replace that of the GC, but in certain circumstances the CJEU may simply set aside the judgment and revert the case to the GC for reconsideration.

⁴⁵ The Court has unlimited jurisdiction on the merits for fines (art 261 TFEU)—that is, it may cancel, reduce or even increase them—with the rationale that stricter scrutiny is desirable where sanctions are imposed.

reassess the facts underlying a Commission decision, nor substitute their decision for that of the Commission. The review is based on error—the decision can only be annulled if the Commission committed an error of fact, law or assessment.⁴⁶ The effect of a GC annulment is to revert the case back to the Commission for a renewed decision.⁴⁷ In the instance of mergers, the concentration is subjected to reinvestigation (based on current market conditions).⁴⁸ The timetable starts again from the date of the judgment.⁴⁹ Both the GC and CJEU are generalist courts. Due to the number of competition cases which come before it, however, the GC could be viewed as a *de facto* specialist tribunal with increasing economic expertise,⁵⁰ particularly as it is configured in chambers, which in practice means that certain judges may develop specialized knowledge.

In Germany, if a merger decision violates procedural or substantive law⁵¹ and, thus, the complainant's rights, the OLG is empowered to strike it down. Both the legal nature of the merger complaint procedure and the competence of the courts are somewhat unusual.⁵² The decisions made by the BKartA correspond by their nature with administrative acts (*Verwaltungsakte*) and can be eliminated if the individual affected initiates an action for annulment (*Anfechtungsklage*).⁵³ Interestingly, the complaint procedure takes place before the OLG, a civil rather than an administrative court, including three specialist competition chambers, with exclusive jurisdiction over merger complaints.⁵⁴ Decisions of the OLG are appealable on points of law to the Federal Court of Justice (BGH) where all competition law cases are assigned to the cartel division (First Civil division).

The complaint procedure is not so much aimed at an objective control of accuracy, but serves the protection of individual rights. It is characterized by

⁴⁶ The GC has full jurisdictional control over errors in the proof or accuracy of facts (Case T-342/00 *Petrolescence and SG2R v Commission* [2003] ECR II-1161 [101]); and errors of law (see further below).

⁴⁷ On appeal, the CJEU can determine the case itself or refer it back to the GC. The former only occurs where the GC had considered all the applicant's pleas but made an error of law vitiating the whole judgment. Acts of Community institutions are assumed to be valid until they are annulled by the Community Courts.

⁴⁸ ECMR, art 10(5).
⁴⁹ The merging parties should submit a new notification, or supplement the original notification where new information is relevant.

⁵⁰ In 2004–2008, 172 out of a total 2409 completed cases were competition cases, to which could be added 234 State aid cases, making 406. Not a high percentage, but second only to intellectual property (561 completed cases) in terms of subject matter: European Court of Justice Annual Report 2008—Statistics of Judicial Activity of the Court of First Instance, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/ra08_en_tpi_stat.pdf> as accessed 11 November 2009.

⁵¹ K Schmidt, 'section 63 GWB para 3' in U Immenga and E-J Mestmäcker (eds), *Wettbewerbsrecht* (4th edn, CH Beck, München, 2007). Sometimes the term 'appeal' is used to denote the 'complaint'. To avoid confusion with the appeal (on legal grounds) to the BGH, the term 'complaint' will be used for actions challenging a decision of the BKartA in the first instance.

⁵² The ARC also provides for other types of claims.
⁵³ ARC, s 92(1)1 in accordance with Regulation of 22 November 1994, GVBl. NRW 1067. The OLG replaced the *Kammergericht* (KG) of Berlin as exclusive complaint court in 1999.

the investigation principle, unusual before civil courts but similar to the strict judicial review in administrative courts. The OLG reinvestigates the facts of the case, acting on its own initiative.⁵⁵ If the court finds a prohibition to be unlawful, it cannot remit the case to the BKartA or replace the original decision. Thus, the merger is permitted by default. If a clearance decision is set aside (in whole or in part), the time limit for the merger assessment begins to run anew from the time of the court's final ruling.⁵⁶

While the UK CAT is a specialist tribunal, the substantive grounds on which challenges can be made to merger decisions are expressly limited to the grounds of ordinary judicial review.⁵⁷ Judicial review in the UK is often characterized as essentially an interpretative process according to which judges are required to apply Parliament's will as it is expressed or, more often than not, implied in the words of the relevant statute.⁵⁸ The grounds of review can be summarized⁵⁹ as being: illegality (whether the public authority has acted within its jurisdiction and directed itself properly in law); fairness (whether the decision has been made in a fair way, having regard to the nature and seriousness of the decision *vis-à-vis* the individual concerned); and 'irrationality' (or '*Wednesbury* unreasonableness') (whether a decision is so unreasonable that no public authority acting reasonably could have arrived at it). The latter ground, while concerned with merits, it is normally an extremely difficult ground of review for a claimant to make out, especially where the decision in question concerns matters which are paradigmatically for the executive. Reflecting the limited nature of the court's supervisory jurisdiction, when a decision is found by the courts to be unlawful, the decision is remitted to the original decision-maker.

IV. JUDICIAL REVIEW OF MERGER DECISIONS IN COMPARATIVE PERSPECTIVE⁶⁰

The case law analyses in this section are structured around three key questions. First, we investigate the extent to which the courts in the three

⁵⁵ ARC, s 70(1). While the parties decide on the subject matter of the dispute the court is not bound by the wording of the complaint and may carry out all necessary investigations in order to establish the facts.

⁵⁶ ARC s 40(6).

⁵⁷ Enterprise Act 2002, s 120.

⁵⁸ Since the courts are concerned with upholding the (express or implied) intentions of Parliament, judges are said not to draw upon principles or values exogenous to the legislation concerned. It is also the case that there are no fundamental individual rights or guarantees which can be upheld in the face of a conflicting Act of Parliament.

⁵⁹ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–411 (Lord Diplock). The heads of review are brought within the doctrine of *ultra vires* by statutory implication: for example, in respect of irrationality or fairness it is implied that Parliament does not intend for powers delegated by it to be exercised in an irrational or unfair way. It is important to note that the grounds of review—themselves based in common law—should not be viewed as static. Rather, they vary over time and have tended to expand with increased judicial activism.

⁶⁰ This section does not offer a complete analysis of all merger review cases. In comparison to both the EU and UK, the number of cases in Germany is relatively large. Since the introduction of

jurisdictions show deference (if at all) to merger agencies in the interpretation of legal norms. Second, we investigate the extent to which determinations of fact are controlled by the reviewing courts. The third question involves the exercise of discretion, including economic assessment. At the outset, we note the conceptual problems in defining the boundaries between these three types of determinations. Paradigmatically discretion implies that agencies have a choice between alternative courses of action. Discretion may, however, be present in the interpretation of legal norms and in factual determinations.⁶¹ We return to these issues in the discussion of the case law below.

A. Law: The Interpretation of (Indefinite) Legal Norms

The application of rules may have a discretionary element; they have to be defined in respect of both meaning and relevance (the rule's applicability).⁶² In this regard, Dworkin makes an important distinction between discretion in the strong and the weak sense.⁶³ In the present context, this distinction is highly relevant to the issue of agencies' interpretation of legal norms. If discretion exists in the strong sense, then the agency will be given some degree of deference in deciding how a statutory term (or rule) should be interpreted. Conversely, if discretion exists in the weak sense, then the courts will hold that there is one correct answer, to be determined ultimately by the court, to the question of the meaning of the legal norm (the 'right-answer thesis').⁶⁴ The distinction between rules and discretion is not straightforward, therefore, and we observe a divergence of approach across our jurisdictions.

In respect of questions of law, neither in the EU nor in Germany is there any deference shown to the merger agencies. According to EU law, there is no margin of appreciation left to the Commission in its interpretation of either

merger control with the second amendment of the Act Against Restraints of Competition in 1973 until the end of 2007, 171 mergers were prohibited. In addition to challenged clearances, a large number of prohibitions were subject to judicial review before the KG/OLG and the BGH.

