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**EU Antitrust Enforcement in  
2025: “Why Wait? Full  
Appellate Jurisdiction, Now”**

**Damien M.B. Gerard**

University of Louvain

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### I. INTRODUCTION

In a series of speeches delivered over the past few weeks, EU Competition Commissioner Almunia and DG COMP Director General Italianer engaged various audiences on the sensitive topic of due process and competition enforcement. The objective was presumably to weigh in the current intense debate over the compatibility of the EU antitrust enforcement system with the requirements of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) on the right to a fair trial, in the context of the impending accession of the Union to the ECHR, as provided for by the Treaty of Lisbon, and of a growing consensus over the (quasi-)criminal nature of EU antitrust proceedings. The message was clear: “major structural changes to [the] competition enforcement and institutional structures are not an option” even though the Commission is “open to local changes that would improve [the] system.”<sup>1</sup> So much for those advocating a radical departure, “within five years,” from the current organization centralizing investigatory, prosecutorial, decisional, and policy-making functions in the hands of the Commission.<sup>2</sup>

Among the reasons justifying their overall satisfaction with the current enforcement system, the chief EU antitrust enforcers referred systematically to the review of the Commission decisions by the European courts, which “represent[...] the ultimate guarantor for due process” and is “very close and very careful.” “I certainly believe that it should be so,” Commissioner Almunia once added.<sup>3</sup> Various prominent representatives of the EU antitrust bar have voiced somewhat different views in recent months. Besides concerns pertaining to the duration of court proceedings or specific inconsistencies, they pointed in particular to what they perceive as a creeping expansion of self-imposed limitations on the degree of scrutiny exercised by the EU Courts over Commission decisions, as a result of the spread of the so-called “manifest error of assessment” standard.<sup>4</sup> Underlying those concerns lies a growing sense of frustration at what is perceived as a disturbing discrepancy between, on the one hand, the transformation of the EU

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<sup>1</sup> See, respectively, Director General A. Italianer, *Safeguarding due process in antitrust proceedings*, *Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy*, New York, September 23, 2010; Commissioner J. Almunia, *Due process and competition enforcement*, *IBA - 14th Annual Competition Conference*, Florence, 17 September 2010 (SPEECH/10/449).

<sup>2</sup> I. Forrester, *A Bush in Need of Pruning: the Luxuriant Growth of ‘Light Judicial Review’*, in, EUROPEAN COMPETITION LAW ANNUAL 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES, p.2 (C.-D. Ehlermann & M. Marquis (eds.), (forthcoming, Hart Publ., Oxford/Portland, 2010), available in the meantime at <http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf>, last visited November 25, 2010); J. Killick & P. Berghe, *This is not the time to be tinkering with Regulation I/2003 – It is time for fundamental reform – Europe should have change we can believe in*, *COMP. L. REV.* at 259 (201).

<sup>3</sup> *Supra*, note 1, Commissioner J. Almunia, *Due process and competition enforcement*.

<sup>4</sup> See, generally, I. Forrester, *supra* note 2 and M. Siragusa’s contribution to the conference celebrating the General Court’s 20<sup>th</sup> anniversary, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/siragusa.pdf>, last visited November 22, 2010.

antitrust enforcement paradigm over the past decade and the corollary expansion of the Commission discretion and, on the other hand, the shrinking of the intensity of judicial review and the contraction of the EU Courts' unlimited jurisdiction with respect to fines.

This short note considers the substance of those claims in section 1, which discusses the emergence of a gap between the modernization of antitrust enforcement over the past decade and the hybrid character of the EU Courts' jurisdiction. To bridge that gap, section 2 advocates a re-balancing of the EU antitrust enforcement system by endowing the EU Courts with full appellate jurisdiction "to review decisions whereby the Commission has fixed a fine or periodic penalty payment." It then finds that Art. 31 of Regulation 1/2003 constitutes an appropriate legal basis to implement that solution. Hence it wonders: why wait for 2025?

