



**UNIVERSITÀ DEGLI STUDI DI PADOVA**

**SCUOLA DI DOTTORATO IN DIRITTO INTERNAZIONALE, DIRITTO PRIVATO E DEL LAVORO**

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## **EVIDENCE AND PROOF IN EU COMPETITION LAW: BETWEEN PUBLIC AND PRIVATE ENFORCEMENT**

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L'avocat avait établi que le vol de pommes n'était pas matériellement prouvé. Son client [...] n'avait été vu de personne escaladant le mur ou cassant la branche. On l'avait arrêté nanti de cette branche (que l'avocat appelait plus volontiers rameau); mais il disait l'avoir trouvée à terre et ramassée. Où était la preuve du contraire? [...] en supposant qu'il fût le forçat Jean Valjean, cela prouvait-il qu'il fût le voleur des pommes? C'était une présomption, tout au plus; non une preuve.

[Victor Hugo, *Les Misérables*, 1862]



## Table of Contents

Table of Contents.....	5
Preface and Acknowledgements.....	9
Table of Cases.....	11
EU Cases.....	11
English Cases.....	16
Italian Cases.....	18
Other Jurisdictions.....	20
Table of Decisions and Reports.....	21
Commission Decisions.....	21
Other Decisions.....	21
Reports.....	21
Glossary and List of Abbreviations.....	23
Abstract.....	27
Abstract (Italian).....	28
Introduction.....	29
1) General EU Law Principles Governing Evidence.....	36
2) The Nature of European Antitrust Proceedings.....	39
A) Proceedings before the European Commission.....	39
B) Proceedings before the EU Courts.....	42
C) Proceedings before National Judges.....	44
3) The peculiarities of Enforcement of EU Competition Law: Why is Evidence so Crucial?.....	45
4) Legal Framework of EU Public Enforcement.....	48
A) European Commission.....	49
B) The National Competition Authorities.....	55
C) The Judicial Review of the EU Courts.....	55
5) Legal Framework of EU Private Enforcement.....	59
A) The Direct Effect of Articles 101 and 102 TFEU.....	61
B) Evidence in the Commission's White Paper.....	63
C) Evidence in the Proposal for a Directive.....	66
6) The English Competition Law Regime.....	68
7) The Italian Competition Law Regime.....	72
8) EU Law and the Enforcement of EU Competition Law at the National Level.....	73
A) The Relationship between EU Competition Law and National Competition Laws.....	74
B) The Relationship between EU Competition Law and National Procedural Systems.....	75
a) The Integration Approach.....	76
b) The International Approach.....	77
Chapter I – Evidence in EU Competition Law: between Substance and Procedure.....	79
1) Evidence Law in Civil and Common Law Tradition.....	79
2) The Applicable Law of Evidence of EU Competition Law.....	85
A) Public Enforcement: Coordination between European Commission and NCAs.....	86
a) Before the Initiation of Proceedings: Allocation of Cases.....	86
b) Along the Proceedings: Cooperation During the Phase of the Investigation.....	87
B) Private Enforcement: Allocation of Cases between National Judges.....	88
a) Determining the Jurisdiction.....	88
b) Determining the Applicable Law.....	95
Chapter II – The Evaluation of the Proof in EU Competition Litigation: a Comparison of Public and Private Enforcement.....	103
1) The Object of the Proof.....	103
A) The Object of the Proof under Article 101 TFEU.....	104
B) The Object of the Proof under Article 102 TFEU.....	105
C) The Object of Proof in Private Enforcement.....	106

a) The Element of Fault.....	107
2) The Admissibility of Evidence.....	108
A) The Admissibility of Evidence in the Judicial Review .....	114
B) The Admissibility of Evidence in the Private Enforcement.....	115
3) The Probative Value of Evidence.....	117
A) The Probative Value of Evidence in the Judicial Review.....	122
B) The Probative Value of Evidence in the Private Enforcement .....	124
4) The Burden of Proof.....	126
A) Burden of Proof and Notorious Facts.....	135
B) Burden of Proof before the English Courts.....	136
C) Burden of Proof before the Italian Courts.....	138
5) Presumptions in EU Antitrust Law .....	139
A) The Presumption of Cartel Participation .....	143
B) The Presumption of Concurrence of Wills.....	145
C) The Presumption of Continuous Infringement.....	147
D) The Presumption of Parental Liability.....	148
E) Other Presumptions under Article 102 TFEU.....	150
F) The Compatibility of Presumptions with the Effects-Based Approach .....	151
G) The Compatibility of Presumptions with the Principle of Presumption of Innocence ...	152
a) The ‘Criminal’ Nature of Competition Law Proceedings under Article 6 ECHR .....	155
b) The ‘Reasonable Limits’ to the Application of Presumptions.....	157
H) The Application of EU Competition Law Presumptions by National Courts.....	161
a) Presumptions before the English Courts .....	164
b) Presumptions before the Italian Review Courts.....	165
I) Presumptions in the Private Enforcement .....	167
6) The Proof-Proximity Principle.....	167
A) The Proof-Proximity Principle in Other Areas of Law.....	171
B) Beneficial Effects of the Application of the Proof-Proximity Principle.....	173
7) The Standard of Proof .....	178
A) Factors Determining the Standard of Proof .....	184
B) The Standard of Proof before the CAT.....	189
C) The Standard of Proof before the Italian Review Judge .....	193
D) The Standard of Proof in the Private Enforcement .....	193
8) Economic Evidence.....	197
A) The Standard of Judicial Review for Economic Evidence .....	202
B) Economic Evidence in the Private Enforcement .....	206
a) Expert witness.....	208
b) Court-appointed expert.....	209
c) Economic Evidence in England .....	209
d) Economic Evidence in Italy.....	213
9) The Standard of Review for Evidence.....	215
Chapter III – The Gathering of Evidence in EU Antitrust Litigation: the Respect of Fundamental Rights and the Mechanisms for Cooperation .....	219
1) Free Movement of Evidence in EU Antitrust Law: Cross-Border Investigations and Coordination between Jurisdictions.....	219
A) The Binding Effect of Final Decisions of Competition Authorities within the European Competition Network .....	221
a) The Binding Effect of Commission’s Decisions.....	221
b) The Binding Effect of NCAs’ Decisions.....	222
c) Circulation of Decisions from the Public to the Private Enforcement .....	225
B) Cooperation between European Commission, National Competition Authorities and National Courts as regards Evidence.....	226
C) The EU Evidence Regulation.....	230
2) Convergence of Fundamental Rights Standards in the Gathering of Evidence .....	236

A) Right to Private and Family Life.....	241
B) Privilege against Self-Incrimination.....	244
C) The Protection of the Legal Professional Privilege.....	250
D) Disclosure and Conflicting Rights.....	254
a) Disclosure in England.....	255
I) Pre-Trial Disclosure.....	256
II) Standard Disclosure.....	258
III) Specific Disclosure.....	259
IV) Disclosure before the CAT.....	259
b) Disclosure in Italy.....	260
c) Disclosure in the Proposal for a Directive.....	261
d) Disclosure Abroad.....	263
E) The Access to Evidence and Files of Competition Authorities by Third Parties within the EU.....	264
a) The Right to Use Evidence Contained in the Competition Authority's File.....	267
b) The Right of Access to the Competition Authority's File.....	267
c) Access to the File in England.....	272
d) Access to the File in Italy.....	273
Conclusions.....	275
Bibliography.....	282





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## Glossary and List of Abbreviations

AG	Advocate-General
AGCM	Autorità Garante della Concorrenza e del Mercato, Italian Competition Authority
Competition Act 1998	Competition Act 1998 as amended by the Enterprise Act 2002 and the Enactments Regulations 2004
CAT	UK Competition Appeal Tribunal
CC	UK Competition Commission
Court of First Instance	Court of First Instance of the European Communities
Chapter I prohibition	The prohibition contained in Section 2 of the Competition Act 1998
Chapter II prohibition	The prohibition contained in Section 18 of the Competition Act 1998
Charter of Fundamental Rights	Charter of Fundamental Rights of the European Union
Civil law	Civil law tradition, as opposed to common law
Civil proceedings	Civil litigation, in the meaning that it is attributed to it under national jurisdictions, as opposed to criminal proceedings
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
Council of State	Consiglio di Stato, Italian review court of second instance
CPR	UK Civil Procedure Rules
DG COMP	Directorate General for Competition
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights

ECN	European Competition Network
ECPR	Efficient Component Pricing Rule
EC Treaty	The Treaty establishing the European Community
EEA	European Economic Area
EFTA	European Free Trade Association
English law	The law of England and Wales
England	England and Wales
ESA	EFTA Surveillance Authority
EU Competition law	EU Antitrust law
EU Courts	The General Court and the Court of Justice of the European Union
EU Evidence Regulation	Regulation (EC) No 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil and Commercial Matters
EU Member States	The 28 member States of the European Union
European judges	The Luxembourg judges and the national judges of the EU Member States
European courts	The EU Courts and the national courts of the EU Member States
EWCA	England and Wales Court of Appeal
General Court	General Court
HHI	Herfindahl-Hirschmann Index
ICN	International Competition Network
NCA	National competition authority
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
OJ	Official Journal of the European Union
Proceedings	Any procedure of public or private enforcement of EU or national competition



	law, including administrative procedures and civil proceedings
Proposal for a Directive	Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union of 11 June 2013
SSNIP	Small but Significant Non-transitory Increase in Price
TAR Lazio	Tribunale Amministrativo Regionale del Lazio, Regional Administrative Tribunal for Latium
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UKHL	UK House of Lords
UK Regulators	OFT, OFCOM, OFGEM, OFWAT, ORR, NIAER and the CAA
UNCTAD	United Nations Conference on Trade and Development
WSRA	Water Services Regulation Authority
WTO	World Trade Organisation



## **Abstract**

This thesis identifies the major evidential issues of EU competition law enforcement and the principles and rules on proof followed by the CJEU and the national courts to solve them. Analysing the case law, the thesis considers how the decisions of the Luxembourg Courts influence the evaluation of evidence of English and Italian judges, both in the public and the private enforcement. Chapter I, after clarifying which rules govern evidential issues before the different authorities, tackles the nature of evidence and criticises its characterisation according to the traditional substance-procedure dichotomy. Chapter II explores the reasons why a significant degree of convergence is reached, well beyond the *effet utile* standard, by the case law of the CJEU and that of the analysed countries (England/Wales and Italy). It also shows that the peculiarities of the enforcement of EU competition law and the crucial role played by evidence in this field are important factors promoting the process of convergence. In Chapter III, the analysis is extended to the gathering of evidence. In this phase, despite the diversity characterising the national administrative procedures, convergence is promoted, on the one hand, by the coordination mechanisms provided by EU law to foster the free movement of evidence and, on the other, by the fundamental rights standards that Member States are bound to follow. The conclusions show how, having been tested by means of judicial integration, the adoption of uniform rules of evidence in EU competition law, complementing Article 2 of Regulation (EC) 1/2003, is conceivable and desirable.

## **Abstract (Italian)**

La tesi esamina vari aspetti relativi alla prova nel diritto europeo della concorrenza, riguardo ai quali principi e regole comuni vengono adottate sia dalla Corte di Giustizia dell'Unione Europea che dalle corti nazionali. Attraverso l'analisi delle decisioni in materia di concorrenza, la tesi considera l'influenza esercitata dalla giurisprudenza della Corte di Lussemburgo sulla valutazione delle prove in due giurisdizioni nazionali, quella inglese e quella italiana, sia nel *public* che nel *private enforcement*. Il primo capitolo, dopo aver illustrato i regimi probatori applicati dalle diverse autorità, affronta il problema della natura della prova e propone una critica della tradizionale rigida distinzione tra profili sostanziali e procedurali. Il secondo capitolo esplora le ragioni per le quali un considerevole livello di convergenza viene raggiunto tra la giurisprudenza della Corte di Giustizia dell'Unione Europea e la giurisprudenza delle corti degli Stati membri analizzati, ben oltre il rispetto del principio dell'effetto utile. Secondo la ricostruzione riproposta, il ruolo cruciale giocato dalla prova in questo campo e le peculiarità del sistema europeo della concorrenza sono fattori determinanti nel processo di ravvicinamento delle discipline probatorie. Nel terzo capitolo, l'analisi si sofferma sull'acquisizione e formazione della prova. In fase di raccolta della prova, nonostante la diversità che caratterizza i procedimenti amministrativi nazionali, la convergenza è stimolata, da un lato, dagli strumenti europei che promuovono la libera circolazione della prova e, dall'altro, dalla tutela dei diritti fondamentali che gli Stati membri sono tenuti a rispettare. L'analisi porta a concludere che alcuni principi uniformi in tema di prova nel diritto europeo della concorrenza siano già osservati dai giudici nazionali e che un corpo di norme comuni dovrebbe essere adottato, ad integrazione della scarsa disciplina della prova contenuta nel Regolamento (CE) 1/2003.

## Introduction

The present work addresses the rules on proof governing the public and private enforcement of EU competition law.<sup>1</sup> The author will contend that a high degree of convergence of procedural rules on proof is progressively being reached in the EU competition law enforcement. The EU case law influences both NCAs and national judges to a great extent. The adoption of common rules and principles can be observed not only within the public enforcement (i.e. between the judicial review of EU Courts and that of national courts), but also between the public and the private enforcement (i.e. between the judicial review of EU Courts and the national civil proceedings). Such symmetry, which is undoubtedly accentuated in the case law regarding the evaluation of evidence, is to a lesser extent attained in the gathering of evidence, due to the important role played in this field by administrative authorities. Reasons of this different evolution of the rules on evidence in EU antitrust law can be traced back to the sharp differences existing between national administrative procedures and to the balance that has to be struck between the principle of procedural autonomy and the principle of *effet utile*. Broad voluntary convergence in the evaluation of evidence stems from the technical nature of the subject-matter and the need to enhance effectiveness. Convergence on the gathering of evidence is, conversely, the objective of Regulations, Notices and, more generally, the ECN. Many instruments are available for the furtherance of convergence in this phase and the role of the judge, especially by means of judicial review for the protection of fundamental rights, is crucial in achieving harmonisation.

It will be demonstrated how convergence of rules on proof in EU antitrust law is highly beneficial in order to avert many difficulties arising out of the multi-level implementation of the EU enforcement system. These common rules of evidence, already tested in the practice, might be statutorily adopted in the future, with a view to improving the functioning of the system and reaching solid harmonisation.

The analysis will provide a comparison of the way evidence is dealt with in the public enforcement, at both the EU level and at the national law, and in the private enforcement before national judges. The dissertation will encompass the analysis of issues

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<sup>1</sup> For the purposes of the present work the term ‘competition law’ is used as a synonym of ‘antitrust law’, encompassing exclusively the enforcement of EU and national prohibitions of restrictive practices and abuses of dominant position.

arising out of the intersection between national civil procedural law and EU law. Some problems are solved by uniform legal rules, while other problems are left to the different legal systems. This intersection is not competition law-specific: in other fields of EU commercial law similar problems arise and are addressed by European Union policies and legislative interventions.<sup>2</sup>

In competition law, however, it seems that the level of convergence reached on the rules on proof is remarkably high. This might be due, on one hand, to the complex nature of the subject-matter, which pushes national judges to adopt a deferential approach to the case law of the EU Courts; and, on the other, to the fact that competition law is a subject-matter located at the core of the advancement of the internal market. Therefore, harmonised (albeit not uniform) procedural solutions are favoured in this field, wherever possible, in conjunction with broad cooperation systems.<sup>3</sup> In addition, due to the direct applicability of Articles 101 and 102 TFEU, national judges are required, in the private enforcement, to act as EU judges in civil national proceedings and to follow the guidance of the EU Courts for the interpretation of substantive EU law.<sup>4</sup>

The thesis will focus on the case law of the EU Courts<sup>5</sup> and of the courts of two chosen jurisdictions (these latter both with regard to the public and the private enforcement of competition law).<sup>6</sup> It will, thus, consider the role of evidence in the enforcement of EU competition law both from the perspective of the European legal system and from that of the national legal system of two Member States: the United Kingdom and Italy. They have been

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<sup>2</sup> EVA STORSKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press 2008) 2. According to the Author, who does not refer specifically to competition law matters, the complexity of the interaction between national procedural law and European law are originated by three main causes: absence of adequate transnational procedural regulation to effectively manage cross-border trade, as fostered by the development of the Internal Market and the four freedoms within the EU; the direct effect of certain EU law provisions, which directly attributes rights and impose obligations upon individuals; and the rights of the private individuals in the field of judicial cooperation and effective access to justice (primarily, the right to a fair trial). All these problems arise in the private enforcement of EU competition law as well.

<sup>3</sup> DAMIEN GERARD, 'Regulation 1/2003 (and Beyond): Balancing Effective Enforcement and Due Process in Cross-border Antitrust Investigations' in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 365.

<sup>4</sup> ENZO CANNIZZARO and LORENZO FEDERICO PACE, 'Le politiche di concorrenza' in GIROLAMO STROZZI (ed), *Diritto dell'Unione Europea - Parte speciale* (3rd edn, Giappichelli 2010) 322.

<sup>5</sup> As specified in the Glossary, the expressions 'EU Courts' and 'Luxembourg Courts' will be used so as to encompass both the Court of Justice and the General Court in their judicial functions, as separate institutions forming the 'Court of Justice of the European Union' (abbreviated CJEU). The term 'Court of Justice' and 'General Court' will be used of preference, whenever possible, in order to avoid ambiguities. The expression 'European judges' or 'European courts' is intended as including both the EU Courts and the national judges of the Member States.

<sup>6</sup> Namely, the analysis of the public enforcement systems of the selected jurisdictions will take into account the case law produced by the national courts empowered to hear appeals lodged against decisions issued by the national competition authority or to exercise judicial review over them.

chosen, out of the twenty-eight, because they are particularly representative of the current functioning of the decentralised enforcement of EU competition law. The case study of the United Kingdom will be adopted because it features one of the most developed and effective public and private enforcement systems in Europe. In the United Kingdom, most of the competition law legislation apply to England and Wales, Scotland and Northern Ireland, but these three countries do not have the same private law systems, and the procedure for bringing a claim differs broadly. For these reasons, only the competition law enforcement of England and Wales will be examined, keeping in mind that most of the observations regarding the public enforcement system of competition law can be referred to the United Kingdom. As specified in the Glossary, the term ‘English law’ will be used to refer to the law of England and Wales. Italy, on the other hand, has had a relatively small number of private enforcement actions at present,<sup>7</sup> more often seeking interim relief rather than decisions on the merits. The selection of a common law and a civil law system is of course intentional, given that in the gathering of evidence and the evaluation of proof the differences between the two traditions are not negligible. This choice will allow appreciating strengths and weaknesses of the two systems, as well as underscoring analogies and differences, in order to determine whether a convergent pattern of evolution may be identified. Furthermore, it will be interesting to detect under which circumstances the case law of the EU Courts adopts concepts which are closely linked to civil law traditions, as opposed to common law ones. Both these countries have relatively young national competition law modelled on Articles 101 and 102 TFEU; this will permit to highlight the developments of the enforcement of EU competition law and of national competition laws.

Along the exposition of the national experiences, some remarks about the public or private enforcement of the relevant national competition legislations will be provided. It is useful to take into consideration the case law relating to those provisions, which are a faithful reproduction of EU provisions, because some of the issues encountered in the

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<sup>7</sup> GIUSEPPE TESAURO, ‘Recenti sviluppi del *private antitrust enforcement*’ (2011) XIII *Mercato concorrenza regole* 427, 430–431. The Author observes how in Italy, in the five years between 2006 and 2010, over 170 undertakings have been sanctioned for antitrust infringements either by the European Commission or the Italian competition authority. Conversely, in the same period of time, around eighteen damages actions were brought before Italian courts, five of which were follow-on actions. It is, however, difficult to obtain an accurate estimate of private antitrust actions, especially since they often terminate following settlement. Compare, for instance, MICHELE CARPAGNANO, ‘Competition Law Litigation: the Italian Perspective (1990-2010)’ in LUIS ANTONIO VELASCO SAN PEDRO and CARMEN ALONSO LEDESMA (eds), *Private Enforcement of Competition Law* (Lex Nova 2011) 81, who gives an estimate of over ninety cases.

context of their application are realistically very similar to the ones posed by the EU law.<sup>8</sup> When doing so, the legal and procedural context in which the domestic courts were deciding was considered apt to allow a proper comparison with the approach taken by the EU Courts.<sup>9</sup> As we shall see, analogous notions of EU and national competition law are often interpreted in the same way by national judges. When needed, the institutional architecture of the English and Italian private antitrust enforcement systems will be considered shortly.

The dissertation will follow an approach which appears, to date, to have been neglected. It will discriminate according to the stage of the judicial proceedings where evidence plays a main role. Rather than simply distinguishing between public and private enforcement, or between judicial and administrative proceedings, or, again, between European and national level, it will transversally analyse the phase of the gathering of evidence, on one hand; and that of the evaluation of the evidence presented by the parties before the decision-maker, on the other. This approach will prove more conducive to the task of depicting the current state of the rules on proof as shown by the case law, with the EU Courts significantly influencing the national judge in most evidence-related matters in antitrust cases. Secondly, it will help shedding some light on the importance of respecting fundamental rights impinged upon by antitrust proceedings. At the same time, this analysis will allow to assess whether any coherent approach can be detected that would adjuvate the circulation of decisions.

The scope of the research has been narrowed down to encompass only antitrust violations – that is, infringements of Article 101 and 102 of the Treaty on the Functioning of the European Union (and, when appropriate, their national transposition). As a result, mergers have been left out of the analysis, due to the particular nature of merger control and the fact that it is not the subject of private enforcement in Europe.<sup>10</sup> So doing, a proper comparison between the public and the private enforcement is made possible for each of the tackled topics. Another important part of competition law, State aid control, has been

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<sup>8</sup> Such as the probative value of documents found in the hands of third parties; the use of presumptions; or the need to evaluate evidence contextually.

<sup>9</sup> In the thesis, where the mentioned competition law cases referred exclusively to the violation of national competition law, the violated prohibition has been indicated into brackets at the end of each case citation. All cases whose citation lacks such detail relate, also or exclusively, to Article 101 and/or 102 TFEU violations.

<sup>10</sup> Mergers are the subject of private enforcement in other jurisdictions, such as the United States, under federal and state law. Private individuals may seek injunctive relief, in order to stop the merger from occurring, or damages arising out of it. See BONNY E. SWEENEY, 'Defining Antitrust Violations in the United States' in ALBERT A. FOER and RANDY M. STUTZ (eds), *Private Enforcement of Antitrust Law in the United States* (Edward Elgar Publishing Limited 2012) 27.



excluded from the scope of the dissertation, as a result of the sharp differences characterising its control procedure.<sup>11</sup>

For different reasons, but in response to the same need of narrowing down the subject-matter of the analysis, the thesis will not consider the topic of evidence from the point of view of international arbitration involving issues of EU competition law. Alternative dispute resolution would merit to be tackled separately, due to, on one hand, the flexibility of choice in the legal and procedural rules to which the parties are entitled and to the confidential nature of the award, which is typical of arbitration. Many other asymmetries and differences from judicial proceedings compel not to enclose an analysis of evidence in arbitration litigation. To mention a few, arbitrators have no coercive powers for the gathering of evidence, especially when it is in the hands of third parties. Arbitrators could theoretically resort to the aid of national courts to assist them in the fact-finding, but this happens in very few cases. In addition, pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called ‘New York Convention’), all courts of contracting parties must recognise and enforce arbitration awards made in other states, in some regards in a smoother way than decisions of administrative authorities or court judgments.<sup>12</sup> More importantly, the current analysis aims at focusing on a strictly *judicial* perspective on evidence in EU antitrust law enforcement. When considering both EU and national proceedings, the decision-making of administrative authorities acting in their capacity as regulators will not *per se* be considered. Only the judicial review of such decisions by the Luxembourg Courts (i.e. the General Court and the Court of Justice) or the decisions of national judges (i.e. the national courts empowered to hear appeals against decisions of the relevant NCA or to exercise judicial review over them)<sup>13</sup> will be discussed.

The dissertation will commence with a basic illustration of the institutional architecture of EU antitrust public and private enforcement.<sup>14</sup> Given the complex and multi-layered structure of the EU competition law enforcement system, it appears necessary to

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<sup>11</sup> It is useful to recall that Article 108(3) TFEU is directly applicable by national judges and that parties affected by unlawful State aid can bring direct action before national courts for damages and injunctive relief. Proving causation and quantification in State aid damages actions arises difficulties that are analogous to those encountered in private antitrust actions. For further details, see FRANCESCO BESTAGNO, ‘L’azione risarcitoria come strumento di *private enforcement* della disciplina di diritto dell’UE sugli aiuti di Stato’ (2013) 27 *Diritto del commercio internazionale* 623, 641–645.

<sup>12</sup> Compare for these aspects, OECD, *Arbitration and Competition* - Hearing held in the Working Party No. 3 meeting of 26 October 2010 [2011] DAF/COMP (2010) 40, para. 7.

<sup>13</sup> For the English system, the appellate powers of the CAT/Court of Appeal and, for the Italian system, the judicial review of the Regional Administrative Tribunal Lazio/Council of State will be examined.

<sup>14</sup> This will be done very shortly, since it is not possible to include a thorough portrait of the framework of EU competition law enforcement.

present briefly the different legal frameworks separately. A brief description of the English and Italian competition law regimes will also be provided, to elucidate the context in which the rules operate. Indeed, a ‘diversity/effectiveness conundrum’<sup>15</sup> arises due to the fact that evidence is gathered and evaluated in different fora in the European context (European Commission, NCAs, national courts). For the public enforcement, the Commission’s approach to evidence and its powers of investigation will be analysed. The judicial review exercised by the EU Courts over its decision will also be illustrated. In the context of the analysis of the public enforcement at the national level, the system of appeal and judicial review provided by the Competition Appeal Tribunal (CAT) and the Court of Appeal/Supreme Court,<sup>16</sup> for England; and the system of judicial review of the Regional Administrative Tribunal Lazio/Council of State, for Italy, will be described. For the private enforcement, since there is no self-sufficient private enforcement system at the European level, the analysis will focus on the harmonized system of private enforcement in the European Union, that is to say the principles established by the EU judicature and ‘soft law’<sup>17</sup> used to bring into line the different traditions, as well as the EU Regulations to determine jurisdiction and applicable law in private antitrust cases. The analysis of the case law of English and Italian courts will be provided when addressing specific issues.<sup>18</sup>

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<sup>15</sup> This expression is used by GERARD, ‘Regulation 1/2003 (and Beyond): Balancing Effective Enforcement and Due Process in Cross-border Antitrust Investigations’ 365.

<sup>16</sup> Judicial review is a type of court proceedings in which the lawfulness of an administrative decision is verified. By means of the judicial review, the exercise of public power is supervised by judicial courts upon application of an individual. The review does not address the merits of the decision, as long as the procedure has been followed, and will not substitute the decision itself. It may, if the case, quash the decision. Appeals, on the other hand, concern the merits of the decision and are apt to substitute it. In England, decisions of competition authorities (the OFT, or other sectoral authorities) may be challenged by a full appeal on the merits to the Competition Appeal Tribunal, if they are appealable under the Competition Act 1998. Non-appealable decisions can be subject to judicial review before the High Court of England and Wales (first instance court). CAT’s decisions can be appealed before the Court of Appeal, either on point of law or as to the amount of the sanction imposed. The Court of Appeal is divided into criminal and civil division. Competition appeals are heard by the Civil Division, headed by the Master of the Rolls. Further appeals can be filed to the Supreme Court (formerly House of Lords), which hears appeals on points of law of the greatest public importance, according to the ordinary system of justice of the UK.

<sup>17</sup> The expression ‘soft law’ is intended as encompassing quasi-legal instruments and rules of conduct issued by the European Commission which, despite not having any binding effect, have an impact on the regulation policy and practice of EU Member States. Compare, for an exhaustive definition, HÅKON A. COSMA and RICHARD WHISH, ‘Soft Law in the Field of EU Competition Policy’ (2003) 14 *European Business Law Review* 25, 27–30.

<sup>18</sup> For the English system, the first instance court is the High Court (or, for follow-on claims for damages or other monetary relief, the CAT). Appeals from the High Court are heard by the English Court of Appeal, and from this latter further appeals are heard by the UK Supreme Court. In Italy, the jurisdiction belongs to specialised divisions within the ordinary courts, the so-called Enterprise Courts (*Tribunale delle imprese*), since the enactment of Law 27/2012. For the intricate framework existing before this concentration (i.e. the separate jurisdiction of the Court of Appeal for national competition law and of the ordinary judge for EU

The first Chapter will tackle the nature of evidence, and its classification as a matter of substance or procedure by the relevant legal framework. It will also clarify which rules govern the allocation of cases before the relevant authorities and the choice of the procedural rules applicable to the matter.

Chapter II will analyse the way in which evidence is evaluated, providing a comparison between the public and the private enforcement systems of the way in which some important issues of evidence are dealt with by the European judges (EU Courts and national courts) and the way some uniform rules of management of evidence are created, interpreted and applied in both systems.

Chapter III will address the moment, albeit preceding in time, of the gathering of evidence in the public and private enforcement, focusing on the existing tools for the gathering of evidence, and on the limits imposed to the process of fact-finding by fundamental rights. The sharing of evidence and the coordination of decisions between administrative and judicial authorities will be addressed. This analysis is aimed at underscoring how cooperation and fundamental rights contribute to fostering the procedural convergence of the rules on proof. It extends to the evaluation of the circumstances under which the final assessment of evidence contained in formal decisions can, or must be, taken into account by different authorities in different proceedings. Chapter III will therefore deal with the intersection between the protection of fundamental rights and the gathering and sharing of evidence, at the national constitutional level or at the European trans-national and international level (particularly within the system of the EU Treaties and of the European Convention of Human Rights).

The research methodology was to combine two fields: EU competition law, on the one hand, and the law of evidence of national jurisdictions, with a comparative approach, on the other. The method adopted consisted of the analysis of the relevant existing provisions and the case law of the EU Courts and of the national courts of the chosen jurisdictions. The entire dissertation will be permeated by the consideration of international commercial litigation aspects of private enforcement. The last Chapter will discuss fundamental rights affected by the application of EU competition law, with the only exception of the presumption of innocence, that is addressed in Chapter II.

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competition law), refer to PAOLO CATALLOZZI, 'Il giudice competente nel processo antitrust' in *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 275–279.

## 1) GENERAL EU LAW PRINCIPLES GOVERNING EVIDENCE

In the EU Member States, competition law provisions are enforced either by the public authorities or by claimants, through civil antitrust action. The two types of enforcement differ in many respects, one of the most important being the nature of the proceedings, which is inquisitorial in administrative public enforcement and adversarial in private antitrust actions. Notwithstanding the undeniably diverse characteristics of the public and the private enforcement of the EU competition law provisions at the European and at the domestic level, a few principles of evidence law can be identified. These principles are generally valid both before the EU Courts and the national judges and therefore, indirectly, guide both the action of the European Commission and that of the NCAs. If a given principle or general rule of evidence is to be applied by the General Court or by the appointed court which hears appeals against decisions of the NCA in the Member States, it is likely that the relevant competition authority will also seek to respect those principles or rules. If they did not, appeals against decisions will be allowed. By the same token, such principles will be applied within national jurisdictions by national civil judges in the private enforcement too, although, in this latter context, some differences remain. The two systems of national enforcement - judicial review, on the one hand, and private enforcement, on the other - tend toward a few intersecting principles. Four well-established principles of evidence law transversally apply both before the European Courts and, generally, the national judges:

- ‘the court knows the law’ (*iuria novit curia*), prescribing that the parties need to prove allegations of facts but not the law that applies to their dispute;<sup>19</sup>
- ‘he who asserts must prove’ (*actori incumbit probatio*), enjoining the parties to adduce sufficient evidence supporting their allegations;<sup>20</sup>

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<sup>19</sup> A clarification in this regard is due: the EU Courts are not bound to know the national laws of the Member States, unless they concur to the formation of the European law itself, as, for instance, general principles common to the laws of the Member States and fundamental human rights. They are not, contrariwise, bound to know administrative acts of individual scope (decisions), nor judicial precedents (of the EU Courts or of other Courts). See PAOLO BIAVATI, *Diritto processuale dell’Unione Europea* (Giuffr  2009) 222–223.