⁶¹ DJ Galligan, *Discretionary Powers* (Clarendon, Oxford, 1986) 6–7; RM Dworkin, 'The Model of Rules' (1967) 35 U Chi L Rev 1, 14–46, 32–40.

⁶² K Hawkins, 'Using Legal Discretion' in DJ Galligan (ed), *A Reader on Administrative Law* (OUP, Oxford, 1996) 247–273, 259.

⁶³ RM Dworkin (n 61) 32–40. In the strong sense, the decision-maker sets the standard(s) according to which discretion is exercised, whereas in the weak sense, the decision-maker is merely interpreting and applying a standard set by an external authority, for example, by the courts or the legislature. There is a further weak sense, where the decision maker's decision is regarded as final, and cannot be reviewed and reversed by any other official. For a critique see Galligan (n 61) 14–20.

⁶⁴ Galligan posits that veracity of the strong/weak distinction depends in turn on the right-answer thesis, which is difficult to maintain in the context of a mature and complex legal system. (Galligan (n 61) 16–17).

the EU Treaty or secondary legislation (such as the ECMR).⁶⁵ Even in respect of highly specialized terms, such as the meaning of ‘collective dominance’ for the purposes of article 2 of the ECMR, the GC in *Airtours* specified in precise terms the criteria which the Commission must apply.⁶⁶ This is despite the fact that the concept of collective dominance—or coordinated effects—is based on game theoretic principles the interpretation of which, it might be argued, requires a high level of expertise.

In Germany, there is no discretion in the interpretation of legal provisions, even in respect of ambiguous legal terms.⁶⁷ The strict control of statutory terms is mandated by the (constitutional) right to effective judicial review, making the approach particularly resistant to change.⁶⁸ The rigour of the court’s scrutiny requires the court to intervene in highly specialized areas, resulting in a shift of the locus of decision-making from the agency to the court.⁶⁹

In the UK, as with other common law systems most notably the US, the general approach has been to allow administrative agencies some discretion in the interpretation of statutory terms, including in competition cases.⁷⁰ In the *South Yorkshire Transport* case decided under antecedent merger legislation—the Fair Trading Act 1973—the House of Lords warned against the dangers of ‘taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision’.⁷¹ Similarly, in *IBA Health v OFT*,⁷² the Court of Appeal chided the CAT for trying to ‘rewrite’ section 33

⁶⁵ Vesterdorf (n 22) 12–15. As a leading text puts it: ‘The Community Courts will normally treat the meaning of terms such as State aid, worker, services, goods, capital, agreement, and other such provisions as questions of law. Their general approach is simply to substitute judgment on these questions of law for that of the initial decision-maker. The CJEU or GC will lay down the meaning of the disputed term, and if the Commission interpretation is at variance with this then it will be annulled.’ (P Craig and G de Burca, *EU Law: Text, Cases and Materials* (OUP, Oxford, 2008) 569).

⁶⁶ Case T-342/99 *Airtours v Commission* [2002] ECR II -4381 [62].

⁶⁷ This has led to the courts exercising an ‘unrestrained’ and ‘virtually appellate’ control over such issues as the competency of candidates for certain professions (see Arai-Takahashi (n 33) 74; Nolte (n 32) 196).

⁶⁸ Nolte (n 32) 204. Some commentators have claimed that German administrative law now recognises what is termed the ‘normative authorisation doctrine’, according to which the courts allow specialist agencies to have some autonomy in the design of their normative programmes (JS Oster, ‘The Scope of Judicial Review in the German and U.S. Administrative Legal System’ (2008) 9 German Law Journal 10, 1267, 1269–1270). While this was recognised by the Federal Administrative Court on one notable occasion (BVerwGE 39, 203), the courts have consistently followed the orthodox approach.

⁶⁹ Arai-Takahashi (n 33) 77.

⁷⁰ In the US, the Chevron doctrine provides a level of deference to administrative agencies in the interpretation of Federal statutes (*Chevron v Natural Resources Defense Council* 467 US 837 (1984)). There is a vast literature on the Chevron doctrine which has been subsequently narrowed by the Supreme Court. See CR Sunstein, ‘Law and Administration after Chevron’ (1990) 90 Columbia Law Review 2071.

⁷¹ *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, 29 (Lord Mustill).

⁷² [2003] CAT 27; [2004] EWCA Civ 142.

of the Enterprise Act 2003⁷³ relating to the OFT's duty to refer a merger to the CC.⁷⁴

The bright line distinction between the meaning of a legal norm and its application has been questioned. There are two core arguments. First, it has been recognized that to maintain that the interpretation of a legal norm will only yield one correct answer is often a 'fiction';⁷⁵ the use of open-textured, ambiguous and incomplete statutory provisions in the delegation of administrative powers must leave open some 'margin of appraisal' on the part of the agency in the interpretation of a statute. While questions of law are normally for the courts, and the courts are the final arbiters of what the law is, an important distinction should be made between administrative law where the agency applies the law in the first instance, on the one hand, and civil or criminal law, on the other, where it is the court which is applying the law *de novo*. This leads to the second argument. Specialist agencies are often in a better position than the generalist courts to resolve ambiguities and interpret technical, legal terms. The interpretation of a statute in a way which promotes effective public policy may depend more on the expertise of the agency rather than the limited knowledge and modes of reasoning employed by the courts.⁷⁶

In comparing the approaches of the courts, regard should be had to the important differences between the UK's common law system with that of the EU and German codified systems. First, in respect of interpretation, the UK courts tend to adopt a literal approach, whereas the Community Courts tend to adopt a purposive/teleological approach.⁷⁷ Second, in this area, the constitutional setting of judicial review appears to be vital. In Germany, the control of administrative discretion mandated by the constitutional right to effective review, appears to produce the somewhat counter-intuitive result that the more complex a legal norm, the more it should be open to challenge.⁷⁸

⁷³ In somewhat tortuous language, section 33 provides: 'The OFT shall . . . make a reference to the Commission *if the OFT believes that it is or may be the case that* . . . [the merger] *may be expected to result in a substantial lessening of competition* within any market or markets in the United Kingdom for goods or services.' (Emphasis added.) Section 22 makes provision for an identical duty but where the merger in question has been completed. While both are framed as duties, the language used necessarily involves an element of discretion.

⁷⁴ For a detailed discussion see A Scott, 'The Cutting of Teeth: IBA Health v OFT' [2004] Journal of Business Law 672; F Alesi, 'UK Merger Review and Section 33: Was the CAT Not Right' (2004) 25 ECLR 8, 470.

⁷⁵ As Arai-Takahashi observes, 'indefinite legal concepts require different evaluations on the basis of particular contexts, and there cannot exist one correct solution' ((n 32) 77).

⁷⁶ Tolley (n 11) 421.

⁷⁷ This difference of approach in the interpretation of statutes tends to be linked to differences in the form of legislation; UK statutes tend to be more detailed and complex, whereas EU law tends to be written in more broad-brush terms (for a discussion see J Bridge, 'National Legal Tradition and Community Law: Legislative Drafting and Judicial Interpretation in England and the European Community' (1981) 19 Journal of Common Market Studies 4, 351).