## II. THE ANTITRUST ENFORCEMENT GAP

Antitrust enforcement in the European Union has undertaken a profound transformation since the late 1990s by way of a process known as "modernization," combining the restatement of most substantive principles with the view to implementing a so-called "economic approach" to antitrust, with profound modifications in the procedural and remedial framework provided for the implementation of those principles. Those modifications started with the issuance of the first leniency notice in 1996, the first fining guidelines in 1998 and, most importantly, the adoption of Regulation 1/2003, followed by the introduction of the settlement procedure.

### A. The Paradox of Modernization

The process of modernization has modified drastically the positioning and incentives of the different actors, whether companies or enforcers and, indeed, the rationality of antitrust enforcement itself. At the core of this systemic turn lies a paradox. Constrained by limited resources, competition authorities have developed utilitarian strategies rooted in effectiveness and deterrence considerations, with the effect of putting greater emphasis on sanctions and remedies, and the tailoring thereof. In the meantime, the modernization paradigm has led to a broad review of substantive principles now embodied in general guidelines articulating an economic discourse which itself emphasizes the singularity of market conditions. The paradox is that the substance of antitrust rules has expanded considerably on paper, while enforcement has come to revolve increasingly around the "negotiation" of fines and remedies.<sup>5</sup> As a corollary, antitrust compliance has become largely a matter of risk management: companies are invited to self-assess their commercial practices and self-comply with general guidance, while managing the risk of complaints and proceedings which, if and when they occur, they strive to contain or settle.

Undoubtedly, the increase in the amount of the fines imposed by the Commission, in the aftermath of the adoption of the (successive) fining guidelines, has changed the rules of the EU antitrust enforcement game. Yet, it is only part of the story. To appreciate fully the transformation at play, fines must be considered together with an increased reliance on negotiated procedures, to the point of becoming the norm.<sup>6</sup> The two elements are mutually

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<sup>5</sup> The term "negotiation" or "negotiated" is used in the remainder of the note to refer generally to the leniency, settlement, and commitment procedures, even though they do not involve "negotiations" *stricto sensu*.

<sup>6</sup> On the Art. 101 TFEU front, the vast majority of cases are prompted by or involve leniency applications, *see* MEMO/06/470 of December 7, 2006, *Competition: Commission Leniency Notice – frequently asked questions*. As far as Art.

reinforcing. The current level of fines puts tremendous pressure on companies to embark on negotiated procedures, even with the knowledge that the outcome may be very unpredictable and the process quite daunting. In turn, those procedures appear to be the only way to contain the exposure arising from the level of fines and other associated costs.

This rather explosive combination may have borne results—after all, most companies do internalize today the “antitrust risk” in devising commercial strategies—but has upset many, in particular counsel whose traditional role—bringing up legal certainty—appears ill-suited to the new enforcement rationality calling rather for acute damage control skills. Generally, lawyers also resent the incentives built into the modernized enforcement system for depriving them of a space for fair dialectic exchanges over the substance of cases, at arm’s length with the Commission. In turn, they perceive modernization as having increased significantly Commission discretion to the detriment of due process.

### **B. The Hybrid Character of the EU Courts Jurisdiction**

As traditionally understood, “the [Court of Justice of the European Union] has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. First, under Article [263 TFEU], it has the task of *reviewing the legality of those decisions*. ... Secondly, [it] has power to assess, in the exercise of the unlimited jurisdiction accorded to it by Article [261 TFEU] and Article [31 of Regulation 1/2003], *the appropriateness of the amounts of fines*” (emphasis added).<sup>7</sup> Thus the EU Court’s jurisdiction to review Commission decisions, as currently interpreted, is hybrid in the sense that it combines two different types of *recours contentieux*, as understood in French administrative law, where it originates.<sup>8</sup>

