

# HOW EFFECTIVE IS JUDICIAL REVIEW IN EU COMPETITION LAW? A QUANTITATIVE ASSESSMENT



MAJOR DEVELOPMENTS IN EU AND ITALIAN  
COMPETITION LAW

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# How are our Judges doing, Psychologically-Wise?

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# Purpose of the Presentation

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- Is judicial review effective in competition cases? => unsettled issue in European scholarship
- Need to go beyond the abstract, conventional discussion of the **standard** of judicial review
- Need for an empirical, **performance**-based assessment of the GC's judicial scrutiny over Commission in competition cases

# Outline

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1. The functions of judicial review
2. Quantitative assessment
3. Conclusion

# 1. The Functions of Judicial Review

# Typology of the Functions of Judicial Review

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- The Lawyer's Standpoint => Safeguarding Universal Values
  - Fundamental procedural rights
  - Dworkin's "*Forum of principles*"
- The Economist's Standpoint => Promoting Welfare
  - Eradicate decisional errors
    - ✦ Shavell's 100% annulment rate prophecy
    - ✦ Ahlborn, Evans and Padilla => in particular, Type I errors
- The Political Scientist's Standpoint => Ensuring Accountability
  - Principal-Agent theory
  - *Ex post* correction device
- Other Functions

## 2. Quantitative Assessment

## 2. Quantitative Assessment

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- Methodology
  - Data-set of more than 200 decisions

Provision	Article 101			Article 102			EUMR		
Source	Total	Orders	Judgments	Total	Orders	Judgments	Total	Orders	Judgments
<b>Total</b>	<b>148</b>	18	130	<b>39</b>	7	32	<b>30</b>	8	22

- State-aid decisions excluded
- Accountability function of judicial review untested, as this would require an investigation of the consequences of the case-law at the Commission's level
  - ✦ But internal re-organisation of DG COMP in 2004
  - ✦ Adoption of internal checks and balances



## 2.1. Performance of the GC in relation to the Safeguarding of Fundamental Principles

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- Participation of stakeholders
- Protecting fundamental rights
  - References to Instruments protecting Human Rights and Fundamental Freedoms
  - References to General Principles of EU Law (including Competition Law)
- Conclusion
  - GC's review is effective in so far as the right-based function is concerned
  - But this is not the GC's primary function

## 2.2. Performance of the GC in relation to the Promotion of Welfare

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- Eradication of decisional errors can be quantitatively measured
  - Shavell's assumption => rational applicants only challenge unlawful decisions
  - 100% annulment rate is unrealistic, but useful
  - Data is difficult to interpret under Article 101 and EUMR
  - Data is **troubling** under Article 102 TFEU => GC never annulled in full a Commission decision / all cases involve partial annulments on peripheral issues

## 2.2. Performance of the GC in relation to the Promotion of Welfare

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Table IX – Number of Annulment Judgments on Incompatibility/Infringement Decisions			
Provision	EUMR	Article 101	Article 102
<b>Total</b>	4/7 (57.1%)	31/ 117 (26.5%)	4/14 (partial: 4)
	(full:4)	(partial: 23) (full: 8)	(full: 0)

Table X – Number and Rate of Revised Fines on article 261 Applications (on fines grounds only)		
Provision	Article 101	Article 102
<b>Total</b>	38/87 (43.7%)	2/11 (18.2%)

## 2.2. Performance of the GC in relation to the Promotion of Welfare

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- Hypothesis 1 – Commission Always Right?
  - Implausible success story as errors are part of human nature
  - Benchmarking
    - ✦ In other areas where standard is possibly lower (EUMR), and negative decisions are less frequent, rate of annulment is higher
    - ✦ In other areas where standard is equal, rate of judgment higher
  - Applicants still lodge Article 102 TFEU proceedings (belief that decisions are flawed is strong)

## 2.2. Performance of the GC in relation to the Promotion of Welfare

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- Hypothesis 2 – Judicial immunity through formalistic normative standards
- Quantitative assessment
  - Proxy 1: Degree of reliance of old, forms-based precedents => most cited cases are *Hoffmann La Roche* and *Michelin II*
  - Proxy 2: Presence of mainstream economic concepts in Article 102 TFEU Judgments
    - ✦ “*Consumer welfare*” not even cited once

**Table XII – Mainstream Economic Concepts in Article 102 TFEU Judgments**

<b>Market power</b>	7/30 (23.3%)
<b>Collusion</b>	3/30 (10%)
<b>Economies of scale (economy of scale)</b>	8/30 (26.7%)
<b>Oligopoly</b>	5/30 (16.7%)
<b>Allocative efficiency</b>	0/30 (0%)
<b>Profit-maximization</b>	2/30 (6.7%)
<b>Consumer welfare</b>	0/30 (0%)
<b>Elasticity (of demand)</b>	2/30 (6.7%)
<b>Efficiency</b>	12/30 (40%)
<b>Market failure</b>	1/30 (3.3%)
<b>Rent</b>	0/30 (0%)
<b>Transaction cost(s)</b>	0/30 (0%)
<b>Opportunity cost(s)</b>	1/30 (3.3%)
<b>Herfindahl-Hirschmann Index (HHI)</b>	1/30 (3.3%)
<b>SSNIP test</b>	0/30 (0%)

# 3. Conclusion

## 3.1. Schizophrenic Judicial Review?

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### Judicial Activism

v.

### Judicial Conservatism

- Article 101 TFEU and EUMR
  - Stringent Review of Commission Decisions
  - Reversal of long-lasting legal standards
    - ✦ EUMR => *Airtours v. Commission*, T-342/99

- Article 102 TFEU
  - Deferent review of Commission Decisions
  - Permanence of normative legal standards



## 3.2. Article 102 TFEU Cases

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- In abuse of dominance cases, however, heavy reliance on old, formalistic normative standards which fare poorly with basic economic concepts, and even with common sense (Tomra v. Commission, T-155/06)
- The Courts conservatism has ordo-liberalist roots => « *big is bad* » philosophy enshrined in the Treaty
- Now let's be serious: the competition rules are not sacred, intangible provisions (increasingly less with the relegation of Article 3(1)g)
- They're a component of economic policy, which ought to be subject to adjustments/optimization over time and with advances in knowledge
- + they are very terse, and their content needs to be clarified
- Generalized risk of type I errors + chilling effect on attempts to modernise competition regimes accross the EU

## 3.3. A Piece of Advice to the GC

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- Why not use the Guidance Communication on Exclusionary Abuses? => a safe and sound, framework, which resorts to basic, but consensual common sense concepts