<sup>20</sup> This principle is embodied, for competition law, by Article 2 of Council Regulation (EC) 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, modified by Council Regulation (EC) 1419/2006 [2006] OJ L 269/1 (hereinafter, simply ‘Regulation (EC) 1/2003’).

- cooperation of the parties, enjoining the parties to cooperate with the judge, whenever he or she orders measures of enquiry and, more generally, to facilitate the process of the gathering of evidence;<sup>21</sup>
- free and unfettered evaluation of evidence by the judge,<sup>22</sup> prescribing that the judge is master of the procedure both as regards the admission – i.e. the relevance and the admissibility - and the evaluation – i.e. the assessment of the probative strength - of the evidence presented.<sup>23</sup>

Two of these principles will be thoroughly examined below. More specifically, ‘he who asserts must prove’, which establishes on whom the burden of proving a given fact weighs, will be addressed when dealing with the allocation of the burden of proof.<sup>24</sup> The principle of unfettered evaluation of evidence will be analysed along with the probative value of evidence.<sup>25</sup> It is important to note the discretion of the judge to evaluate evidence in the EU legal system. The judge is required to evaluate the factual evidence presented by the parties and to determine its reliability.

The principle of free evaluation of evidence allows the EU Courts to take into consideration any factual elements presented, including those elements which, under national rules of evidence, should have been adduced by means of a specific item of evidence<sup>26</sup> (for instance, both English and Italian law sometimes require evidence to be in writing). The principle would exclude, theoretically, the attribution of predetermined value to certain types of evidence. Yet, the principle is recognized also in some national legal systems (and this is one of those aspects where the application of EU competition law may be inconsistent before domestic civil courts), where the law sometimes assigns to certain types of evidence a certain value or significance which the adjudicator cannot disregard, or where there are statutory requirements of written evidence (i.e. when the law requires that,

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<sup>21</sup> The extent of this obligation may vary broadly in the different legal systems. In the English system, disclosure is one of those devices which requires great cooperation on behalf of the parties. In the Italian system, the request for documents under Article 210 of the Code of Civil Procedure, or the inspection, under Article 118 of the same code, are examples of such principle. From the obstructive behaviour of the requested party, the judge may usually draw adverse inferences.

<sup>22</sup> KOEN LENAERTS, ‘Some Thoughts on Evidence and Procedure in European Community Competition Law’ (2006) 30 *Fordham International Law Journal* 1463, 1465–1467.

<sup>23</sup> BIAVATI, *Diritto processuale dell’Unione Europea* 217-224.

<sup>24</sup> See Chapter II, para. 4 below.

<sup>25</sup> See Chapter II, para. 7 below.

<sup>26</sup> BIAVATI, *Diritto processuale dell’Unione Europea* 221-222.

to be held valid, a particular transaction or type of contract, must be proven by a written document).<sup>27</sup>

Before the EU Courts, the only admissible items of evidence are:

- a) any form of documental evidence;
- b) personal appearance of the parties;
- c) request for information and production of documents;
- d) oral testimony;
- e) expert's reports;
- f) inspections of places and things.<sup>28</sup>

Nonetheless, the EU Courts are free to evaluate any information which lawfully comes into their knowledge: for instance, they can rely for their decisions upon written statements of third parties who have not been heard as witnesses.<sup>29</sup> In the words of Judge Vesterdorf, sitting as Advocate-General, in his Opinion in *Rhône-Poulenc SA*, the only guiding principle for the evaluation of evidence, which is unconstrained by the rules laid down in the national legal systems, is the reliability of the evidence presented:

Apart from the exceptions laid down in the Communities' own legal order, it is only the reliability of the evidence before the Court which is decisive when it comes to its evaluation.<sup>30</sup>

This principle has been confirmed by abundant case law.<sup>31</sup> Apart from these general principles, there is a noticeable reluctance to take a clear stand with regard to evidence or proof-related topics in the case law of the Luxembourg Courts. The judgments of the EU

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<sup>27</sup> This is the case of the Italian system, where there are certain types of agreements which can be exclusively proved in writing, such as insurance agreements or out-of-court settlements. The general principle of free and unfettered evaluation of evidence is recognised by Article 116 of the Code of Civil Procedure.

<sup>28</sup> Compare Rules of Procedure of the General Court [1991] OJ L 136/34, last modified on 19 June 2013 OJ L 173/66, Article 65 and Rules of Procedure of the Court of Justice [2012] OJ L 265/1, Article 64(2). The types of evidence listed from b) to f) are the ones that can be ordered by the judge, whereas the parties are free to adduce any type of relevant documental evidence (including records, video, digital data and the like).

<sup>29</sup> BIAVATI, *Diritto processuale dell'Unione Europea* 231.

<sup>30</sup> Case T-1/89 *Rhône-Poulenc SA v Commission* [1991] ECR II-867, 954. This opinion has been more recently confirmed by the Court of Justice in case C-411/04 P *Salzgitter Mannesmann GmbH v Commission* [2007] ECR I-1005, para. 45: '[...] the Court of First Instance was correct to hold: [...] the principle that prevails in Community law is that of the unfettered evaluation of evidence and that it is only the reliability of the evidence that is decisive when it comes to its evaluation.'

<sup>31</sup> Compare joined cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, para. 29; joined cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and Tecnagrind v Commission* [2002] ECR II-4547, para. 223; T-50/00 *Dalmine SpA v Commission* [2004] ECR II-2395, para. 72, also quoted by AG Vesterdorf in his Opinion in *Rhône-Poulenc v Commission*.



Courts, in particular, are rarely crystal clear upon evidential issues such as burden of proof and standard of proof. Nonetheless, it is the author's opinion that this trend might be changing. The case law allows detecting autonomous definitions of some concepts (such as the creation of a 'European' standard of proof, which does not match exactly the national ones) and offers guidance for others (e.g. for the allocation of the evidential burden of proof, with the creation of presumptions, or for the evaluation of evidence). These issues and connected observations will be set out in Chapter II.

## **2) THE NATURE OF EUROPEAN ANTITRUST PROCEEDINGS**

As already noted, the way evidence is evaluated differs radically in criminal, administrative and civil proceedings because of their nature and their teleological approach.<sup>32</sup> In criminal proceedings the judge has the duty to ascertain the truth of the alleged facts with which the accused is charged. In administrative proceedings, the public authority has to find evidence beyond what the parties submitted to its knowledge: the parties' failure to present enough evidence to convince the authorities must not harm the public interest and the rightness of the final judgement. EU public enforcement is an example of administrative proceedings. In civil proceedings, the remit of the judge consists in the resolution of a dispute between individuals, according to the allegations and the evidence presented by the parties. National judges, however, are often endowed with inquisitorial powers of different extent.

The discussion here presented upon the features of competition law proceedings before the different authorities at the European and national level is aimed at clarifying their adversarial nature, as far as the judicial review and the private enforcement are concerned; and at predisposing some later observations upon the relevance of the respect of fundamental rights in the fact-finding process before the European Commission.

### **A) Proceedings before the European Commission**

It is out of doubt that proceedings before the European Commission do not have civil nature for the purposes of the ECHR.<sup>33</sup> Article 23(5) of Regulation (EC) 1/2003 provides that

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<sup>32</sup> IAN DENNIS, *The Law of Evidence* (3rd edn, Sweet & Maxwell 2007) 19.

<sup>33</sup> For further details, see also Chapter II, text accompanying fn. 266-275. Case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v Commission*, not yet reported, Opinion of AG Sharpston, para. 64: 'In the light of those criteria [the three 'Engel criteria'], I have little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing

decisions of the Commission imposing fines on undertakings ‘shall not be of a criminal law nature’. Nonetheless, commentators diverge in considering whether they present administrative or criminal nature. Each position entails relevant consequences with regard to the rights of the parties involved in the proceedings: evidently, a ‘quasi-criminal’ procedure would require stronger protection of the rights of the defending parties, along with particular caution in the phase of the collection of evidence, the application of a different standard of proof and the provision of a thorough system of legal review of final decisions, which administrative proceedings would not necessarily require.<sup>34</sup> The CJEU has provided a rather clear answer: proceedings before the Commission qualify as administrative. The procedure before the European Commission has been expressly described as ‘administrative’,<sup>35</sup> and the Court of Justice excluded that the competition authority in its quality as enforcer of EU competition rules should be considered as a ‘tribunal’ for the purpose of the application of Article 6 of the ECHR.<sup>36</sup> Concerns upon the combination of roles of the Commission as investigator, prosecutor, and judge and the debate upon the importance of a separation of powers in the context of competition matters have been tentatively rebutted with the creation of the Hearing Officer in 1982 and the peer review panels for the scrutiny of the investigation conclusions in 2003. Great criticism, however, is still levelled at the hybrid role of the Commissions,<sup>37</sup> for the questions left unanswered to date, particularly with regard to the protection of fundamental rights, the respect of due process guarantees and the

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agreements in Article 81(1) EC falls under the “criminal head” of Article 6 ECHR as progressively defined by the European Court of Human Rights.’ Compare also joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö v Commission* [1993] ECR I-1307, Opinion of AG Darmon, para. 451: ‘[...] A Commission decision in the field of competition is another matter entirely, particularly where it orders a trader to pay a fine and is therefore *manifestly of a penal nature*’ (emphasis added).

<sup>34</sup> CHRISTOPHER HARDING and JULIAN JOSHUA, *Regulating Cartels in Europe* (2nd edn, Oxford University Press 2010) 199.

<sup>35</sup> Case C-45/69 *Boehringer Mannheim GmbH v Commission* [1970] ECR 769, para. 23: ‘As the purpose of the procedure before the Commission is to apply Article 85 of the Treaty even where it may lead to the imposition of fines, it is an administrative procedure.’

<sup>36</sup> Joined cases C-209 to C-215 and C-218/78 *Heintz van Landewyck S.a.r.l. v Commission* [1980] ECR 3125, para. 8: ‘The Commission is bound to respect the procedural guarantees provided for by Community law on competition; it cannot, however, be classed as a tribunal within the meaning of Article 6 of the European Convention for the Protection of Human Rights, under which everyone is entitled to a fair hearing by an independent and impartial tribunal’ and joined cases C-100 to C-103/80 *SA Musique Diffusion française v Commission* [1983] ECR 1825, 1880, para. 7: ‘[...] the Commission cannot be described as a “tribunal” within the meaning of Article 6 of the European Convention for the Protection of Human Rights.’

<sup>37</sup> A number of proposals have been made to address such general state of things, but all of them were rejected. The most important ones were the transferral of adjudicator upon anti-competitive infringements directly to the General Court, thus reducing the role of the Commission to that of a simple investigator and prosecutor; and the creation of a completely detached EU competition enforcement agency, the European Cartel Office. See HARDING and JOSHUA, *Regulating Cartels in Europe* 202, and, for more details, ARIANNA ANDREANGELI, *EU Competition Enforcement and Human Rights* (Edward Elgar 2008) 235-243.



standard of proof to be applied.<sup>38</sup> Given the alleged inadequacy of these reforms, and spurred by the possibility of accession of the European Union to the ECHR envisaged by Article 6(2) of the Treaty on the European Union (TEU), the attention of commentators was steered in the direction of the standard of review of the EU Courts.<sup>39</sup> It was felt that the judicial review provided for under Article 263 TFEU<sup>40</sup> was the only way to reduce the possible adverse consequences on fundamental rights.<sup>41</sup> Among those who are inclined to consider the procedure before the European Commission a criminal procedure, the major concern is that the protection ensured by the system of the ECHR is not equalled by the standard of review guaranteed by the EU Courts. In particular, as will be clarified in Chapter III, the ‘uncovered areas’ – i.e. those areas where the protection offered by the EU Courts and by the ECtHR differs – are the scope of the privilege against self-incrimination and of lawyer-client confidentiality, namely with regard to the protection of the correspondence with in-house lawyers, and, according to some commentators, the lack of judicial review of the decisions of the Hearing Officer on the disclosure of evidence to the investigated parties.<sup>42</sup> But other discrepancies will be uncovered, including a tension created by the application of presumptions and the respect of the presumption of innocence.<sup>43</sup> The point to mention at this stage is that the variance between the two areas of coverage is mainly to be ascribed to the legal nature of the proceedings:

Article 6 and 8 of the Human Rights Convention were not conceived with either corporate actors or ‘administrative’ procedures foremost in mind. Moreover, even if the Court of Human Rights has insisted that it is the substance of the procedure rather than its formal description that should determine the level of legal protection for defendants, it is still possible to argue that prosecuting a cartel for infringement of the EU rules is different in some important respects from the usual kind of criminal proceeding at the national level.<sup>44</sup>

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<sup>38</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 200-201.

<sup>39</sup> ALBERT SÁNCHEZ GRAELLS, ‘The EU’s Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?’ in VASILIKI KOSTA, NIKOS SKOUTARIS and VASSILIS P. TZEVELEKOS (eds), *The Accession of the EU to the ECHR* (Hart Publishing 2014), forthcoming.

<sup>40</sup> The review of legality here mentioned is supplemented by the unlimited jurisdiction of the CJEU, according to Article 31 of Regulation (EC) 1/2003, to substitute its own appraisal for the Commission’s, with regard to penalties, and to cancel, reduce or increase them.

<sup>41</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 203.

<sup>42</sup> ANDREANGELI, *EU Competition Enforcement and Human Rights* 224-225.

<sup>43</sup> See Chapter II, para. 5 G).

<sup>44</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 203.

Albeit with due consideration for the specific differences characterising competition law, however, the protection of fundamental rights is crucial and the risk of inadvertently exporting administrative policy considerations in private antitrust proceedings must be prevented.

## **B) Proceedings before the EU Courts**

When issuing decisions finding competition law infringements, the European Commission plays a role that is completely different from that of a civil judge in any of the EU Member States. Rather than doing justice between two parties, the Commission must ensure the fairness of the administrative procedure, respect EU law and maintain a coherent competition policy of the European Union.<sup>45</sup> Although the nature of the proceedings brought before the EU Courts is undoubtedly adversarial, rather than inquisitorial, the EU Courts are inspired by similar goals, when operating as review judges. They are constantly acting to protect the consistent interpretation and application of the Treaties.<sup>46</sup> In this respect, the EU Courts have broad inquisitorial powers,<sup>47</sup> but generally they are not often used in practice. Indeed, both the Court of Justice<sup>48</sup> and the General Court<sup>49</sup> can require the parties to provide evidence and can adopt any measure of inquiry.<sup>50</sup> It cannot, however, be concluded that proceedings before the Luxembourg Courts are inquisitorial, rather than adversarial. On the one hand, the powers of EU Courts in the fact-finding may be exercised only once the parties have diligently tried their best to prove their allegations, and they are rarely used in practice; on the other, the Commission is endowed with extensive investigatory powers. The EU Courts can order on their own initiative or under request of a party the gathering of

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<sup>45</sup> Compare Article 17(1) TEU and, for EU competition law, Article 105 TFEU.

<sup>46</sup> MASSIMO CONDINANZI and ROBERTO MASTROIANNI, *Il contenzioso dell'Unione Europea* (Giappichelli 2009) 393.

<sup>47</sup> Case C-119/97 P *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission* [1999] ECR I-1341, paras. 108-111: '[T]he Court of First Instance could not reject the appellants' request to order production of a document which was apparently material to the outcome of the case on the ground that the document had not been produced and there was nothing to confirm its existence. [...] the appellants had stated the author, the addressee and the date of the letter they wished to be produced. Given such details, the Court of First Instance could not simply reject the parties' allegations on the ground of insufficient evidence, when it was up to the Court, by granting the appellants' request to order production of documents, to remove any uncertainty there might be as to the correctness of those allegations, or to explain the reasons for which such a document could not in any event, whatever its content, be material to the outcome of the case.'

<sup>48</sup> Rules of Procedure of the Court of Justice, Article 64(1): 'The Court, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved.'

<sup>49</sup> Rules of Procedure of the General Court, Article 66(1).

<sup>50</sup> Compare Rules of Procedure of the General Court, Article 65 and Rules of Procedure of the Court of Justice, Article 64(2). See text accompanying fn. 28 above.

evidence that they foresee will be helpful for verifying facts, but those proceedings retain adversarial nature.<sup>51</sup> The applicant and the defendant are always responsible for offering evidence in support of their allegations, according to Article 124 of the Rules of Procedure of the Court of Justice.<sup>52</sup> After that, both the applicant in the reply and the defendant in the rejoinder can still give further evidence, provided that they explain the reasons for the delay,<sup>53</sup> but it is forbidden to introduce a new plea in law in the course of proceedings unless it is based on matters of law or of fact which had come to light in the course of the procedure. This procedure is aimed at letting the judges (and the Advocate-General) know thoroughly all the facts, evidence, arguments and conclusions of the parties as early as possible along the proceedings.<sup>54</sup> As it will be observed later, the judges can intervene actively in the evidence gathering process. For example, they can request the parties to provide evidence which is in their possession, but only after they have diligently done their best to support their allegations.<sup>55</sup> These rules of procedure also apply to the European Commission, in its quality as the respondent in the proceedings initiated by the applicant against a Commission's decision before the General Court. Nonetheless, their use seems to be moderate, partly due to the fact that the Commission naturally selects cases in which evidence is stronger and that are likely to resist to the judicial review of the CJEU and partly because it collects evidence at a time that is much closer to the infringement than that in which the case is appealed before the General Court. On top of that, the cases in which applicants expressly contest the infringement are progressively diminishing, especially in cartel cases, due to the major role played by the application of leniency programmes and settlements in eliciting the production of evidence.<sup>56</sup> The test of evidence before the General

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<sup>51</sup> PAOLO BIAVATI, 'L'impatto del diritto comunitario sull'insegnamento del diritto processuale civile' [2008] *Rivista trimestrale di diritto e procedura civile* 227, 234–235.

<sup>52</sup> Rules of Procedure of the Court of Justice, Article 124(1): 'Within two months after service on him of the application, the defendant shall lodge a defence, stating: (a) the name and address of the defendant; (b) the pleas in law and arguments relied on; (c) the form of order sought by the defendant; (d) where appropriate, *any evidence produced or offered*' (emphasis added).

<sup>53</sup> Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities (February 2009), available at <curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9\_2008-09-25\_17-37-52\_275.pdf> accessed on 10 January 2014, Article 14, letter c): 'The initial pleadings must indicate all evidence in support of each of the points of fact at issue. However, new evidence may be put forward subsequently (in contrast to the rule excluding new pleas in law), provided that adequate reasons are given to justify the delay [...]'.  
<sup>54</sup> ROSTANE MEHDI, 'La preuve devant les juridictions communautaires' in HÉLÈNE RUIZ FABRI and JEAN-MARC SOREL (eds), *La preuve devant les juridictions internationales* (A. Pedone 2007), 167–168.

<sup>55</sup> Compare BIAVATI, *Diritto processuale dell'Unione Europea*, 219 and MEHDI, 'La preuve devant les juridictions communautaires', 167–168.

<sup>56</sup> FERNANDO CASTILLO DE LA TORRE, 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) 32(4) *World Competition* 505, 561–562.

Court seems to be focusing mostly on the allocation of the burden of proof; on the accuracy, reliability and consistency of evidence presented in order to seek an annulment for lack of sufficient evidence; and on the specific facts which might play a role in quashing or reducing the imposition of fines.<sup>57</sup>

### C) Proceedings before National Judges

In civil proceedings, such as private antitrust actions, the judge has the responsibility to evaluate the asserted facts according to the claims of the parties. Undoubtedly, the different goals and procedures that characterize civil antitrust cases brought before national jurisdictions broadly affect the way evidence is evaluated. These purposes are one of the main differences in the adjudicator's approach to private enforcement matters compared to public enforcement cases. Nonetheless, differences become less evident when comparing private enforcement proceedings and the judicial review of public enforcement decisions, because the nature of the proceedings is still markedly adversarial. This is due to the fact that, even when in the Member States the courts empowered to review decisions of the NCA are not appellate courts,<sup>58</sup> but judicial review courts (as it is the case in Italy), they can and should review the competition authority's decision thoroughly. In particular, the courts must review the factual elements on which the decision is based and allow re-examining the circumstances of the matter under examination, even if limited to the assessment of the legitimacy of the decision, in a way that is totally similar to (and has been compared with)<sup>59</sup> that of the EU Courts against the Commission's decisions.<sup>60</sup>

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<sup>57</sup> Naturally, the relevance of the grounds of the case are linked to the fact that the scope of the judicial review of the General Court is determined by the arguments raised by the applicant, and cannot go beyond that, except under specific circumstances in which the General Court is empowered to raise issues of its own motion. For further details on this aspect, refer to FERNANDO CASTILLO DE LA TORRE, 'La relevé d'office par la juridiction communautaire' (2005) 3-4 Cahiers de droit européen 395, 440-441. The Author observes that it is not unusual to see the Luxembourg Courts take into consideration *ex officio* elements of fact belonging to files of joined cases or matters relating to the European Union civil service. The Author recalls that the General Court has full jurisdiction according to Article 261 TFEU upon the claim brought against the Commission's decisions imposing fines pursuant to Article 23 of Regulation (EC) 1/2003. Such *de novo* review, independently of any manifest errors of assessment committed by the Commission, justifies the production and the consideration of additional information that was not mentioned in the Commission's decision. Compare joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd v Commission* [2004] ECR II-1181, para. 165 and joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission* [2005] ECR II-10, paras. 164 and 189-190.

<sup>58</sup> In England, the CAT acts as an appellate court which fully reviews the merits of the case.

<sup>59</sup> See, for instance, Council of State, 2 February 2004, decision no. 926, para. 3.3, in which the court stated that the scope of the judicial review of the Court of Justice of the European Union *de facto* encompasses also

In the majority of the Member States there is little leeway for the court to ask the parties to adduce evidence of its own will. National competition law proceedings, therefore, qualify as adversarial, which, if considered with the asymmetry of information that usually characterizes antitrust cases, adds up to the extreme difficulty encountered by the claimant in giving the proof of the alleged antitrust violation in private antitrust actions.

Before moving on to the analysis of the rules of evidence applied in the enforcement of EU competition law and of problems arising out of the handling of evidence before European Commission, EU Courts and national judges, it is necessary to summarise the legal framework and functioning of EU public and private enforcement. The discussion will be introduced by an illustration of the peculiarities of enforcement of EU competition law, paying special attention to evidential issues.

### **3) THE PECULIARITIES OF ENFORCEMENT OF EU COMPETITION LAW: WHY IS EVIDENCE SO CRUCIAL?**

Private and public enforcement of competition law are independent and complementary systems which pursue common objectives.<sup>61</sup> The main goals reached through the synergy of the two types of enforcement have been identified with the injunctive function, which is achieved via cease and desist order or injunctions; the compensatory function, which is achieved via redress; and deterrence, which is achieved via the infliction of fines and, in some systems, also of penalties for individuals, such as disqualification orders and imprisonment.<sup>62</sup> The first objective is pursued by both systems, even if sometimes it is more efficiently attained by means of national civil proceedings.<sup>63</sup> The last objective, deterrence, is mainly served by public enforcement<sup>64</sup> (although an effective private enforcement highly

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the economic analysis carried out by the European Commission. It extends to the factual elements of the case in issue and is similar to the judicial review performed by the Italian administrative judge.

<sup>60</sup> ANNALaura LEONI, 'La tutela giurisdizionale contro gli atti dell'AGCM in materia *antitrust*' in LORENZO FEDERICO PACE (ed), *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 425.

<sup>61</sup> Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final, para 1.2.

<sup>62</sup> WOUTER P.J. WILS, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117–159, 130.

<sup>63</sup> VALENTINE KORAH, *EC Competition Law and Practice* (7th edn, Hart Publishing 2000) 177–178.

<sup>64</sup> Sometimes, severe sentencing is not sufficient to attain perfect deterrence. Compare, for the U.S., the opinion of DONALD C. KLAWITER and JENNIFER M. DRISCOLL, 'Sentencing Individuals In Antitrust Cases: The Proper Balance' (2009) 23 *Antitrust* 75, 79: '[P]erfect deterrence is a worthy, but elusive, goal - particularly in white collar cases like antitrust, where the executive knows the risk but often believes he can "beat the system" or caves to the pressure to keep his business profitable. Unless human nature or the shareholder short-term objectives suddenly evolve, even extreme sentences will not eradicate violations of the antitrust laws.' For a detailed analysis of the effect of antitrust sanctions on deterrence, see DOUGLAS H.

contributes indirectly to increasing overall deterrence); whereas the second one, the compensatory function, is mainly served by private enforcement.<sup>65</sup> There is no formal interdependence between the public and private enforcement: they are institutionally autonomous.<sup>66</sup> They have, however, many points in common with regard to evidence. This is because evidence raises many problems that are experienced in both systems and that are dealt with in analogous ways in the two types of enforcement. Moreover, evidence in competition law has implications on other domains of the law, such as civil procedure, conflict of laws and human rights.

The difficulties of proving an infringement of competition law, encountered by the public authority and the claimant, are many. First of all, both the administrative rules and the fact-pleading nature<sup>67</sup> of civil law proceedings require the regulatory body or the claimant to be in the knowledge of the facts or, at least, the general nature of the facts of the case. Fact-pleading is currently applied by all EU Member States. Allegations of competition law infringements must be supported by sufficient detail and evidence.<sup>68</sup> Since the burden of the proof placed on the authority or the party bringing (administrative or civil) action is heavy, most countries provide for some alleviation of that burden, by means of presumptions, the use of *prima facie* regimes,<sup>69</sup> or the reversal of the burden of proof.<sup>70</sup> Secondly, evidence is particularly important in competition law because the dispute is

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GINSBURG and JOSHUA D. WRIGHT, 'Antitrust Sanctions' (2012) 8 Competition Policy International 46, 46.

<sup>65</sup> These objectives are identified by ASSIMAKIS P. KOMNINOS, 'Relationship between Public and Private Enforcement: *quod Dei Deo, quod Caesaris Caesari*' in PHILIP LOWE, MEL MARQUIS (eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies* (Hart Publishing 2014), forthcoming. For a partially different perspective compare WOUTER P.J. WILS, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 World Competition 3, 5–12.

<sup>66</sup> KOMNINOS, 'Relationship between Public and Private Enforcement: *quod Dei Deo, quod Caesaris Caesari*' in PHILIP LOWE, MEL MARQUIS (eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies* (Hart Publishing 2014), forthcoming.

<sup>67</sup> A fact-pleading system is a legal system which requires that, in order for a claim to be well-founded, it has to mention all facts that need to be submitted before the judge, and the same is required to the defendants as regards their answers. By contrast, the notice-pleading system, as in the U.S, is a system in which pleadings refer to unspecified issues at the very first stage, working as a message to the notified parties conveying the general terms of the impending dispute. All detailed information, technical points and allegation of proof is reserved for a later stage of the proceedings and the task of narrowing the matter is left to the phase of the disclosure. Compare THOMAS R. VAN DERVORT, *American Law and the Legal System: Equal Justice Under the Law* (Cengage Learning 2000) 136.

<sup>68</sup> ALAN RILEY, 'Beyond Leniency: Enhancing Enforcement in EC Antitrust Law' (2005) 28 World Competition 377, 383–384 and ASSIMAKIS P. KOMNINOS, *EC Private Antitrust Enforcement* 226.

<sup>69</sup> In order to establish a *prima facie* case, the evidence provided must be regarded as sufficient to prove that an infringement *might* have occurred.

<sup>70</sup> For the private enforcement, a survey conducted for thirty-two countries can be found in the International Competition Network, *Interaction of Public and Private Enforcement in Cartel Cases* 27.



generally fact-driven<sup>71</sup> and the proof is often revolving upon economic evidence (such as market analysis, pricing trends and the like).<sup>72</sup> Thirdly, evidence of anti-competitive violations is particularly hard to find for two main reasons: on one hand, cartels are often concealed and infringers have an incentive to avoid leaving documental evidence;<sup>73</sup> on the other, relevant evidence is often in the hands of the alleged infringer, meaning that, as often as not, the regulatory body or the claimant is not aware of its existence or does not have access to it. Details of pricing structures and evidence of cartel are often contained in internal company documents. In the case of tight oligopolistic markets, for instance, demonstrating that prices charged by undertakings are nearly identical is not sufficient to establish an infringement. Similar prices could be the totally lawful commercial response to a transparent market with few leading market players. In such cases, the undertaking's documentation would be necessary to prove a cartel.<sup>74</sup> Problems of access to evidence are found also for Article 102 TFEU violations, especially for exploitative abuses,<sup>75</sup> for the inherent difficulties of proving, for instance, an abuse of excessive pricing<sup>76</sup> or discriminatory treatment of customers. Also evidence of exclusionary conducts, however, may be difficult to produce. Consider, for instance, the case of price squeezing (i.e. a form of pricing behaviour by a company that, being dominant in both an upstream and downstream market, charges a price in the upstream market that does not enable its competitors to operate profitably in the downstream market). For the proof of such

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<sup>71</sup> IAN FORRESTER, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"' in CLAUS-DIETER EHLERMANN and MEL MARQUIS (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 410.

<sup>72</sup> BIAVATI, *Diritto processuale dell'Unione Europea* 217.

<sup>73</sup> For reference to the 'clandestine fashion' in which cartels usually take place, see joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cemente del Tirreno SpA v Commission* [2004] ECR I-123, paras. 55–57. *Contra*, see KPE LASOK, 'Some Procedural Aspects and How They Could/Should be Reformed' in *Cross-border EU Competition Law Actions* (Hart Publishing 2013) 212. The Author believes that competition cases are not atypical so far as concerns matters such as the burden and standard of proof, and that the problems caused by the fact that illegal anti-competitive arrangements are often deliberately hidden are not unique to competition law: 'civil frauds are, likewise, typically hidden from view.'

<sup>74</sup> RILEY, 'Beyond Leniency: Enhancing Enforcement in EC Antitrust Law' 383.

<sup>75</sup> RINO CAIAZZO, 'L'azione risarcitoria, l'onere della prova e gli strumenti processuali ai sensi del diritto italiano' in *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 324.

<sup>76</sup> Compare JONATHAN FAULL and ALI NIKPAY (eds), *The EC Law of Competition* (2nd edn, Oxford University Press 2007) 399, who observe how: '[t]he United Brands case highlights the major difficulties of proof associated with finding an abuse of excessive pricing, and probably explains the relative dearth of instances in which the Commission has intervened.' Examples of cases of excessive pricing where evidence was considered 'insufficient' to prove the infringement are: C-27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207; C-298/83 *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission* [1985] ECR 1105; *Scandlines Sverige AB v Port of Helsingborg* (case COMP/36.568) [2006]; *Sundbusserne v Port of Helsingborg* (COMP/36.570) [2006].

behaviour, the squeezed company is required to be in possession of data usually very difficult to access, such as the cost structure of the dominant company. Fourthly, economic evidence may not be conclusive, because the weight to be attributed to specific item of evidence often hinges upon the economic theory or model in question and the plausibility of the assumption on which it is based.<sup>77</sup> Fifthly, even when such economic evidence is available, it is hard to present it to the (review or civil) judge in such a way to make the conclusions convincing, due to the inherently different knowledge of adjudicators and experts. This challenge is compounded by the general reluctance of judges (especially national ones) to go into the details of economic probation theories. Sixthly, the interference of the gathering of evidence with fundamental rights makes the fact-finding process even more arduous. All these issues can be referred to both the public and the private enforcement. Chapter II is devoted to the analysis of the evidence-related issues in competition law proceedings. The framework of EU public and private enforcement is set out below.

#### **4) LEGAL FRAMEWORK OF EU PUBLIC ENFORCEMENT**

From 1962 to 2004, the public enforcement of EU competition law was governed by the provisions contained in Council Regulation (EEC) 17/62,<sup>78</sup> the first Regulation implementing Articles 101 and 102 TFEU (formerly Articles 81 and 82 of the EC Treaty and Article 85 and 86 of the EEC Treaty). Pursuant to this Regulation, the enforcement was based on a notification process, by means of which the information upon an agreement or practice was filed to the Commission on a voluntary basis. The Commission could then issue a decision granting the agreement negative clearance or an individual exemption under Article 101(3) TFEU.