Practically, the scope of the EU Courts annulment jurisdiction is broad as it extends to all possible issues raised by a Commission decision, whereas the scope of the means available to remedy the illegality of a Commission decision is narrow as EU Courts can only annul the decision in whole or in part but they cannot “remake” it, *i.e.*, substitute their own findings for those of the Commission. It is precisely the contrary in relation to the EU Courts’ unlimited jurisdiction with respect to fines: its scope is limited to the assessment of the appropriateness of fines, as set by Commission decisions,<sup>9</sup> whereas judges are free to vary on their own—*i.e.*, “cancel, reduce or increase”—the amount of fines or penalties, once those have been found “inappropriate” in view of a particular error of law or fact.

It is therefore the EU Courts’ annulment jurisdiction (*i.e.*, legality review) that sets the boundaries of the judicial review framework applicable to Commission antitrust decisions,

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102 TFEU enforcement is concerned, it is telling that out of the 17 dominance cases decided by the Commission since 2005, 14 have given rise to commitments decisions.

<sup>7</sup> See, *e.g.*, Case T-220/00, Cheil Jedang/Commission (Amino Acids), [2003] ECR II-2473 ¶ 215 and Joined Cases T-456 and 457/05, Gütermann and Zwicky/Commission (Industrial Thread) [2010] ECR II-not yet reported, ¶ 105.

<sup>8</sup> See, *e.g.*, R. Chapus, *Droit administratif général*, Tome I, 4 éd., Montchrétien, Paris, 1988, p.501 et al.; A. de Laubadère, J.-C. Venezia and Y. Gaudemet, *Traité de droit administratif*, Tome I, 10 éd., L.G.D.J., Paris, 1988, p. 365 et al.

<sup>9</sup> See, *e.g.*, Case T-275/94, Groupement des cartes bancaires “CB”/Commission [1995] ECR II-2169, ¶¶ 59 and 60: “the [Union] judicature is not competent ... to replace the fine imposed by the Commission by a new, legally distinct fine” but only “to rule on fines set by decisions of the Commission.”

including those applicable to the exercise of the unlimited jurisdiction with respect to fines. In turn, when acting pursuant to their annulment jurisdiction, the role of the EU Courts is limited to checking whether the evidence referred to in the decision is “capable of substantiating the conclusions drawn from it.”<sup>10</sup> In other words, they do not carry out anew a balance of probabilities between the different appreciations of the evidence as put forward by the Commission, on the one hand, and the applicant(s), on the other. Rather, they check the internal consistency of the *ratio decidendi* of the Commission’s decision.

Moreover, when carrying out the legality review of Commission decisions, the EU Courts resort to different standards of review, which means that they vary the level of intensity of the scrutiny exercised over various parts of the Commission reasoning. If questions of law and fact are subject to full and unqualified review as to their legality and accuracy, the review of technical assessments, especially of an economic nature and other so-called policy matters, such as the setting of fines, are subject to a deferential standard known as “manifest error of assessment.” The growing reliance on that deferential standard, which was originally made possible by the limits inherent to the EU Courts’ annulment jurisdiction, has been perceived as particularly problematic in recent years. This is notably the case in two respects.

First, while the modernization paradigm aims to bring economic reasoning to the core of antitrust cases, especially in the field of dominance, the EU Courts have systematically held that in so far as “the Commission’s decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court.”<sup>11</sup> As a result, the intensity of the judicial review of the substance of antitrust cases is perceived to have grown increasingly limited and to have possibly contributed to the fact that no single dominance decision has been annulled, even in part (absent on secondary procedural issues), since more than a decade.