⁷⁸ As Nolte observes, the constitutional backdrop '... [h]as contributed to the paradoxical result that the traditional continental distinction between administrative courts and ordinary courts, a distinction which originally symbolised that administrative action was only subject to a

The use by the legislature of indefinite legal concepts can be seen as a mode of delegation whereby the agency, especially in complex or technical spheres, is required to clarify the 'normative programme' in context.⁷⁹ This appears to reflect the approach of the UK courts. One adverse consequence of severely limiting discretion, as in the EU and Germany, might be to force the legislature to enact more detailed and complex rules in the first place, but such complexity may in turn 'paralyse . . . the ability of the administration to ensure a proper balance of interests in individual cases'.⁸⁰

The need for expertise and specialist knowledge supplies a key justification for the delegation of discretionary powers. The credibility of policy, however, also calls for transparent and predictable rules. As recent changes in antitrust laws from formal to more effects-based, economic approaches typify, an impatience with juridified mediating rules has led to an increasing emphasis on goal-based, purposive decisions: what Galligan terms the pursuit of 'substantive rationality'.⁸¹ The source of legitimacy in the exercise of discretionary powers stems in part from 'how well they realize specified goals, not whether [decisions] have been made by the impartial application of fixed rules'.⁸² While merger law is an area one would associate with great complexity and variability—implying a highly discretionary approach—the underlying policy goal of maximizing efficiency also requires a framework of rules which are predictable and transparent. It appears that insofar as legal determinations are concerned, the courts in the three jurisdictions appear to attach different weight to these imperatives.

B. Determinations of Fact

While discretion appears to be limited to those instances where there is a choice for the decision-maker between alternative courses of action, it may also be true to speak of discretion being present in the determination of facts. The identification of relevant facts, and the interpretation of those facts in the application of the rule, necessarily involves some element of 'choice' on the part of the decision-maker.⁸³ Facts are susceptible to subjective interpretation given the ambiguities, and sometimes conflicting, nature of the evidence. Furthermore, discretion is exercised to the extent that the decision-maker may have to decide upon both the methods by which facts are ascertained, the weight to be attached to different types of evidence, and in deciding what level

lesser form of judicial review, in Germany now has the opposite effect of encouraging specialised judges to conduct a very searching form of review' ((n 32) 205).

⁷⁹ Arai-Takahashi (n 33) 77.

⁸⁰ Schwarze (n 31) 276. Alternatively, there is evidence that increasing the complexity of rules may actually result in more discretion, not less. It has been shown empirically that increased complexity in rules may lead to more not less discretion (see Hawkins (n 62) 260 and the references cited therein).

⁸² *ibid.*

⁸¹ Galligan (n 61) 76.

⁸³ Hawkins (n 62) 260.

of evidence is sufficient.⁸⁴ We discuss how the courts have resolved these issues in each of our jurisdictions.

In respect of determinations of fact, review by the GC is said to be intense, apparently leaving 'no room for discretion on the part of the Commission'.⁸⁵ This is the case notwithstanding the prospective nature of the Commission's task in analysing (anti-) competitive effects. According to the Advocate General Tizzano, the issue for the court is to '... verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained'.⁸⁶ On the other hand, where the review concerns 'complex economic assessments' by the Commission, '... review is necessarily more limited, since the [court] has to respect the broad discretion inherent in that kind of assessment and may not substitute its own point of view for that of the body which is institutionally responsible for making those assessments'.⁸⁷ Given this, there is an important distinction to make at the outset between what is a primary fact, on the one hand, and what is an assessment of, or inference drawn, from primary facts, on the other.⁸⁸ The simplicity of this distinction belies the complexity of determining the type of question being addressed. As Vesterdorf states:

What is a fact and what falls within an appreciation of facts is ... not always easy to discern. The issue must be decided on a case-by-case basis depending on the precise context. It seems to me, however, that whenever an issue involves a complex assessment which may lead two reasonable persons to disagree as to the conclusion to be drawn, we are not in the realm of pure fact, but in the realm of appreciation of facts.⁸⁹

In respect of the primary facts, the court must ascertain whether the evidence relied on is factually accurate, reliable and consistent, and also satisfy itself that the evidence is sufficient basis for the complex assessment.⁹⁰ It must also consider whether any possible *omissions* on the part of the Commission are capable of calling into question its finding(s).⁹¹

In respect of the difference between primary facts and the 'complex economic assessments' of facts, there appears to be no general rule or definition

⁸⁴ *ibid* citing DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon, Oxford, 1986) 34–35.

⁸⁵ Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 [86].

⁸⁶ *ibid*.

⁸⁷ On the distinction between 'simple' or 'brute' facts and inferences or conclusions drawn from the primary facts by a process of reasoning or analysis (for example, whether there is a causal relationship between two events) see G Marshall, 'Provisional Concepts and Definitions of Fact' (1999) 18 *Law and Philosophy* 5 447, 451. A third category is that of 'classification': the 'bringing of things, actions or events within the scope of a general description, rule or concept, whether linguistic or legal' (*ibid*, 451).

⁸⁸ B Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 *ECJ* 3, 15.

⁸⁹ Advocate General Opinion in *Commission v Tetra Laval* (n 104) [39].

⁹⁰ Case T-201/01 *General Electric v Commission* [2005] ECR II-5575 [42]–[44] and [48].

which has been devised by the court. Examples of questions which involve complex economic assessments may be said to include market definition,⁹² the existence of barriers to entry or of dominance.⁹³ Other questions could fall into either category depending on the nature of the particular case.⁹⁴ So while it is an apparently clear distinction, in practice it is one which is likely to vary from case to case, not least determined both by the availability of evidence and situations where evidence of equal probative value is pulling in opposite directions.⁹⁵

In the UK, there is some conflicting case law over which is the correct test for a court to apply when reviewing determinations of fact. There is a consistent line of case law which would suggest that the *Wednesbury* test, and hence a high level of deference, is the operative test in this context.⁹⁶ Nevertheless, Carnworth LJ in *IBA Health* made clear that there is no general rule precluding a reviewing court from overturning a decision where it was clear that the original decision-maker's finding(s) of fact did not support that decision.⁹⁷ It was, in his view, unnecessary for the CAT 'to rely on some special dispensation from the ordinary principles of judicial review'.⁹⁸ These principles were sufficiently flexible to embrace the specific context in which it was operating, including specialized expertise of the Tribunal.⁹⁹ In his view, the question before the CAT—whether the evidence before the OFT was sufficient to dispel the uncertainties over the potential substantial lessening of competition¹⁰⁰—was a question 'wholly suitable for evaluation by a court' involving 'no policy or political judgment . . . such as would be regarded as inappropriate for review . . .'.¹⁰¹ Those authorities which were cited in support of the proposition that factual issues could only be overturned under the more restrictive *Wednesbury* test concerned a mix of both policy and factual determinations and were, therefore, distinguishable from the present case.¹⁰²

⁹² Vesterdorf (n 22) 15.

⁹³ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 5 [26].

⁹⁴ Vesterdorf (n 22) 16–17.

⁹⁵ We return to the control of economic assessments and inferences from facts in more detail in the following section.

⁹⁶ See P Craig, *Administrative Law* (Thomson, London, 2003) 503–504 (noting the change of approach over time).

⁹⁷ *IBA Health* (n 72) [94]–[96]. He referred in particular to the speech of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 (HL). The case concerned the issue of whether a particular transaction was 'an adventure in the nature of trade' which the House of Lords accepted was 'an inference of fact'. Lord Radcliffe had made plain that the courts were entitled to overturn such an inference of fact where the 'true and only reasonable conclusion' drawn from the primary facts found by the original decision maker contradicted that inference (p 36).

⁹⁸ *IBA Health* (n 72) [100].

⁹⁹ *ibid.*

¹⁰⁰ With the consequence that there was no duty to refer the matter to the CC.

¹⁰¹ *IBA Health* (n 72) [100].

¹⁰² *ibid* [97–98]. This was true even in respect of *R v DGT ex parte Cellcom* where Lightman J appeared to espouse a light-touch approach for the court in reviewing regulatory decisions ([1999] ECC 314, 331).