In the need of a system ensuring effectiveness, on the one hand, and simplified administration to the greatest possible extent, on the other,<sup>79</sup> the Council enacted Regulation (EC) 1/2003 (also called ‘New Regulation on Procedure’),<sup>80</sup> which entered into force on 1

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<sup>77</sup> IOANNIS LIANOS, ‘“Judging” Economists: Economic Expertise in Competition Law Litigation: A European View’ in IOANNIS LIANOS and IOANNIS KOKKORIS (eds), *The Reform of EC Competition Law* (Kluwer Law International 2010) 293.

<sup>78</sup> Council Regulation No 17 of 21 February 1962 Implementing Articles 85 and 86 of the Treaty [1962], OJ 13/204.

<sup>79</sup> Regulation (EC) 1/2003, Recital (2).

<sup>80</sup> Regulation (EC) 1/2003.



May 2004, repealing and replacing Council Regulation (EEC) 17/62. In the old regime, the European Commission's resources were principally devoted to the process of notifications, rather than to the detection of 'hard-core' competition law infringements. This allocation of resources was perceived as a betrayal of the original goals of effective supervision that the EC Treaty (now, Treaty on the Functioning of the European Union) had set.<sup>81</sup> Under Regulation (EC) 1/2003 the notification and exemption system was abolished and replaced by a decentralised system, in which all competition authorities and national courts of the Member States had power to apply Articles 101 and 102 TFEU in their entirety: a directly applicable system.<sup>82</sup> The rationale for the change from an *ex ante* to an *ex post* control was the need for a better allocation of the scarce resources of the Directorate-General for Competition (DG COMP).<sup>83</sup> Regulation (EC) 1/2003 also strengthened the investigatory powers of the European Commission.

The public enforcement of EU competition law is entrusted to both the European Commission and the NCAs. As observed by some commentators, since the entering into force of Regulation (EC) 1/2003, the major enforcers of EU competition law have been the NCAs, adopting nearly 90% of the overall amount of decisions taken.<sup>84</sup> Nonetheless, the enforcement output of the European Commission has not decreased, and the Commission maintains its role as guiding institution for the enforcement of EU competition law. Only one provision of Regulation (EC) 1/2003, however, concerns evidence: Article 2 on the allocation of the burden of proof, to be read in conjunction with Recital (5).

### A) European Commission

At the EU level, the public enforcement of Articles 101 and 102 TFEU is essentially the responsibility of one institution, the European Commission. The procedure before the

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<sup>81</sup> See Article 83(2)(b) of the EC Treaty: 'to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other' and now, with exactly the same wording, Article 103(2)(b) TFEU. Compare also Recital (2) of Regulation (EC) 1/2003, stating: '[...] Under Article 83(2)(b) [now 103] of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.'

<sup>82</sup> EU competition law can be applied by national competition authorities and national courts in the context of domestic matters when competition law infringements do not affect trade between Member States.

<sup>83</sup> WOUTER P.J. WILS, 'Ten Years of Regulation 1/2003 - A Retrospective' (2013) 4 Journal of European Competition Law & Practice 321, 322.

<sup>84</sup> WILS, 'Ten Years of Regulation 1/2003 - A Retrospective', 323–324. The Author illustrates how, in the period of time running from 1 May 2004 to the end of 2012, the national competition authorities adopted 646 final decisions, whereas the European Commission only took 88 final decisions, i.e. 12% of the total number of decisions.

Commission is mainly based on written statements and inquisitive investigation. The Commission's investigation and procedure are administrative in nature.<sup>85</sup> As explained further below, the Commission enjoys broad powers of investigation and enforcement.

The investigation of the European Commission may be triggered by a complaint lodged by a private party;<sup>86</sup> or may start *ex officio* due to information collected in different ways (press reports, anonymous tip-offs, research, other proceedings, information gathered from leniency applications, referral by a NCA, and so on). Not only the Commission is entitled to reject any complaints submitted in violation of Regulation (EC) 1/2003, but also the Commission is not required to adopt a final decision in relation to every complaint received.<sup>87</sup> Detailed guidelines for the proceedings are provided by Regulation (EC) 773/2004.<sup>88</sup> The content of the complaint is set forth by Form C annexed to Regulation (EC)

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<sup>85</sup> See text accompanying footnotes 33 to 38 above.

<sup>86</sup> Any physical or legal person (including trade unions, trade associations, consumer associations, individual consumers and Member States) may file a complaint if they bear a legitimate interest, meaning that they somehow have to be or have to have been harmed by the alleged infringement. Compare Article 7(2) of Regulation (EC) 1/2003. Pursuant to the Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty of 27 April 2004, 65–77, paras. 36–39, a 'legitimate interest' can be found where undertakings (themselves or through associations that are entitled to represent their interests) are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests: 'This confirms the established practice of the Commission which has accepted that a legitimate interest can, for instance, be claimed by the parties to the agreement or practice which is the subject of the complaint, by competitors whose interests have allegedly been damaged by the behaviour complained of or by undertakings excluded from a distribution system.' Individual consumers who are the buyers of goods or services that are the object of an infringement can also lodge complaints with the Commission, as well as local or regional public authorities. See VAN BAEL & BELLIS, *Competition Law of the European Community* (4th edn, Klumer Law International 2005) 1039–1040. For the right of natural and legal persons to institute proceedings in order to protect their legitimate interests in case their request is not complied with wholly or partly by the Commission, see C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para. 13 and HERWIG C.H. HOFMANN, GERARD C. ROWE, and ALEXANDER H. TÜRK, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 831.

<sup>87</sup> When the Commission has been resorted to with a case, it is up to it to decide whether the complaint has a 'Community interest' and if it deserves to be treated as priority. Community interest is affected any time that the infringement is serious, or the case raise novel issues of law, or the violation has important repercussions on market integration. According to para. 41 of the Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, the Commission: '[...] is not required to conduct an investigation in each case or, *a fortiori*, to take a decision within the meaning of Article 249 EC on the existence or non-existence of an infringement of Articles 81 or 82, but is entitled to give differing degrees of priority to the complaints brought before it and refer to the Community interest in order to determine the degree of priority to be applied to the various complaints it receives.' Paragraph 45 indicates the criteria according to which the Commission must pursue its assessment, particularly balancing 'the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil its task of ensuring that Articles 81 and 82 of the Treaty are complied with.' Since *Automec II*, the Commission has considered that the possibility for the complainants to access private law actions before national courts might justify the rejection of a complaint. Compare case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para. 94.

<sup>88</sup> Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the Conduct of Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L123/18.

773/2004, which requires the complainant to set out in detail the facts from which the infringement arise and, at the same time, to submit:

all documentation [...] relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations [...]).

Complainants are required to identify relevant witnesses and to provide the Commission with statistics or other data showing the effects of the infringement on the market.<sup>89</sup> In short, complainant must adduce all evidence available to them and indicate all information which could be relevant to the investigation.<sup>90</sup>

The enforcement procedure consists of two phases: first of all, the Commission gathers all relevant evidence to ascertain the facts; secondly, it informs the investigated undertaking of its preliminary assessment, holds a hearing and adopts a decision.<sup>91</sup>

Of these two stages, the first one will be set out below; whereas the second one, featuring the assessment of evidence (i.e. the allocation of the burden of proof, the standard of proof, the use of presumptions, etc.), will be most usefully analysed when discussing the judicial review of the decisions taken by the European Commission.<sup>92</sup> Indeed, the European Commission's decision deals with the facts under examination, but rarely engages in the analysis of points of law and it is exclusively targeted to the finding. Moreover, the approach of the EU Courts is highly relevant, given that the evaluation and assessment of evidence are connected to issues of law and fact, which are matters for the General Court.<sup>93</sup> Therefore, the European Commission tends to abide by the principles provided by the General Court or, on appeal, by the Court of Justice, which ultimately determines matters of

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<sup>89</sup> Form C mentioned in Article 5(1) of Regulation (EC) 773/2004, para. 4.

<sup>90</sup> When initiated by a private complaint, the administrative procedure usually consists of the collection of information about the complaint and of a notice under Article 7(1) of Regulation (EC) 773/2004 that there are no grounds for pursuing the complaint (the so-called 'Article 7 letter') or, conversely, of the Commission's decision, which, unlike the 'Article 7 letter', can be challenged pursuant to Article 263 (formerly Article 230) TFEU.

<sup>91</sup> DAMIAN CHALMERS, CHRISTOS HADJIEMMANUIL, GIORGIO MONTI, and ADAM TOMKINS, *European Union Law: Text and Materials* (Cambridge University Press 2006) 941.

<sup>92</sup> See Chapter II, para. 9.

<sup>93</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para. 39.

EU law.<sup>94</sup> This tendency is even stronger when one considers the view of those commentators who emphasise a progressive shift of the Commission from its role as an adjudicator to that of a mere investigator/prosecutor, with its decisions being appealed before the General Court in the vast majority of cases, thus producing a significant amount of case law and operating as the sole proper trial judge.<sup>95</sup>

As regards the fact-finding process, the powers available to the European Commission will be briefly described below, but the topic will be revisited under Chapter III, when discussing cooperation between authorities and gathering of evidence.

When the European Commission opens an investigation, it will often seek relevant information from the undertaking under investigation; other undertakings; governments; and NCAs. This can be done either by means of simple request or by decision.<sup>96</sup> Formal decisions require the addressee of the decision to supply the Commission with relevant information; fines may be imposed in case of non-compliance.<sup>97</sup> The European Commission is empowered, on the one hand, to request information and conduct interviews; and, on the other, to carry out inspections in the investigated undertaking's premises (in the form of visits, oral questions, and searches).<sup>98</sup> The required information must be relevant for the Commission to verify the existence of the alleged infringement. The link between the request for information and the alleged infringement is considered to be sufficiently close

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<sup>94</sup> Compare CASTILLO DE LA TORRE, 'Evidence, Proof and Judicial Review in Cartel Cases' 514: '[I]n so far as the Commission must be satisfied that it could prove its case before the court, the standard that the Court of First Instance will require will necessarily determine the standard to be applied by the Commission.'

<sup>95</sup> For this opinion on the changing role of the Commission, compare HARDING and JOSHUA, *Regulating Cartels in Europe* 220. The Authors, at page 185, highlight how: '[q]uantitatively and qualitatively, this case law [relating to the enforcement of competition policy] accounts for a significant part of the total judicial output in the EU system. It is both a major segment of judicial review and it has contributed significantly to the emerging European public law of due process and the protection of basic rights. [...] It may appear as a cynical observation, yet it should be recognized that powerful actors with considerable resources at their disposal are willing and able to engage in litigation, which in turn produces case law, which in turn contributes to the theory and practice of legal protection.'

<sup>96</sup> Regulation (EC) 1/2003, Article 18(1).

<sup>97</sup> According to Article 23 of Regulation (EC) 1/2003, the Commission may by decision impose on undertakings which do not supply information or refuse to submit to inspections (or, in the lack of a decision, which supply incorrect or misleading information) fines not exceeding 1% of the total turnover in the preceding business year. The Commission can also increase the fine subsequently imposed for any finding of infringement. An example is *Professional Videotape* (Case COMP/38.432) Commission Decision 2007/5469 [2008] OJ C57/08, para. 8.4.1, where representatives of Sony Europe Holding BV refused to answer oral questions and an employee of Sony United Kingdom Limited shredded documents from a file labelled 'Competitors Pricing'. The Commission increased the basic amount of the fine to be imposed on Sony of 30%.

<sup>98</sup> Article 20(3) and Article 20(4) of Regulation (EC) 1/2003 address voluntary investigations and mandatory investigations respectively. Whilst the first ones are only authorized in writing, the latter ones are based on a formal decision. Both orders must specify the subject-matter and the purpose of the investigation, besides any possible penalties in case of non-compliance. Decisions only are reviewable by the General Court. Compare HARDING and JOSHUA, *Regulating Cartels in Europe* 205.

when the European Commission can ‘reasonably suppose, at the time of the request, that the document [sought for] would help it to determine whether the alleged infringement had taken place’.<sup>99</sup> The Commission, however, enjoys wide discretion when deciding whether information is necessary or not in order to bring to light an infringement of the competition provisions, as shown in *Solvay*<sup>100</sup> and *Orkem*.<sup>101</sup> The information is usually provided through documentary evidence or statements of the parties, collected through interviews.<sup>102</sup> The European Commission can also carry out any necessary inspection on the premises of the investigated party (or, where reasonable suspicion exists that books or other business records may be found elsewhere, such other premise, land or means of transport can be inspected)<sup>103</sup> without any advance notice. These so-called ‘dawn-raids’ include the Commission’s right to:

- enter premises, land or means of transport;
- examine the business records of the undertaking and take (hard or electronic) copies or extracts of them;<sup>104</sup>
- seal business premises and books of records during the inspection;
- ask for oral explanations on facts or documents to any representative or staff member of the undertaking.<sup>105</sup>

As recently confirmed by the appeals brought with regard to the power cables cartel, the inspection decisions must be drafted carefully and sufficiently specify the essential characteristics of the subject-matter and purposes of the inspection, in order to protect the undertaking’s rights of defence and to avoid ‘fishing expeditions’.<sup>106</sup>

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<sup>99</sup> Case C-36/92 P *Samenwerkende Elektriciteits-produktiebedrijven NV (SEP) v. Commission* [1994] ECR I-1919, Opinion of AG Jacobs, para. 21.

<sup>100</sup> Case C-27/88 *Solvay & Cie v Commission* [1989] ECR I-3355, para. 1: ‘Even if [the Commission] already has evidence, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to request further information to enable it better to define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved.’

<sup>101</sup> C-374/87 *Orkem v Commission* [1989] ECR 3283, para. 15.

<sup>102</sup> Regulation (EC) 1/2003, Article 19(1).

<sup>103</sup> Regulation (EC) 1/2003, Article 21.

<sup>104</sup> Original documents cannot be removed from the premises of the investigated company. The CJEU has not had the occasion to pronounce itself on the legitimacy of the practice of the Commission to take away the forensic copies of computer hard driver for subsequent review at the Commission’s premises. The issue has been recently arisen in T-135/09 *Nexans France SAS and Nexans SA v Commission*, not yet reported, para. 120, but the General Court considered the challenge inadmissible on grounds that the action of the Commission during the dawn raid was an intermediate measures which is not, alone, subject to judicial review and which implements the decision ordering the inspection.

<sup>105</sup> Regulation (EC) 1/2003, Article 20(2).

<sup>106</sup> *Nexans France SAS and Nexans SA v Commission*, para. 64; T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v Commission*, not yet reported, para. 65.

Once the Commission's officials have started investigating, the relevant undertaking has a duty to cooperate fully, not only giving them access to all relevant files and records but also actively helping them to find the material which is sought for.<sup>107</sup> Obstructive behaviour is penalised by means of periodic penalty payments or by taking them into account when imposing a fine for a finding of infringement.<sup>108</sup> As it has been clarified by the Court of Justice, such positive duty of cooperation entails the Commission's power to have shown all documents requested and the contents of any piece of furniture which its officials indicate. The Commission's officials may not, however, obtain access to premises by force, nor carry out searches without the previous consent of the management staff of the undertaking.<sup>109</sup>

The Commission is entitled to examine records related to the business, stored on whichever medium available. The access to electronic documents is particularly relevant, given the massive relevance of IT resources for storing data related to business activities. The Commission's inspection team is formed by, *inter alia*, information technology experts who are trained to retrieve deleted files and recover any possible information regarding circulation, modification or editing of a file. When conducting investigations, the Commission can require the assistance of the competition authority of the Member State where the inspection is being conducted, especially in those cases where the investigated undertaking opposes the inspection.<sup>110</sup> When the Commission considers that it has gathered sufficient evidence to find an infringement, it will notify the undertaking by issuing a statement of objections.<sup>111</sup> Only the documents mentioned and appended to the statement of objections are admissible as evidence against the undertaking during the proceedings. If the Commission intends to make use of novel evidence in its decision, it has to bring such

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<sup>107</sup> *Fabbrica Pisana* (Case IV/400) Commission Decision 80/334/EEC [1980] OJ L75/30, para. 10: ' [...] the obligation on undertakings to supply all documents required by Commission inspectors must be understood to mean not merely giving access to all files but actually producing the specific documents required.'

<sup>108</sup> Regulation (EC) 1/2003, Article 23(1). For an illustration of how the Commission used to fine obstruction of investigation as an aggravating circumstance in the final decision, and is now starting to fine it as an autonomous infringement, see MAURITS TER HAAR, 'Obstruction of Investigation in EU Competition Law: Issues and Developments in the European Commission's Approach' (2013) 36 *World Competition* 247–268. An example of standalone fining, is found in *Professional Videotape* (Case COMP/38.432) Commission Decision 2007/5469 [2008] OJ C57/08, para. 8.4.1 and see fn. 97 above. It is interesting to note that fines are easily imposed also due to the reversal of the evidential burden of proof that the Commission apply in such cases.

<sup>109</sup> Joined cases C-46/87 and C-227/88 *Hoechst AG v Commission* [1989] ECR I-2927, para. 31.

<sup>110</sup> *Hoechst AG v Commission*, para. 32.

<sup>111</sup> The statement of objections is the document which discusses thoroughly, in the language of the addressee, the facts and legal reasoning on the basis of which the Commission reaches the provisional conclusion that there is an infringement of Article 101 and/or 102 TFEU and states clearly whether the Commission intends to impose a fine. It is a preparatory document and therefore it cannot be challenged before the European Courts.



information to the attention of the concerned parties by means of a ‘letter of facts’, encouraging them to comment on it.<sup>112</sup>

## **B) The National Competition Authorities**

In the Member States, the NCAs have investigative powers which are analogous to those of the European Commission. A significant level of voluntary convergence has been achieved so far, due to the action of the European Competition Network.<sup>113</sup> The NCAs are designated by the Member States to apply Article 101 and 102 TFEU, alongside with the national competition law, and are empowered to ask undertakings to stop the violations, order interim measures, accept commitments and impose financial sanctions.<sup>114</sup> In 2004, along with the enactment of Regulation (EC) 1/2003, the European Competition Network (ECN) was created, a forum for cooperation to which all NCAs and the European Commission take part.<sup>115</sup> Its existence is relevant to the topic here analyzed because its main functions are, on the one hand, the efficient allocation of cases among the network and, on the other, the coordination of investigations and the organisation of mutual assistance and exchange of evidence and other information.

In all jurisdictions, competition authorities are empowered to inspect business premises (often also of undertakings which are not subject to investigation) and request for information during inspections. In Italy, a decision to conduct an inspection can be adopted only following a formal decision to open an investigation,<sup>116</sup> whereas in the UK an inspection can be carried out at any time in the proceedings. All competition authorities may make copies of documents and collect digital evidence, and the vast majority of them have the power to seal premises. Almost all competition authorities are empowered to conduct interviews, some on a voluntary basis (e.g. the UK), some on a compulsory basis.<sup>117</sup>

## **C) The Judicial Review of the EU Courts**

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<sup>112</sup> Article 27(1) of Regulation (EC) 1/2003 provides that ‘[t]he Commission shall base its decisions only on objections on which the parties concerned have been able to comment.’

<sup>113</sup> ECN Working Group Cooperation Issues and Due Process, Investigative Powers Report [2012] 48.

<sup>114</sup> Regulation (EC) 1/2003, Recital (18).

<sup>115</sup> The ECN was created by the ‘Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities’, adopted along with the Regulation (EC) 1/2003, in order to ensure that the EU competition rules are applied effectively and consistently.

<sup>116</sup> Article 14 of Italian Competition Act (Law 287/1990).

<sup>117</sup> ECN Working Group Cooperation Issues and Due Process, Investigative Powers Report.

As observed by numerous commentators,<sup>118</sup> the European Commission combines the three roles of investigator, prosecutor and judge. For present purposes, it is important to note the role played by the EU Courts in rendering the Commission's function as respectful of the defendant's rights as possible.<sup>119</sup> In such interplay between the Commission as a prosecutor/decision-maker and the EU Courts as the guardians of the legitimacy of its decisions, a central role is indeed reserved to the evaluation of evidence. As noted by Judge Vesterdorf, sitting as Advocate-General, in *Rhône-Poulenc SA*, in the occasion of the first judgment adopted by the newly created Court of First Instance in 1989:

[T]he very creation of the Court of First Instance as a court of both first and last instance for the examination of facts in the cases brought before it is an invitation to undertake an *intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound.*<sup>120</sup>

Judicial review by the EU Courts in competition law matters is carried out under Articles 263 and 261 TFEU.<sup>121</sup> The grounds for review are four: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.<sup>122</sup> Usually all challenges are encompassed by the third ground of review but given the high risk of overlap between grounds the applicants tend to formulate them in very broad terms.<sup>123</sup> The creation of the General Court has established a court of first instance, whose mandate entails a way of scrutinising the Commission's fact-finding. According to some authors, with regard to cartels, from the mid-1990s to date the relationship between the Commission and the General Court has moved in

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<sup>118</sup> *Inter alia* DONALD SLATER, SÉBASTIEN THOMAS, and DENIS WAELBROECK, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' [2008] GCLC Working Paper 04/08 2; ANDREANGELI, *EU Competition Enforcement and Human Rights* 3; FRANK MONTAG, 'The Case for a Radical Reform of the Infringement Procedure Under Regulation 17' (1996) 17 *European Competition Law Review* 428–437, 429; WOUTER P.J. WILS, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201–224, 201–202.

<sup>119</sup> Compare *KME Germany AG, KME France SAS and KME Italy SpA v Commission*, Opinion of AG Sharpston, para. 68: 'The fact that the Commission is an administrative body, and may not be able to separate entirely its three functions in the procedure, is a given [...]. The issue is whether the General Court exercised "full jurisdiction" within the meaning of the case-law of the European Court of Human Rights.'

<sup>120</sup> *Rhône-Poulenc SA v Commission*, 908 (emphasis added).

<sup>121</sup> The legal consequences of successful actions brought under Article 263 and 261 of the Treaty on the Functioning of the European Union are (i) the annulment of the decision or of a part of it, and (ii) the cancellation, reduction or increase of the imposed fine respectively.

<sup>122</sup> Article 263(2) TFEU.

<sup>123</sup> ALISON JONES and BRENDA SUFIN, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press 2011) 1135.



the direction of a prosecution/judge relationship, in which the Commission's formal decision plays the role of a statement of the case for the prosecution, which is then judicially tested before the General Court.<sup>124</sup> Without going so far as to affirm a 'de facto separation of functions', it can be agreed that the EU judicial review has been driven, in part, by the willingness of undertakings to challenge all aspects of the Commission's decision.<sup>125</sup> While compelled to ensure that the Commission's decisions contain adequate reasoning, are supported by sufficient evidence and are not manifestly erroneous, the General Court generally refrains from encroaching the margin of appreciation of the Commission.<sup>126</sup>

The judicial review of the EU Courts has assumed four main directions in competition law matters: (i) the interpretation of substantive law; (ii) the legal protection of the due process<sup>127</sup> and of the rights of defence; (iii) the review of the amount of imposed fines; (iv) the test of evidence,<sup>128</sup> in particular by means of attacking the factual basis of the case (but only rarely the existence of the infringement *tout court* or the anti-competitive effects of it) and challenging the sufficiency of evidence gathered by the Commission to ground it. When performing this test, two main aspects are reviewed by the EU Courts: the protection of rights which are directly involved by the gathering of evidence (such as the right to privacy and the privilege against self-incrimination); and inter-related issues of fact and law (such as the allocation of the burden of proof, the standard of proof, the probative strength of evidence and so on). This test of evidence is very broad and amounts, in effect, to an appeal on the merits (as opposed to a mere administrative review).<sup>129</sup> When performing the test of evidence over Commission's decisions, especially with regard to issues that are positioned in the middle of the two domains of substantive and procedural

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<sup>124</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 219-220.

<sup>125</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 184.

<sup>126</sup> DAVID BAILEY, 'Scope of Judicial Review under Article 81 EC' (2004) 41 *Common Market Law Review* 1327, 1328.

<sup>127</sup> In recent judgements, the CJEU clarified that protracted judicial review, as a procedural irregularity which violates Article 47(2) of the Charter on Fundamental Rights, entitles the party concerned to claim compensation for the damage caused by the failure to adjudicate within a reasonable time. The claim must be brought before the General Court sitting in a different composition from that which heard the dispute giving rise to the procedure. See case C-40/12 P *Gascogne Sack Deutschland GmbH v Commission*, not yet reported, paras. 89-90 and C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* [2009] ECR I-6155, para. 195. In previous judgments, the Court of Justice had reduced the fine directly, in order to make up for the excessive length of proceedings before the General Court. See C-185/95 P *Baustahlgewebe GmbH v Commission* [1998] ECR I-8417, para. 48.

<sup>128</sup> ANDREAS SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights*, vol. 54 (Kluwer Law International 2013), International Competition Law Series 258.

<sup>129</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 188.

law,<sup>130</sup> the EU Courts provide authoritative guidance, which ultimately influences national judges (administrative review courts and civil trial judges).

A thorough test of evidence was not performed until the CFI was created,<sup>131</sup> because the ECJ restrained itself, in its function as a Supreme Court responsible for the consistency and uniform interpretation of the law,<sup>132</sup> to the review of manifest errors of fact and errors of law.<sup>133</sup> Among the reasons for the establishment of the CFI, the most important one was the necessity of providing ‘detailed examination of complex facts, particularly – but not exclusively – in competition cases [...]’.<sup>134</sup> In filling in the gap, the Court of First Instance redefined its jurisdiction,<sup>135</sup> progressively assuming the tasks of fully reassessing the evidence presented.<sup>136</sup> Accordingly, the judicial review of the EU Courts encompasses a thorough re-examination of the evidence, although to a limited extent for specific aspects, such as the value to be attributed to evidence.<sup>137</sup> Also the national appellate and review courts embark on such re-assessment when NCAs’ decisions are challenged.<sup>138</sup>

The standard of review for the rules of evidence applied both by the CJEU and by the national courts of England and Italy is illustrated in Chapter II, whereas the protection of fundamental rights and the standard of review for their safeguard in connection with the gathering of evidence and its limits will be considered wholly in Chapter III.

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<sup>130</sup> For an illustration of the ambivalent nature of evidence, see Chapter I, paras. 1 and 2.

<sup>131</sup> The Court of First Instance was established by Council’s decision of 24 October 1988, adopted on request of the Court of Justice, pursuant to Article 168(a) of the EEC Treaty.

<sup>132</sup> Put bluntly, the function of the Court of Justice of the European Union consists in ensuring that the law of the European Union is observed, by means of accomplishing three main tasks: reviewing the legality of the acts of the institutions of the European Union; verifying that the Member States comply with their obligation deriving from the EU Treaties; and interpreting European Law when prompted by national judges.

<sup>133</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 189.

<sup>134</sup> NICHOLAS FORWOOD, ‘The Court of First Instance, its Development, and Future Role in the Legal Architecture of the European Union’ in ANTHONY ARNULL and others (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacob* (Oxford University Press 2008) 37.

<sup>135</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 190. The Authors observe that: ‘[t]he Court of First Instance was opening for itself a large new field of jurisdiction [...]. Review of the facts *de novo* was very much an inventive step on the part of the CFI.’

<sup>136</sup> This task was declined by the Court of First Instance at an earlier stages of its activity, as showed in joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992] ECR II-1403, paras. 319-320: ‘[T]he Court considers that, although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence. In the light of those factors, the Court considers that it is not for itself [...] to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition.’

<sup>137</sup> BAILEY, ‘Scope of Judicial Review under Article 81 EC’ 1331.

<sup>138</sup> See, for Italy, Council of State, 2 February 2004, decision no. 926, para. 3.3; and for England, see fn. 16 above.

## 5) LEGAL FRAMEWORK OF EU PRIVATE ENFORCEMENT

Private enforcement of EU competition law provisions is defined as any type of civil domestic litigation by private claimants in order to enforce EU competition law. Private enforcement does not include the participation of private parties in proceedings before the European Commission or before national competition authorities either as direct complainants<sup>139</sup> or as mere interveners.<sup>140</sup> In other words, it is limited to litigation and alternative dispute resolution, and it encompasses both stand-alone and follow-on actions.<sup>141</sup>

In contrast to ‘privately triggered public enforcement’,<sup>142</sup> ‘[p]rivate enforcement actions are paid for by the individual bringing the action, and that individual can recoup the money paid out as part of the award of compensation if the action is successful’.<sup>143</sup> The Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules<sup>144</sup> contends that the goals of the two types of enforcement define their differences. Both aim at increasing deterrence and compliance of competition law provisions; but providing compensation for a loss caused by a breach of the law is the

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<sup>139</sup> See above fn. 86.

<sup>140</sup> ASSIMAKIS P. KOMNINOS, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing Limited 2008) 1.

<sup>141</sup> This latter distinction is very important for the purposes of the present dissertation, because of the different role played by evidence in the two types of actions. Notably, a stand-alone action is an action taken by a private individual in a competition case where the public enforcement has not previously intervened. In such actions, the claimant is burdened with the tricky task of providing all evidence of the infringement from scratch, without being able to rely on preceding decisions issued by a public authority. This can happen either when a claimant alleges an infringement in the context of a damage action or when a claimant uses competition provisions as a shield, in order to justify a breach of contract or the violation of an intellectual property right. Conversely, in follow-on actions the claimant does not have to demonstrate the anti-competitive infringement on his or her own, given that he or she can lean on the decision of the public authority which produces *erga omnes* effects. In such actions, the claimant’s position is significantly more favourable, especially if one considers that public authorities’ decisions, on occasions, may have binding effect on the national judge. As it will be illustrate further on in the thesis, this is the case, for instance, of Commission’s decisions for the national judges of the Member States, and of the CAT for decisions taken by the OFT in the United Kingdom.

<sup>142</sup> This wording is used by FRANCIS G. JACOBS and THOMAS DEISENHOFER, ‘Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective’ in CLAUDIUS-DIETER EHLERMANN and ISABELLA ATANASIU (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 197.

<sup>143</sup> Conversely, in public enforcement the relevant competition authorities trigger and pursue the investigations and issue orders and sanctions for the ascertained violations. See Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules [2005] SEC (2005) 1732, 3.

<sup>144</sup> Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules’ [2008] SEC (2008) 404.

role of private enforcement alone.<sup>145</sup> Thus, public and private enforcement differ for the consequences that they entail once the infringement has been found. In the Commission's White Paper,<sup>146</sup> the relationship between public and private enforcement is defined as complementary,<sup>147</sup> given that private enforcement, in combination with the action of public authorities, increases deterrence and reduces transgressions of the law.<sup>148</sup> The complementary function of the private enforcement is stressed also by Regulation (EC) 1/2003 which, at Recital (7),<sup>149</sup> underlines the vital role played by national courts in the private enforcement.

If this definition of private enforcement is accepted, private antitrust actions are always civil proceedings.<sup>150</sup> This observation is particularly important when dealing with evidence, because the different nature of the public and private proceedings directly reflects on the management and assessment of evidence and poses, to some extent, different problems. Since the CJEU cannot hear private law suits,<sup>151</sup> the private enforcement of the EU competition rules is a matter of national courts,<sup>152</sup> which are empowered to apply them by Article 6 of Regulation (EC) 1/2003. Each national court will apply its own rules of

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<sup>145</sup> Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules [2008] SEC (2008) 404 17. The White Paper deals exclusively with damages actions, which are the paramount expression of EU private enforcement. Other common forms of private enforcement are actions for injunctive relief, actions for nullity, actions for restitution, actions for declaratory judgments, and rescission, besides defensive litigation. When competition law provisions act as a sword, they represent the grounds for an action seeking compensation or other relief; when they are used as a shield, they come into play as a defence of the party who undergoes the civil proceedings. Common shield actions are counter-actions against the enforcement of a contract or against the enforcement of other rights, such as, for instance, IP rights, when their implementation qualifies as an abuse of dominance. Compare also KOMNINOS, *EC Private Antitrust Enforcement* 2–3.

<sup>146</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final.

<sup>147</sup> Compare Recital (7) of Regulation (EC) 1/2003 and Article 15 of Regulation (EC) 1/2003.

<sup>148</sup> Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules 20–21.

<sup>149</sup> Recital (7) of Regulation (EC) 1/2003 provides that '[w]hen deciding disputes between private individuals, [the national courts] protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.'