Second, the EU Courts have continuously adopted a very deferential position when reviewing the exercise of the Commission’s practice in setting fines, both in terms of opportunity and methodology, and especially so since the introduction of fining guidelines.<sup>12</sup> With that review basically limited to ensuring the internal consistency of the fining policy pursued by the Commission, the EU Courts have ratified most of the innovations brought about by the guidelines. On a different, but related, note, the introduction of the fining guidelines and their recognition as a source of law is perceived to have led to a contraction of the scope of the EU Courts’ unlimited jurisdiction with respect to fines for it moved much of the judicial review of sanctions from the realm of unlimited jurisdiction to that of legality review, with the effect of restricting the scope of the EU Courts’ unlimited jurisdiction to varying the amount of the fine within the framework set forth by the Commission.

Eventually, the EU Courts’ reliance on deferential standards when reviewing key aspects of the substance of antitrust decisions and the sanctions accompanying findings of infringement

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<sup>10</sup> This formulation of the standard of review appears now common to the areas of merger control, dominance and cartels. *See, respectively, e.g.*, Case C-12/03 Commission/Tetra Laval 2005 ECR I-987, ¶ 39, Case T-201/04 Microsoft/Commission [2007] ECR II-3601, ¶ 482 and Case T-446/05, Amann & Söhne et al./Commission (Industrial Thread), paras [2010] ECR II-not yet reported, ¶¶ 54 and 131.

<sup>11</sup> *See, e.g.*, Case T-201/04, Microsoft/Commission [2007] ECR II-3601, ¶ 88.

<sup>12</sup> *See, e.g.*, Case C-289/04 P, Showa Denko/Commission [2006] ECR I-5859 (Graphite Electrodes), ¶ 36 and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P, C-137/07 P, Erste Group Bank et al./Commission (Austrian Banks) [2009] ECR I-8681, ¶ 123.

has further deepened the perception of an absence of alternative to negotiated procedures and exposed a gap between the antitrust modernization process and the hybrid character of the EU Courts' jurisdiction. That gap is directly related to the perception that modernization has so far resulted in a strengthening of the discretion enjoyed by the Commission in the conduct of antitrust proceedings, to the detriment of due process.

### III. BRIDGING THE GAP: FULL APPELLATE JURISDICTION, NOW

The current hybrid judicial review of Commission antitrust decisions appears unsatisfactory to many and ill-suited to ensure the lasting legitimacy of the modernized enforcement system. Addressing those dissatisfactions and bridging the EU antitrust enforcement gap, as referred to above, requires a concomitant modernization of judicial review, which entails freeing the EU Courts from the limits inherent in their annulment jurisdiction when reviewing “[antitrust infringement] decisions whereby the Commission has fixed a fine or periodic penalty payment.”<sup>13</sup> Indeed, empowering the EU Courts—*i.e.*, the General Court (“GC”), with appeal then open to the Court of Justice (“ECJ”) on points of law only—to operate as courts of full appellate jurisdiction would constitute the most effective way, it is argued, to rebalance the incentives built into the current enforcement system by ensuring the full and unqualified review of the whole body of antitrust decisions, including so-called “complex economic assessments” and the Commission practice in setting fines.

#### A. Growing Frustrations With the Current Judicial Review System

The EU Courts' exercise of their hybrid jurisdiction in antitrust cases has raised many frustrations in recent years. As noted, private practitioners often associate the discretion enjoyed by the Commission under the modernized enforcement system with a perceived contraction of the EU Courts' jurisdiction and declining intensity in the review of Commission findings. That perception is rooted in statistical, substantive, and qualitative assessments of the recent antitrust case law of the EU Courts, which reveal a growing restraint in reducing fines, the systematic upholding of Commission's positions on substantive issues, and the proliferation of references to the deferential review standard of the “manifest error of assessment.”

Interestingly, though, frustrations are also perceptible on the part of (former) judges anxious to find ways to accommodate the strict discipline of legality review with the modernized enforcement context. Most notably, former GC President Vesterdorf has openly expressed concerns over the EU Courts' narrow interpretation of their unlimited jurisdiction with respect to fines, calling upon them to “step[...] back a little and take[...] an overall look at all the particular circumstances of the case,” *i.e.*, to question whether “the case is really as serious as claimed by the Commission, or is it less serious or perhaps even more serious” and to review the “overall general fairness of the sanction in view of all the individual circumstances of any particular case.”<sup>14</sup>

Interestingly, that call was echoed recently by some of Justice Vesterdorf's former colleagues, even if with the unfortunate result of leading in a number of cases to inconsistencies in

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<sup>13</sup> Art. 31 of Regulation 1/2003.