Subsequently in *Unichem* the CAT attempted to explain its approach to a review of the exercise of the section 33 duty to refer. It described the approach as being ‘multi-layered’: the first question was whether the OFT had ‘properly evaluated the primary facts of the case’, the second being whether, on the basis of those facts, the OFT’s conclusion or belief that there was an insufficient likelihood of substantial lessening of competition was reasonable.¹⁰³ While being careful not to jettison the *Wednesbury* test, it observed that the reviewing function ‘may properly be more intense than it would be if issues of policy or politics were involved’.¹⁰⁴ In sum the CAT was entitled ‘acting in a supervisory rather than appellate capacity, to determine whether . . . conclusions are adequately supported by evidence . . . [and] that all material factual considerations have been taken into account’.¹⁰⁵

In *Somerfield*, the CAT nevertheless followed the traditional *Wednesbury* approach in scrutinising a divestment package imposed by the CC.¹⁰⁶ It held that, within the confines of that test, the weight that a decision-maker attaches to a particular piece of evidence is for the decision-maker—and not for the court—unless the conclusion drawn from the evidence is unreasonable in the *Wednesbury* sense.¹⁰⁷ Given the restrictive nature of the test, and the need to determine remedial matters ‘expeditiously’, it held itself to be ‘extremely reluctant to entertain applications . . . based on lack of or misinterpretation of evidence, unless the groundwork has been properly laid out’ by the applicant, not least because otherwise the CC ‘does not have a full opportunity to deal with the matter in its defence’.¹⁰⁸ As to the interpretation of evidence by the CC, the CAT held that where evidence was unclear or contradictory, in drawing inferences from it the CC was to be given a wide margin of discretion:

As far as drawing the line is concerned, precisely where the line is to be drawn on an issue such as this is for the [CC] to evaluate: no doubt there will always be arguments in borderline cases. In our view it would need a strong case to show that the [CC] had manifestly drawn the line in the wrong place.¹⁰⁹

The CAT further held that the CC was entitled to look at all available evidence ‘in the round’ and the weight given to evidence was a matter for the CC,¹¹⁰ subject to the proviso that the weight attached to any piece(s) of evidence was neither ‘perverse’ nor ‘a manifest error of appreciation’.¹¹¹

¹⁰³ *Unichem v OFT* [2005] CAT 8 [174].

¹⁰⁴ *Unichem* (n 103) [174].

¹⁰⁵ *ibid.*

¹⁰⁶ *Somerfield v Competition Commission* [2006] CAT 4 [128].

¹⁰⁷ See *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, 764 (Lord Keith).

¹⁰⁸ *Somerfield* (n 106) [131].

¹⁰⁹ *ibid* [176].

¹¹⁰ *ibid* [177]. Nevertheless, the CAT looked to each of *Somerfield*’s substantive points on the alleged deficiencies of the evidence relied on by the Commission and rejected each one (*ibid* [178]–[182]).

¹¹¹ *Somerfield* (n 106) [183].

So while we observe a move towards more intense review of factual determinations, this has been justified in two main ways. First, the new regime, with institutional separation of the merger authorities from political actors, has legitimated more intense review. This is consistent with agency theory: the new system removes an *ex post* control—namely the ability of the Secretary of State to depart from the agency's recommendations—justifying the imposition of a more intense *ex post* control in the form of a heightened standard of review. Second, the intensity of the *ex post* control is further justified by the CAT being an expert tribunal rather than a generalist court. Nevertheless, the CAT itself will mediate the intensity of review in recognition of the expertise of the authority under review, hence the more limited review for the CC as compared with the OFT.

In Germany, the position is quite different from that of both the EU and UK. Under section 70(1) ARC the OLG is required (as was its predecessor the *Kammergericht* (KG)) to reinvestigate the facts *de novo* and *ex officio* where a complaint is brought to it.¹¹² This duty to reinvestigate the facts is unique to the German system. However, despite the wording of section 70(1) it appears from the case law that the complaint court does not engage in a full review of facts. As has been clarified by the BGH on a number of occasions, the first comprehensive investigation into the facts must be carried out by the BKartA.¹¹³ Furthermore, the *ex officio* examination of the complaint court is also constrained by the matter in dispute; only those facts relevant for the decision of the OLG are to be reviewed.¹¹⁴ On that account, the OLG may rely on some of the factual findings of the BKartA. In *Texaco/Zerssen* the KG outlined how the task of investigating the facts is divided between the BKartA and the court and stressed that the first comprehensive investigation was to be done by the BKartA and will not be carried out by the court,¹¹⁵ a practice which has been followed consistently.¹¹⁶ Nevertheless, drawing the line between the court's duty to reinvestigate and its reliance on ascertained evidence has not been easy.¹¹⁷

¹¹² This is the position for administrative law generally. The requirement of re-interrogating the facts is said to be a mechanism of correcting for inequality of arms as between private individuals and better-informed public authorities (Arai-Takahashi (n 33) 71; Schwarze *European Administrative Law* (n 31) 124).

¹¹³ BGH of 24 June 2003 (Habet/Lekkerland) WuW/E DE-R 1163, 1167; KG of 02 July 1982, (*Texaco-Zerssen*) WuW/E OLG 2663, 2674.

¹¹⁴ Karsten Schmidt (n 52) s 70 para 4.

¹¹⁵ KG of 02 July 1982, Kart 21/80 (*Texaco/Zerssen*), WuW/E OLG 2663. The KG regarded the BKartA's market assessment insufficient due to the fact that it was based on mere general statements. It refused, however, to carry out further investigations that would have been necessary in order to gather specific evidence for the existence of a future oil shortage.

¹¹⁶ KG of 26 May 1981, Kart 14/80 (*Braun/Almo*) WuW/E OLG 2539, 2542; OLG Düsseldorf of 18 October 2006, Kart 2/05 (*SES/DPC*).

¹¹⁷ In *Metro/Kaufhof* the BGH reminded the KG of its reinvestigation duty criticizing it for relying on the BKartA's findings which did not support a conclusion regarding alternative sources of supply (BGH of 11 March 1986, KVR 2/85 (*Metro/Kaufhof*) WuW/E BGH 2231). The BGH pointed out that it would have been the role of the KG to investigate the structure of the demand

In addition to the refinements of the *de novo* review of facts, the courts have also restricted the *ex officio* investigation duty insofar as the complainant needs to offer some substantiation to his allegations; simply rejecting the findings of the BKartA does not force a complete reinvestigation of facts.¹¹⁸ The decision of the OLG not to reassess facts in the *E.ON/Stadtwerke Eschwege* merger was affirmed on appeal by the BGH.¹¹⁹ The court stated that where a market data inquiry is carried out by the BKartA, the OLG can normally make use of the results, even if the complainant is denied access to underlying documentation and evidence. Unless precise objections regarding the concealed data have been made, there is no *ex officio* obligation of the court to double-check the reliability of the evidence.¹²⁰

One mechanism assisting the court in complying with its investigatory duty is the ability to call on the BKartA to gather further evidence on its behalf, another feature unique to the German system.¹²¹ There are a number of cases where the court commissioned the BKartA with additional investigations, especially regarding markets and market shares.¹²²

This does raise due process concerns since in the complaint proceedings the BKartA's role is similar to that of a respondent.¹²³ However, as the BGH pointed out,¹²⁴ part of the rationale relates to the BKartA's superior expertise making it best suited to fulfil the task of factual investigation.¹²⁵ To guard itself against a possible bias on the part of the BKartA selecting and presenting facts to the court, the OLG acknowledged that evidence brought forward by the BKartA is not considered to have equivalent probative value to that resulting from the court's own investigation.¹²⁶

side in the relevant market even if the KG agreed with the factual assessment of the BKartA. In a later merger case the investigation of facts by the KG was found to be adequate (BGH of 07 March 1989, KVR 3/88 (Kampffmeyer/Plange), WuW/E BGH 2575, 2577).

¹¹⁸ Denoted in OLG Düsseldorf of 04 May 2005, Kart 19/04, (Deutsche Bahn/KVS Saarlouis) [46].

¹¹⁹ Bundesgerichtshof of 11 November 2008, KVR 60/07 (E.ON/Stadtwerke Eschwege).

¹²⁰ Such precise objections may be a motion to take evidence has been missed out or supplementary evidence was not taken into account.

¹²¹ As was previously noted, in the EU and UK, upon a finding of factual error, the case is remitted back to the agency.