<sup>150</sup> KOMNINOS, *EC Private Antitrust Enforcement* 2.

<sup>151</sup> To be more precise, the General Court has jurisdiction to hear actions brought by private individuals, but only against acts of the institutions or agencies of the European Union affecting them directly and individually. The other actions upon which the General Court has jurisdiction are: appeals on point of law against the decisions of the Civil Service Tribunal; actions brought by the Member States against the Commission; actions brought by the Member States against the Council relating to acts adopted in the field of State aid, dumping and acts by which it exercises implementing powers; actions for damages caused by the institutions or their staff; actions based on contracts concluded by the European Union which expressly choose the jurisdiction of the General Court; actions relating to Community trademarks; actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency.

<sup>152</sup> KOMNINOS, *EC Private Antitrust Enforcement* 142. The Author calls them 'European courts endowed with full jurisdiction'.

evidence,<sup>153</sup> albeit in the broader context of the respect of EU general principles.<sup>154</sup> The difficulties arising from such a diverse system of courts and procedures are mainly connected to the consistency and effectiveness of private enforcement.<sup>155</sup> In June 2013, the European Commission adopted the Proposal of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter, simply ‘Proposal for a Directive’).<sup>156</sup> This is an important development for the harmonisation of the private enforcement, especially in conjunction with the general acceptance on the part of the national courts of the signposting offered by the case law of the EU Courts with regard to evidence and their respect of the rules and principles identified by them.

#### **A) The Direct Effect of Articles 101 and 102 TFEU**

Starting in 2001 with preliminary ruling in *Courage*, the ECJ established the principle according to which private individuals within the European Union have a right to compensation for damages for any breach of competition law provisions. The ECJ specified that it was left to the domestic rules of the Member States to (i) allocate cases by establishing the competence and the jurisdiction; and (ii) provide detailed procedural rules to ensure the right of the individuals to claim compensation for damages. Such procedural rules were only limited by the respect of two principles:

a) the principle of equivalence – enjoining that said rules have to be at least as favourable as those applicable to other analogous national action;

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<sup>153</sup> This holds valid only in principle, with the exception of those cases where the law applicable to the matter is different from the *lex loci*. For further details, see Chapter I.

<sup>154</sup> See Regulation (EC) 1/2003, Recital (5) at the end: ‘This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law’.

<sup>155</sup> From national disparities it is very likely to stem inequality in the application of EU antitrust provisions, which has adverse effects on the general goals of increasing deterrence and lowering the amount of anti-competitive infringements. Compare, for such opinion, KOMNINOS, *EC Private Antitrust Enforcement* 146.

<sup>156</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union of 11 June 2013.

b) the principle of effectiveness – enjoining that said rules ought not to render impossible or too difficult the exercise of rights recognized by EU law.<sup>157</sup>

After *Courage* stated the horizontal liability and the full compensation principle, *Manfredi*<sup>158</sup> confirmed and defined more in detail the standpoint of the CJEU as to the application and implementation of such a principle. With regard to the object of the proof, *Manfredi* identified three requirements that allow individuals to ask for a compensation of damages: a) harm; b) infringement; c) causal link between infringement and harm.<sup>159</sup>

Advocate-General van Gerven, in his Opinion in *Banks*,<sup>160</sup> observed that the principle of liability for damages derived from the breach of EU competition law needed a minimum set of rules laid down at the EU level, in order to preserve the uniform application of EU law. The Advocate-General restated, in his Opinion, the rules already established by the case law of the Court of Justice, which must be observed by national courts. In his view, besides respecting the principle of equivalence and effectiveness,

national rules of evidence may not make it practically impossible or excessively difficult to obtain redress as required by Community law, particularly by means of presumptions or rules of evidence which place an unreasonably heavy onus of proof on the individual in

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<sup>157</sup> Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-06297, para. 19. The European Court of Justice refers to a previous case where the two principles were laid down, see C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] I-4025, para. 27: '[...] it follows from consistent case-law since *Francovich I* [that] it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused; further, the conditions, in particular time-limits, for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness)'.

<sup>158</sup> Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-6619. The preliminary ruling was made to the European Court of Justice by the judge (Giudice di Pace) of Bitonto, Italy, who formulated four questions on issues of civil procedure concerning: a) the parallel application of European and national competition law and the compatibility of Article 33(2) of the Italian Competition Act (Law 287/1990) with European competition law provisions; b) the *locus standi* for nullity and damage actions; c) the *dies a quo* of the limitation period to be observed for seeking compensation; d) the adjudicability of punitive damages.

<sup>159</sup> See *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, para. 2 of the conclusions: 'Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.' Compare KOMNINOS, *EC Private Antitrust Enforcement* 175.

<sup>160</sup> Case C-128/92 *HJ Banks & Co. Ltd. v British Coal Corporation* [1994] ECR I-1209, paras. 47 ff.



question, or by means of special limitations concerning the form of the evidence to be adduced, such as the exclusion of anything other than documentary evidence.<sup>161</sup>

This Opinion seems to have been influential on the Commission, which analyzed thoroughly evidence-related aspects both in the Green Paper<sup>162</sup> and the White Paper, focusing on the challenges to successful private enforcement in Europe; and possible solutions to those challenges.<sup>163</sup> Moreover, the Opinion anticipated a general trend, on the part of the EU Courts, to consider the rules on the allocation of the burden of proof as part of the uniform EU rules on proof of competition law.

## B) Evidence in the Commission's White Paper

As regards evidence, the White Paper devotes paragraph 2.2 to access to evidence and *inter partes* disclosure. The Commission makes the proposal to introduce *inter partes* disclosure<sup>164</sup> as a means to counteract the information asymmetry which characterizes competition law matters. More precisely, the suggestions made by the Commission include:

- endowing the national courts with the power to order disclosure, whenever it proves relevant according to the facts at issue and under the condition that the specific item of evidence required is sufficiently identified or, at the least, its category is;
- ensuring that an order for disclosure is not granted unless the facts are clearly established by the plaintiff, who has to produce all evidence existing in his or her sphere of availability which contributes to the likelihood of the claim;
- allowing the disclosure only upon the circumstance that the claimant cannot get hold of the evidence for which the disclosure is to be granted;
- making sure that the disclosure ordered is connoted by relevancy, indispensability and proportionality as to the case;

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<sup>161</sup> *HJ Banks & Co. Ltd. v British Coal Corporation*, Opinion of AG Van Gerven, para. 48. The Advocate-General quoted, as reference for this rule, case C-199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595, para. 14 and C-104/86 *Commission v Italy* [1988] ECR 1799, para. 7.

<sup>162</sup> Green Paper on Damages Actions for Breach of the EC Antitrust Rules of 19 December 2005, COM(2005) 672.

<sup>163</sup> FRIEDRICH WENZEL BULST, 'Of Arms and Armour - The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law' (2008) 2 Bucerius Law Journal 81, 81.

<sup>164</sup> Specific reference is made by the Commission to the approach taken by the Intellectual Property Directive 2004/48/EC, by way of mentioning the two main pillars of the evidence-related aspects of the proceedings: the fact-pleading and the judicial control of the claim and the disclosure request.

- guaranteeing protection from disclosure to corporate statements<sup>165</sup> submitted in the context of a leniency programme;
- imposing effective, substantive or procedural,<sup>166</sup> sanctions in order to bar the defendant from the concealment or destruction of items of evidence or from adopting obstructive behaviour.

In the Commission Staff Working Paper annexed to the White Paper, the Commission fleshes out the issue of evidence, which results to be, if one considers the length of the several paragraphs in which the different topics are addressed, by far the most elaborate and thoroughly discussed. After giving a short explanation of why this topic is so profoundly connected with the difficulty of giving successful implementation to private enforcement in the European system, the Commission goes on to analyse the three main factors that are considered responsible for the poor performance of damages actions at the date of the publication of the White Paper. The first factor, an unavoidable one, is the need for economic evidence in competition law matters, which are, in the words of the Commission, characterized by a ‘fact-intensive’ nature.<sup>167</sup> The second factor, which is also intrinsic to many competition law cases, is the information asymmetry. This is a consequence of the fact that most evidence relevant to substantiate a damage action is usually in the hands of the defendant, or of third parties. The uneven distribution of the evidence in the sphere of accessibility of the two parties contributes highly to the failure of an efficient use of private enforcement. The third factor is the most workable one, according to the Commission: the

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<sup>165</sup> Corporate statements are voluntary declarations made by or on behalf of an undertaking to the Commission by means of which leniency applicants describe the way a cartel work and illustrate contemporaneous documentary evidence substantiating the existence of the infringement. They are prepared to be submitted under the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases of 8 December 2006, OJ C298/17. See THEMISTOKLIS K. GIANNAKOPOULOS, *Safeguarding Companies’ Rights in Competition and Anti-dumping/Anti-subsidies Proceedings* (Kluwer Law International 2011) 210. At an early stage of the application of leniency programmes by the Commission, the corporate statements were submitted in writing, whereas now, also in consideration of the interaction between discoverability and leniency incentives, the Commission permits only oral statements, i.e. the lawyers of the leniency applicants make an oral statement which is recorded by the Commission’s officials at the Commission’s premises. Such records are protected from disclosure under ‘investigatory’ privilege, whereas pre-existing documents upon which the statement is based are protected from disclosure under the ‘lawyer’s work product’ privilege. Given the delicacy of the disclosure of such statements, the European Commission has so far adopted precautions in order to limit it: it has expressly prohibited their disclosure to third parties, via access to file, requests under Regulation (EC) 1049/2001 or requests of assistance by a national court; and the possibility for co-participants to cartels to make verbatim copies of the statements, under their right to access the file, is denied, owing to the fact that such other copies would then be subject to disclosure of third parties. For further details, see SVEN B. VÖLCKER, “‘Case C-360/09, Pfeiderer AG v. Bundeskartellamt, Judgment of the Court of Justice (Grand Chamber) of 14 June 2011’” (2012) 49 *Common Market Law Review* 695, 696–698.

<sup>166</sup> The Commission mentioned the possibility of drawing adverse inferences to punish the defendant’s unlawful behaviour.

<sup>167</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final.



national rules compelling claimants to formulate and plead their allegations in a clear and precise manner (as envisaged by the fact-pleading system).<sup>168</sup> Since, conversely, there are no legal rules reducing or resolving the problem of information asymmetry, this third factor exacerbates the difficulties of getting compensation in action for damages.

The White Paper takes into account alternative solutions to this conundrum. Besides disclosure, it analyses two other methods to dispose of the problem: lowering the standard of proof and/or shifting the burden of proof. The first of the two solutions is rejected because lessening the amount or the cogency of the evidence required to prove an alleged infringement is detrimental to the compensation system. Such a solution would increase the risk of error and abuses. The second solution should be dismissed, according to the Commission, for two reasons. First, shifting the burden of proof is of no use in facilitating the quantification of damages; and, secondly, it could increase the likelihood of frivolous claims.

Both these reasons, however, are not decisive, as shown by the case law of the EU Courts, by the extensive use of presumptions and by other devices shifting the burden of proof (such as the concept of restriction ‘by object’). In the public enforcement, the quantification of damages is less relevant and the prosecutor selects well-founded cases. In the private enforcement, although quantification is crucial, the infringement has first to be established (in stand-alone cases) and the risk of frivolous claims exists only if the allocation of the burden of proof is ill-managed. Further confirmation can be found in the use of presumptions in the Commission’s Proposal for a Directive, which shows that such method is indeed an effective choice.<sup>169</sup>

As already noted, one of the main difficulties confronting claimants is finding sufficient evidence to discharge the burden of proof and win the case (by proving infringement, suffered harm and causal nexus between the two). In some cases, the evidence

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<sup>168</sup> See fn. 67 above.

<sup>169</sup> A similar solution to the problems of proof was outlined by JÜRGEN BASEDOW, ‘Private Enforcement of Article 81 EC: A German View’ in EHLERMANN and ATANASIU (eds), *European competition law annual 2001*, 141. The Author proposed, as a less radical solution than that of introducing pre-trial disclosure, the possibility of creating an obligation for the defendant ‘to clarify certain facts that have occurred in its sphere of influence’. The Author quotes as an example of such procedural rule, in the field of infringement of liability limits in the carriage of goods under Article 29 of the Convention for the International Carriage of Goods by Road (CMR). In those cases, the burden of proving the gross negligence of the carrier rests upon the consignee or the sender. Nonetheless, given that such parties cannot reasonably be in the knowledge of the internal organisation of the carrier’s business, the German Federal Court requires the carrier to provide the court with such information, once the sender or the consignee has made a *prima facie* case of the carrier’s fault.

needed by the claimant will lie in the hands of the defendant.<sup>170</sup> Matters are not helped by the reluctance of defendants to disclose the evidence or, in cartel cases, having an incentive to conceal or destroy such evidence. To overcome such information asymmetry, the Commission's suggestion in the White Paper was to harmonise the procedural rules of Member States, in order to reach a minimum degree of uniformity. As explained below,<sup>171</sup> the case law of the EU Courts seems to have found a partial solution to this problem in the public enforcement – the so-called proof-proximity principle – that can, and should be applied across the Member States of the EU. The European Commission started to work upon the Proposal for a Directive in 2009.

### C) Evidence in the Proposal for a Directive

On 11 June 2013 the European Commission published a Proposal for a Directive.<sup>172</sup> If the European Parliament and the Council will adopt the proposal or any amended version, the Member States will have to implement the Directive with their national laws within the time limit of two years from the date of adoption of the EU Directive. According to the Commission's proposal, the major hindrances to the development of the redress system throughout the EU are still those pinpointed by the Green Paper of 2005. Therefore, the Proposal for a Directive is aimed at integrating public and private enforcement of competition law and at ensuring that the victims of infringements of the EU competition rules can obtain full compensation for the suffered harm.<sup>173</sup> Chapters II to V of the Proposal contain the rules regarding evidence.<sup>174</sup> Chapter II is about the disclosure of evidence; its Article 5 prescribes that Member States should implement rules that allow their national judges ordering disclosure to the defendant or third parties, whenever there is a *prima facie*

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<sup>170</sup> Compare para. 3 above.

<sup>171</sup> Refer to Chapter II, para. 6 of the present dissertation.

<sup>172</sup> More precisely, the European Commission published a package of documents which included, beside the Proposal for a Directive, the Commission Communication 'Towards a European Horizontal Framework for Collective Redress'; a Recommendation on common principles for collective redress; a Communication on the quantification of harm in antitrust cases and a practical guide on quantification, which comprises the analysis of different methods for quantification.

<sup>173</sup> Proposal for a Directive, para. 1.2. According to the Commission's estimates, in the last few years, out of all cases where the Commission found an infringement, only ¼ of them brought to a civil antitrust action for compensation before the national judge.

<sup>174</sup> The other paramount innovations introduced by the Proposal for a Directive are: empowering national courts to order disclosure; making NCAs' infringement decisions binding before national courts; providing a minimum limitation period of five years; permitting the passing-on defence; introducing rules to facilitate consensual dispute resolution and settlements.

case of a right to compensation.<sup>175</sup> There is a *prima facie* case when the claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he or she suffered harm as a result of a competition law infringement.

Article 7 addresses the limits on the use of evidence, requiring *inter alia* the Member States to consider inadmissible leniency corporate statements and settlement submissions obtained solely through access to the file of a NCA. With the purpose of preserving available evidence, Article 8 prescribes that the national courts impose sanctions on parties, third parties and lawyers when they fail or refuse to comply with a disclosure order, or when they destroy relevant evidence, or when they fail to protect confidential information. Member States shall also ensure that the judge may draw adverse inferences from the party's obstruction of justice. In particular, the judge may presume that sufficient proof had been adduced in order to dismiss the claims and defences. Article 9 provide for the binding effect of final decisions, and will be discussed in Chapter III.<sup>176</sup>

As regards the quantification of harm, in order to facilitate the claimant's task, Article 16 shifts the burden of proof on the defendant. Article 16 aims at introducing a rebuttable presumption that cartels produce harm. The same Article provides that the burden and the 'level of proof' and of fact-finding required to prove quantification complies with the proviso of effectiveness, at the same time ensuring that courts are empowered to equitably estimate the damages, where the plaintiff fails to quantify the suffered harm. Incidentally, it must be noted that the use of the expression 'level of proof' on the part of the Commission as opposed to the more widespread 'standard of proof' might be read in light of its desire to refer to an autonomous concept, which does not recall a common law notion of standard of proof. This choice is in line with the case law of the EU Courts, which patently dodge the use of the wording 'standard of proof'. The fact itself that a proposal of legislative intervention cannot avoid reference to the concept, however, seems to endorse the observation that the notion underlay the EU legal system of competition law.

Essentially, the Proposal is directed at making it easier to prove elements of damages action, and, in order to do so, great recourse is made to the device of the shifting of the burden of proof. This device is used not only in relation to the proof of the alleged infringement, but also with regard to the pass-on defence.<sup>177</sup> Where in an action for damages

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<sup>175</sup> This topic is set out in detail in Chapter III, para. 2 D) c).

<sup>176</sup> See Chapter III, para. 1 A).

<sup>177</sup> The passing-on defence is a defence raised by the defendant, who may claim that the plaintiff has been able to pass the damage (wholly or partly) on to his or her customers by raising prices accordingly. It is aimed at

the existence of a claim for damages or the amount of compensation to be awarded depends on whether or to what degree an overcharge was passed on to the claimant, the burden of proving the existence and scope of such pass-on rests with the claimant. The indirect purchaser, nonetheless, shall be deemed to have proven that a passing-on to him or her occurred where he or she has shown that the defendant has committed an infringement; the infringement resulted in an overcharge for the direct purchaser of the defendant; and he or she purchased the goods/services that were the subject of the infringement.<sup>178</sup> When such proof has been reached, the burden of proving that no passing-on to the indirect purchaser occurred shifts to the defendant.

Shifting the burden of proof is not a novelty within the system of enforcement of the EU competition law and its inclusion in this Proposal for a Directive confirms that it is one of those issues of evidence which would be beneficially harmonised at the EU level, as it will be illustrated below.<sup>179</sup>

## **6) THE ENGLISH COMPETITION LAW REGIME**

The two key statutes founding the English competition law regime are the Competition Act 1998 and the Enterprise Act 2002. They govern competition law in different sectors. The two provisions contained in the Competition Act 1998 are Chapter I and Chapter II. Their wording is very close to that of Articles 101 and 102 TFEU. Chapter I and II entered into force on 1 March 2000,<sup>180</sup> and they are intended to operate and to be interpreted in a fashion consistent with their EU equivalents.<sup>181</sup> More specifically, they are to be enforced by means of applying EU principles, unless there is relevant difference between the situations at hand.<sup>182</sup>

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showing that the plaintiff did not suffer any damage. The passing-on defence is connected with the standing of indirect purchasers. If the passing-on defence is not permitted and the indirect purchaser does not have standing, the direct purchaser may be unduly enriched, whilst the indirect purchaser, who has actually suffered the damage, cannot bring any action. See International Competition Network, *Interaction of Public and Private Enforcement in Cartel Cases*, Report to the ICN Annual Conference of May 2007, Moscow, 11.

<sup>178</sup> Proposal for a Directive, Article 13.

<sup>179</sup> See Chapter II, paras. 5-6.

<sup>180</sup> SANDRA MARCO COLINO, *Competition Law of the EU and UK* (7th edn, Oxford University Press 2011) 41.

<sup>181</sup> Lord Simon of Highbury, *Competition Bill*, HL, Deb 30 October 1997, vol. 582, col 1145: 'To ensure smooth interaction between the EC legal and business environment and the UK prohibitions, we intend that the UK prohibition would be interpreted in a manner consistent with the equivalent provisions under EC law. [Section 60] has this effect.'

<sup>182</sup> See, also, para. 8 A) below.

The Enterprise Act 2002 deals mainly with merger control and market investigation references. It is important to note that the Enterprise Act 2002 established a stand-alone provision<sup>183</sup> which rendered cartel infringements a criminal offence,<sup>184</sup> permitting to impose on individuals jail sentences up to a maximum of five years and/or financial sanctions,<sup>185</sup> and competition disqualifications orders.<sup>186</sup> Whilst the criminal offence extends exclusively to the UK (i.e. directly or indirectly fixing a price for the supply of a product or service in the UK; limiting or preventing its supply or production in the UK; dividing supply or costumers in the UK), competition disqualification orders apply also for decisions of the Office of Fair Trading (OFT) in relation to infringements of Article 101 and 102 TFEU. Clearly the criminal offence is a matter of domestic law, because no criminal liability stems directly from the infringement of EU competition law provisions. There is, however, an intersection (in the practice) between the enforcement of the offence and of the civil provision of the Competition Act 1998. Caution must be taken in order to guarantee the rights of the defence in criminal cases, being the enforcement placed under the jurisdiction of the same regulatory body, the OFT.<sup>187</sup> In particular, the OFT is allowed to use all documental evidence gathered in the course of a civil investigation under the UK competition law to pursue a cartel criminal offence, and vice versa. Statements obtained from interviews by the OFT using criminal powers may be admissible in civil proceedings, whereas when the person is interviewed by the OFT using its compulsory civil powers, such evidence cannot be used in subsequent criminal proceedings unless it is contrary to evidence adduced in those criminal proceedings.<sup>188</sup> In addition, the OFT encounters limitations in using evidence obtained by the European Commission or another NCA to sustain the prosecution of a cartel offence. These evidential constraints are likely to affect the strategic choice of the OFT in deciding which type of actions it wants to undertake.

The regulatory organs implementing (EU and UK) competition law in the UK are the OFT, the Competition Commission and the Competition Appeal Tribunal.

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<sup>183</sup> No interference exist theoretically between the EU provisions, the civil provision under the Competition Act 1998 and Section 188 of the Enterprise Act 2002.

<sup>184</sup> To the author's knowledge, cartel infringement are considered criminal offence in England, France, Germany, Ireland and Slovakia.

<sup>185</sup> Enterprise Act 2002, Section 188.

<sup>186</sup> According to competition disqualification orders, directors who have engaged in serious breaches of competition law are prohibited, up to a maximum of 15 years, from being a company director; acting as a receiver of a company's property; promoting, forming or managing a company or act as an insolvency practitioner.

<sup>187</sup> MARCO COLINO, *Competition Law of the EU and UK* 235.

<sup>188</sup> MICHAEL O'KANE, *The Law of Criminal Cartels - Practice and Procedure* (Oxford University Press 2009) 122–123.

The CC (also referred to as ‘CoCo’), which is not strictly relevant to the present discourse, is empowered to investigate mergers and to conduct market investigation references where referred to it by the OFT.<sup>189</sup>

The OFT is the competition and consumer authority of the United Kingdom, a non-ministerial governmental body (in earlier cases referred to as Director General of Fair Trading) which, in the field of competition law, applies Articles 101 and 102 TFEU and enforces Chapter I and II prohibitions; reviews mergers and prosecute cartel offences (for this latter function in partnership with the Serious Fraud Office in England and Wales).<sup>190</sup> OFT decisions are subject to appeal before the CAT<sup>191</sup> both in relation to Chapter I and II prohibitions and Articles 101 and 102 TFEU. The CAT’s jurisdiction extends to the whole of the United Kingdom, but not to criminal matters (including cartel offences). The judicial review of the CAT’s decisions is performed, with permission, by the Court of Appeal.<sup>192</sup>

In the private enforcement, besides the ordinary avenue of bringing a civil action before the Chancery Division of the High Court,<sup>193</sup> there is an alternative avenue provided for by Section 47A of the Competition Act 1998. Indeed, the CAT is endowed with the power of awarding damages and monetary awards for infringements of Chapters I and II of the Competition Act 1998 or of Articles 101 and 102 TFEU, which have been already

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<sup>189</sup> Pursuant to the Enterprise Act 2002, the OFT can investigate where there is a prospect that a merger will lead to a substantial lessening of competition in the UK. If there is, it can refer the merger to the CC for further investigations and the taking of a decision.

<sup>190</sup> MARCO COLINO, *Competition Law of the EU and UK* 42.

<sup>191</sup> The CAT was created by Section 12 and Schedule 2 to the Enterprise Act 2002, which entered into force on 1 April 2003. The ordinary members of the Tribunal have expertise in law, business, accountancy and economics. The usual composition of the Tribunal is the President and two ordinary members. The Tribunal can: i) hear appeals on the merits in respect of decisions made under the Competition Law Act 1998 by the OFT and the regulators in different sectors (electricity, gas, water, telecommunications, railways and air traffic services); ii) hear actions for damages and other monetary claims under the Competition Law Act 1998; iii) review decision of the Secretary of State, OFT and the Competition Commission in respect of merger and market references; iv) hear appeals against certain decision taken by OFCOM (the independent regulator for the UK communications industries) and the Secretary of State under the Communications Act 2003 and the Mobile Roaming European Communities Regulations 2007.

<sup>192</sup> Permission is usually granted only where there is a real prospect of success or other compelling reason why the appeal should be heard. See RICHARD WHISH and DAVID BAILEY, *Competition Law* (7th edn, Oxford University Press 2012) 449.

<sup>193</sup> The Chancery Division has been appointed as competent court in January 2004, pursuant to an amendment of the Civil Procedure Rules, entitled ‘Transfer of Competition Law Claims’ Part 30.8 (1) and (3): ‘(1) This rule applies if, in any proceedings in the Queen’s Bench Division, (other than proceedings in the Commercial or Admiralty Courts) a district registry of the High Court or a county court, a party’s statement of case raises an issue relating to the application of –

(a) Article 81 or Article 82 of the Treaty establishing the European Community; or

(b) Chapter I or II of Part I of the Competition Act 1998. [...]

(3) The court must transfer the proceedings to the Chancery Division of the High Court at the Royal Courts of Justice.’

Before the amendment, both the County Courts (in those cases where the value was £50,000 or less) and the High Court had jurisdiction.



established by the OFT or the European Commission. Decisions of these latter authorities are binding for the civil judge.<sup>194</sup> The CAT cannot award any remedy other than compensation (such as, for instance, injunctive relief) and cannot be resorted to if appeal remedies are not exhausted (i.e. appeal has been unsuccessful or the time limit has expired). Therefore, whilst the High Court can hear both stand-alone and follow-on private antitrust actions,<sup>195</sup> the CAT's concurrent competence is limited to these latter.

Summing up, the Chancery Division is the exclusive jurisdiction (i) for stand-alone actions, that the CAT cannot hear;<sup>196</sup> ii) for all remedies available under the national law (for instance, injunctive relief), because the CAT is only empowered to adjudicate upon claims for damages or other claims to recover a sum of money; and iii) for some other claims under specific circumstances, due to the different limitations periods for bringing actions before the High Court and the CAT. In general, the limitation period for tort actions brought before the High Court is six years from the date in which the negligent conduct occurred;<sup>197</sup> whereas damages actions must be brought before the CAT within two years of the date on which the appeal arising from the public authority's decision has been decided, or of the date of expiry of the time limit for the appeal, or, if later, of the date on which the cause of action accrued. Before the CAT, follow-on actions can be brought also by consumers' associations or other representative entities, on behalf of individually identified consumers.

This situation is bound to change soon, as a result of the combination of the functions of the OFT and the CC into a single new entity: the Competition and Markets Authority (CMA). By means of the same reform, the scope of the power of judicial review of the CAT might be reduced from a full review over the facts and the merits of the decision to a full review only over the penalty. Reasons for such changes appear to lie in the need for

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<sup>194</sup> Competition Act 1998, Section 58A.

<sup>195</sup> The High Court can hear follow-on actions also in relation to legal initiatives with a broader cause of action than the one covered by the competition authority's decision, for instance when the claimant is alleging to have suffered damages from a longer infringement than the one assessed by the public authority; or with different parties, for instance when the claimant is suing other parties than the ones already found guilty by said authority.

<sup>196</sup> When there is no previous finding of infringement by the Commission or the OFT, the action cannot be brought before the CAT. Such previous decision must be final and the public authority must have ruled on that specific issue, and a finding of facts made as part of the general decision is not sufficient: 'No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition [...].' See *English Welsh & Scottish Railway Limited v Enron Coal Services Limited (in liquidation)* [2009] EWCA Civ 647, para. 31.

<sup>197</sup> Compare Part I, Section 2 of the Limitation Act 1980: 'An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.'

streamlined procedure and consistency across regulatory sectors, in which the scope of the review is limited. It is particularly worth noting, in this context, that the restriction of the appeal to those cases in which relevant ‘new evidence’ has become available at appeal stage is strongly criticised. According to commentators,<sup>198</sup> if appeals focus only on decisions affected by material errors or on cases where novel evidence is adduced, there is a serious risk of sacrificing the interest of justice. The case management powers of the CAT (for instance, the power of admitting evidence which was not available to the administrative authorities and whose introduction at appeal stage is justified) are often conducive to the sound exercise of public powers and for the goals of effectiveness and deterrence. Concomitantly, the jurisdiction on the merits of the CAT is often referred to as a means to ensure the protection of fundamental rights and to warrant compliance with Article 6 ECHR. According to a former President of the CAT, reducing the jurisdiction to a more limited judicial review would dumb down the intensity of judicial oversight and play down the quality of the regulatory decisions themselves.<sup>199</sup>

## 7) THE ITALIAN COMPETITION LAW REGIME

Italian competition law provisions are contained in Law 287/1990. Articles 2 and 3 are modelled on Articles 101 and 102 TFEU. The enforcement of both national and EU competition law provisions is, in relation to the public enforcement, the responsibility of the *Autorità Garante del Commercio e del Mercato* (AGCM, also known as ‘Antitrust Authority’) established in 1990. It operates as an independent body. Besides the enforcement of competition law, it also protects consumers from unfair commercial practices and misleading advertising.

The judicial review over the decisions of the AGCM, which is located in Rome, is exercised by the Regional Administrative Tribunal (TAR) of Lazio, which has an exclusive competence to review its decisions.<sup>200</sup> The review, which is limited to issues of law, is extended to encompass the merits of the case in relation to the sanctions imposed by the

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<sup>198</sup> ARIANNA ANDREANGELI, ‘The Future of the UK Competition Enforcement Regime - More Food for Thought for the CMA?’ (Competition Law in Edinburgh, 23 September 2013) <[www.clie.law.ed.ac.uk/](http://www.clie.law.ed.ac.uk/)> accessed 17 December 2013.

<sup>199</sup> GERALD BARLING, ‘Reforming the UK Competition Regime - Assessing the Impact of New Legislation and Challenges Ahead for the CMA’, 10 September 2013, Westminster Business Forum.

<sup>200</sup> Italian Administrative Procedure Code, Articles 133(1)(l) and 135(1)(b).



AGCM. The extent of the power of the TAR Lazio is indeed analogous to that of the General Court over the European Commission's decisions.<sup>201</sup>

The Italian legal system provides for two levels of judicial review of the AGCM's decisions. The decision taken by the TAR Lazio, as a court of first instance, can be challenged as for its legitimacy, before the Council of State, which is the last instance administrative court. As it will be explained in detail later,<sup>202</sup> both administrative courts have, in the practice, wide powers to review the decisions of the AGCM, in particular as regards the accuracy of the findings of fact and economic assessments. Nonetheless, the administrative courts cannot substitute their judgment to the one taken by the regulatory body, as they do not act as appellate courts. As a result, AGCM's decisions, when they are not upheld, may only be totally or partly annulled. This holds true for any part of the decision except for the one concerning the amount of the fine imposed, which is subject to a full review on the merits and which can be directly substituted.

With regard to the Italian private enforcement, the jurisdiction belongs to specialised divisions within the ordinary courts, the so-called Enterprise Courts, pursuant to the amended<sup>203</sup> d. lgs. 168/2003, Article 3 lett. c) and d). According to Article 33(2) of Law 287/1990, these courts can hear all disputes relating to Italian and EU antitrust law infringements.<sup>204</sup>

## **8) EU LAW AND THE ENFORCEMENT OF EU COMPETITION LAW AT THE NATIONAL LEVEL**

Before moving on to the qualification of evidence-related issues in EU antitrust law, a short illustration of the relationship between EU law and the national legal regimes of competition law could prove useful. It is material to clarify, with regard to competition law, the hierarchy between EU law and national legal systems. The interactions examined are: between the EU competition law and the national competition laws, on the one hand; and between the EU competition law and the national civil procedural systems, on the other.