<sup>14</sup> B. Vesterdorf, *The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?*, GLOBAL COMPETITION POL'Y ONLINE (June 2009), available at [www.globalcompetitionpolicy.org](http://www.globalcompetitionpolicy.org) (last visited November 16, 2010), pp. 6-7.

the articulation of the legality review (Art. 263 TFEU) and the unlimited jurisdiction with respect to fines (Art. 261 TFEU). Besides a tendency of relying on Article 261 TFEU to vary the amount of fines absent any established illegality on the part of the Commission,<sup>15</sup> both the GC and the ECJ have suggested the possibility of broadening the scope of their unlimited jurisdiction beyond fines, to “advance brought against *decisions* whereby the Commission has fixed fines” so as to enable them to “vary the contested *measure, even without annulling it*, by taking into account all of the factual circumstances” (emphasis added).<sup>16</sup>

In essence, those cases embody a controversy as to whether the EU Courts’ unlimited jurisdiction pertains to the “decisions imposing fines” or only to the “amount of the fines.” The controversy is not new, assuredly, and is rooted in the different wording of Articles 261 TFEU and 31 of Regulation 1/2003. Indeed, even though the Treaty refers to the possibility of endowing the Court of Justice with “unlimited jurisdiction *with regard to the penalties*” (emphasis added), Regulation 1/2003 talks about the “unlimited jurisdiction to *review decisions* whereby the Commission has fixed a fine or periodic penalty payment” (emphasis added). Over the years, way before the initiation of the modernization process, the case law settled in favor of the narrow solution.<sup>17</sup> With the modernization of EU antitrust enforcement and the resulting emergence of a gap therein, as outlined in section 1, time has come, it is argued, to reverse that trend and to interpret the EU Courts’ unlimited jurisdiction as applying to the review of the decisions whereby the Commission imposes fines, *i.e.*, full appellate jurisdiction.

## **B. Toward Full Appellate Jurisdiction**

Providing the EU Courts with full appellate jurisdiction would likely change the dynamics of the EU antitrust enforcement system and rebalance the incentives of the relevant actors, as well as discipline the conduct of negotiated procedures as it would provide a credible alternative by ensuring the existence of an open space for litigating the merits of antitrust cases. Such an evolution would not require any “major structural changes to [the] competition enforcement and institutional structures,”<sup>18</sup> which the Commission is unwilling and therefore unlikely to initiate. Yet, it would *de facto* tame the conundrum induced by the combination of the Commission’s

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<sup>15</sup> Case T-53/03, BPB/Commission (Plasterboard) [2008] ECR II-1333, ¶¶ 478-483; Case T-54/03, Lafarge/Commission (Plasterboard) [2008] ECR II-120, ¶ 775; Case T-122/04, Outokumpu and Luvata/Commission (Copper Industrial Tubes) [2009] ECR II-1135, ¶ 66; Case T-127/04, KME Germany et al./Commission (Copper Industrial Tubes) [2009] ECR II-1167, ¶ 121 and T-21/05, Chalkor/Commission (Copper Plumbing Tubes) [2010] ECR II-not yet reported, ¶ 113. *See also* Case C-3/06 P, Danone/Commission (Belgian Brewers), ¶¶ 53-54 and 60-61.