¹²² See, for instance, OLG Düsseldorf of 29 September 2006, Kart 40/01 (Sanacorp/ANZAG); OLG Düsseldorf of 18 October 2006, Kart 2/05 (SES/DPC); OLG Düsseldorf of 11 April 2007, Kart 6/05 (Rhön-Grabfeld).

¹²³ Karsten Schmidt (n 52) section 67 para 3. Commissioning the BKartA with further investigations appears to play a dual role. On the one hand, the competition authority is providing expertise. On the other hand, its defendant-like status may imply a bias and an interest in winning the case in order to prevent potential damage to its reputation and/or budget.

¹²⁴ BGH of 24 June 2003, KVR 14/01 (HABET/Lekkerland) WuW/E DE-R 1163.

¹²⁵ *ibid.* 'Indeed, the law assumes that, as a rule, the court, and not the cartel authority, investigates complementarily in judicial proceedings. However, it is consistent with established practice that extensive investigation, for which the complaint court is not equipped and which would, thus, overburden it, are undertaken by the cartel authority.' (Translation by the authors).

¹²⁶ Karsten Schmidt (n 52) s 70 para 9.

In a number of cases, judges have referred to their own experience and knowledge in order to assess, for example, the substitution of products or consumer preferences. This appears to underline the fact that the court has full jurisdiction over facts. For example, in *Texaco/Zerssen*¹²⁷ the judges, considering the intensity and structure of competition in the market for light fuel oil, concluded, on the basis of their knowledge, that final consumers observe the market, compare prices and look for the best deal. The judges considered themselves being part of a relevant group of consumers and drew a parallel between their own experience (as final consumers) and the conduct of larger customers and bulk buyers.¹²⁸ In a later merger decision the BGH confirmed that a judge or member of the BKartA being among the relevant group of consumers can make the necessary appraisal on basis of his own life experience.¹²⁹ According to the BGH, the complaint judge, whose task is to assess the facts, is obliged to define the decisive market since the definition essentially depends on the (factual) circumstances in the market, a matter within the full control of the OLG.¹³⁰

By way of summary, in the EU review by the GC of factual determinations is intense, leaving little room for discretion on the part of the Commission. In justifying this approach, Vesterdorf argues that the GC was created in part for the purpose reviewing ‘comprehensively and rigorously the factually complex decisions that the Commission adopts in the field of competition’.¹³¹ There is nonetheless some room for discretion even in this area where the evidence pulls in different directions. In the UK, there appears to be some convergence, where the depoliticization of the regime has been used explicitly to justify more control over factual determinations. It is difficult, however, to marry up the subsequent case law, in particular the *Somerfield* decision. This might be due to the fact that the issue concerns merger *remedies*, where there is considerable discretion given to the merger authority (the CC) in its assessment of evidence—an explanation consistent with the judicial review of merger commitments in the EU cases.¹³²

¹²⁷ KG of 02 July 1982, Kart 21/80, (*Texaco/Zerssen*), WuW/E OLG 2663.

¹²⁸ *ibid* 2673.

¹²⁹ The judges found that the BKartA was right to refer to the life experience of its members of staff because they belong to the relevant group of consumers while considering the exchangeability of niche science journals with general popular science journals. BGH of 22 September 1987, KVR 5/86, (*Gruner + Jahr/Zeit II*), WuW/E BGH 2433, 2437. The OLG has relied on the own personal experience of its judges in various decision and confirmed, that the BKartA was entitled to do so as well. See, for instance, OLG Düsseldorf of 15 June 2005, Kart 25/04, (*National Geographic II*) 3.

¹³⁰ This appraisal of factual circumstances cannot be fully reviewed by the appeal court (BGH of 02 October 1984, KVR 5/83, (*Gruner + Jahr/Zeit*), WuW/E BGH 2112, 2121.

¹³¹ Vesterdorf (n 22) 15–16.

¹³² For example, Cases T-87/05 *EDP v Commission* [2005] ECR II-3745 [151]; T-282/02 *Cementbouw Handel & Industrie v Commission* [2006] ECR II 319 [53]–[54]; T-177/04 *EasyJet v Commission* [2006] ECR II-1931 [44]–[45], discussed below.

Part of the justification for a more intense review may be the specialist nature of the CAT, although regard should be had to the governing statute requiring that it applies the same grounds of review as the ordinary (generalist) administrative courts. Furthermore, context clearly matters. There is an importance distinction to be drawn between the OFT's role under phase I and the CC's role under phase II, in terms of the deference shown by the court. Again we note the resonance with our central hypothesis. With functional independence of the agency, the courts imply a need for heightened scrutiny of factual decisions, but the level of scrutiny is mediated by factors such as the depth of the investigation and the relative expertise of the agency.

The German system is the most interventionist, with the OLG having the duty to reinvestigate the facts *de novo*—although in practice this duty has been qualified with the requirement that the complainant offers some substantiation to its allegation that the factual determination is incorrect (in effect, a requirement that an error is disclosed by the complainant, close to the requirement of EU law). Nevertheless, the role of the court is an interventionist one, and some of the features of the system clearly distinguish it from the EU and especially the UK. For example, the court is required to substitute its own findings of fact on finding of a defect, rather than merely remitting the case back to authority. Likewise, the judges are entitled to draw upon their own experience and expertise.

C. The Control of Discretion

We noted in the previous section the difficulty of distinguishing between primary facts, on the one hand, and inferences drawn from facts (including economic assessments), on the other. We now turn to judicial scrutiny of the latter types of determination.

In the EU, whereas questions of law and fact can be challenged on the basis of mere error, complex economic assessments by the Commission can be overturned by the court only where there is a 'manifest error of appraisal'.¹³³ It is in the area of competition law that the standard of review has been most developed. The classic formulation can be found in *Aalborg Portland*, an article 81 EC (now article 101 TFEU) case:

Examination by the Community judicature of complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.¹³⁴

¹³³ 'Manifest' means that the Commission's 'failure to observe legal provisions is so serious that it appears to arise from an obvious error of evaluation' Case T-156/98 *RJB Mining v Commission* [2001] ECR II-337 [87].

¹³⁴ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123 [279].

In the merger context, the language used has varied slightly, with the CJEU in the *Kali and Salz* case referring to a 'certain discretion, especially with respect to assessments of an economic nature'.¹³⁵ In consequence, when defining the rules on concentrations, the reviewing court must take into account the 'discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations'.¹³⁶

Much has been written (which we do not rehearse here) on the recent landmark EU merger review cases and an apparently heightened standard of review relative to the manifest error test.¹³⁷ Far less has been said about the institutional reasons for respecting this discretionary margin in the first place. One rationale of this margin of discretion derives from the constitutional role of judicial review in the EU legal system and the core principle of institutional balance. Arguably this principle denotes a non-hierarchical relationship between the Commission and the Court.¹³⁸ As Advocate General Tizzano stated in *Tetra Laval*, '[t]he Court may not substitute its own point of view for that of the body which is *institutionally responsible* for making those assessments'.¹³⁹

A second and related rationale for this margin of discretion is that DG COMP has greater economic expertise than the Community courts. The GC had previously explicitly recognized in *Petrolessence* that it should not substitute its own assessment for that of the Commission.¹⁴⁰ Likewise, in that case, the GC reiterated the need for the claimant to demonstrate a manifest error.¹⁴¹ The trio of annulled prohibition decisions in 2002 in *Airtours*,¹⁴² *Schneider*¹⁴³ and *Tetra Laval*,¹⁴⁴ do appear to demonstrate the GC's willingness to more closely scrutinize the Commission's treatment of economic evidence, particularly when it uses novel economics theories to reach its conclusions.¹⁴⁵ In *Tetra Laval* the CJEU appeared to approve of this approach, being careful to distinguish between the complex economic assessment itself,

¹³⁵ Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375 (*Kali and Salz*) [223].

