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Margins of Appreciation: Changing Contours in Community and Domestic Case Law

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Margins of Appreciation: Changing Contours in Community and Domestic Case Law

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This article considers the circumstances in which a court, faced with a challenge to a decision taken by a primary decision-maker, accords a "margin of appreciation" to that decision-maker by limiting the intensity of its review. It compares the concept of the margin of appreciation as applied by the Community Courts in the application of Article 81 with that of the domestic courts in the United Kingdom when they are dealing with challenges based on directly effective Community rights or alleged breaches of the European Convention on Human Rights. The article examines how discussion of the existence and scope of the margin is influenced by the reviewing court's perception of its role in administrative challenges more generally and whether the position of a specialist tribunal established to hear a particular kind of case is different from the position of a generalist court.

*The author is a Chairman of the Competition Appeal Tribunal ("CAT") in London. The views expressed in this article are entirely personal, do not necessarily reflect the views of my colleagues and do not indicate how the Tribunal is likely to decide any cases whether currently pending or arising in the future. I would like to thank David Bailey, référendaire at the CAT, for his help with the preparation of this article.

I. Introduction

In this article the term "margin of appreciation" refers to the practice of courts when reviewing a particular decision to acknowledge that they should exercise restraint when considering whether to substitute their own assessment of the merits of the decision. In such cases the reviewing court will not overturn the original decision simply because it would have decided the matter a different way. Rather the court recognizes that the decision-maker's assessment should be overturned only if there is something manifestly wrong with it.

RATHER THE COURT RECOGNIZES THAT THE DECISION-MAKER'S ASSESSMENT SHOULD BE OVERTURNED ONLY IF THERE IS SOMETHING MANIFESTLY WRONG WITH IT.

II. Community Law

The concept—or at least the use of the term "margin of appreciation"—has a much longer pedigree in Community law than it has in English domestic law. Indeed, the idea with which we are so familiar now in the application of certain aspects of the competition rules was expressly incorporated in Article 33(1) of the expired European Coal and Steel Community Treaty 1951. That article provided that the Court may not review the conclusions of the European Commission ("Commission"), drawn from economic facts and circumstances, except "where the [Commission] is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application."

The idea in Community law of conferring a margin of appreciation is not limited to the application of the competition rules. For example, in *Germany* v *Commission*[1] Germany challenged a Commission decision which found that Germany's national allocation plan for greenhouse gases failed to comply with the relevant Directive. The Court of First Instance recognized that it was dealing with a double margin—first, the margin that the Commission must accord to the Member State when the State decides how to implement a directive and secondly, the margin that the Court must accord to the Commission's review of that Member State's implementation in so far as the review entails complex economic and ecological assessments. In its own review of the Commission's assessments, the Court of First Instance stated that it "cannot take the place of the Commission" but must confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers; that the competent authority did not clearly exceed the bounds of its discretion; and that procedural guarantees have been fully observed.

Any consideration of the powers of review of the Court of First Instance in competition matters must start with the source of its power to review: Article 230 EC. Article 230 provides that the legality of Commission acts can be chal-

lenged "on grounds of 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." On its face this is a limited form of review as compared with the "unlimited jurisdiction" which is referred to in Article 229 with regard to the imposition of penalties. But within this single test set out in Article 230, both the Court of First Instance and the Court of Justice have adopted a flexible approach to the scope of review for the different grounds of challenge. The existence of a margin of appreciation for the decision-maker is not uniform across all the different grounds of appeal. There has been no margin conferred when the Court is considering an alleged error of law in the construction of a Community instrument. Indeed, the Community Courts are enjoined by Article 220 EC to ensure that in the interpretation and application of the Treaty, the law is observed. No matter how complex the drafting of the instrument or how arcane and technical the subject matter, the Court will always get to grips with purely legal questions. Thus, in its recent judgment in *British Aggregates Association*,[2] the Court of Justice held that the Court of First Instance had been wrong to accord the Commission a margin of appreciation on the question of whether a particular State measure was an aid for the purposes of Article 87 EC. Since State aid is a legal concept and must be interpreted on the basis of objective factors, the Community Courts must carry out a comprehensive review. There was no justification for the Court giving a broad discretion to the Commission on this issue.

The Court of First Instance also examines the factual findings made by the Commission with great diligence. In his often quoted Opinion in *Commission* v *Tetra Laval*,[3] Advocate General Tizzano said that

> "With regard to the findings of fact, the review is clearly more intense, in that the issue 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."[4]

This reflects both the purpose for which the Court of First Instance was established, namely to strengthen the Community's system of judicial review of such complex assessments,[5] and its role as the human rights compliant tribunal for reviewing cases which may involve the imposition of substantial penalties.[6]

The Court of First Instance has itself drawn a distinction between its close scrutiny of errors of law and of fact and its more constrained scrutiny of matters of complex economic appraisal. There are a number of areas where the European

Courts have acknowledged that a margin of appreciation is appropriate; the discussion in this article will focus on the use of the concept in the application of Article 81. It is also commonly referred to in reviewing the exercise of the Commission's discretion in rejecting complaints[7] and in the application of the EC Merger Regulation.[8]

The reference in the context of the application of Article 81 EC to limits on the scope of review of matters involving "complex economic assessment" goes back to the early case law of the European Court of Justice in *Consten and Grundig*[9] where the Court held that judicial review of these complex matters "take[s] account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom." A more recent description of the test can be found in *Shaw v Commission* where the Court of First Instance stated that:

