



# The Extent of the Judicial Review Practiced by Community Judicature

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# 1. Context

- **Definition** of review of legality : second paragraph of **Article 230** :  
“Lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.”
- **Prima facie**, conditions for entitlement applicable in **all cases**.
- But, article **33 ECSC** Treaty:  
Only “manifest failure” when judge has to examine “the situation resulting from economic facts or circumstances”.

- **Spreading** to EC Treaty (division of powers, judge not omniscient) :

“It should be borne in mind that, although as a general rule the Community judicature undertakes a **comprehensive review** of the question whether or not the conditions for **applying** the competition **provisions** of the EC and ECSC Treaties are met, its **review of complex economic appraisals** made by the Commission is **necessarily limited** to verifying whether the relevant 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” (ECJ 2 October 2003, Krupp Hoesch v Commission, C-195/99, paragraph 55).

- So, two kinds of control :

- **Comprehensive review** (or “full review”) on “purely legal nature” questions;
- **Restricted review**.

- Not only for European judge but **also for national court** when it is acting like Community judicature (ECJ 21 January 1999, Upjohn II, C-120/97, paragraph 36).
- Object of the talk : When these two forms of control are respectively applicable ? because a demarcation line between those two kinds of control is difficult to establish.

## 2. Competence

- Pure legal question → Comprehensive review

## 3. Grounds of the act

- Three kinds of pleas
  - Pleas criticising establishment of facts
    - criticisms about method followed to establish the facts
    - direct dispute about correctness of the facts
  - Pleas against assessment that administration infers of the facts
  - Pleas criticising law grounds : statutory basis or its interpretation

# 3.1. Pleas criticising establishment of facts

## 3.1.1. Method followed to establish facts

### 3.1.1.a. Principle of proper administration to guarantee effectiveness of exercise by administration of its competences

#### 3.1.1.a.1. To Proceed with seriousness and diligence in order to take into account all relevant facts

- Margin of discretion concerning the scope and the relevance of **Court's investigations varies in function of power of assessment of administration** to take final decision.  
→ **Restricted review** about the question to know if Commission had decided on a fully informed basis when it had to decide in the light of **complex assessment** (ECJ 15 June 1993, Matra v Commission, C-225/91, paragraphs 23 et 25).

### 3.1.1.a.2. To decide personally

- For example: CFI 16 September 2004, Valmont v Commission, T-274/01, paragraph 72 (experts)
- **Linked** to the necessity to respect effectively the repartition of **competences** → **Comprehensive review**.

### 3.1.1.b. Respect of formalities and procedures

- Rights of the defence, impartiality, ...
- Strictly **legal** question → **Comprehensive review**.

## 3.1.2. Material accuracy of facts

- Comprehensive review
- Especially about rules on evidence

ECJ 15 February 2005, Commission v Tetra Laval, C-12/03 P

“39. Whilst the Court recognises that the Commission has a **margin of discretion** with regard to economic matters, that does **not mean** that the Community **Courts must refrain** from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is **factually accurate** [...] but also whether that **evidence contains all the information** which must be taken into account in order to assess a complex situation [...]”.



## 3.2. Pleas criticising interpretation and application of the law

- Heart of judicial review : article 220 (1) EC Treaty → comprehensive review

“In its review of legality [...], the Community judicature conducts a full review as to whether the Commission applied properly the relevant rules of law, whose meaning must be determined in accordance with the methods of interpretation recognised by the case-law” (CFI 7 November 2007, Germany v Commission, T-374/04, paragraph 81).

## 3.3. Transition from facts to law

### 3.3.1. Classification

#### 3.3.1.a. Determination of the **relevant characteristics** of the situation

##### 3.3.1.a.1. Circumscribed power

Example : article 51(1)(b) of directive 2004/18 (public contracts) : lowest price

**Comprehensive review** : verification that conditions are fulfilled or not, non restricted to a manifest error

##### 3.3.1.a.2. Discretionary power

Example : article 51(1)(a) of directive 2004/18 (public contracts) : tender most economically advantageous

3.3.1.a.2.i. *Complex assessment* → *restricted review* -  
*manifest error of assessment*

- **Complex economic** assessments : competition law, State aids, common commercial policy, common agricultural policy ... : (for example : ECJ 2 October 2003, Krupp Hoesch v Commission, C-195/99 P, paragraph 55)
- **Complex social** assessments (State aids : ECJ 6 September 2006, Portugal v Commission, C-88/03, paragraph 99)
- Complexity of the **political and legal situations** in third country (measures to protect trade : CFI 28 October 2004, Shanghai Teraoka Electronic v Council, T-35/01, paragraphs 48 and 49)
- **Complex scientific** assessments (medico-pharmacological field : ECJ 21 January 1999, Upjohn II, C-120/97, paragraphs 33 and 34).