¹³⁶ *Kali and Salz* [224].
¹³⁷ See, for example, MF Bay and J Ruiz Calzado, 'Tetra Laval II: The Coming of Age of the Judicial Review of Merger Decisions' (2005) 28 *World Competition* 433; Vesterdorf (n 22); D Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) 40 *Common Market Law Review* 845.

¹³⁸ J Bast, 'Legal Instruments' in A Von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart, Oxford, 2006) ch 9.

¹³⁹ (n 86) (emphasis added). He went further: 'the rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not allow the judicature to go further and particularly to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution' [88].

¹⁴⁰ *ibid.*

¹⁴¹ Case T-342/99 [2002] ECR II-2585.

¹⁴² Case T-310/01 [2002] ECR II-4071 and T-77/02 [2002] ECR II-4201 (divestiture).

¹⁴³ Case T-5/02 [2002] ECR II-4381; CJEU appeal (n 86).

¹⁴⁴ See further Vesterdorf (n 22) 23–25.

over which there is a margin of discretion, and the Commission's 'interpretation' of evidence of an 'economic nature':

Not only must the Community courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether 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.¹⁴⁶

Following that judgment, there appears to be a heightened standard of review in cases such as *MCI*,¹⁴⁷ *GE*,¹⁴⁸ and *Impala*¹⁴⁹ (although the latter has been curtailed by the subsequent Sony BMG appeal in the CJEU).¹⁵⁰ The GC's reasoning in *Tetra Laval* led the Commission to protest that the test was no longer whether the applicant had established that the Commission had committed a manifest error of assessment, but whether it had cast sufficient doubts on the convincing nature of Commission's case.¹⁵¹ In *Schneider*, the court considered that it could uphold a Commission decision even if it was incomplete, as long as it enabled the GC to conclude that the concentration was incompatible with the common market, which appears very close to substituting its decision for that of the Commission.¹⁵² Most recently, in *Sun Chemical Group*, the GC engaged in some degree of economic assessment itself in deciding whether the Commission had followed its horizontal merger guidelines.¹⁵³

We note, therefore, an increased intensity of review in relation to economic assessments made by the Commission. In one sense this may be consistent with our hypothesis—that the increasing discretionary nature of merger law—with a move from a formal to an effects-based approach—increases the need for the court to more intensively scrutinize the Commission's decisions. Two points are of particular note. First, the GC itself is arguably a more expert body

¹⁴⁶ See (n 86).

¹⁴⁷ Case T-310/00 *MCI v Commission* [2004] ECR II-3253.

¹⁴⁸ Case T-201/01 *General Electric v Commission* [2005] ECR II-5575.

¹⁴⁹ Case T-464/04 *Impala v Commission* [2006] ECR II-2289.

¹⁵⁰ Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala and Commission* [2008] ECR I-4951. The CJEU ruled the GC had treated certain conclusions set out in the statement of objections (SO) as established, rather than provisional [73], and had required the Commission to apply a too demanding probative standard to the evidence and arguments put forward by the merging parties in reply to the SO [95]. In contrast, other merger cases have followed the traditional 'manifest error' approach (for example, Cases T-87/05 *EDP v Commission* [2005] ECR II-3745 [151]; T-282/02 *Cementbouw Handel & Industrie v Commission* [2006] ECR II 319 [53]–[54]; T-177/04 *EasyJet v Commission* [2006] ECR II-1931 [44]–[45]. This may be because they relate to commitments of the parties, analogous to the *Somerfield* case in the UK (see below).

¹⁵¹ Commission's arguments under the first ground of appeal in *Tetra Laval* (n 86) [19].

¹⁵² See (n 143) [212].

¹⁵³ Case T-282/06 *Sun Chemical Group and others v Commission* [2007] ECR II-2149. It stated that it must be ascertained whether the Commission failed to follow its own horizontal merger guidelines by not examining whether the merging parties were close competitors [70]. The Court then assessed itself whether the parties were close competitors; the role of smaller producers as alternative credible suppliers; and the possibility of consumers switching suppliers [75].

than the CJEU—the latter espouses the ‘manifest error’ standard and it is more concerned with the systemic coherence of EU law as a whole, aligning it with other policy areas. Second, it is also the case that the standards which structure the way in which the decision is made, while being extra-legal, are derived from economics and are therefore capable of objective justification.¹⁵⁴

As a general proposition, discretionary authority is strictly controlled in Germany. In scrutinizing the exercise of discretion—once the legal norm(s) and facts have been established—the courts apply a proportionality test which ensures that the individual affected is not placed under an excessive burden.¹⁵⁵ In applying this test, the agency is given a certain margin of discretion (*Ermessensspielraum*) which varies according to the context of the decision in question, from deferential to meticulous and rigorous scrutiny.¹⁵⁶ This is the only element of a discretionary decision where the court will entertain the possibility of a range of (legal) outcomes.

In theory the BKartA, as an administrative agency, enjoys a margin of discretion (whenever the law provides for it), and prospective merger analyses necessarily involve some element of judgement. The words of the substantive test, however, appear to leave little room for discretionary judgement.¹⁵⁷ It is only where the undertakings concerned offer commitments, which would allow a clearance subject to conditions, that the BKartA can exercise discretion on the merits.¹⁵⁸

In cases where discretionary power is given to the BKartA, section 71(5)1 ARC states that:

The decision shall also be inadmissible or unfounded if the [BKartA] has improperly exercised its discretionary powers, in particular if it has exceeded the statutory limits of its discretionary powers or if it has exercised its discretion in a manner violating the purpose and intent of this Act.[. . .]¹⁵⁹

¹⁵⁴ Although the freedom of action of the agency is constrained by the need to produce a convincing theory of harm if the merger is to be prohibited, economics is not an exact science to the extent that the choice of expert may well have a bearing on the choice being made.

¹⁵⁵ Arai-Takahashi (n 33) 74; Nolte (n 32) 201–202.

¹⁵⁶ Arai-Takahashi *ibid.* According to Nolte, the proportionality test is applied in an over-extensive manner by the courts ((n 32) 202 and the cases cited therein). The exercise of discretion may also be controlled on the grounds of failure to act, excess, or abuse of discretion (Arai-Takahashi (n 33) 74–75; Schwarze (n 31) 277).

¹⁵⁷ Section 36(1) ARC provides: ‘A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Bundeskartellamt unless the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the disadvantages of dominance.’

¹⁵⁸ Immenga and Velken, ‘section 40 para 40’ in Immenga and Mestmäcker (n 52).

¹⁵⁹ Section 71(5)2 ARC limits judicial control by stating that the appraisal of the general economic situation and trends shall not become subject to judicial review. This is addressed to macro-economic questions which fall to the government to determine. Otherwise, the court would interfere with political decision making and constrain the scope for governmental evaluation (Heinrich Halbey, ‘Kartellbehörden und richterliche Kontrolle—Zur Auslegung des § 70 Abs. 4 GWB’ (1968) *Wettbewerb in Recht und Praxis*, 349, 352).

The correct reading of this section is contentious. Some identify a clarification of the common administrative law doctrine whereby the courts will only control whether the authority has ‘overstepped the boundaries’ of its discretion.¹⁶⁰ If the administration has the legal power to choose one measure out of a number of distinct but legally permissible alternatives, it is not for the court to overrule this decision simply because another alternative would be superior from the judge’s point of view.¹⁶¹ However, according to others, the section’s effect is to give the OLG full jurisdiction over decisions of the BKartA.¹⁶² Accordingly and relying on this provision, the courts have gone beyond administrative law doctrine and thoroughly scrutinized merger decisions including the BKartA’s substantive assessments from the beginning of merger control in 1973.¹⁶³ That includes the establishing of legal norms—the so-called margin of appraisal for indefinite legal concepts—and ‘real’ discretion regarding the legal consequences.¹⁶⁴ By way of example, in one of the first merger decisions, the KG comprehensively reviewed the assessment of facts (albeit incorrectly in substance as was ruled later by the BGH¹⁶⁵) replacing the BKartA’s market share computation with its own calculations.¹⁶⁶ A margin of appreciation for the BKartA, especially concerning economic questions such as definition of markets, apparently did not and does not exist.¹⁶⁷ It has been argued that the special administrative procedure under the ARC aims at a thorough review of decisions in order to counterbalance the wide discretion stemming from imprecise terms in the statutory provisions.¹⁶⁸ This is notwithstanding the fact that the court also strictly controls the interpretation of ambiguous legal norms.

