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COMPETITION LITIGATION BEFORE THE GENERAL COURT: QUALITY IF NOT QUANTITY?

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Abstract

This article explores the extent of the review exercised by the General Court of the European Union in the field of competition litigation and underlines its intensification in three directions: the assessment of the legality of the Commission's decisions, the exercise of its unlimited jurisdiction in relation to fines and penalty payments, as well as the control of the Commission's use of its investigatory powers. It is also observed that this more in-depth review takes place in the context of a drop in the number of applications for annulment lodged before the General Court in competition cases, due notably to the success of the commitments procedure introduced by Article 9 of Regulation 1/2003 as well as the limitations set by the case law of the Court of Justice on the review the General Court may exercise over the decisions resulting from this procedure.

1. Introduction

From its very origin, the General Court (formerly: Court of First Instance) was considered the Competition court of the European Union. Competition and civil service litigation were the first two types of proceedings transferred to the General Court by Council Decision 88/591[1] and were used as justification for its creation with regard to their factual complexity.[2] While civil service litigation was transferred to the Civil Service Tribunal, competition litigation has remained at the heart of the General Court's jurisdiction.

Yet, over the years, a constant decline not only in the proportion of competition litigation in the judicial activity of the General Court (linked with the successive extensions of its jurisdiction), but also – more recently – in

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1. Council Decision 88/591/ECSC, EEC, Euratom of 24 Oct. 1988 establishing a Court of First Instance of the European Communities, O.J. 1988, L 319/1, as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993, O.J. 1993, L 144/21.
2. See the fourth Recital of Decision 88/591.

relation to the absolute number of actions in this field brought before the General Court can be observed. This decline can be attributed to two features of competition law that have been introduced or increased by the process of modernization that started with the entry into force of the Regulation 1/2003.[3]

The first is the decentralization of EU competition law, which led to a situation in which national competition authorities and national courts play a much more important role in its enforcement than before. As a consequence, disputes more often than before follow a different path than that of an action for annulment against a decision of the Commission. It is more frequent for them to be heard before a national judge with the (indirect) assistance of the Court of Justice by means of preliminary ruling procedures. Thus, key judgments such as *T-mobile,*[4] *Tele2Polska,*[5] *Expedia,*[6] *Kone*[7] have been delivered recently by the Court of Justice on request of national courts rather than in the course of an appeal lodged against a judgment of the General Court.

The second feature of Regulation 1/2003 that has a direct impact on the number of actions lodged in the General Court is the success of the commitments procedure, introduced by its Article 9.[8] Statistical data show that this procedure, which allows the Commission to accept and render compulsory engagements offered by undertakings rather than adopting a prohibition decision on the basis of Article 7, has been a real success. Outside the field of cartels for which this procedure is not deemed appropriate,[9] there are now far more commitment decisions than prohibition decisions. The move towards a less confrontational administrative procedure means that there is

3. Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2003, L 1/1.

4. Case C-8/08, *T-Mobile Netherlands and Others*, EU:C:2009:343.

5. Case C-375/09, *Tele 2 Polska*, EU:C:2011:270.

6. Case C-226/11, *Expedia*, EU:C:2012:795.

7. Case C-557/12, *KONE and Others*, EU:C:2014:1317.

8. Art. 9 – Commitments: "1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission . …"

9. Recital 13 of Regulation 1/2003: "Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. *Commitment decisions are not appropriate in cases where the Commission intends to impose a fine*" (emphasis added).

less likelihood that the undertakings concerned will challenge the outcome of this procedure. This is even less likely in view of the far-reaching ruling of the Court of Justice in *Alrosa,*[10] which prevents the General Court from exercising an adequate review of the proportionality of commitments entered into.

Moreover, even in relation to the most serious competition law violations for which companies are subject to fines and cannot go through the Article 9 route, the success of the Commission's leniency programme[11] and the settlement procedure[12] renders undertakings less likely to challenge such decisions.[13]

Thus, from a purely statistical perspective, given the significant increase of the number of actions lodged in non-competition areas and the decline in the number of cases in the area of competition law, the General Court has become less and less the "EU competition Court", than it was at the time of its creation.

Yet, legal review is not about statistics. It remains true that the General Court differs from both national courts and the Court of Justice, since its jurisdiction combines the appraisal of both issues of facts and law involved in competition litigations.[14] Thus, the key question – rather than being the

10. Case C-441/07 P, *Commission* v. *Alrosa*, EU:C:2010:377. On this judgment, see Jenny, "Worst decision of the EU Court of Justice: The *Alrosa* Judgment in context and the future of commitment decisions", 38 Fordham Int'l L.J. (2015), 701.

11. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. 2006, C 298/17.

12. See Art. 10(a) of Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceeding by the Commission pursuant to Arts. 81 and 82 of the EC Treaty, O.J. 2004, L 123/18, as modified by Commission Regulation (EC) 622/2008 of 30 June 2008, O.J. 2008, L 171/3. See also Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Arts. 7 and 23 of Council Regulation (EC) 1/2003 in cartel cases, O.J. 2008, C 167/1.

13. On this question and more generally on the drop of competition cases before the General Court, see Barbier de la Serre, "Competition law cases before the EU Courts: Is the well running dry?" in Merola and Derenne (Eds.), *The Role of the Court of Justice in Competition Law Cases* (Bruylant, 2012), p. 87 et seq.; Waelbroeck, "Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): Que va-t-il rester aux juges?", *The Global Competition Law Centre Working Paper Series*, Working Paper 1/08.

14. On the one hand, the jurisdiction of the ECJ – either on appeal against a judgment of the General Court or through a preliminary ruling – does not, in principle, include questions of facts; see e.g. Case C-378/90 P, *Pitrone* v. *Commission*, EU:C:1992:159, paras. 12–13, in relation to appeals and Case C-282/00, *RAR*, EU:C:2003:277, para 47, in relation to preliminary rulings. This principle is in practice moderated by the possibility for the ECJ to review factual findings of the General Court when their substantive inaccuracy is apparent from the document submitted to it (see e.g. Case C-413/06 P, *Bertelsmann and Sony Corporation of America* v. *Impala*, EU:C:2008:392, para 29) and by the extensive interpretation by the ECJ of its jurisdiction under the preliminary ruling procedure, justified by "the need to afford a helpful interpretation of EU law", which may lead to the Court conducting *de facto* a legal appraisal of the facts (see e.g. Case C-417/10, *3M Italia*, EU:C:2012:184, paras. 41–44). National courts, on

number of actions brought before the General Court – could be whether the quality of the review it carries matches its unique position. This is disputed by some critics in the legal profession as well as in the academic world who consider this review not to be thorough enough in the field of competition law[15] and qualify it as being "deferential" towards the Commission.[16]

In the following it is argued that such criticisms are ill-founded or, at least, exaggerated in the sense that they do not reflect the actual extent of the review exercised by the General Court on the substantive finding that there exists a restriction of competition, on the appropriateness of the level of fines imposed on undertakings, as well as on the exercise by the Commission of its investigatory powers.