> "[r]eview by the Community judicature of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article [81](3) of the Treaty, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers."[10]

Although the test is conventionally thought of as relevant to the application of Article 81(3) rather than Article 81(1), in fact the same formula referring to the need for a "manifest error of assessment" has been invoked in relation to both stages of the application of Article 81. This, perhaps, reflects the move towards a more economics-based application of Article 81(1), with the courts acknowledging that the same margin should be accorded to the Commission in relation to the application of the prohibition in the first place, before any consideration of Article 81(3). Thus in *Remia*[11] (one of the early cases pointing towards a more economics-based approach) the Court of Justice was reviewing a Commission decision which had declared that a vendor's 10 year non-compete covenant fell within the prohibition of Article 81(1) only after the end of the first four years. The Commission then refused to apply the exemption in Article 81(3) to the final six years of the covenant. Advocate General Lenz addressed the question "whether it is possible for the prohibition in Article [81](1) not to be applied to agreements in restraint of competition which in theory fall within its scope without adopting the exemption procedure under Article [81](3)." Having concluded that this was possible he considered that such "non-application" of Article 81(1) must be governed by criteria similar to those contained in Article 81(3):

> "If this is right and the principles regarding exemption from the prohibition of restrictive agreements may be applied to this case by analogy, a further consequence will follow regarding the scope for judicial review of the Commission's decision.... The Court of Justice has recognised that Article [81](3) necessarily implies complex economic assessments of economic matters. Similarly, where such assessments are made in the case of prohibitions of competition agreed in connection with transfers of undertakings, the judicial review must take that fact into account and therefore confine itself to determining the correctness of the facts on which the assessments are based and the applicability to those facts of the relevant legal principles."

The Court followed the Advocate General's conclusions and expressly applied the "manifest error" terminology to the Article 81(1) stage of its review as well as referring to "the discretion which the Commission enjoys" in the application of the exemption. As regards Article 81(1) the Court stated:

> "Although as a general rule, the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article [81](1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking, the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."[12]

The same approach has been adopted more recently when the Court of First Instance has considered the application of both Article 81(1) and 81(3). In *Van den Bergh Foods*[13] the Court referred to the manifest error of assessment test when considering a challenge to the Commission's findings as to the degree of foreclosure in the market for impulse ice cream (paragraph 80) and to the same test when considering the challenge to the Commission's refusal of exemption under Article 81(3) (see paragraph 135). In that case the Court dismissed the challenge as unfounded in both respects. Similarly, in *GlaxoSmithKline Services*[14] the Court of First Instance again referred to the *Remia* formulation of limited review both in its preliminary observations on the application of Article 81(1) (see paragraph

57 of the judgment) as well as in the part of its judgment dealing with Article 81(3) (see paragraph 241). However, in neither context in the *GlaxoSmithKline Services* case did this prevent the Court from making substantial inroads into the Commission's decision. Although it was not contested either that the relevant clause existed and was enforced, or that its purpose was to restrict parallel imports, the Court after reciting the "manifest error of assessment" formula nonetheless overturned the Commission's decision that the clause fell within Article 81(1) by reason of its object alone, and then devoted 80 paragraphs to annulling the Commission's refusal to grant exemption under Article 81(3).

In these cases concerning the application of Article 81(1) and (3) there is no detailed discussion by the Court as to *why* a margin of discretion should be accorded by the Court of First Instance to the Commission in respect of these particular aspects of its review jurisdiction. The attitude of the Community Courts is illustrated by the Opinion of Advocate General Reischl in *Metro (No 1)*[15] where he states that an assessment of a selective distribution system involves difficult economic judgments and that the balancing of the advantages flowing from the system against the restriction of competition calls for complex assessments. "This *necessarily* means" according to the Advocate General "that the Commission has a margin of discretion in this respect and this means at the same time that there is *a corresponding restriction* on judicial review" (emphasis added). But complexity is not generally considered, in itself, a reason for the courts to shrink from getting into the detail of a case. There are many instances where the Courts are willing to immerse themselves in complex matters. Nor can the margin of discretion simply be a recognition of the fact that it is possible for reasonable people to differ on the conclusions to be drawn from an economic analysis. After all, the law is no less an inexact science than economics. It is possible for reasonable lawyers to differ on the proper interpretation of a particular statutory provision but that is not considered a reason for the Courts to refrain from substituting their own interpretation. In relation to the law, though, because of the precedent-setting characteristic of case law and the importance attached to the consistent application of the law across courts sitting within the same jurisdiction, the importance of establishing the one "true" meaning of a provision will always trump respect for the original decision-maker's conclusion.

IN RELATION TO THE LAW, THOUGH, BECAUSE OF THE PRECEDENT-SETTING CHARACTERISTIC OF CASE LAW AND THE IMPORTANCE ATTACHED TO THE CONSISTENT APPLICATION OF THE LAW ACROSS COURTS SITTING WITHIN THE SAME JURISDICTION, THE IMPORTANCE OF ESTABLISHING THE ONE "TRUE" MEANING OF A PROVISION WILL ALWAYS TRUMP RESPECT FOR THE ORIGINAL DECISION-MAKER'S CONCLUSION.

The key here appears to be the fact that the complexity relates to the application of principles of economics (rather than purely of law) and these are pecu-

liarly within the expertise of the Commission rather than the Court. The second element appears to be that where there is a balance to be struck between the advantages and disadvantages of an agreement, (whether in the context of applying Article 81(1) or 81(3)), the decision-maker is entitled to a margin of discretion when it carries out that balance.