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<sup>201</sup> Council of State, 2 February 2004, decision no. 926, para. 3.3.

<sup>202</sup> See text accompanying fn. 495 to 499.

<sup>203</sup> D. lgs. 168/2003 was amended by d.l. 1/2012, passed with amendments by law no. 27 of 24 March 2012, enacted on 25 March 2012.

<sup>204</sup> For a detailed analysis of all types of actions that can be brought under Article 33(2) of Law 287/1990, see FABIO VALERINI, 'Il giudizio di merito nell'azione antitrust' in LORENZO FEDERICO PACE (ed), *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 232–236.

### A) The Relationship between EU Competition Law and National Competition Laws

With regard to the first aspect, which is less relevant to the present discussion, but still important to clarify, it has been already showed how the competition laws of the EU Member States are frequently moulded on the relevant provisions of the TFEU. This is certainly the case of England and Italy. Furthermore, both national competition laws contain a specific provision recommending the NCA and the national judge to interpret the domestic law according to the guidance provided by the EU Courts. Section 60(1) of the Competition Act 1998 provides that:

The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions [...] in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

In addition, Section 60(2)(b) provides that when the national court determines a question relating to competition, it must act with a view to secure that no inconsistencies arise between its decision and the principles laid down by the Treaty and the Luxembourg Courts and their case law. By the same token, Article 1(4) of Law 287/1990 expressly provides that the interpretation of that law must be done according to the principles of EU competition law. These provisions do not compel competition authorities and judges to abide by the procedure of the European Commission and the EU Courts, but compel them to follow the principles that these institutions adopt and to follow their interpretation. They were inspired by the need to avoid misuse of powers, misinterpretation and creative lawyering in the early days of introduction of the domestic competition laws.<sup>205</sup> Clearly, the existence of such provisions does not have any *direct* effect on the converging interpretation of the issues of evidence arising out in relation to EU competition law enforcement. Nonetheless, given that the same administrative and adjudicative bodies enforce national and EU competition provisions at the national level, they will tend to adopt similar views when applying identical rules, like Articles 101 and 102 TFEU and their national transpositions.

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<sup>205</sup> PAOLO GIUDICI, 'Private Antitrust Enforcement in Italy' (2004) 1 Competition Law Review 61, 68.

Consequently, it is likely that an analogous perspective will be adopted in similar cases, even if the scope of the provisions and the markets affected are different.

With regard to the second aspect, far more relevant to the present discussion, three guiding principles must be referred to: the principle of subsidiarity (Article 5 TEU); the principle of supremacy of EU law (Article 4(3) TEU); and the principle of the direct effect of Article 101 and 102 TFEU.<sup>206</sup> But whilst these principles undoubtedly govern the allocation of competences and the substantive application of EU law, they do not solve the issue of the relationship between EU law and national procedural law. To govern this latter relationship two other principles come into play (or, rather a balance between the two): the principle of procedural autonomy, on one hand; and the principle of effectiveness, on the other.

## **B) The Relationship between EU Competition Law and National Procedural Systems**

Articles 101 and 102 TFEU have direct effect, and therefore can be enforced without need for any further implementation at the national level. Those Treaty provisions need to be enforced through the national institutional architecture. Since national procedural rules fill in the gaps left by EU law, the potential for diversity and discrepancy in the implementation of EU competition law is high. Examples include standing, collective redress, remedies and, of course, the approach to evidence. These differences entail a high risk of undermining the effectiveness of EU competition law.<sup>207</sup> That being so, a degree of harmonization in this field is highly desirable, without impairing those national differences which ought not to be ruled out. Harmonization of procedural provisions would be the only way to rule out those differences, if ever, since the current negative integration approach is not sufficient to provide Member States with a clear guidance, nor a reference for eliminating inequalities and discrimination.<sup>208</sup> While some substantive rules like the allocation of the legal burden of proof are contained in Regulation (EC) 1/2003, and are therefore directly applicable by NCAs and national judges, procedural rules should theoretically remain a matter for national provisions.<sup>209</sup>

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<sup>206</sup> MARCO COLINO, *Competition Law of the EU and UK* 38–40.

<sup>207</sup> STORSKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered 2*.

<sup>208</sup> KOMNINOS, *EC Private Antitrust Enforcement* 146.

<sup>209</sup> MICHAEL M. COLLINS, 'The Burden and Standard of Proof in Competition Litigation and Problems of Judicial Evaluation' (2004) 5 ERA Forum 66, 68–69.

The principle of institutional, procedural and remedial autonomy of the Member States provides that, in order to implement EU law provisions at the national level, it is for the domestic rules to govern the procedural aspects of the matter, identify the competent courts and the types of remedies available.<sup>210</sup> Such a principle goes back to the EU case law in *Rewe Zentralfinanz*<sup>211</sup> and *Comet*,<sup>212</sup> and has been subsequently adjusted to competition cases in *Courage* and *Manfredi*. The case law of the CJEU expects the Member States domestic systems to specify the detailed procedural rules governing the enforcement of EU competition law, in the absence of EU procedural rules.<sup>213</sup> Foremost among these rules are the rules of evidence, which play a paramount role in the enforcement of competition law. With regard to the relationship between EU law and national procedural systems, two approaches have been followed to date: the most classical one is the ‘integration approach’, whereas a more recent one is the ‘international approach’.<sup>214</sup>

#### ***a) The Integration Approach***

The so-called ‘integration approach’ is the approach according to which the balance between the procedural autonomy of the Member States and the principle of effectiveness is struck giving precedence to the former. In particular, according to this perspective, EU law is integrated by national law and only this latter ensures the respect of procedural guarantees. As a result, the Member States enjoy procedural autonomy, provided that the two conditions of equivalence and effectiveness are respected. The less recent case law of the CJEU seems to endorse this approach, providing that:

in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State [...] to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically

<sup>210</sup> KOMNINOS, *EC Private Antitrust Enforcement* 147.

<sup>211</sup> Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.

<sup>212</sup> Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, para. 13.

<sup>213</sup> See, for the private enforcement, case C-453/99 *Courage Ltd v. Bernard Crehan and Bernard Crehan v Courage Ltd and others* [2001] I-06297, para. 29.

<sup>214</sup> For this distinction and for sections a) and b), reference has largely been made to ENZO CANNIZZARO, ‘Sui rapporti fra sistemi processuali nazionali e diritto dell’Unione Europea’ [2008] *Il Diritto dell’Unione Europea* 447, 447–450. The Author, in particular, focuses on the impact of EU law on national rules governing the *res judicata* effect.

impossible or excessively difficult the exercise of rights conferred by Community law [...].<sup>215</sup>

### ***b) The International Approach***

The international approach accords more importance to the supremacy of EU law and to the *effet utile*. According to this perspective, EU law is superimposed on the national legal system, whose procedural rules are the instrument by means of which effect is given to EU provisions. Procedural rules, therefore, ought not to hinder, in any way, the application of EU law. It appears that this latter scheme has recently started to prevail, in the case law of the EU Courts, particularly with a view to safeguarding the *effet utile* in those cases where national procedural rules may constitute an impediment to it.<sup>216</sup> Nevertheless, even if, in the furtherance of effectiveness, procedural autonomy may be played down, the adoption of an international approach is not tantamount to harmonisation with regard to procedural rules. Indeed, considerable leeway is still left to domestic provisions, under the condition that they do not deter the application of EU law.

Even if one adopts the ‘international approach’, it by no means follows that national rules on proof will fall foul of the EU law and will need to be substituted by EU rules on proof. Only those national rules on proof that are considered to hinder significantly the application of EU law may be elided. The uncovered area where national rules of evidence should be preserved by virtue of the procedural autonomy, however, is influenced by the EU jurisprudence, well beyond the twin principles of equivalence and effectiveness and, in the author’s opinion, mainly with beneficial effects. As it will be showed in Chapter II, considerable convergence is reached on the rules on proof between the EU level and the national level. This process appears to be inspired often by the target of effectiveness and can be considered an expression of an overall propensity for the ‘international approach’ in this field of law. For those (many) rules of evidence which are not governed by EU law, NCAs and national judges voluntarily adopt rules of proof laid down by the case law of the Luxembourg Courts, in pursuance of the *effet utile*. One example of this jurisprudential harmonization is the one of evidential presumptions. Presumptions affect the evidential burden of proof and, therefore, the standard of proof. They could be considered as a

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<sup>215</sup> *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, para. 29.

<sup>216</sup> CANNIZZARO, ‘Sui rapporti fra sistemi processuali nazionali e diritto dell’Unione Europea’ 450.

‘procedural’ issue. Nonetheless, presumptions applied by the EU Courts when dealing with competition law matters become part of the substantive scope of Articles 101 and 102 TFEU,<sup>217</sup> and have to be applied by NCAs and national judges in their direct application of those provisions.<sup>218</sup>

This *ad hoc* process of harmonization by ‘international convergence’ proves to be considerably smoother than the imposition of exogenous legal rules by means of a Regulation or even of a Directive, for two reasons. First, it is softer and diluted in time. Secondly, it directly gives NCAs and national judges the power and the responsibility to adhere to uniform substantive or procedural rules. This is valuable because NCAs and national judges are in the best position to embody changes and transfer their knowledge to the other players in the proceedings.

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<sup>217</sup> RENATO NAZZINI, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press 2011) 291.

<sup>218</sup> Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 53: ‘In applying Article 81 EC, any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States. As regards the presumption of a causal connection formulated by the Court in connection with the interpretation of Article 81(1) EC, [...] the Court went on to consider that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. [...] In those circumstances, it must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law.’ See, for further details, Chapter II, para. 5 of the present dissertation.

## Chapter I – Evidence in EU Competition Law: Between Substance and Procedure

### 1) EVIDENCE LAW IN CIVIL AND COMMON LAW TRADITION

Evidence is the pivotal element of adjudication.<sup>1</sup> Without prejudice to the national differences and peculiarities, legal proceedings can always be reduced to three stages: (i) allegation of facts; (ii) proof of facts with evidence; and (iii) decision-making. Relying heavily on evidence to reach a decision is normally an unavoidable step. The need to adduce and evaluate evidence is only unnecessary where the facts are known to the judge at all times.<sup>2</sup> In all other cases, evidence is crucial. Yet, extremely hard to classify. Evidence may be considered as part of substantive law or of procedural law; or, in alternative, may be considered as the intersection between these two spheres of law.<sup>3</sup> Not all European legal systems separate the law of evidence law from civil procedural law and, more importantly, there is no single way across legal systems to characterise evidence. Many continental legal systems, and particularly those based on the Napoleonic code,<sup>4</sup> set out the rules concerning the allocation of the burden of proof, the types of evidence envisaged, the admissibility of evidence and its probative value in their civil codes. Rules governing the gathering and handling of evidence are usually located in the civil procedure codes. This two-fold allocation of the rules concerning evidence supports the idea that evidence acts as an intersection between substantive civil law and procedural civil law and, indeed, inspired the

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<sup>1</sup> LAURENCE IDOT, 'Access to Evidence and Files of Competition Authorities' in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 259.

<sup>2</sup> JOSÉ LEBRE DE FREITAS (ed), *The Law of Evidence in the European Union* (Kluwer Law International 2004) 1. It must be pointed out that, in some systems, evidence might not be necessary according to statutory provisions or other rules which operate as strong inferences in favour of the claimant. An example is, in English tort law, the effect of *res ipsa loquitur*.

<sup>3</sup> C. H. VAN RHEE and REMME VERKERK, 'Civil Procedure' [2006] Elgar Encyclopedia of Comparative Law 120, 120. As highlighted by the Authors, one of the difficulties of providing a clear-cut definition of 'civil procedure' has to do with the blurred distinction between procedure and substance. In the words of the commentators: 'Substantive law *inter alia* defines, regulates and creates rights and duties, whereas procedural law regulates the legal proceedings in case of a dispute concerning those rights and duties. However, in practice the distinction is not always that clear. How should, for example, remedies in English law be classified? Do they belong to the domain of procedural or substantive law? [...] And to what area of the law do the rules on proof belong? [...]'

<sup>4</sup> This is the case of Italy, France, Belgium, Luxembourg and Portugal.



outline of this thesis. Conversely, the common law tradition and the legal tradition of some other European civil law systems<sup>5</sup> identify all rules of evidence as rules of procedure.<sup>6</sup>

The dichotomy between substance and procedure is, especially in relation to EU law matters, losing much of its attractiveness.<sup>7</sup> A European process of re-interpretation of this dichotomy is underway,<sup>8</sup> but the distinction between substance and procedure still entails important consequences. Namely, characterisation of the rules of evidence according to the substance-procedure dichotomy is not merely theoretical in nature. In EU competition law, it has significant implications under two main perspectives: on the one hand, with regard to the relationship between EU law and national procedural systems;<sup>9</sup> on the other, with regard to the relationship between *lex causae* and *lex fori* in the private enforcement.

Within the first intersection, if a particular issue is qualified as substantive rather than procedural, it will fall under EU law directly, and the national law will not govern it. Contrariwise, if it is considered as procedural, it may be governed, according to the perspective to which one adheres,<sup>10</sup> either exclusively by national procedural law, with the only proviso that equivalence and effectiveness are respected; or by national procedural law as an instrument for the application of EU law, and under the condition that the former fully implements the latter. For instance, if, under EU law, the evidential burden of proof qualifies as a ‘procedural’ issue, because it ultimately reverts to the standard of proof (and therefore falls out of the scope of Article 2 of Regulation (EC) 1/2003), such issue will be governed exclusively by national law, which does not necessarily need to integrate EU presumptions. By contrast, if it qualifies as a substantive issue, EU law will govern it, and reference to the case law of the EU Courts with regard to presumptions is mandatory.

Within the second intersection, which concerns private enforcement exclusively, characterisation of the issue as substantive or procedural also entails important consequences. It is well-known that the national judge may be required, in multi-jurisdictional antitrust actions, to apply the law of a country different from his or her own.

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<sup>5</sup> Such as Greece, the Netherlands, Sweden and Norway. Slightly differently, Germany, Austria and Switzerland put all rules of evidence in the Code of Civil Procedure, with the only exception of the rules concerning the allocation of the *onus probandi*.

<sup>6</sup> LEBRE DE FREITAS, *The Law of Evidence in the European Union* 3.

<sup>7</sup> ELSABE SCHOEMAN, ‘Rome II and the Substance-Procedure Dichotomy: Crossing the Rubicon’ (2010) 81 *Lloyd’s Maritime and Commercial Law Quarterly* 81, 93.

<sup>8</sup> See, for instance, the original characterisation operated by Rome I and Rome II Regulations of matters such as limitation periods, burden of proof, presumptions, mode of proof, interlocutory injunctions and forms of compensation.

<sup>9</sup> This perspective refers to both the judicial review of NCA’s decisions and the private enforcement of EU competition law.

<sup>10</sup> See text accompanying fn. 207 to 218.

Consequently, in those countries where procedural rules only encompass the gathering and the handling of the proof, the rules of evidence of another country (for instance, as regards the apportionment of the burden of proof, the object of the proof, or the relevant presumptions) may, in principle, be applied by means of the applicable law. Conversely, in common law countries, where it is generally considered that rules of evidence are procedural, the national judge should always make reference to his or her national law, as law of the forum.

The results attained by means of applying the conflict of laws rules, however, are not always easy or satisfying. The main reason is that when the substance of the matter is governed by EU rules for choice of law, what qualifies as a procedural matter is autonomously determined by EU law and differs from what qualifies as a procedural matter under national law.<sup>11</sup> For instance, when the matter falls under the jurisdiction of a court of a Member State of the European Union, for civil antitrust actions brought by individuals who have (allegedly) been harmed by contractual breaches, reference can be made to Article 18 of Regulation (EC) 593/2008 (Rome I).<sup>12</sup> For actions in tort and other non-contractual obligations, to Article 22 of Regulation (EC) 864/2007 (Rome II).<sup>13</sup> This is the only evidential matter that is expressly governed by EU uniform private international law. The formulation of the two provisions is analogous. The applicable law (*lex causae*) applies to the extent that it contains rules which raise presumptions of law or determine the burden of proof.<sup>14</sup> A contract or an act intended to have legal effect may be proved by any type of proof recognised by the law of the forum or by any other law according to which the obligation has validly arisen, if such latter type of proof can be administered by the forum.<sup>15</sup>

In competition law cases, however, Article 2 of Regulation (EC) 1/2003 determines the allocation of the legal burden of proof. Adopting the distinction between the evidential and legal burden of proof as adumbrated by the case law of the EU Courts would ease the tension.<sup>16</sup> It is not, however, completely clear whether those choice of law rules incorporate judicially created presumptions in their role as part of the substantive applicable law of the

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<sup>11</sup> ADRIAN BRIGGS, *The Conflict of Laws* (3rd edn, Oxford University Press 2013), Clarendon Law Series 197.

<sup>12</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), OJ [2008] L 177/6.

<sup>13</sup> Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ [2007] L 199/40.

<sup>14</sup> Article 18(1) and Article 22(1) of Rome I and Rome II Regulations.

<sup>15</sup> Article 18(2) and Article 22(2) of Rome I and Rome II Regulations.

<sup>16</sup> See Chapter II, text accompanying fn. 149 to 157.

EU<sup>17</sup> (therefore depriving the choice of law rule of its substantial meaning, for the solution would be the same across the EU), or not (and therefore depriving Article 2 of Regulation (EC) 1/2003 of any effect, or, at the least, making it redundant in the private enforcement, for the solution would be the one laid down by the applicable law). Moreover, since the evidential burden of proof (and presumptions of fact) is often intertwined with the assessment of the probative value of the evidence, which traditionally falls within the scope of the *lex fori*,<sup>18</sup> it appears that such inconvenient *depeçage* is very likely to be ill-managed by national courts. Whilst the evaluation of the probative value of evidence and the hierarchy between different means of proof is undoubtedly a matter for national procedural law, the applicable law still governs the application of any presumptions, and, in particular, the determination of whether the lack of direct evidence entitles the judge to rely on circumstantial evidence. In addition, since the probative assessment of evidence is strongly intertwined with other procedural law issues, such as admissibility,<sup>19</sup> allocation of the evidential burden of proof, and the standard of proof,<sup>20</sup> it is submitted that it would be inconvenient to subject them to different laws, thus creating profound discrepancies.<sup>21</sup> Preference should be given to the guidelines offered by the EU Courts in order to reach uniform procedural solutions, whenever possible.

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<sup>17</sup> As the EU case law seems to suggest. Compare Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 53: '[I]t must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law.'

<sup>18</sup> In this regard, it must be specified that the probative value of evidence can be governed by different laws according to the type of evidence assessed. It is generally agreed that written documents are governed by the *lex loci actus* (i.e. the law of the place where the document was drafted or the transaction concluded), whereas testimony and presumptions of facts are governed by the *lex fori*. Compare, for this opinion, ERIC FONGARO, *La loi applicable à la preuve en droit international privé* (L.G.D.J. 2004) 108–109.

<sup>19</sup> For the opinion that admissibility and probative value of evidence should be governed by the same law to preserve legal certainty and predictability, see, with regard to Rome I Regulation, ANTONIO LEANDRO, 'Articolo 18, Onere della prova' in FRANCESCO SALERNO and PIETRO FRANZINA (eds) *Commentario al Regolamento (CE) 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (Roma I)* [2009] *Nuove Leggi Civili Commentate* 886–892, 892.

<sup>20</sup> Note that the standard of proof is traditionally considered as a procedural issue, but with less conviction than other questions, such as that of admissibility. Since, in the next paragraphs, it will be illustrated how the standard of proof is linked to the allocation of the evidential burden of proof, the assessment of the probative value of evidence, and the use of presumptions, it is contended here that all these issues should be to the maximum extent possible governed by the same law, the EU law of evidence, which, at the present stage, is established by means of the case law of the EU Courts.

<sup>21</sup> See, for this opinion, also MARIE-LAURE NIBOYET, 'Contre le dogme de la *lex fori* en matière de procédure' in *Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon* (Daloz-Sirey 2008) 372–373, who contends that issues of probative value and administration of evidence are so strongly connected to other issues concerning evidence, such as admissibility, that they should all be subject to the same law, namely the *lex causae*.

Finally, a clash clearly arises with regard to presumptions of causation, such as those contained in the Proposal for a Directive. In particular, in order to lighten the burden of proof for the claimant, Article 16 of the Proposal for a Directive introduces a rebuttable presumption that anti-competitive infringements produce harm. The establishment of causation and the definition of the object of the proof, traditionally considered a matter of national law,<sup>22</sup> would then be governed by EU law.

Against this background, it appears to be far more effective to adopt uniform European rules of management of evidence.<sup>23</sup> Indeed, it seems that many questions of evidence, such as those revolving upon the object of the proof, the allocation of the burden of proof and the standard of proof now fall under EU law. This is partly due to the rules contained in Regulations and soft law (Notices),<sup>24</sup> but to a much greater extent to the voluntary convergence of the national courts towards the rules on proof applied by the EU Courts. The flexibility in the characterisation of issues of evidence could be part of a general trend across the EU, implemented also by the advent of uniform choice of law instruments, which have substracted specific issues from the scope of the national *lex fori*.<sup>25</sup> But, on one hand, this ‘substraction’ occurs only for common law countries, given that most continental systems already qualified those issues as substantive;<sup>26</sup> on the other, it is very limited in relation to evidence (as already noted, only Article 18 and 22 of Rome I and II Regulations).

In the field of competition law, it seems more plausible that the progressive convergence of rules on proof is traced back to the ‘integration approach’ and to the prevalence attributed to effectiveness over procedural autonomy. In this vein, it appears that,

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<sup>22</sup> *Society of Lloyd’s v John Stewart Clementson* [1997] ECC 193 Queen’s Bench Division (Comm), para. 61: ‘It is common ground that the questions of causation and remoteness of loss are determined by English law.’

<sup>23</sup> For instance, considerations connected to where the relevant evidence is located might redirect the choice of jurisdiction within which the claim is brought – and therefore possibly influence the allocation of the evidential burden of proof, if one adopts the view that it should be borne by the party in whose hands the evidence is available, as opposed to the general head of jurisdiction of the defendant’s domicile. For more on the proof-proximity principle, refer to Chapter II, para. 6.

<sup>24</sup> For the ‘quasi-legislative’ role taken on by the Commission with regard to all issues that can be dealt with at the national level, see FRANCESCO MUNARI, ‘Antitrust Enforcement after the Entry into Force of Regulation (EC) 1/2003: the Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts’ in BERNARDO CORTESE (ed), *EU Competition Law* (Wolters Kluwer 2014) 116–117.

<sup>25</sup> SCHOEMAN, ‘Rome II and the Substance-Procedure Dichotomy: Crossing the Rubicon’ 88; RICHARD GARNETT, *Substance and Procedure in Private International Law* (Oxford University Press 2012) 189–190; MARTIN ILLMER, ‘Neutrality Matters - Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law’ (2009) 28 *Civil Justice Quarterly* 237, 253.

<sup>26</sup> As evidence of such trend in civil law systems, GARNETT, *Substance and Procedure in Private International Law* 190, quotes Article 3130 of the Quebec Civil Code, as one of the most blatant examples: ‘Evidence is governed by the law applicable to the merits of the dispute, subject to any rule of the court seized of the matter which are more favourable to the establishment of evidence.’

in the private enforcement, such indirect process of harmonization via the assessment of evidence by the EU Courts could enhance the effectiveness of the system. In turn, this would create uniform rules of management of evidence. It would also rectify discrepancies created by the application of general conflict of laws rules that were not designed specifically to meet the particular characteristics of antitrust law.<sup>27</sup> In the enforcement of EU competition law, the ‘subtraction’ of evidential issues from the *lex fori* is even more accentuated. Instead of expanding the role of the *lex causae* and narrowing that of the *lex fori*, we witness a progressive broadening of the scope of the EU law and narrowing of national procedural laws. Aiming at effectiveness, EU law thus covers evidential and procedural issues, curtailing the role of the forum also with regard to many rules affecting the outcome of the case. This is due to the fact that many of those procedural issues are intertwined with the substantive law (i.e. EU competition law). Consequently, EU law redefines the substance-procedure dichotomy so as to serve its purposes.

Regarding the types of evidence that are available in antitrust cases, a distinction between common law and civil law tradition could be once again drawn, but has little significance in the practice. In common law, there is no closed list of types of evidence. Any type of evidence is admissible, subject to the limits that are imposed by the case law. The means of evidence usually accepted under English law are testimony, hearsay, documental evidence (including any type of exhibits) and expert evidence.<sup>28</sup> Conversely, in civil law traditions, lists of the admissible means of evidence are often found in the civil codes. The most widely accepted types of evidence are witness testimony, documental evidence, in-court or out-of-court inspections by the judge and expert evidence. Other common types of evidence are presumptions,<sup>29</sup> confessions, oaths or affidavits, oral examination and the litigants’ behaviour. Nonetheless, even when the list of the types of evidence is prescribed by civil codes, it is not exhaustive and is normally interpreted broadly, so as to encompass different possibilities of storing data and new technologies.<sup>30</sup> Usually common law does not attribute probative value to evidence and adduced evidence is subject to the free evaluation of the judge. Conversely, in accordance with listing admissible types of evidence, civil

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<sup>27</sup> See Introduction, para. 3.

<sup>28</sup> GORDON BLANKE and RENATO NAZZINI (eds), *International Competition Litigation - A Multijurisdictional Handbook* (Wolters Kluwer 2012) 156–157.

<sup>29</sup> Although it is not possible to consider presumptions as proper means of adducing evidence, they are often, in civil legal systems, included in such broad category. Compare ENRICO REDENTI and MARIO VELLANI, *Diritto processuale civile* (Giuffrè 2011) 174; LUIGI PAOLO COMOGLIO, *Le prove civili* (3rd edn, UTET Giuridica 2010) 645.

<sup>30</sup> LEBRE DE FREITAS, *The Law of Evidence in the European Union* 9–10.

codes derived from the Napoleonic tradition sometimes set the probative value of single types of evidence.

As a final thought on this point, it must be restated that, when applying EU competition law, NCAs and national judges are strongly influenced by the evaluation of evidence by the European Commission and the EU Courts and a high degree of harmonization is attained through the case law of the EU Courts. In addition to Article 2 Regulation (EC) 1/2003, reference must be made to the rules on evidence applied by the EU Courts in competition matters. These rules could be applied uniformly across the EU and complement (or supplement) the national provisions. Chapter II is devoted to the identification of such general rules and the circumstances in which such convergence is witnessed.

## 2) THE APPLICABLE LAW OF EVIDENCE OF EU COMPETITION LAW

In order to determine which rules on proof are applicable to EU competition law cases it is necessary to determine who is enforcing them: the EU Commission or the NCAs (in the sphere of public enforcement); or the national judge (in the context of private enforcement).<sup>31</sup> For some evidence-related issues, EU law is directly applicable. A clear example is Article 2 of Regulation (EC) 1/2003; the same legal burden of proof is applied by the European Commission, the NCAs, and the national judges. Some aspects, such as presumptions of fact, are governed by the case law of the EU Courts. It has been noted above<sup>32</sup> how convergence beyond the *effet utile* standard is progressively reached on those aspects that are not harmonised. This convergence is voluntary and operates only for some

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<sup>31</sup> A different topic is that of the concurrent application of EU and national competition law. According to Article 3 of Regulation (EC) 1/2003, it is possible that EU and national competition law apply concurrently to the same infringement. As a general principle, the application of national law in concurrence with EU law is only acceptable where it does not jeopardize the coherent and uniform application of the EU law, due to the supremacy of this latter. Where this two laws clash, EU law takes precedence, but the Member States are not precluded from applying on their territory stricter national competition laws regulating unilateral behaviour. The landmark case in this regard is case C-14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR 1, paras. 5 and 9, where the Court of Justice affirmed the possibility of a parallel application of the EU and national competition law, provided that the latter ‘does not prejudice the uniform application, throughout the Common Market, of the Community rules’. Yet, national authorities can ‘take action against an agreement, in accordance with their internal law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it’. Compare case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, paras. 51-52 and Article 16(1) of Regulation (EC) 1/2003.

<sup>32</sup> Reference is made to the adoption of an ‘international approach’ with regard to the relationship between EU law and national procedural systems of the Member States.



areas left uncovered by EU law. Indeed, not all aspects of evidence/proof in competition law have been harmonised. Other issues (e.g. admissibility of evidence, proof of causation, economic evidence) are still determined by national laws. Thus it is important to determine whether a specific matter falls under the jurisdiction of the European Commission or of a NCA, for the purposes of public enforcement, and, for the private enforcement, the court of which Member State has jurisdiction upon the case and which law is applicable to the case. These latter questions are addressed in the following paragraphs.

## **A) Public Enforcement: Coordination between European Commission and NCAs**

### ***a) Before the Initiation of Proceedings: Allocation of Cases***

Recital 18 of Regulation (EC) 1/2003 provides that competition authorities ‘should suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority [...]’. The criteria for the allocation of cases between the Commission and one or more NCAs can be found in the Commission Notice on Cooperation within the Network of Competition Authorities (Network Notice).<sup>33</sup> Usually NCAs are considered in a good position to deal with a case if there is a ‘material link’ with the case and therefore if:

1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within, or originates from its territory;
2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.<sup>34</sup>

The physical location of evidence is therefore one of the criteria that is relevant for the allocation of cases before NCAs in the public enforcement. Parallel action of two or three NCAs may be appropriate if the anti-competitive agreement or practice substantially affects competition in their respective territories and the action of one NCA would not be sufficient

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<sup>33</sup> Commission Notice on cooperation within the network of competition authorities, OJ [2004] C101/43 (hereinafter, simply, ‘Network Notice’).

<sup>34</sup> Network Notice 8.



to bring an end to the infringement in question.<sup>35</sup> The Commission is well placed to deal with a case when the agreement or practice has effects in more than three Member States. The NCAs can request the Commission to start proceedings or to take up their cases, when deemed necessary. In addition, the Commission may choose to deal with cases closely linked to other Commission proceedings or in those cases where a Commission's decision is needed to develop the EU competition policy or to ensure effective enforcement.

To ensure consistency within the European system, the NCAs must inform without delay the Commission after starting proceedings (the first formal investigation measure)<sup>36</sup> and later on supply the Commission with a summary of the case and any eventual draft decisions, no later than 30 days prior to its adoption.<sup>37</sup>

### ***b) Along the Proceedings: Cooperation During the Phase of the Investigation***

Issues related to the gathering of evidence and its sharing will be analyzed in Chapter III. For present purposes, it will suffice to anticipate that the cooperation between NCAs and the Commission is touched upon by Article 11(2) of Regulation (EC) 1/2003, which provides that the European Commission shall transmit to all NCAs copies of the most important documents collected through its investigations and, upon request of the NCA, it shall provide all other documents used for the case. Article 12 allows the exchange of information gathered by one NCA before re-allocation of the case to another or by one NCA while assisting another in its investigations. Fundamental rights are safeguarded by Article 12(2), which provides that shared evidence can only be put to the use of applying Articles 101 and 102 TFEU and 'in respect of the subject matter for which it was collected by the transmitting authority'. Article 12(3) is devoted to limiting the dangers of transferring evidence towards those countries, like the UK, where the enforcement of competition law envisages the imposition of criminal sanctions.<sup>38</sup> Article 12(3) provides that the transmission of evidence is admitted only if the law of the transmitting NCA provides for sanctions of a similar kind to those of the receiving NCA, or if evidence has been collected in a way which would be admitted by the law of the receiving NCA, i.e. by means of

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<sup>35</sup> Network Notice 12.

<sup>36</sup> Regulation (EC) 1/2003, Article 11.

<sup>37</sup> Regulation (EC) 1/2003, Article 11(4); MARK FURSE, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006) 102.