2. Review of the Commission's assessment as to the existence of a restriction of competition

A frequent criticism relating to the extent of the review exercised by the General Court over the Commission's finding that an agreement or a conduct restricts competition is the existence of a more "limited review" (by opposition to a "comprehensive review") that applies in relation to complex economic matters and which confers on the Commission a certain "margin of appraisal".[17]

When the Commission deals with "complex economic matters" in the course of the application of Articles 101(1),[18] 101(3),[19] 102[20] TFEU or when assessing the compatibility of a proposed merger[21] the General Court can limit its scrutiny 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 finally, whether there has been any manifest error of assessment or misuse of powers. The word "manifest" implies that "the failure

the other hand, if they are competent to apply EU competition law have no jurisdiction to interpret it (save in the exceptional case of the application of the "*acte clair*" doctrine, based on Case C-283/81, *Cilfit* v. *Ministero della Sanità*, EU:C:1982:335).

15. Interpreted here as including the application of Arts. 101 and 102 TFEU and the EC Merger Regulation (see *infra* note 33). State aid is not covered by this article.

16. See e.g. Forrester, "A bush in need of pruning: The luxuriant growth of 'light judicial review'", in Ehlermann and Marquis (Eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2011), pp. 407–453.

17. Ibid.

18. Case C-42/84, *Remia and others* v. *Commission*, EU:C:1985:327.

19. Joined Cases C-56 & 58/64, *Consten and Grundig* v. *Commission*, EU:C:1966:41.

20. Case T-65/96, *Kish Glass* v. *Commission*, EU:T:2000:93, para 64.

21. Joined Cases C-68/94 & C-30/95, *France and others* v. *Commission*, EU:C:1998:148.

to observe legal provisions is so serious that it appears to arise from an obvious error in the evaluation".[22] It follows that the General Court should not intervene whenever it considers the Commission to be wrong, but only in circumstances where a certain threshold has been exceeded leaving no doubt whatsoever about the Commission's error.

Nevertheless, the importance of such marginal review within the whole system of judicial control should not be overestimated, since its scope is limited (*infra* section 2.2.), and the leeway that it provides the Commission with is of a precarious nature (*infra* section 2.3.). Moreover, the concept of marginal review should not be confused with the separate issue of the effects of the economic base of competition policy (*infra* section 2.1.).

2.1. *The economic rationale of competition policy in the EU*

One criticism sometimes expressed together with or in addition to the existence of a marginal review highlights the "uneconomic" or "not sufficiently economic"[23] approach of the General Court when it reviews Commission decisions in the field of competition law. However, such a comment does not in itself concern the extent of the General Court's review but rather its economic rationale. Some commentators would prefer the General Court and the Court of Justice to be (more) inspired by what is known as the "post-Chicago school"[24] which advocates an antitrust policy focused on the sole search for economic efficiency as measured in terms of its effects on consumers. In essence, this approach calls for a less interventionist antitrust policy, limited to practices or agreements which have palpable effects on consumer welfare. As a consequence, in this view, Commission's decisions concluding that there exists an infringement of competition law should be subject to a more intense review.

This message has sometimes been listened to. In its judgment in *GlaxoSmithKline,*[25] the General Court took into consideration whether final consumers were deprived of the advantages of effective competition in order

22. Case T-156/98, *RJB Mining* v. *Commission*, EU:T:2001:29.

23. See e.g. Loozen, "The requisite legal standard for economic assessments in EU competition cases unravelled through the economic approach", 39 EL Rev. (2014), 91–110; more generally Orbach, "How antitrust lost its goal", 81 *Fordham Law Review* (2013), 2253–2277, and Stucke, "Reconsidering antitrust goals", 53 *Boston College Law Review* (2012), 551–629.

24. On this question see e.g. Marty, "Le critère du bien-être du consommateur comme objectif exclusive de la politique de concurrence: Une mise en perspective sur la base de l'histoire de l'antitrust américain", 4 *Revue Internationale de Droit Économique* (2014), 471–497.

25. Case T-168/01, *GlaxoSmithKline Services* v. *Commission*, EU:T:2006:265.

to establish whether an agreement had as its object a restriction of competition, and concluded that it did not.

However, this finding was subsequently overruled by the Court of Justice on the ground that, "like other competition rules laid down in the Treaty, Article (101 TFEU) aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price".[26] In this judgment, as well as in many others, the Court of Justice respected the ordoliberal philosophy underlying the treaties[27] in which the defence of the competition process and, hence, of market structure, is paramount. The fact that this approach lies in the treaties cannot be overlooked.[28] It has been argued that is prevents a shift in the economic rationale of competition enforcement from a focus on the defence of market structure towards an emphasis on the sole question of consumer welfare.[29]

This has to be kept in mind when analysing the *Intel*[30] judgment, in which the General Court applied the traditional *Hofmann-Laroche*[31] case law and concluded, *inter alia*, that the use of exclusivity rebates by an undertaking in a dominant position was, by its very nature, capable of restricting competition and, hence, there was no need for the Commission to demonstrate their actual effects on competition. Consequently a 150-page long annex of the contested Decision purporting to demonstrate that "as efficient competitors" would be prevented from competing by such exclusivity rebates was deemed irrelevant.[32] Thus it could be argued that, in a situation in which competition is already weakened, the preservation of the market structure entails a protection of competitors, regardless of their actual efficiency.

26. Joined Cases C-501, 513, 515 & 519/06 P, *GlaxoSmithKline Services* v. *Commission*, EU:C:2009:610, para 63.

27. On Ordoliberalism, see e.g. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998).

28. See *inter alia* Protocol (No. 27) on the internal market and competition, which refers to "a system of undistorted competition, as part of the internal market" or Art. 3(1)(b) TFEU which states that "the Union shall have exclusive competence in the following areas: the establishing of the competition rules necessary for the functioning of the internal market".

29. Thus Wils argues that a shift of the policy objectives of US antitrust law through a change of the case law of the Supreme Court is possible since the Sherman Act does not specify the objectives of the antitrust prohibition it includes, but that the ECJ is not in the same position in view of the clear objectives of the treaties; see Wils, "The judgment of the EU General Court in *Intel* and the so-called 'more economic approach' to abuse of dominance", 4 *World Comp* (2014), 405–434, at 416.

30. Case T-286/09, *Intel* v. *Commission*, EU:T:2014:547.

31. Case C-85/76, *Hoffmann-La Roche* v. *Commission*, EU:C:1979:36.

32. Case T-286/09, *Intel*, para 143.

2.2. *The limited scope of the "margin of appraisal"*

The recognition of a margin of appraisal to the benefit of the Commission in competition matters is not the rule but rather the exception. As a principle, the General Court must undertake a comprehensive review of whether the conditions of Article 101 or of Article 102 TFEU or of the Merger Regulation[33] are met. This is demonstrated by the emphasis put on the Commission's duty to analyse the agreement or measure at stake in their proper economic context, which must include a "counterfactual analysis". According to settled case law "in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute".[34] For instance in *O2 Germany,*[35] the Commission's insufficient analysis of what the competitive structure of the market would have been in the absence of an agreement led to the annulment of its decision.

Another example of the importance attached to a comprehensive review of the Commission's analysis and finding that there exists a restriction of competition is the narrow interpretation of "presumptions", that is to say situations in which the Commission is under no duty to analyse the effects of the agreement or the practice at stake. Even though such presumptions exist, as illustrated by the above-mentioned *Intel* judgment, they have to be interpreted narrowly. The recent judgment of the Court of Justice in *Groupement des cartes bancaires*[36] is a clear demonstration of that. When the Commission establishes that an agreement by its object restricts competition, there is no further need to analyse its effects. Yet, it was made very clear that such a qualification – which amounts to a form of presumption that such an agreement has negative effects on competition – should be limited to the types of coordination between undertakings which reveal a sufficient degree of harm to competition and, consequently, that the concept of restriction of competition "by object" is of strict interpretation.