<sup>16</sup> Case T-69/04, Schunk and Schunk Kohlenstoff-Technik/Commission [2008] ECR II-2567 (Electrical and Mechanical Carbon and Graphite Products), ¶¶ 23 and 41, Case T-446/05, Amann & Söhne and Cousin Filterie/Commission (Industrial Thread) [2010] ECR II-not yet reported, ¶ 144, and Case C-534/07 P, Prym and Prym Consumer/Commission (Needles) [2009] ECR I-not yet published, ¶ 86. For an earlier reference along the same lines, *see* Joined Cases C-238, 244, 245, 247, 250-252 and 254/99, Limburgse Vinyl Maatschappij et al./Commission (PVC II) [2002] ECR I-8375, ¶ 692 (“the unlimited jurisdiction conferred on the [Union] judicature authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine”).

<sup>17</sup> *See* R. Joliet, *Le droit institutionnel des Communautés européennes – Le contentieux*, FAC. DRT. LIÈGE at 107 (1981) and J. Usher, *Exercise by the European Court of its Jurisdiction to Annul Competition Decisions*, EUR. L. REV., 299-300 (1980). At the time, none of those authors could foresee the transformation in antitrust enforcement rationality as it took place over the past decade.

<sup>18</sup> *Supra* note 1.

functions as investigator, prosecutor, judge, and policy-maker in antitrust cases, including the concern of prosecutorial bias. For it would indeed force the Commission to conduct proceedings in the shadow of full review, to appear before the EU Courts on an equal footing with the applicant, and, necessarily, to enter into a dialogue with the EU Courts, which would then be recognized fully as actors of the field of competition policy. Meanwhile, the Commission's prosecutorial discretion and the benefits resulting from its unitary structure would be preserved. Likewise, the EU Courts would be informed in reviewing the cases by the assessment carried out previously by the Commission at first instance.

Interestingly, the decisions of many national competition authorities are already subject to full appellate jurisdiction.<sup>19</sup> At EU level, quite remarkably, the current legal framework appears to provide for all necessary means to support such a modernization of judicial review. Thus, *de jure*, a formal modification thereof appears unnecessary. In particular, Article 31 of Regulation 1/2003 ("Article 31") ought to constitute a sufficient and appropriate legal basis to petition the EU Courts—*i.e.*, the GC—to exercise unlimited jurisdiction in respect of Commission's antitrust decisions establishing an infringement and imposing a fine or periodic penalty payment. In a nutshell, this is so for a number of reasons favoring an alignment of the interpretation of Art. 261 TFEU ("unlimited jurisdiction with regard to the penalties"), on the wording of Article 31 ("unlimited jurisdiction to review decisions whereby the Commission has fixed a fine").

First, Article 31 (and previously Article 17 of Regulation 17/62) constitutes the sole—or at least by far the most prevalent—instance of implementation of Article 261 TFEU. The way it is phrased carries therefore particular weight as to the interpretation to be given to the scope of Article 261 TFEU itself, and therefore to the notion of "penalties" enshrined therein. Second, Recital 33 of Regulation 1/2003 (and the equivalent recital of Regulation 17/62) also supports a broad interpretation of the scope of the unlimited jurisdiction conferred on the EU Courts pursuant to Art. 261 TFEU. Third, the first systematic commentary of the Treaty provisions on competition and of Regulation 17/62, as edited by *Deringer* who was directly involved in the discussions surrounding the adoption of that regulation, expressly reads Article 17 as conferring upon the Court of Justice "compétence de pleine juridiction au sens de l'art. [261] du Traité sur les recours intentés *contre les décisions* par lesquelles la Commission fixe une amende ou une astreinte" (emphasis added).<sup>20</sup> Fourth, the provision corresponding to Article 261 TFEU in the expired 1951 Treaty Establishing the European Coal and Steel Community (Art. 36 ECSC), which appears to constitute the only historical source of interpretation available in European primary law, refers to "unlimited jurisdiction *in appeals against pecuniary sanctions* and periodic penalty payments imposed under this Treaty" (emphasis added).