<sup>38</sup> Compare Section 188 of the Enterprise Act 2002. See, for further details, Introduction, text accompanying fn. 183 to 187.

guaranteeing the same level of protection of the rights of defence of natural persons. This provision does not prevent the risk that NCAs evade their national provisions by means of trying to obtain evidence from another NCA, in those cases where the gathering of a specific item of evidence is prohibited in the country of the receiving NCA - because, for instance, that particular means of proof is prohibited under its rules of evidence - and is allowed under the rules of evidence of the transmitting NCA.<sup>39</sup>

## **B) Private Enforcement: Allocation of Cases between National Judges**

Ever since the recognition of the direct effect of Articles 101 and 102 TFEU, private antitrust actions for their enforcement fall within the scope of national jurisdictions. Pursuant to those provisions, national judges are empowered to declare the nullity of a contractual obligation and to determine whether the alleged infringement satisfies the conditions for the defence under Article 101(3) TFEU. Other elements of the adjudication are left either to the case law of the EU Courts (which, for instance, identifies the justifications under Article 102 TFEU)<sup>40</sup> or to the national laws, particularly as regards the legal consequences of the infringement.<sup>41</sup> What has been left largely ungoverned by EU law is the question of proof. National provisions on evidence and civil procedure fill the gaps left behind by the EU Regulations and by the case law of the EU Courts. It is necessary to clarify how the allocation of cases is performed throughout the European Union and, in the following paragraph, how the applicable law is determined. To set the scene, it is convenient to set out briefly below the existing rules applicable to the private enforcement and then explain which of them influence how evidence is collected and evaluated. Finding out the *lex fori* and the *lex causae* is a preliminary step in order to determine which of these laws govern the particular issue of evidence under consideration in cross-border litigation.

### ***a) Determining the Jurisdiction***

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<sup>39</sup> CHALMERS, HADJEMMANUIL, MONTI, and TOMKINS, *European Union law* 966.

<sup>40</sup> Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, not yet reported, paras. 40–41: '[I]t is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 82 EC [...]. In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary [...] or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.'

<sup>41</sup> STEFANIA BARIATTI, 'Problemi di giurisdizione e di diritto internazionale privato nell'azione *antitrust*' in *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 267.

It is common ground that the provisions of the *lex fori* will be applied to the admissibility,<sup>42</sup> the acquisition and the disclosure of evidence (which is one of the reasons why the English legal system is regarded as being highly desirable for claimants, given its broad and effective disclosure mechanism).<sup>43</sup> To determine the forum in which a private antitrust case will be brought, it is necessary to refer to Regulation (EC) 44/2001.<sup>44</sup> This Regulation provides that the claimant may sue the defendant in his or her domicile,<sup>45</sup> pursuant to Article 2, according to the usual general forum<sup>46</sup> or, in alternative, according to the special jurisdictions provided for by Articles 5(1) and 5(3). The application of these special jurisdictions depends on whether the case can be characterised as contractual or tortious/non-contractual. The contractual characterisation takes precedence over the tortious one.<sup>47</sup> Accordingly, it must first be considered whether the matter relates to a contract before the matter can be qualified as non-contractual. Also, the expression ‘matters relating to a contract’ under Regulation (EC) 44/2001 is broadly interpreted, encompassing all contractual obligations existing regardless the fact that a contract has been concluded, including those actions brought in order to declare the nullity of the contract, therefore challenging the existence of the contract itself,<sup>48</sup> or to claim restitution.<sup>49</sup> Consequently, Article 5(1) is applicable to ‘all actions in which the concerned parties are the parties to the restrictive agreement.’<sup>50</sup> The only exception to this rule is contained at Article 23 which provides, for claims connected to contracts (like in the case of shield litigation), that parties

<sup>42</sup> BRIGGS, *The Conflict of Laws* 192.

<sup>43</sup> Between those governed by the law of the seised judge, there are also other issues that are not related to evidence, like the types of remedy available, the funding devices, the amount and the allocation of legal costs, which may steer the claimant towards a forum or another.

<sup>44</sup> Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2001] L12/1.

<sup>45</sup> The internal laws of the Member States whose courts are seised are taken into account to define the notion of ‘domicile’. For legal persons and associations the domicile is the place where the entity has its statutory seat, its central administration, or its principal place of business. For undertakings based in the United Kingdom or Ireland, the statutory seat is the registered office or the place of incorporation or the place under the law of which the formation took place. Compare Articles 59 and 60 of the Brussels Regulation.

<sup>46</sup> When the defendants are more than one, in multi-party cases, the claimant has the choice to sue in the domicile of any of the defendants.

<sup>47</sup> Case C-189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and co. and others* [1988] ECR 5565, para. 17.

<sup>48</sup> BLANCA VILÀ COSTA, ‘How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach’ in JÜRGEN BASEDOW and others (eds), *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 23.

<sup>49</sup> PIETRO FRANZINA, *La giurisdizione in materia contrattuale - L’art. 5 n. 1 del regolamento n. 44/2001/CE nella prospettiva della armonia delle decisioni* (Cedam 2006) 279-283.

<sup>50</sup> VILÀ COSTA, ‘How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach’ 24.

must seize the forum chosen in the contract, which ousts the jurisdiction of any other competent court.

The most common form of private enforcement, i.e. actions for damages between parties who are not bound by contractual obligations, as well as injunctions<sup>51</sup> and actions for a negative declaration establishing the absence of liability in tort or delict,<sup>52</sup> fall within the scope of Article 5(3).<sup>53</sup> That provision states that the action must be brought before the court of the place where the effect or, if multiple, one of the effects was felt (that is, the place where the harmful event occurred). The place where the harmful event occurred has been defined, in line with the ubiquity rule established in *Mines de potasse*,<sup>54</sup> as both the place where the damage occurred and the place of the event giving rise to the damage.<sup>55</sup> It is interesting to note that the most significant reason why such fora are relevant according to the circumstances of the case under examination is their ‘potential to be particularly helpful with regard to the procurement of evidence’.<sup>56</sup>

The place where the harmful event occurred or may occur can be, in antitrust cases, the place where the anti-competitive agreement was concluded, or the place where the decisions implementing it were taken, or the place where the abuse of dominance is carried out.<sup>57</sup> Whilst usually the abuse of dominant position harms individual competitors, or

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<sup>51</sup> Given the fact that the provision of Article 5(3) provides that the court for the place where the harmful event occurred or *may* occur, this head of jurisdiction is deemed to be valid also for *ex ante* injunctive relief. Compare VILÀ COSTA, ‘How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach’ 25. For preliminary injunctions and other interim measures in contractual matters, Article 31 of Regulation (EC) 44/2001 provides that application can be made to the court of the Member State which allows their granting, even if the jurisdiction is reserved to the judge of another Member State. For the sake of expediency and urgency, the provisional measure will be normally asked to the judge where the action is required to be performed. It is theoretically possible that the claimant asks for the granting of an injunction to a court different from that having jurisdiction and from that of the country where the injunctions has to be enforced, for reasons of convenience (i.e. because a certain court is particularly fast in issuing decisions, or because the claimant has more familiarity with the legal system of a country or with the language). To that purpose, at the moment, a declaration of enforceability is required for the injunction to be executed. Such declaration will not be any more required when Regulation (EU) 1215/2012 will enter into force on the 10 January 2015. Compare Article 39 of said Regulation: ‘A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.’

<sup>52</sup> Case C-133/11 *Folien Fischer AG and Fofitec AG v Ritrama SpA*, not yet reported, para. 55.

<sup>53</sup> *Deutsche Bahn AG & others v Morgan Crucible Company plc & others* [2013] CAT 18, paras. 27–29.

<sup>54</sup> Case C-21/76 *Handelskwekerij G. J. Bier BV v Mines de potasse d’Alsace SA* [1976] ECR 1735, para. 24.

<sup>55</sup> Case C-51/97 *Réunion européenne SA and Others v Spliethoff’s Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002* [1998] ECR I-6511, para. 28. Compare also *Handelskwekerij G. J. Bier BV v Mines de potasse d’Alsace SA*, para. 11 (f), paras. 15-19.

<sup>56</sup> JÜRGEN BASEDOW, ‘International Cartels and the Place of Acting under Article 5(3) of the Brussels I Regulation’ in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 32.

<sup>57</sup> VILÀ COSTA, ‘How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach’ 28.

customers or suppliers, located in one Member State, anti-competitive restrictions under Article 101 TFEU often result in scattered effects and in losses produced across a number of States.

Yet, rarely this head of jurisdiction coincides with the place where evidence is apt to be found. For instance, in the case of an action brought by a competitor, where multi-jurisdictional disputes are less likely to arise, *Marinari*<sup>58</sup> seems to suggest that the competent jurisdiction is where the anti-competitive effects of the infringement were felt. In the case of an action brought by a consumer,<sup>59</sup> however, the place of the suffered harm will be the claimant's domicile,<sup>60</sup> which is usually remotely connected with the evidence of the infringement, in particular with the factual elements of the infringement as opposed to the suffered harm. Conversely, in the case of follow-on actions, the problem has little relevance.

In multi-jurisdictional antitrust cases it is generally very hard to pinpoint the exact location where the direct harmful consequences were felt.<sup>61</sup> In those cases, the claimant is entitled to sue in each of the Member States where the damage occurred, but only for the harm caused in that particular State.<sup>62</sup> In order to claim damages in respect of the overall harm suffered, the claimant would have to refer to other heads of jurisdiction, namely the domicile of the defendant or the place of the event giving rise to the damage.<sup>63</sup> Whilst Article 102 TFEU infringements may harm individual competitors, suppliers or consumers, Article 101 TFEU usually inflicts harm to a much wider range of customers (and competitors) in a number of different States. This therefore justifies the adoption of the

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<sup>58</sup> See, for instance, how the Court of Justice links the 'efficiency of proof' with the interpretation of Article 5(3) in case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1995] ECR I-2719, para. 20: '[A]s regards the argument as to the relevance of the location of the assets when the obligation to redress the damage arose, the proposed interpretation might confer jurisdiction on a court which had no connection at all with the subject-matter of the dispute, whereas it is that connection which justifies the special jurisdiction provided for in Article 5(3) of the Convention. Indeed, the expenses and losses of profit incurred as a result of the initial harmful event might be incurred elsewhere so that, as far as the efficiency of proof is concerned, that court would be entirely inappropriate.'

<sup>59</sup> No special forum is provided for consumers in regard to tortious acts.

<sup>60</sup> BARIATTI, 'Problemi di giurisdizione e di diritto internazionale privato nell'azione antitrust' 269.

<sup>61</sup> For a general analysis of the difficulties arisen by cross-border EU competition law actions, that the current private international law framework is not well suited to tackle, see MIHAIL DANOV, 'EU competition law enforcement: Is Brussels I suited to dealing with all the challenges?' (2012) 61 *International and Comparative Law Quarterly* 27–54.

<sup>62</sup> Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995] ECR I-415, paras. 30–32.

<sup>63</sup> VILÀ COSTA, 'How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach', 28–29.

*Shevill* approach, whose factual circumstances were analogous to those usually found in Article 101 TFEU matters.<sup>64</sup>

According to the Court of Justice, when it is very hard to locate where the event took place (i.e. where the undertaking acted in infringing competition rules, the so-called ‘place of acting’), it is preferable that the plaintiff commences the litigation in the jurisdiction where the damage occurred.<sup>65</sup> In *Cooper Tire v Shell*,<sup>66</sup> the case of a single and continuous infringement under Article 101 TFEU, the English High Court adumbrated the problem of identifying where the event which gave rise to the damage had occurred. The problem was accentuated by the circumstance that the meetings between co-infringers had taken place in various locations across Europe (Milan, Vienna, Amsterdam, Brussels, Richmond-on-Thames, Frankfurt, Grosse Leder, and Prague). The Butadiene Rubber cartel was, by pure happenstance, instigated and implemented in England. The High Court expressed a sense of unease in concluding:

[I]n the context of a Europe-wide cartel orchestrated at meetings in several countries, that the place where the harmful event occurred is England because that is where the first meeting took place.<sup>67</sup>

The English High Court also noted how the claimant is entitled to bring proceedings only in respect of the damage occurred in the jurisdiction in which the court is seised. Therefore, the claimant’s choice of forum must encompass this factor too. Given the difficulty of satisfying the head of jurisdiction under Article 5(3), the English High Court opted for Article 6(1) of Regulation (EC) 44/2001, which allows a party domiciled in one of the Member States to be sued in another State, if this is the place where all other defendants are domiciled and their claims are ‘so closely connected that it is expedient to hear and determine them together to

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<sup>64</sup> JÜRGEN BASEDOW, ‘International Cartels and the Place of Acting under Article 5(3) of the Brussels I Regulation’ in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012), 33.

<sup>65</sup> *Réunion européenne SA and Others v Spliethoff’s Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002*, para. 32. For further details on how this approach is not followed by the Court of Justice in those cases where there is a risk of limiting the possibility of initiating legal actions only to those damages occurred in the State where the judge has been seised, see FRANCESCO SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (CE) n. 44/2001 - La revisione della Convenzione di Bruxelles del 1968* (3rd edn, Cedam 2006) 158–159. With regard to the risks of parallel multiple actions with different subject-matters, see at 162-163.

<sup>66</sup> *Cooper Tire & Rubber Company and others v Shell Chemicals UK Limited and others*, High Court Queen’s Bench Division [2009] EWHC 2609 (Comm). The 101 TFEU infringement concerned, in that case, agreements on price targets, sharing of customers by non-aggression agreements and the exchange of sensitive commercial information relating to prices, competitors and customers.

<sup>67</sup> *Cooper Tire & Rubber Company and others v Shell Chemicals UK Limited and others*, para. 65.



avoid the risk of irreconcilable judgments resulting from separate proceedings [...]’.<sup>68</sup> The rationale behind Article 6(1) is one of procedural economy and of preservation of the consistency of the legal system. Closely connected pieces of litigation may be brought together in the same jurisdiction, instead of being splintered across different Member States.<sup>69</sup> Under Article 6(1), it is possible, in the case of cartels, to bring together actions directed to the compensation of the harm suffered by direct buyers, competitors and indirect purchasers.<sup>70</sup> In *Cooper Tire v Shell*,<sup>71</sup> the High Court decided for an ‘extensive interpretation’<sup>72</sup> of Articles 2 and 6(1) of Regulation (EC) 44/2001 which allowed the claimant to bring the case before the English courts, even if only three (out of the twenty-four) original defendants were domiciled in England. In that case, the English High Court held that it is the claimant’s responsibility to establish ‘a good arguable case’ that the chosen court has jurisdiction on the matter.<sup>73</sup> ‘A good arguable case’ was described as ‘flexible’ by the High Court, in the sense that the standard varied according to the type of issue under examination.<sup>74</sup> When the assessment of the correct jurisdiction requires proving a fact or resolving an issue of law, those questions first need to be addressed to ensure that the particular judge has jurisdiction. For instance, the claimants may be required to establish the fact that subsidiaries and parent company acted as a single economic entity in the particular case, or that their claim towards one of the defendant does not present the risk of being struck out. This proof is clearly subject to the law of the forum exclusively.

The Italian judge relied on Article 6(1) in order to found its jurisdiction in a case stemming from the same synthetic rubber cartel. The Milan court, which was asked to pronounce itself in an action for a negative declaration establishing the absence of the infringement and subsequent damages, but only limited to the defendants domiciled in Italy, considered that the claims were closely connected and that the infringement was essentially the same one, despite the multiple defendants.<sup>75</sup>

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<sup>68</sup> Regulation (EC) 44/2001, Article 6(1).

<sup>69</sup> RICHARD WHISH, ‘Damages Actions in the Courts of England and Wales’ in LUIS ANTONIO VELASCO SAN PEDRO (ed), *Private Enforcement of Competition Law* (Lex Nova 2011) 160.

<sup>70</sup> MICHAEL WILDERSPIN, ‘Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation’ in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 42.

<sup>71</sup> The second part of the decision deals with the ‘torpedo’ effect purposely created in order to stay proceedings, compare paras. 66-91.

<sup>72</sup> WHISH, ‘Damages Actions in the Courts of England and Wales’ 161.

<sup>73</sup> *Cooper Tire & Rubber Company and others v Shell Chemicals UK Limited and others*, para. 36.

<sup>74</sup> *Deutsche Bahn AG & others v Morgan Crucible Company plc & others*, paras. 30-31.

<sup>75</sup> Court of Milan, *Soc. Eni v Soc. Pirelli Tyre*, 8 May 2009 (2011) *Rivista di diritto internazionale privato e processuale* 405.



The different issue of who bears the burden of proving the jurisdiction of the seised court, and to which extent, has been addressed by the English High Court in *Roche v Provimi*,<sup>76</sup> where Hoffman-La Roche, the defendant in an action for damages following from the European Commission's decision in the Vitamins cartel, sought to strike out and set aside part of the proceedings. The High Court was asked, among other issues, to determine whether it had jurisdiction under Article 5(3), 6(1), and 23 of Regulation (EC) 44/2001, in a case involving contracts with Swiss, French, and German jurisdiction clauses. The Court established that it was for the claimant to found that the English courts had jurisdiction, notwithstanding the choices of forum included in the contracts. Regarding the standard of proof, the High Court concluded that 'the court must be as satisfied as it can, having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction'. But such test is nothing like the civil standard of proof of the balance of probabilities, as cautiously clarified by Mr. Justice Aikens (as he then was):

In trying to encapsulate the test that the claimants have to pass in dealing with that point, the phrase 'has much the better of the argument' will do to describe what a claimant must achieve. But that test must not be applied like a formula, for fear of falling into the trap of thinking that the claimant must prove, on a balance of probability, that the jurisdiction clauses do not apply to the present disputes. That is clearly not the correct test.<sup>77</sup>

As far as the forum within the chosen jurisdiction is concerned, the domestic procedural rules of the chosen jurisdiction must be followed.<sup>78</sup> The choice may be influenced by different considerations, relating to the specialisation of the court or the specific circumstances of the case. As an example, in England, the rule that requires that appeals must be exhausted before a monetary claim can be brought before the CAT without permission<sup>79</sup> has redirected litigation towards the High Court, where proceedings can be

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<sup>76</sup> In *Roche Products Ltd & Others v Provimi Ltd*, High Court [2003] EWHC 961 (Comm), paras. 9-11, the English High Court confirmed the direct applicability of Regulation (EC) 44/2001 to the matter under examination by virtue of Section 2(1) of the European Communities Act 1972. The High Court confirmed that the 'general jurisdictional rule is that a party should be sued in the courts of the Member State in which it is domiciled' and that concurrent jurisdictions were established on the basis of Article 5(3) and 6(1) of the same Regulation. The same articles were relied on in *Toshiba Carrier UK Ltd v KME Yorkshire Ltd*, High Court Chancery Division [2011] EWHC 2665 (Ch), para. 9.

<sup>77</sup> *Roche Products Ltd & Others v Provimi Ltd*, para. 57.

<sup>78</sup> BARIATTI, 'Problemi di giurisdizione e di diritto internazionale privato nell'azione antitrust' 268.

<sup>79</sup> Section 47A(5)(b) and Rule 31(3) of CAT Rules.

commenced as of right. Similar strategic choices may be taken by the litigants who seek interim relief, which at present cannot be granted by the CAT.<sup>80</sup> In other jurisdictions across the European Union, some courts have become particularly popular or have gained a reputation for being plaintiff-friendly for different reasons (such as Amsterdam, Düsseldorf, Paris).<sup>81</sup>

For the sake of completeness, all the above mentioned provisions of Regulation (EC) 44/2001 about jurisdiction remain untouched by the successor to the Brussels Regulation, Regulation (EU) 1215/2012,<sup>82</sup> which will enter into effect on 10 January 2015.

### ***b) Determining the Applicable Law***

In apparent contrast with the adamant belief (reported especially by Anglo-Saxon commentators)<sup>83</sup> that substance is always governed by the *lex causae* while procedure is governed by the *lex fori*, what is regarded as procedural not only varies between different national laws, but also from national laws to EU law. Evidential issues, due to their substantial/procedural nature, are variously characterised.<sup>84</sup> The issue of applicable law is relevant because the law governing evidence and the formation of the proof is not always categorised as procedural law. Thus, once the correct jurisdiction has been established, not all evidence-related issues are automatically solved. Some evidential issues will be governed by the law of the forum (usually applicable to issues of procedure). Others will be governed by the applicable law. This is the case for not only presumptions of law and the allocation of the legal burden of proof,<sup>85</sup> but also the object of the proof (i.e. the definition

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<sup>80</sup> The CAT is, however, empowered to award interim relief in relation to any case before it, pursuant to Rule 61 of CAT Rules. See also BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 137.

<sup>81</sup> For an analysis of the importance of procedural aspects such as the availability of disclosure, a 'low' standard of proof and other plaintiff-friendly instruments like presumptions, see MIHAIL DANOV, FLORIAN BECKER, and PAUL BEAUMONT (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing 2013) 67–68.

<sup>82</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ [2012] L 351/1. Regulation (EU) No. 1215/2012 is fully applicable also to the United Kingdom, Ireland and Denmark.

<sup>83</sup> BRIGGS, *The Conflict of Laws* 189; SCHOEMAN, 'Rome II and the Substance-Procedure Dichotomy: Crossing the Rubicon' 83.

<sup>84</sup> ILLMER, 'Neutrality Matters - Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law' 255.

<sup>85</sup> For this latter aspect, in EU antitrust actions, reference is made to the provision contained at Article 2 of Regulation (EC) 1/2003, which takes precedence.

of which elements need to be proven) and the question of causation.<sup>86</sup> Other evidential issues will be governed by the *lex loci actus*.

As far as the applicable law is concerned two major problems arise: first, in which situations the EU competition law is applicable other than in intra-EU litigation; and, secondly, which national law is applicable in intra-EU litigation.<sup>87</sup>

Regarding the first issue, in situations where the applicable law is the one of a third country (that is, a country that is not part to the European Union), there are two main approaches for applying the EU competition rules, despite the fact that they are not integral part of the applicable law. The first approach is the one in which the parties did not make any choice of applicable law. In that situation, the seised judge will have to make reference to his or her national conflicts of law rules in order to determine the applicable law and will be bound to apply EU competition law if the relevant conflicts of law rules compels the application of EU law. This means that Articles 101 and 102 TFEU are deemed to contain an implicit rule, unilaterally established, which imposes their application in all cases where a connecting link (or connecting factor) with the territory of the European Union exists. Such connecting link consists in the anti-competitive effect of the conduct in the EU territory.<sup>88</sup> By means of such unilateral affirmation, EU competition law is applied in cases where the only connecting link is the anti-competitive effect on all or part of the EU territory, where all other elements characterizing the case<sup>89</sup> connect it to non-EU countries.

The second case in which it is possible to apply the EU competition rules is the case where the law of the forum recognizes those rules as necessarily applicable in a private

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<sup>86</sup> Some of these aspects will be governed by the uniform substantive EU law, if and when the Proposal for a Directive will be adopted. See, for an overview, Introduction, para. 5 C).

<sup>87</sup> KOMNINOS, *EC Private Antitrust Enforcement* 239 ff.

<sup>88</sup> The territory of the European Union largely coincides with the territory of the 28 EU Member States. The Overseas Countries and Territories (OCTs) are excluded, and so are some islands, like the Faroe Islands and certain enclaves or landlocked territories within the EU territory, such as Andorra, Liechtenstein, Monaco, San Marino, and the Vatican City, which all have special relationship agreements with the European Union. Conversely, some other territories of the EU enjoy *ad-hoc* arrangements or exemptions from EU customs or VAT provisions (examples are Büsingen am Hochrhein, Campione d'Italia, Livigno, Heligoland, the Channel Islands or the Isle of Man). The EU competition rules are extended, by the agreement establishing the EEA, to all EFTA countries, with the exception of Switzerland. For further details on Articles 53 and 54 EEA, modelled on Articles 101 and 102 TFEU; on the ESA, empowered to enforce the EEA competition rules; and on the EFTA Court, see *EU Competition Law: Text, Cases, and Materials* 115–116.

<sup>89</sup> Such as, for instance, the defendant's domicile, the nationality of the parties involved, the main place of business of the undertaking or its place of incorporation, the place where the infringement was committed or where the damages were felt.

international law sense (the so-called ‘overriding mandatory provisions’),<sup>90</sup> which are defined as those

provisions whose respect is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable [...].<sup>91</sup>

It seems that, in those situations, even if EU law applies, the applicable law of the third State will solve evidential issues. The EU rules on proof should be disregarded, as the overriding mandatory power is connected to their content, rather than to the procedural aspects. This observation is supported by the common conception according to which overriding mandatory rules ‘do not exclude the entire foreign law but only so much of that law which is inconsistent with the legislation’.<sup>92</sup> The foreign law will be regarded to solve those issues of evidence that are a matter for the applicable law.

Turning to the second problem, concerning intra-EU litigation, in order to determine which of the law of the Member States is applicable to the matter at issue, EU private international law is applicable. Naturally, any time that a complaint is lodged with the Commission or a NCA about an alleged anti-competitive behaviour, it is excluded from the scope of Rome I and Rome II Regulations by virtue of their Article 1(1).<sup>93</sup> Where the infringement of competition law has been committed in the context of an agreement between the parties, Rome I Regulation provides for the applicable law,<sup>94</sup> giving precedence to the choice of law contained in the contract. Separately, reference has to be made to Rome

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<sup>90</sup> See Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004/C 101/04, para. 3. Compare case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, paras. 36 and 39: ‘[...] Article 81 EC (ex Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. [...] For the reasons stated [...] the provisions of Article 81 EC [...] may be regarded as a matter of public policy within the meaning of the New York Convention.’ See VAN BAEL & BELLIS, *Competition Law of the European Community* 1185: ‘These provisions [Articles 101 and 102 TFEU] are a matter of public policy implying, *inter alia*, that national courts which under their national law have to apply national rules of public policy of their own motion, should also apply Articles 81 and 82 of their own motion’.

<sup>91</sup> The definition is contained at Article 9 of the Rome I Regulation, which provides that *lex causae* is applicable without prejudice to the overriding mandatory provisions of the *lex fori*.

<sup>92</sup> GARNETT, *Substance and Procedure in Private International Law* 62.

<sup>93</sup> FALLON and FRANCO, ‘Private Enforcement of Antitrust Provisions and the Rome I Regulation’ 64.

<sup>94</sup> The applicable law is determined according to a list of connecting factors for the most common types of contracts; for the remaining contracts according to a close connection test. See FALLON and FRANCO, ‘Private Enforcement of Antitrust Provisions and the Rome I Regulation’ 65.

II Regulation when the alleged infringement is non-contractual or when the choice of law in the contract is defective, for claims of damages, injunctions arising out of tort, and unjust enrichment. Accordingly, the applicable law will most often be, in antitrust cases, the law chosen by the parties, that of the country where the party required to effect the characteristic performance of the contract has his or her habitual residence, or that of the country whose market has been, or is more likely to be, affected.<sup>95</sup> The effects principle is contained in Article 6(3)(a) of the Rome II Regulation.

Identifying which market has been, or is more likely to be, affected is not always an easy task. The task is particularly difficult in multi-jurisdictional infringements, like international cartels, which affect the market of different countries, especially in stand-alone actions, where there is no previous decision of a competition authority. In an attempt to reduce the costs and burdens borne by the claimant,<sup>96</sup> Article 6(3)(b) of the Rome II Regulation provides that, in such cases, when the claimant brings his or her claim before the court of the domicile of the defendant, following the general rule of jurisdiction of Article 2 of the Brussels I Regulation, he or she has two options. The claimant can choose to apply either the law identified according to the effects principle or the law of the seised court, if the market of that Member State is one of those 'directly and substantially affected by the restriction of competition'. If the claim is brought against more than one defendant, the claimant has that option only if that Member State's market has also been affected directly and substantially. This is intended to prevent the risk that the claimant includes defendants in the litigation just to guarantee himself or herself the opportunity 'to shop' for their applicable law too.

For the purposes of this discussion, it is important to point out that Article 6(3) of the Rome II Regulation was directly inspired by the policy goal of fostering private enforcement at the national level within the EU,<sup>97</sup> rather than by the general goals of predictability and uniformity of results. The particular nature<sup>98</sup> of competition law required an autonomous regulation, which is not completely in line with the general objectives of

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<sup>95</sup> In contrast with the general criterion provided for torts and delicts by Article 4(1) of Rome II Regulation, which indicates the place where damages have occurred (clearly opting for the 'the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'), for antitrust cases the relevant provision is Article 6(3). This latter provision cannot be derogated.

<sup>96</sup> STÉPHANIE FRANCO and WOLFGANG WURMNEST, 'International Antitrust Claims under the Rome II Regulation' in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 124.

<sup>97</sup> FRANCO and WURMNEST, 'International Antitrust Claims under the Rome II Regulation' 92.

<sup>98</sup> See Introduction, para. 3.

other conflict of laws rules.<sup>99</sup> This consideration advocates for the argument according to which existing private international rules sometimes struggle to adapt to the particular nature of competition law.

Article 1(3) of Rome I and Rome II Regulations explicitly exclude evidence and procedure from their scope of operation. Regard must be had, for evidential issues, to the choice of law rules of the forum, which often redirect to the *lex fori*.<sup>100</sup> Apart from the requirements for formal validity,<sup>101</sup> the only exceptions are Article 18 of Rome I Regulation for contractual breaches; and Article 22 of Rome II Regulation for actions in tort. They provide, respectively, that the application of presumptions of law and the allocation of the burden of proof shall be governed by the applicable law; and that the use of any type of proof, recognised by the law of the forum or (alternatively)<sup>102</sup> by any other law according to which the obligation has validly arisen (i.e. *lex causae* or *lex contractus/lex loci actus*), is admitted, if such latter mode of proof can be administered by the forum.<sup>103</sup> It is submitted that presumptions falling within the scope of these provisions are only presumptions of law relating to contractual or non-contractual obligation. This argument is corroborated by the Giuliano-Lagarde Report<sup>104</sup> on the corresponding Article 14(1) of the Rome Convention of 1980,<sup>105</sup> according to which the provision referred to those rules of substance relieving the party in whose favour they operate from the necessity of producing any evidence. Presumptions of fact, on the other hand, are part of procedural law and should not be subject to the law of the contract. Perfectly in line with this distinction, it is argued that EU evidential presumptions, in competition law, are neither subject to Article 2 of Regulation (EC) 1/2003, nor to Articles 18(1) and 22(1) of Rome I and Rome II Regulations. They are, conversely, theoretically a matter of national procedural rules, but, in the author's view, as it will be shown below, national judges tend to adopt them by virtue of their effectiveness.<sup>106</sup>

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<sup>99</sup> The other rules contained in the Rome I and Rome II Regulation are inspired by the intent of maintaining uniformity and legal certainty and to call for the application of the law which displays the closest connection to the matter under examination.

<sup>100</sup> See GARNETT, *Substance and Procedure in Private International Law* 194.

<sup>101</sup> See Article 11 of Rome I Regulation and Article 21 of Rome II Regulation.

<sup>102</sup> For an explanation on the alternative and not cumulative reference to these laws, see LEANDRO, 'Articolo 18, Onere della prova' 889.

<sup>103</sup> It is considered that reference is made to cases where evidence cannot be easily or practically administered by the judge, depending on the specific circumstances of the case. See, for such interpretation, LEANDRO, 'Articolo 18, Onere della prova' 890.

<sup>104</sup> MARIO GIULIANO and PAUL LAGARDE, Report on the Convention on the law applicable to contractual obligations [1980] OJ C282.

<sup>105</sup> Rome Convention on the law applicable to contractual obligations of 19 June 1980 [1980] OJ L 266.

<sup>106</sup> For further details on the distinction between presumptions of law and presumptions of fact, see Chapter II, para. 5.



It must be noted, however, that, pursuant to these provisions contained in the EU Regulations, the issue of the legal burden of proof may not always fall under the scope of the law of the obligation, as opposed to the *lex fori*. According to some commentators, presumptions and the burden of proof should be subject to the law of the obligation only if, according to the choice of law rules, the matter is classified as substantive and not procedural by the *lex causae*. As a result, the judge should apply the law of the cause of action to verify whether this law considers the burden of proof as a substantive issue.<sup>107</sup> If the judge, by means of applying the applicable law, finds out that that law does not ‘want’ to be applied, because it treats the issue as procedural, the EU provision does not apply and the matter is likely to be solved according to the conflict of law rules of the judge. If those conflict of law rules identify presumptions and the burden of proof as substantive issues governed by the *lex causae*, it seems plausible to apply this latter, disregarding whether it ‘wants’ to be applied or not, to avoid gaps.<sup>108</sup> It appears, however, that the most correct interpretation would be to dispense with the need for the judge to re-classify the evidential issue according to the *lex causae*, to preserve the goals of predictability and certainty envisaged by the Regulation.<sup>109</sup> Reasoning otherwise, the matter would be characterised differently according to the *lex causae* and uniformity would be jeopardised. It is established, however, that rules on presumptions and on the allocation of the burden of proof would be ruled out if incompatible with public policy<sup>110</sup> (for instance, if they were considered incompatible with Article 6 ECHR and the presumption of innocence).