Thus, the "margin of appraisal" is clearly the exception and applies only in situations where the Commission's assessment involves complex economic considerations. Moreover, it only concerns one of the grounds of review, namely the infringement of the Treaty or any rule of law relating to its application. Legal arguments based on an alleged lack of competence, an

33. Council Regulation (EC) 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings (the EC Merger Regulation), O.J. 2004, L 24/1.
34. See e.g. Case C-7/95 P, *Deere* v. *Commission*, EU:C:1998:256, para 76.
35. Case T-328/03, *O2 (Germany)* v. *Commission*, EU:T:2006:116.
36. Case C-67/13 P, *CB* v. *Commission*, EU:C:2014:2204.

infringement of an essential procedural requirement or the existence of a misuse of powers, but also on an error of law are not affected. On the contrary, the General Court is more prone to scrutinize other aspects of the legality of the decision,[37] since "care should be exercised in particular when discretionary determinations (are) made in relation to individual case".[38]

2.3. *The precarious nature of the "margin of appraisal"*

It could be argued that the margin of appraisal enjoyed by the Commission in relation to complex economic matters is more a leeway than a real freedom as it ultimately depends on the willingness of the judiciary to consider that a given situation involves "complex economic appraisals". Indeed, it is ultimately for the Courts to determine what is sufficiently complex to justify the recognition of a margin of appraisal. As Advocate General Cosmas stated "the [Union] judicature has the power to remain master of its tasks, defining itself the depth to which its investigation will go on each occasion".[39]

In that respect, it must be noted that the level of scrutiny carried out by the General Court over the Commission's complex economic appraisal has been considerably extended since the "dramatic October 2002" series of merger annulments.[40] Given the extent of the scrutiny exercised by the General Court, commentators, as well as the Commission in its appeal in the *Tetra Laval* case, criticized the General Court for conducting a "de novo" assessment of the merger, while claiming to have solely carried out a marginal review.[41]

Even though the Court of Justice dismissed the appeal, its reasoning remains somehow unclear. Rather than stating straightforwardly that the General Court is free to carry out an in-depth analysis of complex economic assessments if it considers that it is in a position to do so, the Court of Justice recalled the principle of a marginal review, but underlined that "the Courts of

37. See Case C-269/90, *Technische Universität München*, EU:C:1991:438, paras. 13–14: "Where the (Union) institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present".

38. Craig, *EU Administrative Law* (OUP, 2012), p. 333.

39. Opinion of A.G. Cosmas in Case C-83/98 P, *France* v. *Ladbroke Racing and Commission*, EU:C:1999:577, at footnote 4.

40. Case T-342/99, *Airtours* v. *Commission*, EU:T:2002:146; Case T-310/01, *Schneider Electric* v. *Commission*, EU:T:2002:254; Case T-5/02, *Tetra Laval* v. *Commission*, EU:T:2002:264.

41. See Bailey, "Standard of proof in EC merger proceedings: A common law perspective", 40 CML Rev. (2003), 845–888, at 850.

the European Union must not refrain from reviewing the Commission's interpretation of information of an economic nature . . . [n]ot only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that 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".[42] The Court also added that when the Commission carries out a "prospective analysis" that is to say "an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition", it is necessary for the Commission "to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely".[43]

The reference to the exercise of a marginal review in the judgment of the Court of Justice, as well as the emphasis on the type of evidence the Commission must gather to demonstrate the existence of a restriction of competition, led commentators to consider that this judgment did not involve any intensification of the test of review exercised by the General Court, but rather a clarification of the standard of proof that the Commission must satisfy to demonstrate the existence of a restriction of competition.[44] However it could equally be argued that "adding a requirement that the evidence should not only substantiate the conclusion but moreover that the conclusion should be 'the most likely' would seem to indicate a stricter standard of review than previously".[45]

This second interpretation appears supported by the more recent dictum of the Court of Justice – expressed in the context of the review of the legality of decisions imposing fines for a violation of competition law – that Courts

42. Case C-12/03 P, *Commission* v. *Tetra Laval*, EU:C:2005:87, para 39. The formula developed by the ECJ in *Tetra Laval* has since become the standard test in circumstances where the EU judicature is faced with assessments of a complex economic or technical nature, even outside the field of competition law. See e.g. Case C-405/07 P, *Netherlands* v. *Commission*, EU:C:2008:613, para 55; Case T-475/07, *Dow AgroSciences and others* v. *Commission*, EU:T:2011:445, para 153; Case T-257/07, *France* v. *Commission*, EU:T:2011:444, para 87; Case T-187/06, *Schräder* v. *CPVO*, EU:T:2008:511, para 61.

43. Case C-12/03 P, *Tetra Laval*. para 43.

44. Meij, "Judicial review in the EC Courts: *Tetra Laval* and beyond", in Essens, Gerbrandy and Lavrijssen (Eds.), *National Courts and the Standard of Review in Competition and Economic Regulation* (Europe Law Publishing, 2009), p. 19; see also Jaeger, "The standard of review in competition cases involving complex economic assessments: Towards the marginalisation of the marginal review?", 2 JECL&Pract. (2011), 294–314, at 299.

45. Wahl, "Standard of review: Comprehensive or limited?" in Ehlermann and Marquis (Eds.), op. cit. *supra* note 16, available at <www.eui.eu/documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Wahl.pdf> (last visited 10 Dec. 2015).

cannot use the Commission's margin of appraisal "as a basis for dispensing with the conduct of an in-depth review of the law and of the facts".[46] As Advocate General Mengozzi observed, such a statement may have far reaching consequences in the sense that it can potentially neutralize *de facto* the very principle of the recognition of a margin of appraisal to the Commission.[47]

This more in-depth control, together with the observation that the General Court does not shy away from analysing arguments based on economic theories, led president Jaeger to raise the issue of "a marginalization of the marginal review".[48] In essence it was argued that the marginal review should be limited to circumstances in which the Commission "makes economic policy choices"[49] instead of being dependent on the complexity of the assessment involved. In this perspective, "situations implying elements of economic policy would be clearly excluded from a comprehensive review", while "all other economic elements – irrespective of their level of intricacy – in a decision subject to the EU Court's control would be examined under the full review".[50]

3. Review of fines and penalty payments imposed by the Commission

Under Article 261 TFEU, "[r]egulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations". Under Article 31 of Regulation 1/2003 "(t)he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment (; i)t may cancel, reduce or increase the fine or periodic penalty payment imposed". A similar wording can be found in Article 16 of Regulation 139/2004.

46. Case C-389/10 P, *KME Germany and others* v. *Commission*, EU:C:2011:816, para 129; Case C-86/10 P, *Chalkor* v. *Commission*, EU:C:2011:815, para 62; Case C-199/11, *Otis and others*, EU:C:2012:684, paras. 59 and 61.

47. Opinion of A.G. Mengozzi in Case C-382/12, *MasterCard and others* v. *Commission*, EU:C:2014:42, para 119.

48. Jaeger, op. cit. *supra* note 44. See also the Opinion of A.G. Mengozzi in Case C-382/12, *MasterCard and others* v. *Commission*, para 119, who noted that "(f)or several years the scope of the case law on marginal review has been significantly reduced".