According to the orthodox theory, in the UK judicial review is not concerned with the merits of a decision. Indeed, were this otherwise it is often said that a court would be acting unconstitutionally by substituting its view for that of the public body (a supreme) Parliament chose to make the

¹⁶⁰ *ibid.*

¹⁶¹ This approach seems akin to the ‘range of reasonable reasons’ concept known in the UK.

¹⁶² Schmidt (n 52) s 71 para 37 (n 80).

¹⁶³ BGH of 05 May 1968, WuW/E BGH 907, 911; Schmidt (n 52) s 71 para 37.

¹⁶⁴ Schmidt (n 52) s 71 para 36.

¹⁶⁵ BGH of 21 February 1978, KVR 4/77 (GKN/Sachs), WuW/E BGH 1501.

¹⁶⁶ KG of 01 December 1976, Kart 15/76 (GKN/Sachs), WuW/E OLG 1745, 1749.

¹⁶⁷ There are numerous cases in which the courts have reassessed the BKartA’s market definition, for instance, for vacuum cleaner bags (OLG Düsseldorf of 30 April 2003, VI Kart 9/00 (V), (Staubsaugerbeutelmarkt)); journals (KG of 24 November 1982, Kart 11/81, (Gruner + Jahr/Zeit), AG 1983, 284, and OLG Düsseldorf of 15 June 2005, VI Kart 25/04, (National Geographic II) WuW/E DE-R 1501); grocery wholesale markets (KG of 16 October 1984, Kart 14/83, (Metro/Kaufhof), WuW/E OLG 3367); and gas (KG of 23 March 1977, Kart 11/76, (Erdgas Schwaben) WuW/E OLG 1895).

¹⁶⁸ Schmidt (n 52) s 71 para 37; Bundesgerichtshof of 05 May 1968, WuW/E BGH 907, 911. As the BGH pointed out (n 130): ‘A limitation of the competence to review on the part of the complaint court does not result from the fact that the BKartA would have discretion regarding the question of whether to clear or prohibit a merger; only in choosing remedies (*Bedingungen und Auflagen*) is discretion of the cartel authority is possible [...]’ (Translation by the authors).

decision.¹⁶⁹ Furthermore, in respect of economic regulation (including competition law), the courts have traditionally shown agencies a high level of deference.¹⁷⁰ As was discussed previously, the approach in the merger context has shifted significantly, partly as a result of the institutional and procedural reforms under the Enterprise Act 2002. While section 120(4) of that Act specifically limits the jurisdiction of the CAT to that of judicial review,¹⁷¹ in the *IBA Health* case the CAT was attempting to rely on its status as a specialist tribunal as permitting it to depart from the standard *Wednesbury* test governing the exercise of discretion,¹⁷² stating that the test was one simply of (objective) 'reasonableness'.¹⁷³ While the Court of Appeal did not approve of its attempt to rework the *Wednesbury* formulation,¹⁷⁴ it held that this was not the correct test for factual determinations, in respect of which the court was entitled to ask whether they were 'reasonable'.¹⁷⁵ In other words, with respect to questions of fact, the court's jurisdiction was not circumscribed by the *Wednesbury* test. Irrespective of the use of subjective language, the absence of a political or policy dimension rendered the question as being one of fact and, in regard to such questions, there 'is no doubt that the [CAT] is entitled to enquire whether there was adequate material to support that conclusion . . .'.¹⁷⁶ The real significance of the case is that the Court of Appeal read down the application of the *Wednesbury* test by defining 'discretion' in narrow terms, ie, applying only to decisions with a political or policy dimension. There followed some confusion in subsequent cases over the nature of discretion. For example in *Unichem v OFT* the CAT held that for a decision without a policy or political dimension, the use of the word discretion with its 'connotation of policy' was not appropriate;¹⁷⁷ the 'more correct concept is one of a margin of judgment'.¹⁷⁸

Subsequent case law demonstrates that the level and type of scrutiny depends very much on institutional factors and the need to ensure that the court's reviewing function does not undermine the implementation of the policy. The CAT had an opportunity to revisit the appropriate standard of review in

¹⁶⁹ If Parliament had intended there to be a right of appeal (to the courts) on the merits of a decision, it would have legislated for such a right.

¹⁷⁰ For a discussion of the case law see M Harker, 'UK Utility Regulation: Licences, Commitment and Judicial Review' (2005) 76 *Annals of Public and Cooperative Economics* 5.

¹⁷¹ Section 120(4) provides that in determining an application for review the CAT '... shall apply the same principles as would be applied by a court on an application for judicial review'.

¹⁷² On this basis, the CAT stated that it was 'unpersuaded' that there was a direct 'readover' to section 120 from cases where the courts had shown a level of deference to specialized decision-makers in the competition and regulatory spheres (*IBA Health* (n 72) [220]).

¹⁷³ *IBA Health* (n 72) [225] (emphasis supplied).

¹⁷⁴ The Vice-Chancellor stated: 'Plainly unreasonableness in the ordinary and natural meaning of the word is different from *Wednesbury* unreasonableness. If [the] CAT was seeking to apply the former meaning as the test of *Wednesbury* unreasonableness they were wrong to do so' (*IBA Health* (n 72) [61]).

¹⁷⁶ *IBA Health* (n 72) [93] (references omitted).

¹⁷⁸ *Unichem* (n 103) [172].

¹⁷⁵ *IBA Health* (n 72) [64].
¹⁷⁷ *Unichem* (n 103) [171–172].

Somerfield v Competition Commission.¹⁷⁹ In this case, the review was against a decision of the CC, rather than the OFT, and concerned the imposition of merger remedies.¹⁸⁰ Looking to the relevant statutory provisions under which the Commission was operating, the CAT concluded that it was entitled to a 'clear margin of appreciation' in deciding what action was 'reasonable and practicable' for remedying the substantial lessening of competition.¹⁸¹ It also stressed the 'considerable experience' that Commission members had 'particularly in business and commercial matters' and its entitlement 'to bring that experience to bear when reaching judgments on particular matters'.¹⁸² Similarly, in *Stericycle v Competition Commission*¹⁸³ the CAT were faced with a challenge to the CC's decision to require the appointment of a hold separate manager as an interim measure during the course of its inquiry.¹⁸⁴ The powers were expressed in broad terms allowing for the intervention where actions of the firm 'might prejudice' the outcome of the reference, signifying a 'relatively low threshold of expectation' that the ultimate remedies might be impeded.¹⁸⁵ The Commission was entitled to intervene, therefore, where it considered there was 'at least some risk of that happening'.¹⁸⁶ While the CC must exercise its interim powers 'reasonably and proportionately' it did enjoy 'a considerable margin of appreciation'.¹⁸⁷ The task for the Tribunal was whether the appointment of a hold separate manager 'was within the range of decisions open to it as a reasonable decision-maker'.¹⁸⁸ This is a well known reworking of the *Wednesbury* test. Furthermore, the fact that alternative (perhaps less restrictive) remedies were available to the CC did not render the decision unreasonable.¹⁸⁹ This would appear to distinguish the test from that of proportionality.

¹⁷⁹ *Somerfield* (n 106).

¹⁸⁰ The case concerned the terms of a divestiture remedy which the CC imposed upon *Somerfield* after it had acquired a number of stores from a competitor supermarket chain. In particular, *Somerfield* challenged the CC's decision requiring the divestment of acquired rather than pre-existing stores, arguing that both would have the effect of restoring the status quo ante. For a detailed discussion see M Harker, 'UK Merger Remedies under Scrutiny' (2007) JBL 620.

