THE RULE OF THE LEAST IMPERFECT: A REVIEW OF DESPOINA MANTZARI, COURTS, REGULATORS, AND THE SCRUTINY OF ECONOMIC EVIDENCE (OUP 2022)

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In this timely book, Dr. Despoina Mantzari tackles a prominent question in regulation: how do generalist courts handle the decisions of specialist decision-makers? [1] Markets require decision-makers to engage with expert knowledge. While regulators are institutionally structured to handle this task, the same cannot be said about generalist courts. As Mantzari puts it, there is an 'epistemic asymmetry' between courts and regulators in tackling complex economic matters.[2] As such, judicial control presents many challenges for the error-correction function of adjudication. The book exposes and addresses these challenges by analyzing regulatory decisions and the corresponding systems of judicial review in the utilities sector. The book essentially claims that 'the least imperfect' institution should interpret and decide on economic evidence, turning the question into one of relative institutional competencies. Unless a specialist court is established, expert agencies are generally better-situated ('less imperfect') to analyze economic evidence. In such a setting, generalist courts ensure legality of decisions by assessing whether regulators conform to principles of rationality or due process.

Mantzari's book is an impressive display of interdisciplinary legal research. The author should be commended for skillfully combining insights from

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[1] Despoina Mantzari, *Courts, Regulators, and the Scrutiny of Economic Evidence* (OUP 2022).

[2] Ibid 187.

philosophy, economics, and political theory with legal analysis. Indeed, the book achieves more than what it advertises. Even though Mantzari only looks at UK and US law, her arguments can be extended to EU law as well. Similarly, although she deals with utilities regulation, readers of competition or public procurement law will find much relevant information within the book's pages.

Comprised of eight chapters, Mantzari's book comprehensively unpacks the use of economic evidence in regulation. After a brief introduction, in Chapter II we understand what is so special about economic evidence. After all, courts engage with information from many disciplines. Mantzari argues that economics occupies a special place in regulation and adjudication because of two reasons. First, whilst courts struggle with all types of expert knowledge, economic evidence is special because it serves both a descriptive and a prescriptive purpose. Unlike natural sciences, economics not only explains, but it also advocates.[3] Second, this 'dual dimension' of economics is known to influence regulatory design. Many regulations are built upon economic insights, including utilities, antitrust, and even criminal law. For instance, in competition law proceedings, economic evidence gives substance to open-ended legal provisions. Anything can be a 'restraint of trade', but what constitutes an illegal restraint of trade usually turns upon economic knowledge. This is another reason why economic evidence deserves careful attention.[4]

The next four chapters substantively address how courts and regulators examine economic evidence. An important discussion awaits readers in Chapter IV, where Mantzari challenges the oft-cited claim that regulation is a technocratic enterprise. It is true, concedes Mantzari, that regulators

[3] For example, economic analysis can study the effects of minimum wage legislation on employment. This would be a descriptive analysis. However, these studies may also generate policy prescriptions, such as introducing a cap on minimum wage to curb unemployment.

[4] Mantzari (n 1) 15.

heavily engage with economic evidence. However, the book goes deeper to expose the discretionary power of experts. Not only are regulators constrained by rationality and due process considerations ('thin legality'), but they are also affected by institutional, ideational, and structural factors.[5] Importantly, regulators make decisions within the context of the broad political and economic setting prevailing in their jurisdiction. These structural constraints may "[…] downplay the pursuit of economic efficiency in favor of non-economic and non-competition law values that have infused the regulatory objectives, such as that of affordability, especially when regulators exercise operational discretion".[6] By acknowledging that expert regulators possess significant discretion, especially in interpreting evidence, Mantzari recognizes that economic analysis is not infallible.[7] Contrary to views that brand economic analysis as unambiguous, the book asserts that regulatory decisions cannot escape discretion and politics completely.[8]

Chapters V and VI delve deeper into the reception of economic evidence by judges via two case studies. In reviewing the US system, Mantzari describes how judicial review of economic evidence has increasingly dwindled in intensity from an intense "hard look" review into a "thin legality" assessment. The main reason for this trend is the judiciary's belief in the relative advantages of institutional competence that regulators possess over courts, together with the system of internal checks established by agencies. By contrast, some courts, like the Competition Appeals Tribunal, have been

[5] Mantzari (n 1) 70.

[6] Mantzari (n 1) 87.

[7] Alan J Devlin and Michael S Jacobs, 'Antitrust Divergence and the Limits of Economics' (2010) 104 Northwestern University Law Review 253.

[8] Herbert Hovenkamp, 'Antitrust Policy After Chicago' (1985) 84 Michigan Law Review 214; Eleanor M Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window' (1986) 61 New York University Law Review 554.

established specifically with such institutional considerations in mind, which allows for a more detailed review of economic evidence.