49. Jaeger, op. cit. *supra* note 44, at 310.

50. Ibid.

The extent of the review exercised by the General Court in the course of its unlimited jurisdiction implies taking into account conflicting considerations. On the one hand, it derives from the wording of Articles 23(1) and (2), 24(1) and (2) of Regulation 1/2003, as well as 14(1), (2) and 15(1) of Regulation 139/2004, that the intention of the legislature was to provide the Commission with a sufficient level of discretion in relation to the determination of the appropriate level of fines or penalty payments.[51] These provisions all refer to the *possibility* for the Commission to impose fines or penalty payments up to a certain amount. Since the legislature has conferred upon the Commission a certain amount of discretion, it could be argued that the respect for institutional balance implies that the General Court should not substitute its analysis for that of the Commission.

On the other hand, account should also be taken of the very high level of fines imposed on undertakings,[52] including fines for "mere" procedural offences (such as breach of seal for which E.ON was fined 38 million euro).[53] The level of such fines and the fact that they are imposed by an administrative body – the Commission – raises, in turn, the question of the compatibility of the EU system of enforcement of competition law with the requirements of Article 6(1) ECHR and Article 47 of the EU Charter of Fundamental Rights.

The safeguarding of both interests – the preservation of institutional balance and the need to take into account the adverse effects of fines on the undertakings concerned – has generated different opinions with regard to the extent of powers of the General Court under Article 261 TFEU. The recent case law tends to place more emphasis on the second interest, by favouring a wider interpretation of such powers. The effect of this shift is to disconnect as much as possible the examination of the appropriateness of the level of the fines from the issue of the legality of the decision establishing an infringement (*infra* section 3.1.). A question is open as to whether it should go even one step further (*infra* section 3.2.).

3.1. *The broadening of the scope of the unlimited jurisdiction*

A "traditional controversy" existed in relation to the precise extent of the unlimited jurisdiction of the General Court. It appears to derive from a joint reading of Articles 256(1) and 261 TFEU, which seems to imply that unlimited jurisdiction is not a stand-alone judicial remedy, but should rather

51. See e.g. Joined Cases C-189, 202, 205–208 & 213/02 P, *Dansk Rørindustri and others* v. *Commission*, EU:C:2005:408, para 172.

52. On the amount of fines see <www.ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last visited 10 Dec. 2015).

53. See Case C-89/11 P, *E.ON Energie* v. *Commission*, EU:C:2012:738.

be exercised within the framework of an action for annulment.[54] The existence of this "inherent bond" between both provisions has been interpreted in two different ways.

According to a restrictive or "objective" view, the possibility for the General Court to alter the amount of a fine under its unlimited jurisdiction is the necessary consequence of a finding of illegality. This position was clearly affirmed in the *BASF* judgment insomuch as it stated that "it is possible for the Court to exercise its unlimited jurisdiction under Article [261 TFEU] only where it has made a finding of illegality affecting the decision, of which the undertaking concerned has complained in its action".[55] Unlimited jurisdiction would be of use, for instance, in circumstances in which an applicant demonstrated that the decision was illegal inasmuch as the level of fine imposed violated the principle of proportionality. This opened the way for the General Court to use its powers under Article 261 TFEU to adjust its amount appropriately. Several judgments of the General Court followed this direction.[56] It is also worth noting that this "objective conception" of the unlimited jurisdiction is also applicable elsewhere, in the field of trademark litigation.[57]

In a wider or "subjective" view, the "inherent bond" is interpreted more loosely and implies, in essence, that the unlimited jurisdiction must be exercised within the general procedural framework of an application for annulment. Beyond this requirement, Article 261 TFEU is considered largely autonomous, in the sense that there is no preliminary obligation on the part of the applicant to demonstrate that the legality of the decision is vitiated in order to trigger its application. This disconnection between the (il)legality of a decision and the review of the fine imposed broadens the unlimited jurisdiction of the General Court in several directions.

54. See Case T-252/03, *FNICGV* v. *Commission*, EU:T:2004:326, paras. 21–25; Case T-69/04, *Schunk and Schunk Kohlenstoff-Technik* v. *Commission*, EU:T:2008:415, para 246; Case T-132/07, *Fuji Electric* v. *Commission*, EU:T:2011:344, para 207.

55. Case T-15/02, *BASF* v. *Commission*, EU:T:2006:74, para 582.

56. See e.g. Case T-329/01, *Archer Daniels Midland* v. *Commission*, EU:T:2006:268, para 382; Case T-330/01, *Akzo Nobel* v. *Commission*, EU:T:2006:269, para 130.

57. Under Art. 65(3) of Council Regulation (EC) 207/2009 of 26 Feb. 2009 on the Community trade mark, O.J. 2009, L 78/1, para 13, the ECJ has "jurisdiction to annul or to alter the contested decision". The reference to the possibility to "alter" the contested decision has been interpreted by the General Court and then by the ECJ in a narrow fashion since "[this power] does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take"; see Case C-263/09 P, *Edwin* v. *OHIM*, EU:C:2011:452, para 71.

First, in a "subjective" conception of the unlimited jurisdiction, applications can be declared admissible, even though they submitted no claims based on the illegality of the decision and concentrated solely on the appropriateness of the fines, provided they are introduced within the time-limit set up by Article 263 TFEU.[58]

Second, in the course of its review of fines, the General Court is entitled to take into account elements that had no bearing on the legality of the decision. For instance, in its judgment in *Arkema France*, the General Court substantially decreased the amount of a fine in view of certain factual evidence that the undertaking should have brought to the attention of the Commission prior to the adoption of the contested decision, but did not. Because of this omission there was no question of the decision being illegal. And yet, in view of this evidence, the General Court still concluded that the level of the fine was inappropriate and should be reduced.[59]

Third, the extension of elements that can be taken into account also applies *ratione temporis*. While the legality of a decision can solely be assessed by reference to […]the factual and legal situation existing at the date on which the act was adopted,[60] the General Court can also, in the course of its unlimited review, take into account elements which are posterior to the contested decision.[61] Thus, for instance, in *Romana Tabacchi*, the financial impossibility – demonstrated by the applicant in the course of proceedings – to provide a bank guarantee to secure the payment of the fine imposed was one of the elements that led the General Court to substantially reduce its amount.[62]

Fourth, since the unlimited jurisdiction can be triggered without the decision being tainted with illegality, there is, in theory, not much room left for the exercise by the Commission of its discretion in fixing the amount of a fine, since the General Court is entitled to substitute its reasoning to that of the Commission for reasons of pure equity.

58. Case T-50/03, *Saint-Gobain Gyproc Belgium* v. *Commission*, EU:T:2008:252; Case T-37/05, *World Wide Tobacco España* v. *Commission*, EU:T:2011:76. On this question, see Bernardeau and Christienne, *Les amendes en droit de la concurrence: Pratique décisionnelle et contrôle juridictionnelle du droit de l'Union* (Larcier, 2013), pp. 809–810.

59. Case T-217/06, *Arkema France and others* v. *Commission*, EU:T:2011:251, paras. 247–280; see also Case T-322/01, *Roquette Frères* v. *Commission*, EU:T:2006:267, paras. 293–316.

60. According to settled case law, see e.g. Joined Cases C-209-215 & 218/78, *Van Landewyck and others* v. *Commission*, EU:C:1980:248, para 40; Case T-329/01, *Archer Daniels Midland* v. *Commission*, para 377.