III. Domestic Law

The modern principles governing judicial review of executive decisions in England grew out of the prerogative writs which the court could issue at the suit of the Crown when the Crown brought an action against the executive on behalf of an individual citizen.[16] Although national arrangements for hearing challenges to administrative action differ across the Member States, all national courts within the EU have had to accommodate within their legal systems the direct effect of Community law. Those which, like the United Kingdom, have incorporated the European Convention on Human Rights into their domestic law enabling citizens to enforce those rights through their domestic courts will also have had to grapple with how traditional tests for assessing executive decisions need to be adapted to ensure that Convention rights are fully protected.

The expression "margin of appreciation" arrived relatively late in English domestic jurisprudence but the idea behind it has been at the core of the development of judicial review. The discussion has been conducted against a legal background marked by two important features. The first feature is the existence of two well recognized but traditionally very different standards of review. The contrast is thus between "an appeal on the merits" in which the reviewing court examines the matter afresh, hearing evidence and forming its own view and "an application of the principles of judicial review." This distinction is firmly embedded, and the language used in the lengthy and continuing debate among English judges and jurists over how far review of decisions challenged on Community law or human rights grounds has moved towards a "merits" review is a product of this dichotomy.

The second feature is that the courts' review of the decisions of public bodies in English law is moving from a position of traditional reluctance to intervene in areas of policy to a position of greater intensity of scrutiny. In Community law, as we have seen, the courts could be said to have adopted the concept as a self-denying ordinance, given that there is nothing within Article 230 which requires the application of a less intense degree of scrutiny in respect of some aspects of the Commission's decisions but not others. The margin of appreciation conferred by the Community courts on the Commission is thus set against the "default position" of a more intensive degree of scrutiny. By contrast, the "default position" in review of administrative decisions in English law is one in which a much greater degree of deference has generally been shown to the decision-maker.

IV. "Traditional" Judicial Review

There are three generally recognized grounds of challenge in judicial review under English law—excess of power, irrationality, and procedural irregularity. More recently a fourth has been added: in *E v Home Office*[17] the Court of Appeal held that mistake of fact giving rise to unfairness is a separate head of challenge in judicial review proceedings. As with Community law, the courts' scrutiny of legal issues generally allows no margin of discretion to the decision-maker in relation to any aspect of legal interpretation that the decision-maker is called on to undertake.[18] In some rare instances, a margin of appreciation has been extended to a decision-maker if the factors relevant to the proper interpretation of a statutory term are considered peculiarly within that decision-maker's expertise. This is illustrated by the decision in *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport*.[19] The jurisdiction of the former Monopolies and Mergers Commission over mergers was limited to cases where the area affected by the merger constituted "a substantial part of the United Kingdom." Although the interpretation of the phrase therefore set the bounds of the MMC's jurisdiction, the House of Lords held that because the criterion of substantiality was so imprecise and included not only geographical extent but population and economic activities, the court was only entitled to interfere if the MMC's decision could not be regarded as rational.

THERE ARE THREE GENERALLY RECOGNIZED GROUNDS OF CHALLENGE IN JUDICIAL REVIEW UNDER ENGLISH LAW—EXCESS OF POWER, IRRATIONALITY, AND PROCEDURAL IRREGULARITY. MORE RECENTLY A FOURTH HAS BEEN ADDED: IN E V HOME OFFICE THE COURT OF APPEAL HELD THAT MISTAKE OF FACT GIVING RISE TO UNFAIRNESS IS A SEPARATE HEAD OF CHALLENGE IN JUDICIAL REVIEW PROCEEDINGS.

In the main, however, the debate over margins of appreciation has taken place in the review by the courts of the executive's exercise of discretionary powers—although the debate predates considerably the introduction of that phrase in English case law. In the English jurisprudence the issue for discussion is not when the courts should hold back from a full, rigorous appraisal of the merits of the decision but rather in what narrow circumstances can the courts intervene in the decision-making of the executive at all. The early cases set the bar high. The classic exposition is that of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[20] and the test, commonly referred to as "the *Wednesbury* test," is usually expressed in terms that the courts intervene only if the decision is so unreasonable that no reasonable decision-maker could have made it. Sometimes this has been expressed in more extravagant terms. Indeed, in *Wednesbury* itself, Lord Greene MR stated that the decision needed to be "something so absurd that no sensible person could every dream that it lay within the powers of the authority." Lord Diplock has described the task facing some-

one challenging the exercise of a discretionary power as needing to establish that the decision was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[21]

RECENT CASES HAVE EXPRESSED THE TEST IN MORE MEASURED TERMS—AN OFTEN CITED FORMULATION IS THAT OF THE DECISION "BEING UNREASONABLE IN THE SENSE THAT IT IS BEYOND THE RANGE OF RESPONSES OPEN TO A REASONABLE DECISION-MAKER."

Recent cases have expressed the test in more measured terms—an often cited formulation is that of the decision "being unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker."[22] A recent application of the classic test can be seen in the judgment of Beatson J in *R (Centro) v Sec of State for Transport*.[23] There a challenge was brought against a decision by the defendant Government department concerning the method of calculating the reimbursement of transport providers who provide concessionary fares for elderly and disabled people. Beatson J stated:

> "If this ground of the challenge is analysed as based on irrationality the claimant has to overcome a high threshold. This is because the issues for decision concerned the application of complex economic concepts in particular the elasticities applied to price increases to be used as part of the calculation of the reimbursement rate paid to transport operators providing travel concessions. It is clear that, when considering decisions of this nature in the context of judicial review, the court is particularly cautious and reluctant to intervene."