In addition, the contention that Art. 261 TFEU is not referred to among the causes of action listed in Art. 256 TFEU, which determines the competence of the GC, is also besides the point. Indeed, as also informed by Art. 36 ECSC, the unlimited jurisdiction conferred upon the

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<sup>19</sup> This is clearly the case in Belgium, France and Germany and with nuances in The Netherlands, Luxembourg, Denmark, Hungary, Latvia and others EU Member States (*see* the ANTITRUST ENCYCLOPEDIA available at [http://www.concurrences.com/nr\\_one\\_question.php3?id\\_rubrique=652&lang=fr](http://www.concurrences.com/nr_one_question.php3?id_rubrique=652&lang=fr), last visited November 28, 2010).

<sup>20</sup> *See* A. Deringer (ed.), *Les règles de la concurrence au sein de la C.E.E.* (Analyse et commentaires des articles 85 à 94 du Traité), REV. MARCH. COMM. 148 (1965) (free translation: "unlimited jurisdiction within the meaning of Art. [261] of the Treaty in relation to actions introduced against decisions whereby the Commission imposes a fine or a periodic penalty payment").



EU Courts by Article 31, as enabled by Art. 261 TFEU, derives from Art. 263 TFEU for, as the GC itself acknowledged, “an action in which the [Union] judicature is asked to exercise its unlimited jurisdiction with respect to a *decision imposing a penalty* necessarily comprises or includes a request for the annulment, in whole or in part, of that decision” (emphasis added).<sup>21</sup> Moreover, even though the current interpretation of the boundaries of judicial review is relatively entrenched in the case law, the modernization of the EU antitrust enforcement framework provides the EU Courts with a justifiable opportunity to depart from the classic articulation of its hybrid jurisdiction. As noted, some recent judgments already testify of a tendency to move into the direction of a broader interpretation of the EU Courts’ unlimited jurisdiction. Then, why wait for 2025 when the EU Courts could exercise full appellate jurisdiction over antitrust infringement decisions imposing fines, now?

#### IV. CONCLUSION

The modernization process initiated a decade ago, which translated, notably, in the rise in the amount of fines combined with increased reliance on negotiated procedures, has modified profoundly the rationality of EU antitrust enforcement. In recent years, as this short note has exposed, a gap has emerged, however, between the transformations resulting from the modernization process and the scope of the EU Courts hybrid jurisdiction in antitrust matters, which has been a source of frustrations for private parties and (former) judges alike.

Bridging that gap requires, in turn, providing the EU Courts (primarily the GC) with a greater role, *i.e.*, full appellate jurisdiction, in adjudicating over appeals brought against Commission infringement decisions imposing fines, with the effect of ensuring the full and unqualified review of the whole body of Commission antitrust decisions and of providing private parties with an open space for fair dialectic exchanges over the substance of cases, at arm’s length with the Commission. Practically, this modernization of judicial review could be effected positively within the current legal framework, in particular by rooting the review of Commission infringement decisions in Article 31 of Regulation 1/2003 and, as a corollary, by interpreting the EU Courts’ unlimited jurisdiction as pertaining to the whole body of those decisions and not only to the alteration of the amount of fines.

In view of their sophisticated resources, the task is certainly within the expertise of the EU Courts, as it is already the case for the courts of many Member States. At the end, what is at stake is nothing less than the legitimacy of the EU antitrust enforcement system which, in the EU Courts’ own words, is conditioned on the effectiveness of the judicial review process.<sup>22</sup>

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<sup>21</sup> Order of 9 November 2004 in Case T-252/03, FNICGV/Commission (French Beef) [2004] ECR II-3795, ¶ 25 and Case T-69/04, Schunk/Commission (Electrical and mechanical carbon and graphite products) [2008] ECR II-2567, ¶ 246.

<sup>22</sup> For a recent restatement, *see, e.g.*, Case T-54/03, Lafarge/Commission (Plasterboard) [2008] ECR II-120, ¶¶ 42 et seq.