61. See Case T-541/08, *Sasol and others* v. *Commission*, EU:T:2014:628, para 438: "It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicants received a fine which properly reflects the gravity and the duration of the infringement in question…."

62. Case T-11/06, *Romana Tabacchi* v. *Commission*, EU:T:2011:560, paras. 282–286.

Although the Court of Justice did not as such explicitly rule on whether a finding of illegality is a prerequisite to the exercise of the powers delegated by Article 261 TFEU, its case law seems to indicate a favour towards the "wider conception" of the unlimited review, since the standard formula that is now consistently used refers to the possibility "in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed".[63]

In any event, whatever the actual position of the Court of Justice on this question is, it should be observed that the wider view conception has superseded the objective one in the practice of the General Court and that now the trend is oriented towards a broader interpretation of Article 261 TFEU.[64] This certainly provides the undertakings concerned with a more effective judicial protection in the sense of Article 6(1) ECHR and Article 47 of the Charter of Fundamental Rights.

However, such powers must be exercised with caution. Due consideration should still be given to the administrative practice of the Commission, notably in relation to its method of setting fines. The guidelines for the calculation of fines published by the Commission[65] provide the undertakings concerned with legal certainty and ensure consistency. Obviously, such guidelines are not binding on the General Court which, in the course of its unlimited jurisdiction, can decide to determine the amount of a fine using a different method.[66] Yet, unless their legality is successfully challenged or an applicant demonstrates that they should not have been applied to its specific situation, it is difficult to see why the General Court should disregard them. Unlimited review may serve to adjust the amount of a fine so as to ensure that it is appropriate to the individual situation of the applicant. However when exercising such powers the General Court must also keep in mind the need for consistency and legal certainly.[67] So unless it adopts its own fining policy, it

63. See Joined Cases C-238, 244, 245, 247, 250–252 & 254/99 P, *Limburgse Vinyl Maatschappij and others* v. *Commission*, EU:C:2002:582, para 692; Case C-3/06 P, *Groupe Danone* v. *Commission*, EU:C:2007:88, paras. 61–62; Case C-86/10 P, *Chalkor* v. *Commission*, para 63.

64. On this question, see Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014), pp. 627–629.

65. See e.g. Commission Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation (EC) 1/2003, O.J. 2006, C 210/2.

66. Case T-360/09, *E.ON Ruhrgas and E.ON* v. *Commission*, EU:T:2012:332, paras. 301–305.

67. On this question, see Arabadjiev, "Unlimited jurisdiction: What does it mean today?", in Cardonnel, Rosas and Wahl (Eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing, 2012), 383–402, p. 396.

could be argued that, save in exceptional circumstances, it is best that the General Court uses the Commission's guidelines as a basis for its own calculation.

Indeed, if too much judicial deference towards the Commission is certainly a pitfall, an arbitrary use by the General Court of its unlimited jurisdiction would not represent a better situation for the undertakings concerned. This is even more so given that the Court of Justice carries a very limited review in that respect.[68]

3.2. *Unlimited review of the fine or of the decision?*

Some commentators have called for a broadening of the scope of the unlimited jurisdiction by going one step further in order to encompass the review of the entire contested decision, so that the court becomes a "full appellate jurisdiction".[69] In this perspective the General Court would be entitled to substitute its reasoning for that of the Commission not only in relation to the amount of the fine but also in relation to the examination of whether there exists an infringement of competition law.

Essentially, two series of arguments have been put forward in favour of such an approach: first, it would be necessary to comply with human rights standards; second, it would require no changes to the current legal framework.

Under Article 6(1) ECHR "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal". A similar principle can be found in Article 47(2) of the Charter of Fundamental Rights which states "everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal" and embodies the right to an effective remedy before a court within the EU legal order.[70]

It is well accepted that, in view of the amount of fines involved, competition proceedings qualify as criminal charges within the meaning of the ECtHR

68. See Case C-89/11 P, *E.ON Energie* v. *Commission*, paras. 125–126: "It is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of European Union law". Consequently it is only "in as much as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine".

69. See Forrester, op. cit. *supra* note 16; Gerard, "Breaking the EU antitrust enforcement deadlock: Re-empowering the courts?", 36 EL Rev. (2011), 457–479.

70. Case C-279/09, *DEB* v. *Bundesrepublik Deutschland*, EU:C:2010:811, para 40.

case law.[71] Since fines are not part of the "hard core of criminal law", they can be imposed, in the first instance, by the Commission without violating the provisions of Article 6(1) ECHR, even though the Commission does not constitute an "independent tribunal". However there must exist the possibility of an appeal "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision". Some authors have disputed whether the review exercised by the General Court matches this standard. For instance Slater, Thomas and Waelbroeck consider that in order to comply with the ECHR requirements "the [General Court] cannot limit its analysis to 'manifest errors of appraisals or misuses of power' but should in every case reassess fully the facts and the choice of the appropriate legal and economic tests applied to these facts… [t]he unlimited jurisdiction should not be limited to altering the amount of the fines imposed on companies but should also extend to the very determination of the infringement giving rise to these sanctions".[72]

It has also been argued that the current legal framework does not prevent the scope of the unlimited jurisdiction from being extended to the decision as a whole. In that respect references have been made to the drafting of Recital 33 and the first sentence of Article 31 of Regulation 1/2003, which both mention an unlimited jurisdiction being exercised in respect of *decisions* by which the Commission imposes fines or periodic penalty payments.[73] At least one judgment of the Court of Justice could be interpreted as endorsing this view.[74]

However interesting they may appear, the merits of these arguments are open to discussion. In view of the most recent case law of both the ECtHR and the Court of Justice, an extension of the scope of unlimited review does not appear necessary to ensure the compatibility of the EU system of enforcement of competition law with Article 6(1) ECHR and Article 47 of the Charter of Fundamental Rights. It is also questionable whether such an extension is not, perhaps, somehow, premature.

In *Menarini,*[75] the ECtHR held that the Italian system of judicial review of antitrust decisions adopted by the national competition authority was

71. This point was made as early as 1989 in Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc* v. *Commission*, EU:T:1991:869, para 885.

72. Slater, Thomas and Waelbroeck, "Competition law proceedings before the European Commission and the right to a fair trial: No need for reform?", 5 *European Competition Journal* (2009), 97–145, at 140.

73. Forrester, op. cit. *supra* note 16, at section F; Gerard, op. cit. *supra* note 69, at 476.

74. *Limburgse Vinyl Maatschappij* v. *Commission*, *supra* note 63, para 693, which could be understood as implying that the General Court is entitled to rule on the substance of the infringement in the course of its unlimited jurisdiction.