It is this test that has had to be adapted to deal first with the direct effect of Community law and more recently with the domestic incorporation of the European Convention on Human Rights ("Convention"). In the development of judicial review concerning alleged breaches of directly effective Community rights, there has been considerable discussion of the shift from "traditional" judicial review which leaves a substantial margin of appreciation to the decision-maker to a more intensive review where the court cannot avoid substituting its own decision. A description of what is needed was set out in the judgment of Laws J in *R v MAFF ex parte First City Trading Limited*.[24] That case concerned a challenge to a national instrument, the Beef Stocks Transfer Scheme, on the grounds that it infringed the fundamental Community principle of equality of treatment. The judge held that the Community principle did not apply in this purely domestic context. But he went on to consider whether, if the principle

had applied, the scheme was objectively justified. The Government relied on a passage from *Roquette Frères*[25] which adopted the "manifest error" test. The Government argued that this was in reality "a test closely akin to *Wednesbury*." Laws J rejected this. He recognized that there must remain a difference between the approach of the court in arriving at a judicial decision on the question whether a measure is objectively justified and that of the primary decision-maker himself: the court's task is to decide whether the measure in fact adopted lies within the proper legal limits of the decision-maker's powers.

Laws J then went on to explain the difference between *Wednesbury* and what he called "European review":

> "The difference between *Wednesbury* and European review is that in the former case the legal limits lie further back. I think there are two factors. First, the limits of domestic review are not, as the law presently stands, constrained by the doctrine of proportionality. Secondly, . . . the European rule requires the decision-maker to provide a fully reasoned case. It is not enough merely to set out the problem, and assert that within his discretion the Minister chose this or that solution constrained only by the requirement that his decision must have been one which a reasonable Minister might make. Rather the Court will test the solution arrived at, and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable, and proportionate to the aim in view. But as I understand the jurisprudence, the Court is not concerned to agree or disagree with the decision: that would be to travel beyond the boundaries of proper judicial authority, and usurp the primary decision-maker's function. Thus *Wednesbury* and European review are different models—one looser, one tighter—of the same juridical concept which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power."

Referring to Laws J's judgment as repaying close study, the Court of Appeal in *Eastside Cheese*[26] also stressed two aspects in particular: first, the difference between ordinary judicial review and the test to be applied when the challenge concerns the proportionality of the decision; and second, the need to respect the choice made by the responsible decision-maker after consultation with his expert advisers. The Court in *Eastside Cheese* introduced the idea that the width of the margin of appreciation is a flexible concept:

> "(. . .) there seems to be no good reason in principle or authority for two sharply different tests. The margin of appreciation for a decision-maker (which includes, in this context, a national legislature) may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the member state in question. The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided (not, as the secretary of state submits, only with the latter)."

Inevitably the question arose as to how far the principle of proportionality, originally regarded as relevant only in Community law cases, should be regarded as part of the *Wednesbury* test in a purely domestic context. In *Alconbury*[27] Lord Slynn noted that the difference between that principle and the *Wednesbury* test was not as great as was sometimes supposed because of the margin of appreciation the Community Courts accord to the Commission in making economic assessments. It should be recognized as part of English administrative law: "Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing." However, he cautioned that this does not mean that judicial review amounts to a complete rehearing on the merits of the decision unless Parliament has authorized this in a particular area.

This idea of some flexibility in applying the judicial review standard was described more recently in *Mabanaft Ltd*.[28] There Beatson J. referred to the margin left to the decision-maker in that case as being "at the broader end of the spectrum." Carnworth LJ also adopted the idea of a spectrum of intensity of review in *IBA Health*[29] where he said that at one end of the spectrum a "low intensity of review" is applied to cases involving issues of political judgment or matters of national economic policy while more intense review is applied at the other end of the spectrum for decisions alleged to infringe fundamental rights. The idea of a spectrum thus suggests a more nuanced approach.

In the human rights sphere, the margin of appreciation conferred on the Contracting States by the Convention was described by the Strasbourg court in *Fretté v France*.[30] In that case the application challenged the ban in France on homosexuals being considered as potential adoptive parents. Having found that there was no common practice among the Contracting States as to whether to apply such a ban, the Court held that the States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin will vary, the Court said, according to the circumstances, the subject matter, and its back-

ground. It is therefore natural that national authorities, who have a duty in a democratic society to consider the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. Because of their "direct and continuous contact with the vital forces of their countries" such authorities are in principle better placed than an international court to evaluate local needs and conditions.

The way in which this affects the role of the domestic courts was described by Lord Hope in *ex p Kebilene*[31] who stated that when national courts are considering Convention issues arising within their own countries "the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules." Further, the questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality:

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. . . . It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

There have been two aspects of this adaptation which vary in the extent to which they depart—or at least in which they acknowledge that they are departing—from the traditional judicial review test. The first aspect expresses the idea that although the test being applied is still the same "within the range of reasonable responses" test, it is applied more intensely because of what is at stake for the person affected by the decision. Thus in *R (Ross) v West Sussex Primary Care Trust*[32] the judge expressed the test in the following terms: "the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable; the Courts must subject [the decision-maker's] decision to anxious scrutiny because the Claimant's life is at stake."