Against this backdrop, in cross-border antitrust matters, the legal burden of proof,<sup>111</sup> presumptions of law<sup>112</sup> and the mode of proof<sup>113</sup> are governed according to EU Regulations, whereas all other issues of evidence will be governed according to the conflict of laws rules of the forum.<sup>114</sup> As anticipated, however, some rules of proof (e.g. presumptions of fact) are

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<sup>107</sup> LEANDRO, ‘Articolo 18, Onere della prova’ 888.

<sup>108</sup> GARNETT, *Substance and Procedure in Private International Law* 200.

<sup>109</sup> SCHOEMAN, ‘Rome II and the Substance-Procedure Dichotomy: Crossing the Rubicon’ 87.

<sup>110</sup> LEANDRO, ‘Articolo 18, Onere della prova’ 888.

<sup>111</sup> Article 2 of Regulation (EC) 1/2003.

<sup>112</sup> Articles 18(1) and 22(1) of Rome I and Rome II Regulations.

<sup>113</sup> Articles 18(2) and 22(2) of Rome I and Rome II Regulations.

<sup>114</sup> Whether all evidential issues left out of the scope of the Rome Regulations will be subject to the *lex fori* is a matter for the national judge to decide. See ILLMER, ‘Neutrality Matters - Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law’ 242: ‘By merely excluding them from the material scope of application, national laws are left to decide whether to apply the *lex fori* or the *lex causae* according to their understanding of the dichotomy. The net result of this exclusion, however, comes close to an allocation to the *lex fori*: Member States are entitled to apply the *lex fori* to all matters of evidence and procedure.’



established by means of the case law at the EU level and, due to their general recognition in the public enforcement and to the specificities of competition law, are being adopted at the national level as well, by both the NCAs and the national judges. Nonetheless, to date, harmonisation remains limited and uncomplete. Therefore, the relevant rules of evidence are still partly determined by the competent jurisdiction and the applicable law respectively.

As a last remark on this point, in the same way as the proof of jurisdiction, proof of the applicable law must be established according to the rules of procedure of the seised jurisdiction. The same is (theoretically) true for the standard to which they have to be proved. Usually, it is for the claimant to establish the relevant facts for the determination of the correct jurisdiction or of the appropriate applicable law only if they are contested by the defendant, or if the issue has to be raised *ex officio* by the court.



## Chapter II – The Evaluation of the Proof in EU Competition Litigation: A Comparison of Public and Private Enforcement

### 1) THE OBJECT OF THE PROOF

Before addressing the evidential challenges in connection with the application of Articles 101 and 102 TFEU, it is necessary to analyze the structure of these norms and to state clearly what needs to be proven by competition authorities and claimants in order to prove their case. This topic is by nature intertwined with that of the legal burden of proof, which will be analyzed afterwards, leaving aside what already said in the present paragraph.

‘Evidence’ and ‘proof’ are not synonyms, despite the fact that a single word is used in some European languages to represent these distinct ideas.<sup>1</sup> The term ‘evidence’ denotes the display of the existence of a fact, or that an asserted fact has happened. It thus relates to the means presented in order to prove (or disprove) a fact. ‘Proof’ is defined as the result of the process of demonstration of the existence of an alleged fact to the requisite legal standard. It is the conclusion inferred from the available evidence.

According to Article 2 of Regulation (EC) 1/2003, the burden of proving an infringement under Article 101 and Article 102 TFEU rests upon the authority or party alleging it,<sup>2</sup> in application of the general principle *actori incumbit probatio* (‘he who asserts must prove’).<sup>3</sup> While under both prohibitions the party alleging the infringement bears the burden of proof, the legal burden rests on the party concerned if it wishes to defend its agreement under Article 101(3) TFEU. There is no equivalent reversal of the (legal) burden of proof laid down by Article 102 TFEU, but it is for the undertaking concerned to raise any plea of objective justifications and support it with evidence.<sup>4</sup>

Owing to the principle ‘he who asserts must prove’, it would run against the EU principle (and to the established EU law of evidence) to allow the Commission or the plaintiff to only assert the infringement, while charging the defendants with the burden of

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<sup>1</sup> The same word is used to combine both concepts, for example, in German (Beweis), French (preuve), Italian (prova/mezzo di prova), Greek (απόδειξη), Romanian (dovadă).

<sup>2</sup> It is widely accepted, and here given for granted, that Article 2 of Regulation (EC) 1/2003 is applicable to both public and private enforcement proceedings. See MAJA BRKAN, ‘Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?’ (2005) 28 *World Competition* 479, 502.

<sup>3</sup> For how fair and natural this principle might be perceived in the European context, it is not established in every jurisdiction. The major example of rejection of this principle in competition law is represented by *per se* rules.

<sup>4</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.

proving their innocence.<sup>5</sup> The only task for the accused/defendant is to demonstrate how the evidence relied on by the Commission/NCA or claimant (as the case may be) does not meet the ‘requisite legal standard’.<sup>6</sup>

### A) The Object of the Proof under Article 101 TFEU

The elements to be proven for an infringement of Article 101 are: the identity of two or more<sup>7</sup> undertakings involved;<sup>8</sup> an appreciable<sup>9</sup> effect on trade between Member States;<sup>10</sup> the agreement, decision by association of undertakings or concerted practice;<sup>11</sup> the fact that the

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<sup>5</sup> LENAERTS, ‘Some Thoughts on Evidence and Procedure in European Community Competition Law’ 1471; LUIZ ORTIZ BLANCO, *European Community Competition Procedure* (2nd edn, Oxford University Press 2006) 162. Other Authors, nonetheless, highlight how the principle of presumption of innocence has more to do with the standard of proof to be met, rather than with the object of the proof. See CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 509.

<sup>6</sup> MARIO SIRAGUSA and CESARE RIZZA (eds), *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors*, vol. III (Claeys & Casteels 2007) 21.

<sup>7</sup> JONES and SUFIN, *EU Competition Law: Text, Cases, and Materials* 147: ‘The question of when behaviour is truly unilateral [...] and when unilateral behaviour is merely apparent (receiving explicit or tacit acquiescence by another) is an important and difficult one [...]. The former [...] falls outside of Article 101 and the scope of the competition rules unless conducted by a dominant firm’.

<sup>8</sup> It is also often held that the Commission must give precise evidence of the participation of the undertaking to the infringement, compare case T-295/94 *Buchmann GmbH v Commission* [1998] ECR II-813, para. 121, not available in English: ‘Or, pour que la Commission puisse tenir chacune des entreprises visées par une décision comme celle de l’espèce pour responsable, pendant une période déterminée, d’une entente globale, il lui faut établir que chacune d’elles soit a consenti à l’adoption d’un plan global recouvrant les éléments constitutifs de l’entente, soit a participé directement, pendant cette période, à tous ces éléments.’ *Contra* see case T-110/07 *Siemens AG v Commission* [2011] ECR II-477, para. 55, where the General Court held that the apportionment of the burden of proof can vary, depending on the kind of evidence adduced, which may require the counterparty to provide an explanation or justification. Therefore, in cases ‘[w]here [...] the Commission has adduced evidence of the existence of an agreement, it is for an undertaking which has taken part in that agreement to adduce evidence that it distanced itself from that agreement’. See, for further details on the shifting of the evidential burden of proof, Chapter II, para. 5 A).

<sup>9</sup> Compare Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [2001] OJ 368/13. The Notice identifies market share thresholds below which an agreement is not likely to *appreciably* restrict competition (aggregate market share below 10% for competitors and below 15% for non competitors).

<sup>10</sup> The definition of the relevant market is required only to the purpose of establishing that Article 101 infringement has appreciable effects on trade between Member States, differently from what happens for infringements of Article 102 TFEU, where ‘the definition of the relevant market is a necessary precondition’, see case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, para. 230.

<sup>11</sup> Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, para. 173. It is contended that a satisfactory concept of collusion in general, and, in particular, of the three forms it may take (agreements, decisions and concerted practices) is not well-defined by the EU case law, so that it is ‘virtually impossible to draw a line between, on the one hand, unlawful (reciprocal) agreements and, on the other, lawful unilateral acts’. See PETER STIG JACOBSEN and MORTEN BROBERG, ‘The Concept of Agreement in Article 81 EC: On the Manufacturer’s Right to Prevent Parallel Trade within the European Community’ (2002) 23 *European Competition Law Review* 127, 139. As a consequence, it is hard to pinpoint a conception of collusion that is ‘capable of being proven when the undertakings do not openly acknowledge, and actively seek to conceal, its existence’. Compare OKEOGHENE ODUDU, *The Boundaries of EC Competition Law - The Scope of Article 81* (Oxford University Press 2006) 59. Nonetheless, in certain circumstances, the EU Courts do not require the qualification of the infringing conduct as an agreement or as a concerted practice, tracing the violation back to

agreement has as its object or effect the restriction of competition; the duration of the restraint of competition (whereas information regarding dates and place of the meetings between competitors is not required),<sup>12</sup> and other variable elements depending on the factual circumstances of the case.<sup>13</sup> Article 101(3) TFEU allows the undertaking to prove the existence of its right to benefit from an exemption rendering inapplicable the prohibition of Article 101(1) TFEU. Exemptions are granted if the anti-competitive practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. In addition, the practice ought not to (i) impose on the concerned undertakings restrictions which are not indispensable to the attainment of said objectives; and (ii) afford them the possibility of eliminating competition in respect of a substantial part of the products in question. Once the infringement has been established, the undertaking may provide such evidence. If it does not manage to do so, the infringement of Article 101(1) TFEU is considered proven.<sup>14</sup>

## B) The Object of the Proof under Article 102 TFEU

When the alleged infringement is an abuse of a dominant position, it is necessary for the Commission, NCA or claimant to prove the relevant product and geographical markets

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the broad category of 'cartel offence'. See CASTILLO DE LA TORRE, 'Evidence, Proof and Judicial Review in Cartel Cases' 511.

<sup>12</sup> Joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, para. 2354: 'It is therefore irrelevant that it has not been possible to determine the precise date on which that agreement was concluded in 1984, since the evidence adduced by the Commission indicates that an agreement within the meaning of Article 85(1) of the Treaty was concluded in 1984.'

<sup>13</sup> ORTIZ BLANCO, *European Community Competition Procedure* 163. Elements to be proved for the assessment of the infringement are very diverse, depending on the specific violation, as specified by the Court of Justice in case *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, para. 60: '[T]he number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.'

<sup>14</sup> ORTIZ BLANCO, *European Community Competition Procedure* 165.

(sometimes the temporal market is also considered by the Commission)<sup>15</sup>; the dominance of the undertaking in the relevant market (which on its part requires the assessment of market shares and the existence of barriers to entry) held within the internal market or at least in a substantial part of it; an abuse of such dominance; the appreciable effect on trade between Member States. The lack of objective justification needs to be proved only after the defendant has made a *prima facie* case of the existence of such justification.<sup>16</sup> Contrary to the structure of Article 101 TFEU, nonetheless, the existence of objective justifications is not incompatible with the proof of an infringement, but excludes the suitability of a sanction. In this perspective, they are considered here as operating on the evidential burden of proof, rather than on the legal burden of proof.<sup>17</sup> Objective justifications may be categorised under three types: (i) legitimate business behaviour, which includes commercial freedom, when the firm is efficiently competitive or objective necessity, when it had no alternative way to act for external reasons; (ii) efficiency considerations, when the abuse of dominance produces efficiency benefits for final consumers; (iii) public interest, when such interest justifies the anticompetitive behaviour. The first of such justifications is by far the easier to prove.<sup>18</sup>

### C) The Object of Proof in Private Enforcement

In the case of both Article 101 and 102 TFEU, whenever the claimant is seeking compensatory damages, further conditions must be established: the existence of a causal nexus linking the abuse and the damages (causation);<sup>19</sup> the suffered damages and their

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<sup>15</sup> *ABG Oil* [1977] OJ L117/1; joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd. and others v Commission*, not reported.

<sup>16</sup> CHALMERS, HADJEMMANUIL, MONTI, and TOMKINS, *European Union law* 1025. See *Post Danmark A/S v Konkurrencerådet*, paras. 40–41, quoted at Chapter I, fn. 40.

<sup>17</sup> For this distinction, see para. 4 of this Chapter.

<sup>18</sup> TJARDA VAN DER VIJVER, ‘Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuse?’ (2013) 4 *Journal of European Competition Law & Practice* 121, 121–122 and 132.

<sup>19</sup> Causation is usually interpreted as a question of fact, and it has to be established by means of showing that it is more probable than not that the damage would not have been suffered, had the infringement not occurred. Tort law rules generally apply, so that only the damage directly caused by the infringement can be recovered by the claimant (provided that, according to *Courage/Manfredi* principles, the claimant is granted full compensation, which includes lost profits and interest). The burden of proof of causation always rests with the claimant. See *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (Chapter II prohibition), para. 78: ‘[The CAT] should compare the position in the ‘real world’ (in which the infringement occurred) with what the position would have been in the counterfactual or ‘but-for’ world (in which there was no infringement). To the extent that the Claimant is worse off in the real world than it would have been in the ‘but-for’ world, such losses are to be treated as having been caused by the infringement and

amount (quantification);<sup>20</sup> and, in those national systems requiring it as a condition for redress, the element of fault.<sup>21</sup> Since the first two elements only arise in damages actions and, as a result, would not enable a comparison with public enforcement, they are not discussed further here. With regard to the third element, the fault, its analysis is particularly well-suited to showing the influence of EU case law on national judges.

### *a) The Element of Fault*

Pursuant to the English legislation proof of fault is not necessary. In particular, in England, an antitrust damages action is a tortious action for breach of a statutory duty and a breach of antitrust law entails strict liability. Thus, once the infringement is proven, no further proof of fault is needed.<sup>22</sup> This approach is totally consistent with the case law of the EU Courts, which has long established that, for the element of negligence to be found, it is sufficient that the parties have full knowledge that their behaviour will result in a restriction of competition, even if they are not aware of the fact that they are committing an infringement.<sup>23</sup>

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are in principle recoverable (subject to issues such as remoteness and mitigation). By the same token, to the extent that a particular claimed loss would equally have been suffered in the 'but-for' world, such loss is not to be treated as having been caused by the infringement, and the Claimant has no claim for damages in respect of it [...]. Claimants must then give evidence that they suffered harm as a result of the violation, and thus quantify the importance of the damages suffered.

<sup>20</sup> Compare *Arkin v Borchard Lines Ltd. & others* [2003] EWHC 687 (Comm), para. 591. The High Court, even though it did not conclude to award any damage, outlined the suggested methodology for loss calculation. It is based on the counterfactual, and it involves the identification, 'as a matter of commonsense', of the amount of losses 'directly' caused to the claimant. When the defendant manages to demonstrate that, in the counterfactual, the position of the claimant would have not been better, no loss is awarded. As an example, in *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (Chapter II prohibition), 2 Travel Group Plc had tried to contend that, among the losses suffered there was the loss of commercial opportunity. Namely, given that the alleged abuse of dominant position drove 2 Travel Group Plc out of business, this latter had to sell some land, that otherwise it would have kept as a capital asset and gained value over time. The CAT did not award compensation for that loss on grounds that Cardiff City Transport Services had successfully managed to give evidence that 2 Travel Group Plc was already in an economic crisis and that 2 Travel's need to sell the land had little to do with the infringement (para. 444). The causal link between the sale and the abuse of dominance had not been established.

<sup>21</sup> The proof of fault on the part of the person causing the damage needs to be established, for instance, under the Austrian and German system. See BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 4 and 286. Proof of other elements may be required by the domestic tort law rules of each country, such as, for example, mitigation, in order to subtract from the calculation of damages the loss which has been avoided or should have reasonably been avoided by the claimant.

<sup>22</sup> SIMON VANDE WALLE, *Private Antitrust Litigation in the European Union and Japan - A Comparative Perspective* (Maklu 2013) 164.

<sup>23</sup> See, *inter alia*, joined cases T-202/98, T-204/98, T-207/98 *British Sugar v Commission*, not yet reported, para. 127: 'It is settled case-law that, for an infringement of the competition rules of the Treaty to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules. It is sufficient that it could not have been unaware that its conduct was aimed at



In the Italian system, an analogous approach is taken by the review judge.<sup>24</sup> Whilst the element of fault is in theory required, a presumption of strict liability operates, according to which, once the infringement is established, it is for the undertaking to prove that it acted without fault.<sup>25</sup> Fault is expressly required also by the Italian system of civil redress,<sup>26</sup> according to Article 2043 of the Civil Code. Notwithstanding such provision, in private antitrust damages, the civil judge has frequently made use of the above mentioned reversal of the burden of proof, which shifts the burden of showing the absence of fault on the alleged infringer. Although such reversal is often said to be based on Article 2600 of the Civil Code,<sup>27</sup> which establishes a presumption of fault for acts of unfair competition, it appears much more plausible to make it derive directly from the influence of the case law of the Luxembourg Courts. Indeed, the regime of acts of unfair competition is very different from that of antitrust, and, in the Italian system, this distinction is underlined by the allocation of the relevant norm for acts of unfair competition, in the Civil Code, and for antitrust, in Law 287/1990. Conversely, the consistency with the case law of the EU Courts and with the national public enforcement is evident. This is thus one of those evidential issues where the national regime converges towards the EU case law, far beyond what would be required by the equivalence and effectiveness principles.

## 2) THE ADMISSIBILITY OF EVIDENCE

Admissibility is needed for evidence to be accepted and produced before the court. When evidence is considered inadmissible, that evidence has to be excluded from consideration even though it might shed light on the merits of a case. The issue of admissibility is closely related to the standard of proof and, in turn, with the outcome of a case.

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restricting competition.’; joined cases C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *NV IAZ International Belgium and others v Commission* [1983] ECR 3369, para. 45.

<sup>24</sup> Council of State, *Soc. P. v AGCM*, 9 May 2011, decision no. 2742 (2011) Foro amministrativo 1598.

<sup>25</sup> Compare Council of State, decision no. 2438 of 20 April 2011, para. 2.4.2; TAR Lazio, decision no. 6917 of 2 August 2011, para. 6. The element of fault is required by Article 3 of Law 689/1981, referred to by Article 31 of Law 287/1990.

<sup>26</sup> CAIAZZO, ‘L’azione risarcitoria, l’onere della prova e gli strumenti processuali ai sensi del diritto italiano’ 324.

<sup>27</sup> MASSIMO SCUFFI, ‘I poteri inibitori e risarcitori del giudice nazionale antitrust’ in GIAN ANTONIO BENACCHIO and MICHELE CARPAGNANO (eds), *I rimedi civilistici agli illeciti anticoncorrenziali. Private Enforcement of Competition Law - Atti del III Convegno di Studio presso la Facoltà di Giurisprudenza dell’Università di Trento 15-16 aprile 2011* (Cedam 2012) 42–43; CAIAZZO, ‘L’azione risarcitoria, l’onere della prova e gli strumenti processuali ai sensi del diritto italiano’ 326.

With regard to the admissibility of evidence in the public enforcement of competition law before the EU Courts, there are no rigid rules governing the admissibility of evidence. Instead, the EU Courts are guided only by the general principle of the free and unfettered evaluation of evidence. When evidence is gathered and transmitted to the Commission in compliance with national laws, it is admissible as evidence under EU law:

[G]iven that there is no legislation at Community level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible.<sup>28</sup>

The same rule of reciprocity applies for evidence obtained in non-EU countries.<sup>29</sup> Apart from this rule of compliance with domestic legislation, EU case law has identified a few procedural rules in the context of competition law. In principle, the Commission and the EU Courts can consider all evidence relevant to the specific matter,<sup>30</sup> but there are boundaries within which evidence can be produced and evaluated by the EU Courts. First of all, evidence found to have been obtained by the competent authorities through the use of violence would be inadmissible.<sup>31</sup> Secondly, means of adducing evidence which are not envisaged by the Rules of Procedure of the EU Courts, which constitute a *numerus clausus*, would be excluded. Thirdly, inadmissibility also applies to evidence gathered in violation of fundamental rights, because the Commission, as with any EU institution, is bound to respect the general principles of law recognized as part of the European legal order.<sup>32</sup> This matter

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<sup>28</sup> Joined cases C-310/98 and C-406/98 *Hauptzollamt Neubrandenburg v. Leszk Labis (Met-Trans) and Sagpol SC Transport Miedzynarodowy i Spedycja* [2000] ECR I-1797, para. 29.

<sup>29</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 27 fn. 94.

<sup>30</sup> The lack of specific rules limiting the admissibility of evidence has brought commentators to conclude that evidence is considered unreliable by the EU Courts only when assessing its probative value, rather than *ex ante*, on the basis of its inadmissibility. Compare SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 26: 'As a result of the generous rules on admissibility, the probative value of evidence – in terms of the weight, credibility and sufficiency – is a central issue in cartel cases, particularly as the secrecy surrounding cartels mean that the Commission is often required to rely on evidence which is indirect or of somewhat weak probative value.'

<sup>31</sup> Case C-511/06 P *Archer Daniels Midland Co. v Commission* [2009] ECR I-5843, Opinion of AG Mengozzi, para. 114: 'Whilst it is true [...] that in Community law – saving specific provision to the contrary – a particular fact may be proved by any form of evidence (freedom as to the form of evidence adduced) and determination of the probative value of an item of evidence is a matter for the Community judicature, not for legislation (unfettered evaluation of evidence), it cannot on the other hand, in my view, be maintained that every item of evidence produced is usable and has to be evaluated as to its merits by the Commission or the Community judicature. That would be inconceivable, for example, in the case of a statement found to have been obtained by the competent authorities through the use of violence.'

<sup>32</sup> Case C-94/00 *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes and Commission* [2002] ECR I-09011, para. 49: '[...] If the decision in question were

will be analyzed in Chapter III, when discussing the fundamental rights that are involved by investigations. For the present purposes, it is anticipated that inadmissibility either allows the judge to eliminate it physically from the case file; or entitles the party required to disclose it to avoid such a court order. Other examples of inadmissible evidence before the EU Courts are:

- statements or documents acquired by the Commission in an earlier proceeding under Regulation (EC) 1/2003, when it is not directly relevant to the subject-matter;<sup>33</sup>
- documents in respect of which the undertaking under investigation has not had an opportunity to exercise its right to be heard during the course of that investigation;<sup>34</sup>
- communications between lawyers and clients that benefit from legal professional privilege;<sup>35</sup>

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annulled by the Community judicature, the Commission would in that event be prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature.’ See, also, case C-46/87 R *Hoechst AG v Commission* [1987] ECR 1549, Order of the President of the Court, para. 34.

<sup>33</sup> Case C-85/87 *Dow Benelux NV v. Commission* [1989] ECR 3137, paras. 17-18: ‘With regard to the complaint concerning the improper use of information obtained during the investigations [...], it should be pointed out [...] that information obtained during investigations must not be used for purposes other than those indicated in the order or decision under which the investigation is carried out. [...] in addition to professional secrecy, [...] that requirement is intended to protect the rights of the defence of undertakings [...]. Those rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof.’ See also joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission* [2002] ECR I-8375, para. 305: ‘[I]t is forbidden to make direct use as evidence in a second proceeding of a document obtained in a previous proceeding.’

<sup>34</sup> Case C-107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* [1983] ECR 3151, para. 27: ‘Since these documents were not mentioned in the statement of objections, AEG was entitled to take the view that they were of no importance for the purposes of the case. By not informing the applicant that these documents would be used in the decision, the Commission prevented AEG from putting forward at the appropriate time its view of the probative value of such documents. It follows that these documents cannot be regarded as admissible evidence for the purposes of this case.’

<sup>35</sup> Case C-155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575, paras. 29-31: ‘If an undertaking which is the subject of an investigation [...] refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission’s authorized agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection [...], although it is not bound to reveal the contents of the communications in question. [...] Since this is a matter involving an appraisal and a decision which affect the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition, the solution of disputes as to the application of the protection of the confidentiality of written communications between lawyer and client may be sought only at Community level. In that case it is for the Commission to order [...] production of the communications in question and, if necessary, to impose on the undertaking fines or periodic penalty payments [...] as a penalty.’ See also case C-7/04 P (R) *Commission v Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd* [2004] ECR I-8739, Order of the President of the Court, paras. 37-38: ‘The Court has also held, with respect to a decision by the

- statements made by executives of an undertaking in reply to questions posed in the course of a preliminary examination of witnesses prior to the initiation of national civil proceedings, where the reply entails an admission of an infringement of the competition rules;<sup>36</sup>
- minutes of questioning from national criminal proceedings, where transmission of those minutes to the Commission has been declared unlawful by the competent national court;<sup>37</sup>
- statements made in a proceeding other than the one conducted by the Commission, where the interested party was not given benefit of the procedural protection that he or she would have enjoyed under EU law if those statements had been taken directly by the Commission.<sup>38</sup>

Besides this case-law inspired list, in antitrust cases, the most likely reason for the inadmissibility of documents is their confidentiality. In search for a balance between the protection of the right of defence and the confidential nature of certain information, Article 67(3) of Rules of Procedure of the General Court provides that:

[...] the General Court shall take into consideration only those documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity of expressing their views.

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Commission to order an investigation, that if that decision were annulled by the Community judicature, the Commission would in that event be prevented from using [...] any documents or evidence which it might have obtained in the course of that investigation [...]. The same principles apply where a decision of the Commission not to allow professional privilege for one or more documents is at issue and that decision is annulled by the Community judicature’.

<sup>36</sup> Case C-60/92 *Otto BV v Postbank NV* [1993] ECR I-5683, para. 20: ‘[T]he Commission - or for that matter a national authority - cannot use that information to establish an infringement of the competition rules in proceedings which may result in the imposition of penalties, or as evidence justifying the initiation of an investigation prior to such proceedings.’

<sup>37</sup> Case C-407/04 P *Dalmine SpA v Commission* [2007] ECR I-829, paras. 62-63: ‘As regards, next, the admissibility of those minutes as evidence, it must be held [...] that the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. Furthermore, [...] the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority [...]. As regards the use of that information by the Commission, the Court of First Instance correctly observed [...] that Dalmine’s arguments could affect only ‘the reliability and therefore the probative value of its managers’ statements and not the admissibility of that evidence in the present proceedings’. [...] the principle which prevails in Community law is that of the unfettered evaluation of evidence and the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility. Accordingly, as the transmission of the minutes in issue was not declared unlawful by an Italian court, those documents cannot be considered to have been inadmissible evidence which ought to have been removed from the file.’

<sup>38</sup> This list, with similar wording, and reference of the cited case law can be found in *Archer Daniels Midland Co. v Commission*, Opinion of AG Mengozzi, paras. 114-115.

This principle also applies in the event of joined cases,<sup>39</sup> in order to avert the situation where a competitor, that is party to the proceedings, discovers confidential and potentially sensitive information regarding the appellant undertaking.<sup>40</sup>

It is evident from the preceding observations, that the approach to the admissibility of evidence in antitrust proceedings before the Luxembourg Courts is shaped by concerns that are typical of an adversarial blueprint, rather than an inquisitorial one. Whilst this consideration can be referred only to the review process and not to the procedure before the EU Commission, it must be observed that the rules on admissibility in Article 67 of the Rules of Procedure of the General Court appears to encapsulate a more general principle.<sup>41</sup> That principle requires the adjudicators to rely on evidence on which the parties had the opportunity to express their views.<sup>42</sup> If evidence from which the Commission has drawn conclusions in its decision has not been communicated to the defendant, that evidence should not be used to support that decision in the course of the review control.<sup>43</sup> Such principle is at the basis of the mechanism of the statement of objections and of the provisions of Article 12 of Regulation (EC) 773/2004, pursuant to which the Commission ‘shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.’ Moreover, in support of the above observations, anonymous evidence is considered admissible,<sup>44</sup> but its nature must be taken into account when determining the weight of that

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<sup>39</sup> Rules of Procedure of the General Court, Article 50(2).

<sup>40</sup> BIAVATI, *Diritto processuale dell’Unione Europea* 227-230.

<sup>41</sup> BIAVATI, *Diritto processuale dell’Unione Europea* 229.

<sup>42</sup> Compare also MARC JAEGER, ‘The Court of First Instance and the Management of Competition Law Litigation’ in HEIKKI KANNINEN and others (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tiili* (Hart Publishing 2009) 11: ‘Considering the fact-intensive nature of competition cases, which generally require in-depth economic analysis, the measures of organisation of the procedure have been developed through the years to ensure that the preliminary report, and consequently the report for the hearing, is as detailed as possible so as to allow all of the judges in the chamber to master from the earliest stage of a procedure all of the facts at stake.’

<sup>43</sup> Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 21: ‘In that respect it must be held that since the reply of Steetley Chemicals was not disclosed to AKZO, although the Commission drew conclusions from it, the information contained in that document cannot be used in the present proceedings.’

<sup>44</sup> *Dalmine SpA v Commission*, paras. 72-73: ‘The prevailing principle of Community law is the unfettered evaluation of evidence and the sole criterion relevant in that evaluation is the reliability of the evidence [...]. Moreover, it may be necessary for the Commission to protect the anonymity of its informants [...] and that fact alone cannot require the Commission to set aside evidence in its possession. Consequently, whilst Dalmine’s arguments may be relevant in evaluating the reliability and, therefore, the probative value of the sharing key document, it should not be regarded as inadmissible evidence which should be removed from the file.’ Compare also, with regard to the protection of informant’s anonymity, case C-145/83 *Stanley George Adams v Commission*, [1985] ECR 3539, para. 34: ‘As regards the existence of a duty of confidentiality it must be pointed out that Article 214 of the EEC Treaty lays down an obligation, in particular for the members



evidence.<sup>45</sup> Admitting evidence whose origin is undisclosed could be seen as a violation Article 6(3)(d) of the ECHR.<sup>46</sup> Nonetheless, the admissibility of evidence without cross-examination has been confirmed as compatible with the system of EU law by the General Court.<sup>47</sup> It seems that such a conclusion, in the lack of clearer indications in relation to the criminal nature of competition law proceedings, is justified by the considerable difficulties of gathering evidence. Doubt remains, however, about whether there is adequate respect of the principle of equality of arms, especially due to the fact that the utility of cross-examination of a witness may be significant in some cases.<sup>48</sup>

The fact-intensive nature of competition law must be reconciled with, especially for cartel cases, a recurring scarcity of direct evidence. This may be done also by means of lowering the standard of admissibility of evidence in this field. This attitude of the CJEU, according to which it

is the sole judge of whether the information available to it concerning the case before it needs to be supplemented [...] to assess the relevance of the request to the subject-matter of the dispute and the need to examine the witnesses named [...]<sup>49</sup>

does not only affect the Commission's approach, but also affects the approach of the national courts to cases of public and the private enforcement.

With regard to the admissibility of evidence at the national level, the rules of admissibility of evidence vary according to the legal system. A frequent feature of many

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and the servants of the institutions of the Community 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'. Although that provision primarily refers to information gathered from undertakings, the expression 'in particular' shows that the principle in question is a general one which applies also to information supplied by natural persons, if that information is 'of the kind' that is confidential. That is particularly so in the case of information supplied on a purely voluntary basis but accompanied by a request for confidentiality in order to protect the informant's anonymity. An institution which accepts such information is bound to comply with such a condition.'

<sup>45</sup> *Salzgitter Mannesmann GmbH v Commission*, paras. 46-50.

<sup>46</sup> CASTILLO DE LA TORRE, 'Evidence, Proof and Judicial Review in Cartel Cases' 534. For the criminal nature of competition law proceedings, see para. 5 G) a) of this Chapter.

<sup>47</sup> Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission* [2002] ECR II-1487, para. 392; *Aalborg Portland and others v. Commission*, paras. 200-201; joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré SA and others v Commission* [2007] ECR II-947, paras. 87-88; case T-54/03 *Lafarge SA v Commission* [2008] ECR II-120, paras. 145-150.