In the UK, regulators' assessment of economic evidence is subject to 'external' checks through the court system, which features specialized tribunals.[9] Specialist courts like the Competition Appeals Tribunal (CAT) carry out reviews not only of legality, but also of appropriateness ('merits review'). By contrast, US regulators are subject to internal reviews of legality through an administrative law judge. The US system still houses external review, but the federal courts typically defer to agencies' interpretation of economic evidence. This is because federal courts place trust in the internal review of legality the agencies go through.[10] Mantzari's descriptions are useful and informative. That said, recent developments initiated by some US regulators may disturb the status quo. For example, the Federal Trade Commission (FTC) has lately adopted a more aggressive enforcement program. The current FTC leadership takes bold actions in an effort to reorient the application of antitrust law. Many enforcement actions taken by the FTC do not fit completely within the boundaries of existing law. This produces clashes with the administrative law judges. In some cases, the FTC decided to ignore or overrule the points raised by its own internal review system.[11] A possible consequence of this trend could be greater scrutiny by federal courts over FTC decisions in future.[12]

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[9] Mantzari (n 1) 30.

[10] Ibid 38-45. US courts' deference to regulatory agencies is known as the "Chevron doctrine". See, *Chevron Inc. v. Natural Resources Defence Council* [1984] 467 U.S. 837.

[11] The internal review system of the FTC has already been criticized for ineffectiveness. See Maureen K Ohlhausen, 'Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?' (2016) 12(4) Journal of Competition Law & Economics 623.

[12] As a corollary, some scholars argue that the Supreme Court may overrule *Chevron.* See, Amy Hove, 'Supreme Court likely to discard *Chevron*' (*SCOTUS Blog,* 17 January 2024) <https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/> accessed 4 April 2024.

An important contribution of the book lies in its relevance to contemporary issues of regulation. One is the problem of digital markets. These markets display peculiarities that make regulation especially challenging, such as data-driven scale economies and powerful network effects resulting in winner-takes-most scenarios.[13] Consequently, jurisdictions seeking to regulate digital markets look for alternatives to traditional regulatory tools. For example, the EU complements competition enforcement with the Digital Markets Act (DMA). The DMA entails specific rules for powerful players in digital markets ("gatekeepers") to ensure those markets remain fair and contestable. The DMA has attracted significant commentary since its inception.[14]

While Mantzari addresses neither competition law nor digital markets, her book promises to enrich the discussion in both fields. The main premise of the book is illustrative. Because of epistemic asymmetries and relative advantages in institutional competence, judges often defer to agency decisions in regulation.[15] That said, one area where courts can meaningfully constrain regulatory decisions is "thick legality". This can be done, for instance, by assuring that enforcers properly respect procedural rights. Mantzari's argument ties well with recent developments in EU competition law. Procedural due diligence in EU competition law has grown in importance. EU Courts view protecting the procedural rights of defendants

[13] Filippo Lancieri and Patricia Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26 Stanford Journal of Law, Business & Finance 65.

[14] See, e.g., Pablo Ibanez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561; Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 Journal of European Competition Law & Practice 542.

[15] Although there certainly have been cases where courts asserted epistemological superiority over enforcers in matters of economic expertise. For a clear exposition in EU law, see David J Gerber, 'Courts as Economic Experts in European Merger Law' in Hawk (ed), *International Antitrust Law and Policy* (Juris Publishing 2004).

as an appropriate intrusion into a regulator's margin of discretion. One can observe that EU judicial review functions as a procedural guarantor in competition cases. The scope of this function not only incorporates fundamental rights protection, but it also reaches substantive questions of law as well.[16] For example, grounding competition enforcement on the as-efficient competitor concept is often viewed as the pinnacle of the 'more economic approach' in EU competition law. This is usually taken as the main message of the *Intel* judgment.[17] But that judgment can just as easily be construed as protecting the defendants' rights of defense.[18] Thus, as Mantzari argues, courts can (and do) exercise meaningful judicial review without venturing deep into economic theory.

In closing, the book identifies two challenges for the treatment of economic evidence in the future: the growing use of new economic theories and technological change. Mantzari argues that behavioral economics is poised to challenge decision-making in agencies and courts.[19] Behavioral economics relaxes the rationality assumption of neoclassical economics, thereby increasing the complexity of regulatory law when used. Similarly, the shift from industrial to informational modes of economic growth is bound to introduce 'new disciplinary communities' into regulation.[20]

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[16] Case C-694/20 P *Orde van Vlaamse Balies* [2022] OJ C35/6; Case C-693/20 P *Intermarché Casino Achats* ECLI:EU:C:2023:172.

[17] Case C-413/14 P *Intel Corporation* ECLI:EU:C:2017:632.

[18] James S Venit, 'The judgment of the European Court of Justice in Intel v Commission: A Procedural Answer to a Substantive Question?' (2017) 13(2) European Competition Journal 172.

[19] See generally, Maria de Campos, *Behavioral Economics and Regulation* (Routledge 2023); James Cooper & William Kovacic, 'Behavioral economics: implications for regulatory behavior' (2012) 41 Journal of Regulatory Economics 41; Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin 2009).

[20] Mantzari (n 1) 205.

It can be argued that the two challenges are not separate, but actually represent trends feeding off each other. Accelerating technological change may require new models and theories to be explained. Similarly, to account for technological developments, regulators may need to develop new tools to measure and identify innovation. Such novelties are likely to recalibrate the reception and review of economic evidence. Mantzari's book can help address these challenges by demonstrating the limits of discretion, the importance of institutional design, and the proper reach of judicial review in complex matters.