But recent decisions have acknowledged that the courts' approach to the judicial review of decisions challenged directly on human rights grounds must go beyond even this "anxious scrutiny." An often cited exposition of the test is found in the speech of Lord Steyn in *ex p Daly*.[33] He noted that there is an overlap between the traditional grounds of review and the approach of proportionality such that most cases would be decided in the same way whichever approach is adopted. But, he went on, the intensity of review is "somewhat greater" under the proportionality approach. The doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Further, the proportionality test may go further than the traditional grounds of review inasmuch as the test may require attention to be directed to the relative weight accorded to interests and considerations. Lord Steyn acknowledged that the differences in approach between the traditional grounds of review and the proportionality approach may sometimes yield different results.

BUT RECENT DECISIONS HAVE ACKNOWLEDGED THAT THE COURTS' APPROACH TO THE JUDICIAL REVIEW OF DECISIONS CHALLENGED DIRECTLY ON HUMAN RIGHTS GROUNDS MUST GO BEYOND EVEN THIS "ANXIOUS SCRUTINY."

In that case the House of Lords still emphasized the distinction between the proportionality test and "a shift to the merits"—Lord Steyn stressed that the respective roles of judges and administrators are fundamentally distinct and will remain so and that "In law context is everything." This has been maintained even in a case (such as *R* v *Governors of Denbigh High School*[34]) where the courts have stressed that in the human rights context, the court is not concerned with the *process* by which the decision-maker arrived at the impugned decision but with whether or not the decision was right. But perhaps the high point of this adaptation of the judicial review test has come in the context of the courts' review of decisions in relation to compulsorily-detained people under mental health legislation. The Court of Appeal in *R (Wilkinson)* v *Broadmoor*[35] held that, when judicial reviewing a decision to treat a detained mentally ill hospital patient without his consent, the court should conduct a "full merits review" as to whether the proposed treatment infringed his human rights, and, to that end, he was entitled to require the attendance of witnesses to give evidence and to be cross-examined. That case has been treated as authority for the proposition that a court, albeit exercising a judicial review function, does so not on a *Wednesbury* basis, but by deciding the matter for itself on the merits after a full consideration of the evidence, whether oral or in writing.[36]

V. A Margin of Appreciation in Proceedings before Specialist Tribunals

The move in domestic law away from the idea of two different tests, one for "traditional" judicial review and one for "European" or "human rights" review, to the idea of the margin of appreciation involving a spectrum of different intensities of review is to be welcomed. It is particularly useful when considering the jurisdiction of specialist tribunals set up to hear appeals from the decisions of a single kind of decision-maker. For such tribunals, the legislation establishing them will usually specify the nature of the appeal and may provide for different kinds of appeal for different kinds of decisions. For example, the Competition Appeal Tribunal is required in appeals against decisions under the domestic competition regime which mirrors Articles 81 and 82 EC to "determine the appeal on the merits by reference to the grounds of the appeal set out in the notice of appeal."[37] But in considering appeals from decisions relating to merger control, the Tribunal is enjoined to "apply the same principles as would be applied by a court on an application for judicial review." A similar dichotomy is found in the jurisdiction of the recently created Charity Tribunal which is required, when considering appeals from certain decisions of the Charity Commission, to "consider afresh" the decision appealed against but which must apply judicial review principles in challenges to other Charity Commission decisions.[38]

THE MOVE IN DOMESTIC LAW AWAY FROM THE IDEA OF TWO DIFFERENT TESTS, ONE FOR "TRADITIONAL" JUDICIAL REVIEW AND ONE FOR "EUROPEAN" OR "HUMAN RIGHTS" REVIEW, TO THE IDEA OF THE MARGIN OF APPRECIATION INVOLVING A SPECTRUM OF DIFFERENT INTENSITIES OF REVIEW IS TO BE WELCOMED.

Two questions arise from the idea of a margin of appreciation in this context. The first is whether the width of the margin accorded by the tribunal to the decision-maker is, or should be, different because of the specialist expertise of the tribunal. The second is whether there is scope for the tribunal to confer on the original decision-maker a margin of appreciation even in those appeals where the legislation specifies that the appeal is on the merits.

As regards the first question, the Competition Appeal Tribunal has considered this issue in the context of its merger jurisdiction in which, as noted above, it is required to apply the principles that would be applied by a court on an application for judicial review. In *British Sky Broadcasting*[39] the appellant argued that since Parliament had chosen to allocate the power of review to the Tribunal, a specialist body, as opposed to a generalist court, Parliament must be taken to have intended that a higher intensity of review would follow from that choice. The Tribunal rejected this argument and described the difference that having a specialist tribunal should make. The Tribunal recognized that it is a specialist body to which Parliament has entrusted applications to review decisions of the

competition regulators in the context of the complex statutory merger regime. Such cases often concern consideration of concepts and issues which the Tribunal is also required to grapple with on a day-to-day basis in its other jurisdictions. That is why the Tribunal's composition is required by statute to contain competition expertise, and its members are selected for their relevant knowledge and experience. In its consideration of the cases which come before it the Tribunal enjoys a degree of familiarity with the statutory regime, the relevant case-law, and some of the legal and economic concepts which arise. This familiarity, as well as the relevant expertise at its disposal, "may render the Tribunal a more demanding and/or less deferential tribunal than might otherwise be the case where a court is called upon to review the decision of a specialist regulator." But the Tribunal went on:

> "(. . .) in our view none of this means that the Tribunal is applying judicial review principles in a different way or is exercising a higher intensity of review than would be the case if the matter were before the Administrative Court. If [the appellant's] submission amounts to no more than that the Tribunal should use its specialist expertise wherever possible when assessing the validity of findings and the lawfulness of decisions in the context of section 120 reviews, then such submission can hardly be disputed. However this would not in our view be applying the principles of judicial review in a different way from the Administrative Court. If his submission amounts to more than this then it seems to us that it is not supported by the authorities to which he has drawn our attention, and is inconsistent with [*Office of Fair Trading v IBA Health Limited* [2004] EWCA Civ 142] and with subsection 120(4) itself."