75. ECtHR, *A. Menarini Diagnostics S.R.L.*v. *Italy*, Appl. No. 43509/08, judgment of 29 Sept. 2011.

compatible with Article 6(1) ECHR. This judgment is highly relevant in view of the significant similarities which exist between the Italian and EU systems of enforcement of competition law. Notably, the fact that within the framework of the Italian system of judicial review, an administrative court is not entitled to substitute its assessment to that of the competition authority did not prevent the ECtHR from concluding that there existed full jurisdiction in the sense of the relevant case law, since the national court was able to control the facts and evidence, verify whether the administration had made proper use of its powers, and carried out a thorough analysis of the appropriateness of the penalty. This matches the level of scrutiny exercised by the General Court over the Commission's decisions. Exactly the same conclusion was reached by the Court of Justice in relation to Article 47 of the Charter of Fundamental Rights.[76] These judgments led Advocate General Kokott to conclude, under Opinion 2/13, that "with regard to Article 6 ECHR, the proposed accession of the EU to the ECHR does not require any institutional changes to be made in the system governing the imposition of financial penalties in the field of competition law".[77]

Moreover, in the search for an intensification of the review conducted by the General Court, it is far from certain that an extension of the scope of Article 261 TFEU should constitute the next objective. In this respect a distinction must be drawn between the review of the Commission's decisions relating to cartels and those imposing fines for infringements of Article 101 or 102 TFEU other than cartels.[78]

It could be argued that the Commission's decisions fining undertakings for their participation in cartels, which represent the vast majority of the decisions involving fines today, are already subjected to a high standard of review, for two reasons. The first one is that, in this field, assessments of a complex economic nature are less frequent. The second one is that fines are at the heart of the decision. What is at stake is less whether the alleged conduct (price

76. See Case C-86/10 P, *Chalkor* v. *Commission*, para 67; Case C-389/10 P, *KME Germany* v. *Commission*, para 133; Case C-272/09 P, *KME* v. *Commission*, EU:C:2011:810, para 106: "The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter".

77. View of A.G. Kokott under Opinion 2/13 delivered on 13 June 2014, EU:C:2014:2475, para 151.

78. On this distinction, see Wils, "The increased level of EU antitrust fines, judicial review and the ECHR", 33 *World Comp* (2010), 5–29, at 21 et seq.

fixing, market sharing etc.) constitutes a violation of competition, than what the amount of the sanction should be. This means that all aspects of the decision are potentially pertinent for the calculation of the fine and, consequently, are likely to fall within the ambit of the General Court's unlimited jurisdiction.

The question presents itself in a different configuration in areas others than cartels where fines are imposed, which essentially cover Article 102 decisions. Contrary to cartel decisions, it could be argued that – even though they can reach very high levels – fines are not at the centre of the decision. They are the consequence of a finding there has been an infringement of competition law, which may imply assessments of a complex economic nature subject solely to a marginal review. Since such a finding is largely autonomous from the examination of the fine imposed, the exercise of the General Court's unlimited jurisdiction on the issue of fines will have little impact on the intensity of the control exercised on the key question of whether the conduct amounted to a breach of competition law.

In respect of such decisions (which constitute only a small minority of the decisions involving fines, although they are highly visible), the question of an intensification of the extent of the review carried by the General Court can rightfully be raised. Yet subjecting the assessment of the existence of a restriction of competition to the General Court's unlimited jurisdiction might appear a drastic or premature step. It would represent a shift from a review (sometimes) limited to the manifest error of assessment standard, directly to the possibility for the General Court to substitute its own economic assessment for that of the Commission. It would be more logical to ensure, in the first place, a comprehensive control of legality of such decisions through a continuation of the "marginalization of the marginal review" process.

4. Review of the Commission's use of its investigatory powers

In order to gather information, the Commission is provided with important fact-finding powers. It can require undertakings to submit to an inspection under Article 20(4) of Regulation 1/2003 and compel them to provide the information requested in a decision adopted on the basis of Article 18(3) of the same Regulation. While the specific nature of these powers implies that these Commission decisions are to a large extent subjected to a lighter review than other decisions (*infra* section 4.1.), this is somehow counterbalanced by a more in-depth scrutiny when it comes to ensuring that such (wide) powers are not used in an arbitrary fashion (*infra* section 4.2.).

4.1. *The "inherent limitations" on the review of the Commission's use of its investigatory powers*

The judicial review of the Commission's investigatory powers involves balancing conflicting interests.

On the one hand, consideration must be given to the adverse consequences they have on the undertakings concerned. Inspection decisions represent an important intervention in their private sphere, and on the basis of Article 20 (4) of Regulation 1/2003 can be conducted without a prior judicial warrant.[79] While a decision requesting information might appear, at first, not as intrusive, answering it may involve an extremely heavy workload. For that reason, decisions requesting information and inspection decisions – even though they are steps in procedure that may lead to a final decision on the legality of the behaviour of the undertakings concerned – are amenable to judicial review by the General Court.[80] The undertakings do not have to await the adoption of a final decision on the substance of their behaviour in order to raise the potential illegalities which may have vitiated the inspection decisions and decisions requesting information.

On the other hand, the very nature of such decisions must also be kept in mind. The Commission's investigatory powers are exercised in the course of the "preliminary investigation stage" of the procedure, which covers the period up to notification of the statement of objections.[81] It is a fact-finding phase: the Commission is looking for information, and is not yet in a position to present its case against the undertakings concerned. Its purpose is to allow the Commission to verify and gather evidence on an alleged breach of competition which may (or may not) have taken place and it concerns documents that undertakings are unlikely to disclose willingly. Consequently, in order to preserve the effectiveness of the investigation, it has been held that undertakings cannot fully benefit from the rights of defence in the course of the preliminary phase of the administrative procedure.[82] This, in effect, provides the Commission with a certain leeway in the conduct of its

79. On the issue of judicial warrant, see Berghe and Dawns, "'Little pig, little pig, let me come in': An evaluation of the European Commission's powers of inspection in competition cases", 30 ECLR (2009), 407–423, at 411–412.

80. Thus the qualification of "preliminary or purely preparatory measure" in the sense of Case C-60/81, *IBM* v. *Commission*, EU:C:1981:264, paras. 9–10, is not applicable to such decisions.

81. Case T-99/04, *AC-Treuhand* v. *Commission*, EU:T:2008:256, para 47.

82. Ibid., para 48: "if those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it".

investigations. But it is not without limits: the General Court must "prevent (such rights) from being irremediably compromised during that stage of the administrative procedure",[83] by ensuring that evidence is not gathered in an illegal manner by the Commission. This equilibrium appears more clearly if one considers the extent of the duty of the Commission to state the reasons on which its decision is based. The obligation to give reasons is considered one of the fundamental principles of EU law which the General Court has to ensure are observed, if necessary by considering of its own motion a plea of failure to fulfil that obligation.[84] Indeed such a fulfilment is a prerequisite of any judicial control since it enables the undertaking concerned to ascertain the Commission's reasoning and the Court to carry out its review.

Yet, when drafting inspections decisions or decisions requesting information, the Commission is subject to what might be called "a light duty to state reasons" when compared with the regular application of Article 296 TFEU. According to settled case law, Articles 18(3) and 20(4) of Regulation 1/2003 lay down the essential constituents of the statement of reasons for a decision requesting information or ordering an inspection.[85] Although they may appear to be essentially of a technical nature, the importance of these two provisions (which are drafted in a fairly similar way)[86] should not be underestimated. They illustrate the search for a compromise between the preservation of the rights of the undertakings concerned and the recognition of the specificities of the preliminary stage of the administrative procedure.[87]

In principle, the Commission is under no duty to provide more information to the undertakings concerned than the ones listed in these two provisions. For

83. Ibid., para 51.

84. See e.g. Case T-241/97, *Stork Amsterdam* v. *Commission*, EU:T:2000:41, para 74.

85. In relation to decisions requesting information, see *inter alia* Joined Cases T-458/09 & T-171/10, *Slovak Telekom* v. *Commission*, EU:T:2012:145, paras. 76–77; Case T-292/11, *Cemex and others* v. *Commission*, EU:T:2014:125, para 34. In relation to inspection decisions, see e.g. Case T-402/13, *Orange* v. *Commission*, EU:T:2014:991, para 90.