¹⁸¹ *Somerfield* (n 106) [87–88]. See in particular Enterprise Act 2002, ss 34, 35 and 41. The approach was followed in *Celesio v OFT* [2006] CAT 9.

¹⁸² *Somerfield* (n 106) [123]. The Commission was concerned that sale of the existing (and less attractive) stores would not attract suitable buyers within a reasonable timeframe so as to correct the substantial lessening of competition. The CAT held that, in this regard, inferences on saleability it had drawn from the relative unprofitability of the existing stores was not 'outwith the [Commission's] margin of appreciation' (ibid.).¹⁸³ [2006] CAT 21.

¹⁸⁴ Enterprise Act 2002, s 81. The CAT's starting point was to look to provisions which enabled the CC to impose interim remedies on a merged entity in an instance where the integration of the businesses may prejudice the effectiveness of the remedies package decided ultimately by the CC. Section 81 permits interim measures, including the appointment of a hold separate manager, in order to avoid pre-emptive action on the part of the merged firms. 'Pre-emptive action' is defined as 'action which might prejudice the reference or impede the taking of action under this Part which may be justified by the Commission's decision on the reference' (Enterprise Act 2002, s 80(10)).¹⁸⁵ *Stericycle* (n 183) [129].

¹⁸⁶ ibid (original emphasis).

¹⁸⁸ ibid [149].

¹⁸⁷ ibid [130].

¹⁸⁹ ibid.

In the area of discretion, in the strict sense of a choice between alternatives, we note evidence of a strong convergence of the UK system towards that of the EU. The case law is somewhat contradictory. Initially, the *Wednesbury* test was limited to those decisions with connotations of policy. The change of approach has been justified explicitly by the procedural reforms made under the Enterprise Act 2002. As Carnworth LJ noted, the Act has led to the cessation largely of the role of the Secretary of State and the abandonment of the 'public interest' test in favour of an explicit competition-based test.¹⁹⁰ This judicial recognition of the depoliticization of merger control, with the consequence it has for an increase in the judicial scrutiny of merger control, is the most significant aspect of the case, at least from our point of view. Whereas under the previous regime, the decisions in merger cases were taken ultimately by a politician, now the decisions of the independent competition agencies are determinative. This justifies the court tightening the *ex post* control it has over the authorities, a result consistent with agency theory. At the EU level we see evidence of an increased level of scrutiny in merger cases. While there has been no comparable shift in the locus of decision-making (as in the UK), one argument that has been used to explain the increased levels of scrutiny of the court has been the need for credible decision-making, especially in the light of a move towards a more effects-based analysis. The German system appears to be the most stable and is the one where the courts have the most control over merger decisions. This is more likely explained by the constitutional foundations of judicial review in that jurisdiction, in particular, the central importance of effective judicial protection of private rights.

V. CONCLUSIONS

The central motivation for this article is the apparent increased intensity in judicial review of merger decisions, despite the fact that this policy area has become more complex, requiring more (particularly economic) expertise. We would therefore expect more, not less, deference to be shown by the courts to agencies. Simple accounts of juridification fail to fully explain this phenomenon.¹⁹¹ At least for the UK and the EU, we consider that the increased scrutiny is better explained by agency theory.

The apparently counter-intuitive increased level of scrutiny in the EU and the UK is not without a credible explanation, taking into account the particular

¹⁹⁰ *IBA Health* (n 72) [79].

¹⁹¹ Law's horizontal expansion, the most common meaning of juridification, relates to the expansion of legal regulation to activities which were previously there was none. For a survey of its differing usages see LC Blichner and A Molander, 'Mapping Juridification' (2008) 14 *European Law Journal* 1, 36. For narrative based on juridification in other areas of competition law see, for example, S Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy' (2005) 18 *Governance* 3, 431; I Maher, 'Juridification, Codification and Sanction in UK Competition Law' (2000) 63 *Modern Law Review* 4, 544.

need for *ex post* controls of independent agencies in order to promote the credibility of policy and decision-making. For the EU we would associate ourselves with the observations of Gerber who claims that the relationship between the European Commission and the EU Courts has shifted over time.¹⁹² He traces an apparent shift from an integration imperative during the foundational period of the Community, where the Court is characterized as ‘saviour’ of the European Commission, to a more recent critical relationship as the system has matured, reflecting a need for increased credibility and legitimacy. The recent landmark judgments of the EU Courts evidencing a heightened standard of review seem consistent with this narrative.

What of merger review at the national level? In national systems, a similar trend can be observed. Schwarze notes an identifiable Union-wide trend towards common standards of modern administrative law among the EU Member States.¹⁹³ For example, depoliticizing merger policy by removing, or at least limiting, the possibility of ministerial intervention and approval heightens the need for alternative modes of accountability, with the courts playing an increasing role. The recent approach of the UK CAT and Court of Appeal to judicial review seems consistent with this observation. There appears to be less deference displayed than was the case under the previous system, in part justified by the depoliticization of the regime, which has the curious result, according to the appellate court, of shifting the fact-discretion distinction. In the EU, it is well known that the Commission is granted a ‘margin of appreciation’ in complex economic assessment, but it has been claimed, not least by the Commission, that this margin has been eroded in recent times.¹⁹⁴ Likewise, in the UK, the *Wednesbury* test for the standard of judicial review has largely been side-lined. While there will always be tensions between the need for legal certainty and the need for flexibility and expertise in the implementation of policy, this trade-off may be struck differently in jurisdictions such as Germany, where there is a strong tradition of the legal control of power in administrative law generally, and in merger law in particular. In practice, though, the courts do show some respect for the expertise of the agency by commissioning it with further investigations.

Differing constitutional bases are also highly relevant. This is particularly so in the case of Germany because of the explicit significance, at a constitutional level, of effective judicial protection of individual rights. In a jurisdiction such as the UK, where the role of the review court is characterized as

¹⁹² DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, Oxford, 1998) chapter 9.

¹⁹³ J Schwarze, ‘Enlargement, the European Constitution, and Administrative Law’ (2004) 53 ICLQ 969–984, 972.

¹⁹⁴ Indeed, in *Tetra Laval*, the Commission argued unsuccessfully before the CJEU that the GC had exceeded its reviewing function. For a discussion see J Temple Lang, ‘Two Important Merger Regulation Judgments: The Implications of *Schneider-Legrand* and *Tetra Laval-Sidel*’ (2003) 28 European Law Review 2, 259.

being one primarily to ensure that the intentions of the legislature are complied with, we would expect to see more deference. This is certainly the case. For example, in the UK, partly flowing from difference in the literal approach to statutory interpretation, some level of deference is shown in the interpretation of legal norms, although this depends very much upon the decisional context. With respect to the important distinction between weak and strong discretion, the UK's system appears to grant the agency some discretion over the interpretation of legal norms. In contrast, the EU Courts are increasingly willing to prescribe and specify in detail complex legal norms, and in Germany the approach is much the same.¹⁹⁵

Courts are often omitted from institutional analysis, despite the fact that their rulings can have important implications for the success, or otherwise, of a policy. Agency theory offers a convincing framework given the particular need for *ex post* controls of independent agencies in order to promote the credibility of policy and decision-making. This is not, however, without tensions. While increased judicial supervision can promote credibility, if taken too far it may actually undermine the policy by increasing the scope for errors, especially where a generalist court substitutes its decisions for those of an expert agency, or controls discretion to such an extent that 'substantive rationality' is undermined.

In addition, standard principal agent models are too simplistic to account for the role of the court. Given the importance of the constitutional context in which courts operate, in addition to principles of institutional separation and the distinct forms of legitimacy that the judiciary enjoys (as compared with the executive and the legislature), it would be wrong to characterize the courts as merely the surrogate of the principal (exercising *ex post* control on its behalf). A more nuanced approach is required, as this article has sought to demonstrate.

¹⁹⁵ Although here the strict control of legal norms is mandated by the right to effective judicial control.