The decision in *British Sky Broadcasting* was undoubtedly correct as a matter of statutory interpretation and was necessarily in line with the authorities, particularly the Court of Appeal's judgment *IBA Health* there cited. The legislator in directing a tribunal to apply the same principles as a generalist court does not intend the tribunal, however specialist, to take advantage of its expertise by moving closer to a merits review. But if the generalist courts are moving towards considering the margin of appreciation inherent in the judicial review process as more of a spectrum—depending on the character of the decision-maker and the scope of what has to be decided—there is perhaps room, as the Tribunal acknowledged, for a specialist tribunal to be "more demanding and/or less deferential" in its application of those same principles. Indeed in *IBA Health*,[40] although Carnwath LJ held that the statutory provision was a clear indication that, not withstanding the Tribunal's specialized composition, the review was

limited to the ordinary principles applied by the Administrative Court, he went on to say that the Tribunal's "instinctive wish for a more flexible approach than *Wednesbury* would have found more solid support in the textbook discussions of the subject, which emphasise the flexibility of the legal concept of 'reasonableness' dependent on the statutory context."

Two further strands support such a conclusion. The first takes us back to a consideration of why a margin of appreciation arises in the first place. We saw earlier how, in Community competition law cases, the Court of First Instance limits the intensity of its review in areas where the Commission has carried out a complex economic assessment. There are also domestic cases in the competition law sphere where the same reason has been given by a generalist court for not interfering with the decision-maker's conclusions. In two recent cases involving the Rail Regulator, the courts stressed the specialist knowledge of the regulator and the availability to it of expert advice. In *London and Continental Stations*[41] Moses J. (as he then was), stated that in considering the various challenges to the regulator's directions, the court must "bear in mind that he was reaching his conclusions in a field in which he was both expert and experienced. He was advised by experts." The imbalance in access to expert knowledge and experience of necessity meant that the reviewing role of the courts is modest.[42] Moses J. referred to the earlier case of *Winsor v Bloom*[43] where the Court of Appeal acknowledged the role of the rail regulator as the guardian of the public interest and stated that "he is better placed than a court to make an overall assessment of what is in the interest of the rail network." It is an open question whether such considerations are still relevant where the appeal goes to a statutory tribunal which is set up specifically to review the regulator.

The second strand can be drawn from the cases which consider how the margin of appreciation conferred by the Human Rights Convention is translated into the domestic sphere by national courts. A straightforward illustration can be seen in *Belfast City Council v Miss Behavin' Limited*[44] where the House of Lords considered the application of Article 10 ECHR and Article 1 Protocol 1 to the refusal by a local Council in Northern Ireland to license a sex shop in a particular locality. Lord Hoffmann said that this is an area of social control in which the Strasbourg court has always accorded a wide margin of appreciation to Contracting States and that in terms of the domestic constitution this "translates into the broad power of judgment entrusted to local authorities by the legislature." But the relationship can be more complex. Lord Hoffmann's stance in *Miss Behavin'* can be contrasted with his speech in another recent Northern Irish case *In re P and others (AP)*[45] where the House of Lords was considering a legislative prohibition on adoption by unmarried couples. The question was whether it was within the margin of appreciation of the Northern Irish Government to apply such an outright ban. The case was striking because there was substantial evidence before the court that the Government had consulted widely on the draft legislation and that 95 percent of respondents to the consultation were opposed

to the proposal to extend adoption to unmarried couples. Lord Hoffmann acknowledged that "where questions of social policy admit of more than one rational choice, the courts will ordinarily regard that choice as being a matter for Parliament." But he held that the margin conferred by the Court in Strasbourg on the Contracting States does not necessarily translate in the domestic sphere to a margin of appreciation conferred *by the judiciary on the domestic legislature*:

> "In such a case, it [is] for the court in the United Kingdom … to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch."

Baroness Hale agreed with Lord Hoffmann that an element of flexibility in the Strasbourg Court's application of the Convention does not mean that the national courts must give the legislature the benefit of that flexibility. Where a matter lies within the Contracting State's margin of appreciation, it is up to that State to form its own judgment, and the courts were, in this case, in as good a position to form that judgment as the Northern Ireland legislature.

The difference in approach in the two cases is perhaps a reflection of the courts' assessment of the legitimacy of their own assessment of the proportionality of the measure under challenge. In *Miss Behavin'* the margin of appreciation is extended to the local authority because the court respects "the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be."[46] But where, as in *In re P*, the court considers that it is just as able as the legislature to decide what "appears to be appropriate" within that margin in the United Kingdom, it need not shrink from doing so.

FINALLY AS TO THE SECOND QUESTION WHETHER THERE IS SCOPE FOR A MARGIN OF APPRECIATION WHEN AN APPEAL AGAINST THE EXERCISE OF A DISCRETION IS ON THE MERITS, THE ANSWER IN THE COMMUNITY CONTEXT IS A CLEAR "YES."