86. Under Art. 18(3) of Regulation 1/2003: "(w)here the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice". Art. 20(4) of Regulation 1/2003 states: "The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted".

87. See e.g. Case T-23/09, *CNOP and CCG* v. *Commission,* EU:T:2010:452, para 41; Joined Cases C-97-99/87, *Dow Chemical Ibérica and others* v. *Commission*, EU:C:1989:380, para 55.

instance, even though the Commission must have reasonable grounds for suspecting an infringement of competition rules prior to the exercise of its investigatory powers,[88] there is no obligation on its behalf to mention – or even to refer – in the contested decision, to the elements which are already in its possession and on the basis of which it decided to act.[89] The rationale behind the exclusion from the scope of the duty to state reasons of one of the most important aspects of the Commission's reasoning lies in the protection of its investigations. Should the extent of the Commission's knowledge of the potential competition infringements be made available to the undertakings concerned, there would be a risk that they may conceal information. Another illustration of what could be qualified as a "narrow" duty to state reasons can be found in the context of decisions requesting information. The Commission is not required to provide, in its decision, a specific justification of the necessity of each individual question. It is sufficient that it states the subject-matter and purpose of the request. This should allow the undertakings concerned to assess the necessity of the information required.[90]

However, Articles 18(3) and 20(4) of Regulation 1/2003 both include one element which is qualified as being "fundamental" for the protection of undertakings concerned, that is to say the obligation on the Commission to state the subject-matter and purpose of the decision.[91] In the rationale of Articles 18(3) and 20(4), this specific obligation represents a limit against potential excesses by the Commission of its investigatory powers and allows for a judicial review of such decisions.

Indeed, the indication of the subject matter and purpose of the investigatory measure is deemed "necessary for the undertakings concerned to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defence".[92] In other words, it defines the scope of the investigatory measure. Thus, in the context of decisions requesting information, the Commission is only entitled to require the disclosure of information which may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information.[93]

88. See e.g. Case T-135/09, *Nexans France and Nexans* v. *Commission,* EU:T:2012:596, para 43.

89. See e.g. Joined Cases T-458/09 & T-171/10, *Slovak Telekom* v. *Commission,* para 77.

90. On this question see the Opinion of A.G. Jacobs in Case C-36/92, *SEP* v. *Commission,* EU:C:1993:928, para 30.

91. See e.g. Case T-402/13, *Orange* v. *Commission*, para 80, in relation to inspection decisions and Case T-292/11, *Cemex and others* v. *Commission*, para 40, in relation to decisions requesting information.

92. See e.g. Case T-339/04, *France Télécom* v. *Commission*, EU:T:2007:80, para 57.

93. See e.g. Case T-292/11, *Cemex and others* v. *Commission,* paras. 40–41.

In the same manner, in the course of an inspection decision, the Commission may only search for business records, and examine them, if they can be of some relevance to the procedure concerned.[94] For instance, in *Deutsche Bahn*, the Court of Justice considered that an inspection decision of the Commission should have been annulled by the General Court, since the Commission had informed its agents before the conduct of the inspection of the existence of another complaint against the undertaking concerned, unrelated to the subject-matter of the inspection, a fact which led to the seizure of documents outside the scope of the putative infringement as defined in the decision.[95]

Moreover, the equilibrium drawn in the case law also takes into account that the safeguard of the rights of defence of the undertakings implies ensuring that evidence is not gathered in violation of their fundamental rights, such as in breach of the legal professional privilege which entails a protection of the communications with their (independent) legal counsel[96] or of the protection against self-incrimination.[97]

4.2. *A more in-depth scrutiny of the protection against arbitrary intervention*

When exercising its investigatory powers, the Commission must take into account the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal; this constitutes a general principle of EU law.[98] This implies not only verifying whether there has been any breach of the

94. On this question, see the Opinion of A.G. Kokott in Case C-37/13 P, *Nexans and Nexans France* v. *Commission*, EU:C:2014:223, para 62.

95. Case C-583/13 P, *Deutsche Bahn and others* v. *Commission*, EU:C:2015:404, paras. 57–71.

96. Case C-155/79, *AM & S Europe* v. *Commission*, EU:C:1982:157; Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals* v. *Commission*, EU:C:2010:512. On this question, see *inter alia* Frese, "The development of general principles for EU competition law enforcement: The protection of legal professional privilege", 32 ECLR (2011), 196–205.

97. Case C-374/87, *Orkem* v. *Commission*, EU:C:1989:387, paras. 28–35; Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, *Aalborg Portland and others* v. *Commission*, EU:C:2004:6, paras. 62–65. On this question, see Stessens, "The obligation to produce documents versus the privilege against self-incrimination: Human rights protection extended too far?", 22 EL Rev. (1997), 45–62.

98. This principle must be respected both in relation to inspection decisions (see e.g. Case T-135/09, *Nexans France and Nexans* v. *Commission*, para 40) and in relation to decisions requesting information (see e.g. Joined Cases T-458/09 & T-171/10, *Slovak Telekom* v. *Commission*, para 81).

principle of proportionality,[99] but also that the Commission did not use its investigatory powers in an arbitrary manner. A control of this second requirement is imperative in view of the extent of the powers vested in the Commission and the limited rights enjoyed by the undertakings concerned.

Thus, it is of paramount importance to ensure that the Commission does not indulge in the practice of so-called "fishing expeditions", that is to say does not send requests for information or carry out inspections "on a speculative basis, without having any concrete suspicions".[100] In order not to be qualified as arbitrary, an inspection decision or decision requesting information must be directed at gathering the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which the Commission already possesses certain information, constituting reasonable grounds for suspecting an infringement of the competition rules.[101]

To make sure that this is so, the General Court must ascertain whether the contested decision was based on sufficient grounds. This can be done in two different manners.

First, through a form of presumption, when the drafting of the decision permits it. A clear indication of what the Commission is looking for tends to imply that it does not act in a speculative or arbitrary manner, but rather that is has sufficient grounds to believe that a breach of competition law might have been committed.[102] In other words: if the Commission is looking for something precise, then it can reasonably be inferred that it must have had good reasons for doing so.

Secondly, in circumstances in which the subject-matter and purpose of the decision are defined in a rather vague manner, upon request from the applicant, the General Court can verify what the indicia at the disposal of the Commission were when it adopted its decision and whether they were sufficient to trigger the use of its powers. In the course of the legal proceedings, the General Court orders the Commission to communicate the elements on which it acted and conduct the necessary verification. The possibility that such an *ex post* review of the grounds on which the Commission acted has been contemplated by the Court of Justice, but merely

99. On the proportionality of inspection decisions, see Case T-402/13, *Orange* v. *Commission*, para 22 et seq. On the proportionality of decisions requesting information, see Case T-292/11, *Cemex* v. *Commission*, paras. 110 et seq.

100. Opinion of A.G. Kokott in Case C-37/13 P, *Nexans and Nexans France* v. *Commission,* para 43.

101. In relation to inspection decisions, see Case T-402/13, *Orange* v. *Commission*, para 43. In relation to decisions requesting information, see Case T-292/11, *Cementos Portland Valderrivas* v. *Commission*, EU:T:2014:121, para 40.