3.3.1.a.2.ii. *Wide power of assessment without allusion to complexity* → *restricted review - manifest error*

- Exercise of **legislative power** (ECJ 22 November 2001, Netherlands v Council, C-110/97, paragraphs 61 et 62)
  
- **Individual decisions** : wide discretion which involves assessments :
  - social nature (State aids: ECJ 15 June 1993, Matra v Commission, C-225/91, paragraphs 24 and 25) ;
  - **prospective** analysis in **merger** control (CFI 25 march 1999, Gencor v Commission, T-102/96, paragraph 163)
  
- **Members States** : broad power of appreciation.  
For example : Identification of tasks of general economic interest (CFI 12 February 2008, Bupa v Commission, T-289/03, paragraphs 165 and 166)

3.3.1.a.2.iii. *Only margin of assessment*  
Inclination to **comprehensive review**

### 3.3.2. **Consistency of the reasoning**

- “Community Courts [...] establish whether the **evidence** [...] is [...] **consistent** [...] and whether it is capable of **substantiating** the conclusions drawn from it” (ECJ, Commission v Tetra Laval, paragraph 39)
- Especially by review of the **reasoning** which must be free from inconsistency (CFI 24 January 1995, Tremblay v Commission, T-5/93, paragraph 42) : **Full review** (see conventional formula : ECJ, Krupp Hoesch v Commission, paragraph 55, above)

## 4. Operative part of the act

### 4.1. Circumscribed power concerning object of acts

- For example : article 7(5) of Regulation N° 659/1999 : When a notified measure is a State aid incompatible with the common market : only to decide that the aid shall not be put into effect
- **Normal review** on this object, whatever the power of assessment about reasons

## 4.2. Discretionary power concerning object of acts

### 4.2.1. Kinds of acts

#### 4.2.1.a. Community measures

##### 4.2.1.a.1. Exercise of **legislative power**

**Broad discretion** in areas which involve political, economic and social choices (ECJ 6 December 2005, ABNA et al., C-453/03, C-11/04, C-12/04 et C-194/04, paragraph 69)

- common agricultural policy
- common transport policy ...

##### 4.2.1.a.2. **Individual decisions**

For example : Article 7(3) of Regulation N° 659/1999 : Aid compatible with the common market → positive decision with conditions guaranteeing this compatibility + obligations allowing to control the respect of those

## 4.2.1.b. National measures

- Member States : Wide margin of assessment to aim the level of protection of the legitimate interests to further. Id. for organization of SGEI (CFI 12 February 2008, Bupa v Commission, T-289/03, paragraphs 165 and 166).



## 4.2.2. Extent of judicial review

### 4.2.2.a. Restricted review

- When discretionary power
  - Community authorities must respect the principle of proportionality ... but “the lawfulness of a measure adopted in [the] sphere [of wide discretion] can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue” (ECJ 7 September 2006, Spain v Council, C-310/04, paragraphs 96 and 98)
  
  - Concerning organization by members States of SGEI : In absence of provision, choices only open to criticism in the event of their manifest error (CFI 12 February 2008, Bupa v Commission, T-289/03, paragraphs 165 and 166).

## 4.2.2.b. Full review

### 4.2.2.b.1. If **circumscribed** power concerning object of acts

### 4.2.2.b.2. **Derogation** from **free movement** of goods or from free movement of persons

- No restriction to the extent of judicial review on national measures :
  - in action for failure to fulfil obligations
  - in preliminary ruling (indirect judicial review on national law by the means of the answers provided with regard to interpretation of the Community law)
- Id. for **organization** by members States of **SGEI** in the light of fundamental freedoms of the Community (ECJ 20 February 2001, Analir, C-205/99, paragraphs 35, 38 and 40)

#### 4.2.2.b.3. **Unlimited jurisdiction**

- In **competition cases** (article 229 EC, article 31 of regulation N° 1/2003)
- **Wide margin** of discretion of the **Commission** in fixing the amount of **finances do not prejudice** the exercise of unlimited jurisdiction (cancel, reduce or increase the fine) (CFI 8 July 2004, JFE Engineering et al. v Commission, T-67/00, T-68/00, T-71/00 et T-78/00, paragraph 538)

# 5. Special case of the action to establish **liability**

- Kind of judicial review: Particular purpose, but **based on unlawful** measure attributable to a Community Institution (ECJ 23 March 2004, Mediator V Lamberts, C-234/02 P, paragraph 59)
- In principle, **restricted review** : Only if breach is sufficiently serious. Decisive test for this criterion : The member State or the Community Institution concerned **manifestly and gravely disregarded** the limits on its discretion (ECJ 5 March 1996, Brasserie du Pêcheur and Factortame, C-46/93 and 48/93, paragraphs 51, 53 and 55)