Finally as to the second question whether there is scope for a margin of appreciation when an appeal against the exercise of a discretion is on the merits, the answer in the Community context is a clear "yes." As we have seen, the conferring of a margin of appreciation in challenges to the Commission's application of Article 81 occurs in the context of a test which, in other respects including errors of fact, is treated as a full merits review. Even in relation to the review of fines, where the

Courts' jurisdiction is unlimited, the Court of First Instance will allow a margin of appreciation on the part of the Commission.[47] The margin of discretion therefore does not arise because the nature of the appeal is regarded as something less than an appeal on the merits. It arises because of the nature of the decision under review.

In domestic law, if one could move away from the "judicial review" and "appeal on the merits" tags, one could argue that the case law concerning EC law and human rights challenges are also examples of what is, in effect, a merits appeal in which a margin of appreciation is conferred on the decision-maker. The court recognizes that, while the traditional *Wednesbury* test is inadequate because the court must come closer to deciding whether the decision is right or wrong, there is also to some extent an area of discretion within which the decision-maker's conclusions should not be disturbed. Cases such as *Eastside Cheese* which focus on the nature of the decision and the decision-maker encourage this flexibility.

This situation arose in sharp focus in the recent decision of the Competition Appeal Tribunal in *T-Mobile (UK) Limited (Sequencing)*.[48] The mobile phone operators challenged the Office of Communication ("OFCOM")'s decision to carry out an auction of new bands of radio spectrum before it had decided whether it was going to require operators to hand back bandwidth that the operators already used. The question, which was tried as a preliminary issue, was whether this challenge fell within the jurisdiction of the CAT, in which case it would be heard as an appeal "on the merits" or whether the operators could only challenge the decision by way of judicial review. A subsidiary question was what difference, if any, there would be between the intensity of review in each case. Both sides accepted that judicial review was a "flexible" test but the operators relied on *ex p Daly* and *Governors of Denbigh High* to show that there was still a real difference between an appeal on the merits and judicial review—even the more intensive judicial review carried out in human rights cases. The Tribunal decided that it did not have jurisdiction, without having to decide how its approach to the appeal would differ from that of the Administrative Court. On appeal, the Court of Appeal referred to cases in which the judicial review test had been adapted to allow a full merits investigation where this was required by the Human Rights Act 1998. Jacob LJ, with whom the other members of the Court agreed, said:

> "it seems to me to be evidence that whether the 'appeal' went to the CAT or by way of JR, the same standard for success would have to be shown. In either case it would not be enough to invite the tribunal to consider the matter afresh—as though the [decision] had never been made."

In other words, the nature of the decision, which Jacob LJ described as "an overall value judgment based upon competing commercial considerations in the context of a public policy decision" meant that even if it was challenged in an appeal on the merits before the Tribunal, it would not be appropriate for the Tribunal simply to disregard OFCOM's reasoning and start with a blank sheet.

The Tribunal has, in another telecoms case, indicated that despite a statutory appeal being on the merits, the regulator has a margin of appreciation as to how it tackles a particular dispute. In *T-Mobile and ors (Termination Rate Disputes)*[49] the Tribunal was considering an appeal against a dispute determination brought under section 192 of the Communications Act 2003. OFCOM argued that it would be inappropriate for the Tribunal to allow a complete opening up of the disputes' subject matter which went beyond the confines of the matters that had been raised by the parties in the course of OFCOM's investigations of these disputes. Moreover, the Tribunal should be "slow to interfere" where errors of appreciation are alleged as opposed to errors of fact or law. The Tribunal acknowledged this margin:

> "(. . .) there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause."

VI. Concluding Remarks

In one of the leading text books on domestic judicial review principles, the editors contrast the high threshold of the traditional *Wednesbury* test with the abundant instances in the case law of courts overturning the executive's decisions and actions at all levels. This is not, they say, because ministers and public authorities regularly take leave of their senses or act in an outrageous manner. Rather it is "because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behaviour."[50] For competition lawyers, this brings to mind the Court of Justice's description of the Commission's first ground of appeal in *Tetra Laval*, namely that the Court of First Instance, "whilst claiming to apply the test of manifest error of assessment, in fact applied a different test."[51]

The development of the margin of appreciation in Community case law has taken place in a coherent way within the context of the tests laid down by Article 230 and the instruments implementing Article 229. Although the precise bounds of the margin may be open to debate, the formulations used by the Courts to describe what they are doing, and the circumstances in which the margin is accorded, are reasonably consistent. The development of the concept in English domestic law has been accelerated by the courts needing to get to grips with the application of Community and human rights norms. The case law shows an increasing focus on the characteristics of the decision, of the decision-maker, and of the reviewing court as determining the scope of the margin to be accorded rather than on the traditional divisions between judicial review principles and appeals on the merits.

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1 Case T-374/04 Germany v Commission, 2007 E.C.R. II-4431.

2 Case C-487/06 P British Aggregates Association v Commission, judgment of 22 December 2008.

3 Case C-12/03P Commission v Tetra Laval, 2005 E.C.R. I-987 at ¶86. The CFI made the same point in Case T-201/01 General Electric v Commission 2005 E.C.R. II-5575, ¶62.

4 For a discussion of the difficulty of separating consideration of errors of fact from errors of appraisal, *see* T. Reeves & N. Dodoo, *Standards of Proof and Standards of Judicial Review in EC Merger Law*, Int'l Antitrust L & Pol., Ch. 6, (Barry Hawk, ed., 2005).

5 *See* the comments of AG Cosmas in Case C-344/98, Masterfoods v Commission, 2000 E.C.R. I-11368, at ¶ 54.

6 *See*, *e.g.* Case T-348/94 Enso Española v Commission, 1998 E.C.R. II-1875, ¶¶55-65.