102. See Case T-402/13, *Orange* v. *Commission,* para 90.

indirectly or in the form of *obiter dicta*.[103] The first cases in which such a review was actually conducted were *Nexans*[104] and *Prysmian*[105] in relation to inspection decisions and *Cementos Portland Valderrivas*[106] in relation to decisions requesting information.

Such an in-depth *ex post* judicial review provides the undertakings with better protection against arbitrary use by the Commission of its powers.[107] It is also more in line with the requirements of the ECtHR in relation to the compatibility of inspection decisions with Article 6(1) ECHR. Article 20(4) of Regulation 1/2003 allows the Commission to carry out a mandatory search of premises without judicial warrant. For the Strasbourg Court, a lack of prior judicial warrant may only be counterbalanced by the availability of an effective *ex post* judicial review.[108]

Yet it should also be kept in mind that such a review might be open to abuse if the real purpose of a request is to gain an early access to the Commission's files. As already stated, investigatory powers are exercised during the preliminary phase of the administrative procedure, at a point in time in which undertakings have no right of access to such files. If the General Court needs to adjudicate on whether the Commission had ground to act, the evidence provided in the course of the legal proceedings must be transmitted to the applicants, so as to comply with the adversarial principle. Although Article 103 of the new rules of procedure of the General Court[109] permits the access

103. See Joined Cases C-97-99/87, *Dow Chemical Ibérica*, para 52, as well as Case C-94/00, *Roquette Frères*, EU:C:2002:603, paras. 54–55.

104. See Case T-135/09, *Nexans France and Nexans* v. *Commission*, paras. 72–94.

105. See Case T-140/09, *Prysmian and Prysmian Cavi e Sistemi Energia* v. *Commission*, EU:T:2012:597, paras. 70–90.

106. See Case T-292/11, *Cementos Portland Valderrivas* v. *Commission*, paras. 42–61.

107. See Laghezza, "From the Nexans judgment to the 'next' improvements of the EU dawn raid procedure?", 34 ECLR (2013), 214–217, at 217.

108. See e.g. ECtHR, *Harju* v. *Finland*, Appl. No. 56716/09, judgment of 15 Feb. 2011, paras. 40 and 44. More recently, in *Delta Pekárny a.s.* v. *the Czech Republic*, Appl. No. 97/11, judgment of 2 Oct. 2014, the ECtHR considered that an inspection carried out by the Czech national competition authority at a company's premises had given rise to an infringement of Art. 8 ECHR on the basis, notably, that issues such as the necessity, the duration and the scope of the inspection as well as its proportionate character had not been open to judicial review. In *Vinci Construction and GMT génie civil et services* v. *France*, Appl. No. 63629/10 and 60567/10, judgment of 2 April 2015, the ECtHR criticized the national court for not conducting a sufficient control, *inter alia* of whether documents seized were connected to the investigation. On the issue of the compatibility of the Commission's investigatory powers with human rights, see e.g. Messina, "The protection of the right to private life, home and correspondence v. the efficient enforcement of competition law: Is a new EC Competition Court the right way forward?", 3 *European Competition Journal* (2007), 185–212, and Weiss, "Human rights and EU antitrust enforcement: News from Lisbon", 32 ECLR (2011), 186–195.

109. New rules of procedure of the General Court adopted on 23 April 2015, O.J. 2015, L 105/1.

to such documents to be restricted to the lawyers only, it is far from being a perfect solution.

To avoid this pitfall, a recent judgment made clear that the General Court would not automatically carry out such a review, even when requested to do so by the applicant.[110] If the Court takes the view that the scope of inquiry has been defined sufficiently precisely, it may consider that an inspection decision or a decision requesting information is not arbitrary on this sole basis. Thus it is only when there is a *prima facie* doubt as to the potential arbitrary nature of the contested decision that the General Court is likely to take this further step. For instance, in *Nexans*[111] as well as in *Prysmian*,[112] the scope of inquiry referred to "the supply of electric cables and material associated with such supply, including, amongst others high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables", thus the investigation could be said to encompass anything that is linked with the supply of electric cables. After examination of the elements provided, the Court concluded that the Commission had not demonstrated that it had possessed reasonable grounds for ordering an inspection covering all electric cables, and hence annulled, in part, the contested decision.

In *Cementos Portland Valderrivas*[113] the Commission had stated in its decision requesting information that it was investigating "restrictions on trade flows in the European Economic Area (EEA), including restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price coordination and related anti-competitive practices in the cement market and related product markets." Even though the scope of inquiry appeared particularly wide, an examination of the elements provided by the Commission led the General Court to dismiss the application.

5. Conclusion

Although there is always room for improvement, it could be argued that the gradual "marginalization of the marginal review" within the framework of Article 263 TFEU, the move towards a broader view of the unlimited jurisdiction under Article 261 TFEU, as well as the emphasis on the protection against arbitrary intervention in the private sphere of the undertakings concerned, draw a picture which is quite different from the "deferential" attitude sometimes painted.

110. See Case T-402/13, *Orange* v. *Commission*, paras. 88–91.
111. See Case T-135/09, *Nexans France and Nexans* v. *Commission*, para 3.
112. See Case T-140/09, *Prysmian* v. *Commission*, para 3.
113. See Case T-292/11, *Cementos Portland Valderrivas* v. *Commission,* para 4.

However, the intensity of the review carried out by the General Court is of little consequence if most of the disputes are resolved at the administrative stage, notably through the Article 9 procedure. In principle, there is nothing wrong with the fact that undertakings and the Commission settle their disputes in a non-contentious way, provided of course, that those commitments are entered into genuinely and on a voluntary basis. Yet the "extensive" use of such alternative means of resolution may cast some doubts on whether this is always the case. In this perspective two judgments of the Court of Justice deserve special attention.

On the "negative side" (in a judicial scrutiny perspective), the consequences of the *Alrosa*[114] judgment must be mentioned. It follows from this judgment that the Commission does not have to search for less onerous commitments than the ones proposed, and is entitled to accept commitments that go beyond what could have been ordered after an infringement procedure. Thus, the Commission is under a duty to examine the necessity of commitments only if the undertakings concerned offer less burdensome commitments that are equally appropriate. However, even then, the General Court can only establish a breach of the proportionality principle if the Commission commits a manifest error of assessment. This approach, while legally sound, significantly limits the scrutiny that the General Court can exercise over commitments decisions, and may have contributed to a possible "excessive use" of the Article 9 procedure.

On the "positive side", there is the narrower definition of restrictions by object provided by the Court of Justice in the *Groupement des cartes bancaires* judgment.[115] Indeed, as one commentator put it, an "allegation of an object infringement no doubt brings companies to the settlement table more promptly than allegation of an infringement by effect";[116] it can therefore be reasonably considered that a limitation of this qualification to the most serious infringements only, may contribute to a lesser pressure on an undertaking to go down the route of an Article 9 procedure and, thus, deprive itself of the benefits of judicial control.

114. See Case C-441/07 P, *Commission* v. *Alrosa*. See Jenny, op. cit. *supra* note 10 at 725 et seq.

115. See Case C-67/13 P, *CB* v. *Commission*.

116. Heinisch, "The object of the exercise: A look at the ECJ's landmark *Groupement des Cartes Bancaires* decision", 13 *Competition Law Insight* (2014), 16–17, at 17.