7 *E.g.* Case T-115/99 Système Européen Promotion SARL v Commission, 2001 E.C.R. II-691, ¶34.

8 The Tetra Laval case (*supra* note 3) has been the subject of much discussion.

9 Joined Cases 56 & 58/64 Consten and Grundig v Commission, 1966 E.C.R. 299.

10 Case T-131/99 Shaw v Commission, 2002 E.C.R. II-2023, ¶38. National courts now, of course, face this task when considering private law actions under Article 81 post Modernisation.

11 Case 42/84 Remia v Commission, 1985 E.C.R. 2545.

12 Case 42/84 Remia v Commission [1985] ECR 2545. The use of the word "manifest" to describe the kind of defect which takes a decision outside the margin of appreciation is a constant factor in the test as applied in many different contexts.

13 Case T-65/98 Van den Bergh Foods v Commission, 2003 E.C.R. II-4653.

14 Case T-168/01 GlaxoSmithKline Services v Commission, 2006 E.C.R. II-2969. This case is on appeal to the ECJ: Joined Cases C-501/06 P etc.

15 Case 26/76 Metro v Commission (No 1), 1977 E.C.R. 1875 at page 1924. Note that AG Tizzano in Tetra Laval (*supra* note 3), ¶89, stated that it is the rules on the division of the powers between the

Commission and the Courts which prevents the courts from entering into the merits of the Commission's complex economic assessments.

16 The prerogative writs were "certiorari" issued to quash a decision, "prohibition" ordering the public body not to do something, and "mandamus" ordering the public body to take specified action. These names have now been updated to a quashing order, a prohibition order, and a mandatory order. Judicial review proceedings in the United Kingdom are still nominally brought by the Crown on the application of the individual against the public body.

17 E v Home Office, 2004 EWCA Civ 49.

18 *See*, for example, the discussion in R (Iran) v Home Secretary, 2005 EWCA Civ 982.

19 R v Monopolies and Mergers Commission, ex p South Yorkshire Transport, 1993 1 W.L.R. 23.

20 Associated Provincial Picture Houses Ltd v Wednesbury Corporation, 1948 1 K.B. 223.

21 Council for Civil Service Unions v Minister for the Civil Service, 1985 A.C. 408, at 410.

22 R v Ministry of Defence ex p Smith 1996 Q.B. 517.

23 R (o.a.o. Centro) v Sec of State for Transport, 2007 EWHC 2729 (Admin).

24 R v MAFF ex parte First City Trading Limited, 1997 1 C.M.L.R. 250.

25 Case 138/79 Roquette Frères v Council, 1980 E.C.R. 3333.

26 R v Secretary of State for Health ex p Eastside Cheese, 1999 EuLR 968.

27 R v Secretary of State for the Environment, Transport and the Regions ex p Alconbury Developments Ltd, 2001 UKHL 23.

28 R (o.a.o. Mabanaft Ltd) v Secretary of State for Trade & Industry, 2008 EWHC 1052 (Admin), recently upheld by the Court of Appeal, [2009] EWCA Civ 224.

29 Office of Fair Trading v IBA Health Ltd, 2004 EWCA 142.

30 Fretté v France 2002 38 E.H.R.R. 438.

31 R v DPP ex p Kebilene, 2000 2 A.C. 326.

32 R (Ross) v West Sussex Primary Care Trust judgment of the Administrative Court 10 September 2008 at ¶39.

33 R v Secretary Of State for the Home Department, ex p Daly, 2001 UKHL 26.

34 R v Governors of Denbigh High School, 2006 UKHL 15.

35 R (o. a. o. Wilkinson) v Broadmoor, 2001 EWCA 1545.

36 R (o. a. o. JB) v Haddock, 2006 EWCA Civ 961.

37 A similar test applies in appeals under section 192 of the Communications Act 2003: see section 195 of that Act.

38 See ¶¶ 1(4) and 4(4) of Schedule 1C to the Charities Act 1993 inserted by the Charities Act 2006 section 8(3).

39 British Sky Broadcasting v Competition Commission, 2008 CAT 25. An appeal against the CAT's decision is pending.

40 *Supra* note 30.

41 R (London and Continental Stations and Property Ltd) v The Rail Regulator, 2003 EWHC 2607 (Admin).

42 *See also* J. Sullivan in GNE Railway v Office of Rail Regulation 2000 EWHC 1942 (Admin) at ¶¶ 39 and 44.

43 Winsor v Bloom, 2002 EWCA Civ 955.

44 Belfast City Council v Miss Behavin' Limited, 2007 UKHL 19.

45 *In re* P and others (AP), 2008 UKHL 38.

46 *Per* Baroness Hale at ¶37.

47 *See e.g.* Case T-49/95 Van Megen Sports v Commission, 1996 E.C.R. II-1799 where the Court pointed out that because fines constitute an instrument of the Commission's competition policy, the Commission "must therefore be allowed a margin of discretion when fixing their amount" (¶53).

48 T-Mobile (UK) Limited and Telefónica O2 UK Limited v Office of Communications (Sequencing) [2008] CAT 15.

49 T-Mobile and ors v Office of Communications (Termination Rate Disputes), 2008 CAT 12. *See similarly* E.ON v GEMA a decision of the UK Competition Commission in an appeal against the energy regulatory: Case CC02/07 10 July 2007 at ¶5.15.

50 Wade & Forsyth Administrative Law (OUP 9th ed,, 364 (2004).

51 Case C-12/03P Commission v Tetra Laval, 2005 E.C.R. I-987 at ¶19.