<sup>48</sup> *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission*, paras. 384-385. Compare also SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 298-299

<sup>49</sup> Joined cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG and Österreichische Volksbanken AG v Commission* [2009] ECR I-8681, paras 319-320.

system is the link between the admissibility of evidence and its relevance to the matter at issue and the way in which the evidence in question has been gathered.

### A) The Admissibility of Evidence in the Judicial Review

As far as the appellate and review jurisdictions in England and Italy are concerned, the CAT and the TAR Lazio are respectively endowed with extensive powers to reconsider the factual elements of the case.<sup>50</sup> This is in line with the flexible criteria of admissibility of evidence applied by the EU Courts. It reflects the view that appellate and review courts in the UK and Italy are largely free to decide whether evidence is admissible before them. For instance, in Italy, the administrative judge has recently been vested with the power to order expert evidence, so that no procedural constraints will hamper its ability to fully evaluate the facts.<sup>51</sup> The Italian administrative judge can make use of all civil means of proof, except for declaration under oath and confession.<sup>52</sup> As a result, evidence with mandatory value attached to it are excluded from the proceedings, with full respect of the principle of free evaluation of the judge.

In England, the CAT adopts a ‘broad brush’ approach: in the taking of witness evidence, it declared to be willing to give much more importance to the general picture and to ‘circumstances of overall fairness’<sup>53</sup> rather than to strict rules of procedure or evidence.<sup>54</sup> Under CAT Rule 22, the CAT can give directions in order to focus attention on those issues upon which it requires evidence; which types of evidence it requires and the nature of the evidence required; and the way in which the evidence must be presented.<sup>55</sup> Moreover, it has the power to admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken; it may require any witness to give evidence or dispense it if a witness statement has been submitted. The CAT has a broad

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<sup>50</sup> Along the dissertation, unless otherwise specified, when talking about the function of the CAT as an appellate court, reference is made exclusively to public appeals against findings of fact by the OFT, as opposed to its function under Section 47A of the Competition Act 1998 in private follow-on actions.

<sup>51</sup> LEONI, ‘La tutela giurisdizionale contro gli atti dell’AGCM in materia antitrust’ 425.

<sup>52</sup> ELIO CASETTA, *Manuale di diritto amministrativo* (6th edn, Giuffrè 2004) 769 and 855–856.

<sup>53</sup> *Argos Limited and Littlewoods Limited v OFT*, [2003] CAT 16, para. 105 (Chapter I prohibition).

<sup>54</sup> Compare also *British Telecommunications plc v Office of Communications (Ofcom) and Hutchison 3G UK Ltd* [2011] EWCA Civ 245, para. 75. In that case, the Court of Appeal dismissed an appeal brought by Ofcom against a procedural decision of the CAT. The CAT had agreed, in a preliminary ruling, to allow BT to introduce fresh evidence on the appeal, which it had not presented to Ofcom. The Court of Appeal upheld the CAT’s decision on ground that ‘refusal to admit fresh evidence would not be consistent with basic justice [...]. Indeed, the case might be thought to provide a compelling illustration of why the strict general exclusionary rule contended for by Ofcom would be capable of causing injustice.’

<sup>55</sup> The Competition Appeal Tribunal Rules 2003, Statutory Instrument 2003 No. 1372, para. 22.



discretion in its appreciation of the collected evidence, and its case law shows that many factors have a bearing upon the probative value to be attributed to a specific item of evidence.<sup>56</sup>

### **B) The Admissibility of Evidence in the Private Enforcement**

As for the private enforcement, this ‘broad brush’ approach takes the form of a general *favor probationis*, i.e. a rule of validation which aims at ‘saving’ the admissibility and validity of the evidence presented. It is generally accepted that admissibility of evidence is determined according to the law of the forum,<sup>57</sup> which deals with how the facts are to be proved and the means of proof which may be used by the parties. The consequences of such strict characterisation, nonetheless, may lead to undesirable results. For example, an item of evidence could be accepted into evidence in the forum even if it were inadmissible under the law of the cause of action. Conversely, if that evidence were admissible in the *lex causae* it would be excluded from consideration under the *lex fori*. Since direct evidence in some competition law matters, such as cartels, is particularly sparse, this outcome is not the most desirable. Doubts have been expressed as to the effectiveness and consistency of this rule if applied mechanistically, because it could have a profound impact on the outcome of the case.<sup>58</sup> The argument that a court should take account of the inadmissibility of an item of evidence when assessing its probative value is not convincing for two reasons. First, the argument only applies in cases where evidence is admitted, and does not provide a solution for the much more serious situation in which evidence is excluded. Secondly, the evaluation of the probative value of evidence raises similar concerns as regards its allocation under the *lex fori* or the *lex causae*.<sup>59</sup> This second concern is even more troubling when one considers that coordination between NCAs across the EU easily allows evidence to be transferred from one jurisdiction to another and, as often as not, the country where the claimant eventually decides to sue, either on a follow-on or on a stand-alone basis, is a third country.

With regard to the admissibility of documentary evidence in private cross-border litigation it can be further observed that a strict *lex fori* approach is adopted by common law

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<sup>56</sup> *JJB Sports Plc and Allsports v Office of Fair Trading* [2004] CAT 17, para. 294: ‘[O]ur general approach to the witness evidence [...] is to be cautious, and to look for corroboration, whether from the context, documents, or other witnesses, wherever possible.’

<sup>57</sup> FONGARO, *La loi applicable à la preuve en droit international privé* 203.

<sup>58</sup> GARNETT, *Substance and Procedure in Private International Law* 191.

<sup>59</sup> This opinion will be supported in the next paragraph.

countries.<sup>60</sup> By contrast, in civil law systems, where the question as to the admissibility of the means of adducing evidence is usually considered as falling under the law of the place of its execution (*lex loci actus*), regardless of its admissibility under the law of the forum.<sup>61</sup> It is submitted that a more consistent solution is provided by Articles 18(2) and 22(2) of the Rome I and Rome II Regulations, which allow any mode of proof recognised either by the law of the forum or by the law of the cause of action or of the place of the act.

In the English system, all types of documents (including all notes, records, statements, correspondence, tapes or any other material support with stored data) or witnesses are generally admissible within the terms of the question brought before the court. The rules upon the collection of evidence are contained in Part 32 of the Civil Procedure Rules ('CPR'). An unusual feature of the English system concerning the gathering of the proof is the broad disclosure. Rules on disclosure enable each party to obtain documentary evidence in the control of the other party or in the hands of a third party. Since disclosure plays a very important role in the effectiveness of private enforcement in England, it will be analysed on its own in Chapter III.<sup>62</sup> Apart from documentary evidence, evidence is given by witnesses, who usually write witness statements before the trial and are then cross-examined at the trial about the facts, events and matters described in their statement. If a witness is reluctant to attend the trial, his or her presence at the hearing can be ordered by the court issuing a written summons. A witness summons him or her to attend the hearing and, where appropriate, give oral testimony or to produce documents before the court. This second function is very similar to that of disclosure, but operates exclusively for documents possessed by a witness. Witness statements, together with the cross-examination and re-examination of the witness at trial, may have weight, depending on the witness credibility.

In Italy, the general rules of relevance and admissibility for civil proceedings apply. Some commentators<sup>63</sup> consider that the means of adducing evidence contemplated by Italian law form a *numerus clausus*, including only documents, presumptions, confession,

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<sup>60</sup> Compare *Wicken v Wicken* [1999] Fam 224; [1999] 2 WLR 1166, where the question arose as to the validity of a divorce letter from the former husband as a valid method of proof for a talaq divorce between two Muslims of Gambian nationality. The law of the cause of action was the Gambian law, under which the authenticity of the handwritten letter had to be verified by two witnesses. Conversely, under the English law, the law of the forum, the Gambian requirements were not necessary and the letter was considered *per se* authentic and therefore admissible. See GARNETT, *Substance and Procedure in Private International Law* 192–193.

<sup>61</sup> FONGARO, *La loi applicable à la preuve en droit international privé* 74.

<sup>62</sup> See Chapter III, para. 2 D).

<sup>63</sup> ANTONIO CARATTA, 'Prova e convincimento del giudice nel processo civile' [2003] *Rivista di diritto processuale* 27, 52; NICOLA PICARDI, *Manuale del processo civile* (2nd edn, Giuffrè 2010) 307.

declaration under oath and testimony. The majority of the scholars, however, now agree that there is no specific rule excluding the admissibility of alternative types of evidence other than those listed in the Civil Code.<sup>64</sup> It is also generally accepted that all ‘atypical’ types of evidence (such as written statements of third parties or evidence collected in previous, concluded proceedings or joined proceedings) are to be evaluated by the judge under Article 2729 of the Civil Code, as if they were *indicia*.<sup>65</sup> In this respect, ‘atypical’ evidence is assessed by the judge pursuant to Article 116(1) of the Civil Procedure Code. Article 116(1) provides for the principle of free and unfettered evaluation of evidence, with the exception of those types of evidence which have a legally binding value.<sup>66</sup> Atypical evidence is excluded from consideration, however, whenever it infringes a legal norm or due process.<sup>67</sup>

### 3) THE PROBATIVE VALUE OF EVIDENCE

Closely linked to the issue of admissibility of evidence, is the assessment of its probative value. In what can be considered a summary of the rules on the probative value of evidence for EU competition law, the General Court established its approach to the evaluation of evidence as follows:

- the sole criterion for evaluating freely adduced evidence is its reliability;<sup>68</sup>
- the reliability and the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the reputed and reliable nature of its content;<sup>69</sup>

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<sup>64</sup> *Inter alia*, MICHELE TARUFFO (ed), *La prova nel processo civile* (Giuffrè 2012) 73; LUIGI LOMBARDO, ‘Profili delle prove civili atipiche’ [2009] *Rivista trimestrale di diritto e procedura civile* 1447, 1447–1448.

<sup>65</sup> REDENTI and VELLANI, *Diritto processuale civile* 180; CRISANTO MANDRIOLI, *Il processo di cognizione*, vol. II (6th edn, Giappichelli 2007), Corso di diritto processuale civile 119. For the necessity of written documents of third parties to be corroborated by other evidence, see LOMBARDO, ‘Profili delle prove civili atipiche’ 1454.

<sup>66</sup> As an example, the judge must consider as fully proved those facts which are described by public officers as happened in their presence in the emanation of a public deed; or those facts which make the object of confession or declaration under oath of the parties to the proceedings. This evidence, however, is rare in private antitrust actions.

<sup>67</sup> Court of Cassation, 5 March 2010, decision no. 5440 (2010) *Giurisprudenza italiana* 2589-2595.

<sup>68</sup> *Dalmine SpA v Commission*, para. 72; joined cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering v Commission* [2004] ECR II-2501, para. 273; T-44/00 *Mannesmannröhren-Werke AG v Commission* [2004] ECR II-2223, para. 84; *Vela and Tecnagrind v. Commission*, para. 223; and *Rhône-Poulenc SA v Commission*, Opinion of AG Vesterdorf, at II-869.

<sup>69</sup> *Cimenteries CBR and others v Commission*, para. 1053; *Rhône-Poulenc SA v Commission*, Opinion of AG Vesterdorf 867, 869 and 956.

- documents that have been drawn up in close connection with the events<sup>70</sup> or by direct witnesses of those events<sup>71</sup> or statements which run counter to the interests of the declaring party are particularly reliable.<sup>72</sup>

The principle of free and unfettered evaluation of evidence, which, as already illustrated, is recognized as a general principle of EU evidence law,<sup>73</sup> is a polar star in the reasoning of the EU Courts since its affirmation in *Rhône-Poulenc*. All legitimately gathered evidence is considered by the judge to the end of reaching his or her conviction upon the facts. The factors influencing the free evaluation carried out by the judge are set out below.

The EU Courts clearly favour a contextual approach to evidence, which is also particularly helpful in those cases where there is a total lack of documentary evidence.<sup>74</sup> An overall view is useful for the ‘sanity check’ of the available evidence,<sup>75</sup> to verify whether alternative plausible explanations exist which give the evidence a more coherent and meaningful sense.<sup>76</sup> This attitude of the EU Courts is matched by their propensity not to require a point-by-point demolition of the arguments of the investigated undertaking on the part of the Commission.<sup>77</sup> What is relevant in the eyes of the Court of Justice is the consistency of the story proposed by the Commission (or by the defence of the undertaking). Whilst it might be easy to find plausible alternative explanation for an isolated item of evidence, it is hardly possible to do so for a body of evidence and information considered as a whole.<sup>78</sup>

With regard to the timing of evidence, in its Opinion in *Rhône-Poulenc SA*, Judge Vesterdorf, sitting as Advocate-General, stated that the fact that the documents are drawn up

<sup>70</sup> Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, para. 181 and case T-157/94 *Empresa Nacional Siderurgica SA (Ensidesa) v Commission* [1999] ECR II-707, para. 312.

<sup>71</sup> *JFE Engineering v Commission*, para. 207.

<sup>72</sup> *JFE Engineering v Commission*, paras. 207, 211 and 212. The admission of facts contrary to one’s interests is attributed relevance also when statements come from officers or managers of the investigated undertaking, provided that they are under an obligation to act in the interests of their company. Compare *SIRAGUSA* and *RIZZA*, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 27.

<sup>73</sup> Case C-239/11 P, C-489/11 P and C-498/11 P *Siemens v Commission*, not yet reported, para. 128.

<sup>74</sup> See Introduction, fn. 73.

<sup>75</sup> Case C-48/69 *Imperial Chemical Industries Ltd. (ICI) v Commission* [1972] ECR 619, para. 68: ‘[T]he question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole [...]’.

<sup>76</sup> *Rhône-Poulenc SA v Commission*, Opinion of AG Vesterdorf, at II-954: ‘A very important factor [...] is the overall view of the evidence. It is clear that even where it is possible to give a reasonable alternative explanation of a specific document, which may be isolated from a number of documents, the explanation in question might not withstand closer examination in the context of an overall evaluation of a whole body of evidence.’

<sup>77</sup> *Bolloré SA and others v Commission*, para. 451.

<sup>78</sup> CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 540.

immediately after a meeting and without any thought for the fact that they might fall into the hands of third parties, enhances their probative value. In the specific circumstances of the Polypropylene case, according to the Advocate-General, the reports of the meetings showed that they were drafted with care by people who were in the knowledge of the relevant facts described, and their content was concise, measured, and clear. Ultimately, these circumstances led the Advocate-General to conclude, insofar as material:

[...] I consider that there need be no hesitation in assuming that the notes are a reliable source for understanding what took place at the meetings and given their ordinary natural meaning they thus provide a basis for surmising the significance of the matters discussed.<sup>79</sup>

Interestingly, the probative value of the document is not diminished by the circumstance that the document is hardly legible, unsigned or undated, provided that its origin is made clear by circumstantial evidence.<sup>80</sup> This is because, even if legal formalities like signatures and dates may help a court to authenticate a document, obviously in antitrust there is much less scope for formality. Statements emanating from people acting on behalf of an undertaking are attributed higher probative strength than those emanating from employees, because managers and chairmen are under a professional obligation to act in the interests of the company. Their statements are regarded as particularly credible.<sup>81</sup> Moreover, when evidence has been disclosed following compulsion by state authorities, it is considered highly reliable, owing to the serious consequences arising from perjury under criminal law.<sup>82</sup> Any evidence available can therefore be used in evidence, on condition that it is considered altogether with other evidence,<sup>83</sup> and the judge must take into account whether, for instance, the document emanated from third parties<sup>84</sup> or whether the identity of the

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<sup>79</sup> *Rhône-Poulenc SA v Commission*, Opinion of AG Vesterdorf, at II-956 and II-957.

<sup>80</sup> Case T-11/89 *Shell v Commission* [1992] ECR II-757, para. 86: 'The Court finds that the evidence which the applicant puts forward in order to diminish the evidentiary weight of that note made by Hercules' marketing director cannot contradict the conclusions which the Commission drew from the note. The note itself is free of ambiguity and the fact that it is badly written, unsigned and undated is quite normal since it is a note taken during a conversation, probably over the telephone, and the anti-competitive object of the note was a reason for its author to leave the least trace possible [...]'. CASTILLO DE LA TORRE, 'Evidence, Proof and Judicial Review in Cartel Cases' 546.

<sup>81</sup> *JFE Engineering v Commission*, paras. 206 and 210.

<sup>82</sup> *JFE Engineering v Commission*, para. 312.

<sup>83</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 25.

<sup>84</sup> Case C-40/73 *Suiker Unie and others v Commission* [1975] ECR 1663, para. 164: 'Contrary to the view of SU and CSM there is no reason why the Commission and the Court should not accept as evidence of an

author is undetermined.<sup>85</sup> In particular, the General Court considers highly reliable also documents originated by other infringing undertakings, thus indicating that their status as defendants does not necessarily impinge upon the probative strength of the evidence they provide.<sup>86</sup> Moreover, the fact that the evidence was not produced by a person who had direct knowledge of the facts does not necessarily lower its probative strength.<sup>87</sup> Clearly, precautions such as those usually applied in the field of criminal law, like the exclusion of hearsay,<sup>88</sup> do not apply in antitrust proceedings. This supports the observation that the assessment of evidence in EU competition law does not entirely fit the model of criminal proceedings. It also entails the implication that the full safeguards of proceedings under domestic criminal law do not have to be guaranteed. The less stringent procedural guarantees of ECHR are applicable since competition law is classified as ‘non-hard core’ criminal law.<sup>89</sup>

The credibility of the relevant evidence can be traced back to the information contained, the author and the circumstances in which the particular document or other type of evidence was produced.<sup>90</sup> As observed by the General Court in *Shell*,<sup>91</sup> the more detailed the evidence, the more it is likely to be reliable, in that the level of detail is deemed to be

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undertaking’s conduct correspondence exchanged between third parties, provided that the content thereof is credible to the extent to which it refers to the said conduct.’ See also *Shell v Commission*, para. 86: ‘[T]he fact that the information is reported second hand is immaterial since the Commission expressly uses the note as written, contemporaneous evidence of the facts, and as evidence that producers other than the author of the note had concluded an agreement.’

<sup>85</sup> Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission* [1999] ECR II-931, para. 665: ‘[T]he exact identity of the author of the planning documents does not appear to be decisive. The only question which matters is whether those documents may be regarded as the blueprint for a cartel, as the Commission maintains.’ See also *Shell v Commission*, para. 86: ‘The author’s imprecise recollection of the circumstances in which the note was drawn up does not impugn its evidentiary value since the contents of the note indicate that the information which it contains was provided by one of the ‘big four’, and it is not necessary to identify which of the ‘big four’.’

<sup>86</sup> *JFE Engineering v Commission*, para. 192: ‘[N]o provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings [...]. If that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 82 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted it by the EC Treaty [...].’

<sup>87</sup> *JFE Engineering v Commission*, para. 299: ‘It is inappropriate to infer therefrom that the statement made on behalf of a company by an executive thereof, against it and against other undertakings, is of limited probative value because he did not have direct knowledge of the facts. A fortiori, there is no reason to reject such an item of evidence as inadmissible.’

<sup>88</sup> Compare Article 197(a) of Italian Criminal Procedure Code.

<sup>89</sup> *Jussila v Finland*, Application no. 73053/2001 [2006] ECHR XIV, para. 43.

<sup>90</sup> *Cimenteries CBR and others v Commission*, para. 3172.

<sup>91</sup> *Shell v Commission*, para. 86: ‘Finally, the precise, detailed nature of that information makes it wholly unlikely that it simply reflected market gossip, was completely wrong or invented.’



inversely proportional to the likelihood of its wrongness or inexactness. It is interesting to note that the EU Courts will take account of the fact that a national judge has discarded evidence as unreliable, thereby reducing its evidentiary weight.<sup>92</sup> *Ex post* drafted documents are treated with particular caution by the Luxembourg Courts, especially when they yield exculpatory content:<sup>93</sup>

[T]he value of evidence alleged to be exculpatory evidence may diminish, for example, because it came to light at the initiative of the defendants and at a time when it was already clear that the Commission had begun to suspect a cartel infringement and the undertakings concerned had therefore received a warning (*‘in tempore suspecto’*).<sup>94</sup>

When the admissibility, relevance and weight of evidence is not contested by the defendant it will be considered as reliable. It appears that, in EU law, an acknowledgment of certain facts by the undertaking in question is interpreted as some sort of probative estoppel,<sup>95</sup> preventing it from challenging the probative value of that evidence at a later stage.<sup>96</sup> The estoppel is justified on the ground that only a timely contestation would permit the Commission ‘to investigate the matter more thoroughly and to attempt to adduce further evidence’.<sup>97</sup> When evidence has not been referred to in the decision or in the statement of

<sup>92</sup> Case T-36/05 *Coats Holdings Ltd and J & P Coats Ltd v Commission* [2007] ECR II-110, paras. 165–167: ‘The applicants correctly point out that Mr E was not involved in the negotiation of the 1994 agreements and that the judge rejected his evidence as unreliable in the litigation between Entaco and Prym in the High Court of Justice in September 1999. [...] As regards the compensation scheme, Mr E’s statements are contradictory [...] In those circumstances, Mr E’s testimony is unreliable and incapable of corroborating the Commission’s case.’

<sup>93</sup> *Lafarge SA v Commission*, para. 509: ‘[E]n ce qui concerne la nouvelle déclaration de M. [G] [...], il y a lieu de relever que la requérante ne l’a pas invoquée pendant la procédure administrative. Eu égard à la circonstance selon laquelle cette déclaration est tardive, éloignée de la date des faits en cause et manifestement établie aux fins de l’instance, elle n’a qu’une faible valeur probante et ne saurait mettre en cause les éléments factuels relevés par la Commission dans sa décision.’; *Archer Daniels Midland Co. v Commission*, para. 51.

<sup>94</sup> *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, para. 28.

<sup>95</sup> *Tokai Carbon Co. Ltd v Commission*, para. 108: ‘As to whether Nippon can go back on that cooperation and claim before the Court that it had not participated in the infringement between May 1992 and March 1993, it has consistently been held that where the undertaking involved does not expressly acknowledge the facts, the Commission must prove the facts and the undertaking is free to put forward, in the procedure before the Court, any plea in its defence which it deems appropriate [...]. It may be concluded, *a contrario*, that that is not the case where the undertaking expressly, clearly and specifically acknowledges the facts: where it explicitly admits during the administrative procedure the substantive truth of the facts which the Commission alleges against it in the statement of objections, those facts must thereafter be regarded as established and the undertaking estopped in principle from disputing them during the procedure before the Court.’ See *Lafarge SA v Commission*, para. 509, quoted at fn. 93 above.

<sup>96</sup> CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 552.

<sup>97</sup> *Tokai Carbon Co. Ltd v Commission*, para. 106.



objections, it cannot be relied upon by the Commission when the decision is challenged before the General Court.<sup>98</sup>

### A) The Probative Value of Evidence in the Judicial Review

In the appellate and review proceedings under national law, similar principles seem to be followed. Mention has been made of the adoption of a contextual assessment of evidence by the UK CAT,<sup>99</sup> and the breadth of the review of the Italian administrative judge suggests that its control over the evidence and its power of assessment is comparable. In a Scottish<sup>100</sup> case, *Aberdeen Journals Limited v OFT*, the CAT observed that no supremacy of one kind of evidence over another exists that the Tribunal would have to follow when deciding a case. The appellant is free to decide on which type of evidence to rely on. The Tribunal is then free to decide whether the evidence presented is sufficient to prove the alleged case.<sup>101</sup> The presence, as well as the absence, of a certain category of evidence must be appreciated 'in the round' by the Tribunal, when taking its decision.<sup>102</sup> Moreover, Rule 22(2) of the CAT Rules 2003 provides that the Tribunal can admit or exclude evidence, regardless of whether or not the evidence was available to the respondent when the disputed decision was taken. Hence, before the Tribunal, documents will rarely be considered inadmissible, but the weight attributed to them may vary according to different factors, particularly those that would have rendered the document inadmissible under other jurisdictions (such as, for example, a document that contains hearsay).<sup>103</sup>

When assessing the value of documentary evidence, the Tribunal considers its natural meaning, by means of identifying the time at which it was formed, the context of its preparation, and the identity of the author; it therefore proceeds to according it the probative

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<sup>98</sup> *JFE Engineering v Commission*, para. 176.

<sup>99</sup> *Argos Limited and Littlewoods Limited v OFT*, para. 105. See text accompanying fn. 53 above.

<sup>100</sup> As already clarified, when referring to the case law of England or the UK, reference is made to the England and Wales jurisdiction. Nonetheless, since the English rules of public enforcement are largely applicable to Scotland, it seems acceptable to make reference here to a Scottish case of public enforcement.

<sup>101</sup> It appears evident how the assessment of evidence is directly connected with the issue of the standard of proof.

<sup>102</sup> *Aberdeen Journals Limited v OFT* [2003] CAT 11(Chapter II prohibition), para. 128. The Tribunal admits that consumer surveys, market studies and any type of evidence showing the attitudes of consumers or end users are particularly valuable to the definition of the relevant market. Nonetheless, there is no rule of law requiring the plaintiff to necessarily provide them, in case he or she considers other evidence more relevant and sufficient to make their case.

<sup>103</sup> *Tesco Stores Ltd and Tesco Holdings Ltd and Tesco plc v OFT* [2012] CAT 31 (Chapter I prohibition), paras. 125–128; *Aberdeen Journals Limited v OFT*, para. 131. For the irrelevance of this argument to solve inconsistencies, see text accompanying fn. 59 above.

value considered appropriate.<sup>104</sup> It is open to those who wish to challenge the document's accuracy or credibility to produce a witness statement from the author of the document which seeks to clarify its content or place that document in context. In those cases where evidence is extremely fragmented and sparse,<sup>105</sup> the English courts will consider indirect or circumstantial evidence, being also prepared to rely entirely on such evidence in some cases.<sup>106</sup> In practice, it is necessary, when considering the evidence available, to take into account that colluding parties are generally well aware of the risks involved by such activity and normally take care to not leave record of their violation, such as minutes of meetings or e-mail exchanges.<sup>107</sup> On the one hand, it is easy to see that the contextual approach adopted by the EU Courts is followed also by the CAT; on the other hand, it is hard to imagine that the CAT will adopt such an approach only when reviewing OFT decisions and not when deciding on follow-on actions for damages brought before it.

The context in which a document is formed is very important also for the Italian review judge, which considers that statements emanating from chief executive officers must be accorded high probative strength.<sup>108</sup> The importance of the overall consideration of evidence is also stressed repeatedly by the Council of State, which, in its evaluation, focuses on the probative framework considered as a whole. In particular, the need for a contextual approach arises out, in cartel cases, of the scarcity of direct evidence in certain cases,<sup>109</sup> and the fact that a too rigorous evaluation of evidence would result in the complete frustration of the objectives of deterrence of competition law.<sup>110</sup> The fact that the proof is based on circumstantial evidence does not make it any less reliable.<sup>111</sup> The Council of State considers that documents found in the hands of a third party can be used in evidence,<sup>112</sup> contrary to what the ordinary courts case law appears to suggest. Italian civil procedural rules provide that such documents do not qualify as evidence but only as an 'argomento di prova'. An

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<sup>104</sup> *Tesco Stores Ltd and Tesco Holdings Ltd and Tesco plc v OFT*, para. 125; *Aberdeen Journals Limited v OFT*, para. 132.

<sup>105</sup> *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24 (Chapter I prohibition), para. 312.

<sup>106</sup> *JJB Sports Plc and Allsports v Office of Fair Trading* (Chapter I prohibition), para. 206: 'In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard.'

<sup>107</sup> *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24 (Chapter I prohibition), paras. 107, 558, 560 and 604.

<sup>108</sup> Council of State, *B. v AGCM*, 23 May 2012, decision no. 3026, para. 4; Council of State, 30 August 2002, decision no. 4362 (Article 2 of Law 287/1990), para. 5.1.2.

<sup>109</sup> Council of State, *Soc. Trambus v AGCM*, 9 April 2009, decision no. 2201 (2009) Repertorio del foro italiano 838 (Article 2 of Law 287/1990).

<sup>110</sup> Council of State, *B. v AGCM*, 23 May 2012, decision no. 3026, para. 5.

<sup>111</sup> Council of State, *Soc. Ataf v AGCM*, 25 March 2009, decision no. 1794, para. 10.5.

<sup>112</sup> Council of State, *Soc. Colabeton v AGCM*, 29 September 2010, decision no. 5864 (2010) Repertorio del foro italiano 722.

‘argomento di prova’ is not regarded as having any probative value *per se*, but it can be considered by the judge for the corroboration of other evidence, or for its interpretation.<sup>113</sup> It is generally accepted, in the case law of the Italian ordinary judges, that decisions should not be based on an only ‘argomento di prova’.<sup>114</sup> By contrast, the Italian Council of State expressly referred to the judgment of the Court of Justice in *Suiker Unie*.<sup>115</sup> It stated that there is nothing preventing the judge from relying exclusively on an ‘argomento di prova’, provided that it is considered reliable.<sup>116</sup> In the lack of direct evidence, the judge may resort to inferences and corroborating evidence. This approach is in keeping with the one taken by the EU Courts: as often as not, direct evidence of an agreement is rarely found.<sup>117</sup> That being so, circumstantial evidence may be used to establish the existence of concerted practices.<sup>118</sup> The reasoning of the Italian review courts is substantially analogous to that of the EU Courts in that it makes reference to the need to take into account the effectiveness of the overall system, which would lose much of its sense in the practice if the Court did not rely on circumstantial evidence.<sup>119</sup> Moreover, the principle of contextual evaluation of evidence<sup>120</sup> is expressly endorsed by both the TAR Lazio and the Council of State, which both stress the importance of considering the facts in conjunction with the body of evidence available.<sup>121</sup>

## B) The Probative Value of Evidence in the Private Enforcement

In the English private enforcement, in principle there is no hierarchy of evidence for EU competition law matters. Especially for cartels, English judges are well aware of the fact

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<sup>113</sup> The distinction can be appreciated by means of comparing Article 116(2) and 116(1) of the Italian Civil Procedure Code.

<sup>114</sup> COMOGLIO, *Le prove civili* 61–62 and 191.

<sup>115</sup> Compare text accompanying fn. 393 below.

<sup>116</sup> Council of State, 12 January 2001, decision no. 1189 (Article 2 of Law 287/1990), para. 4.2: ‘The fact, as highlighted by the TAR, that a single item of evidence would not be suitable to prove the prohibited practice is not conclusive, because what is relevant is exclusively the credibility of the note, which is apt to found the present action.’; Council of State, 2 March 2001, decision no. 1191 (Article 2 of Law 287/1990), para. 4.2.

<sup>117</sup> Council of State, *B. v AGCM*, 23 May 2012, decision no. 3026, para. 5.1.

<sup>118</sup> TAR Lazio, 8 August 2005, decision no. 6088 (Article 2 of Law 287/1990), para. 9; Council of State, 30 August 2002, decision no. 4362 (Article 2 of Law 287/1990), para. 5.1.8.

<sup>119</sup> Council of State, *B. v AGCM*, 23 May 2012, decision no. 3026, para. 5.1.

<sup>120</sup> See also text accompanying fn. 78 above.

<sup>121</sup> This is the Italian criterion of the ‘congruenza narrativa’, recalled by, *inter alia*, Council of State, *AGCM v Acea SpA, Suez Environnement SA, Federutility-Federazione Imprese Energetiche ed Idriche*, 24 September 2013, decision no. 5067, para. 5.1; TAR Lazio, *Soc. Siemens SpA v AGCM*, 18 June 2012, decision no. 5559, para. 10; Council of State, *Rifornimenti aeroportuali italiani Srl and Rifornimenti aeroportuali milanesi v AGCM*, 20 Febbraio 2008, decision no. 594, para. 4.

that not much direct evidence is usually available. In the words of Lord Denning MR in *Registrar of Restrictive Trading Agreements v W.H. Smith & Son Ltd*:

People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing, nor even into words. A nod or a wink will do.<sup>122</sup>

The English High Court attaches particular importance to contemporaneous documents, which are capable of having high probative value. A helpful example is provided by *Bookmakers Afternoon Greyhound Services Limited v Amalgamated Racing Limited*, where Mr Justice Morgan held that ‘documents which pointed, even obliquely, to the existence of an agreement or concerted practice had particular weight.’<sup>123</sup> To assemble the various indicia together to form a coherent picture and, more importantly, a position that would stack up in court, it is not unreasonable to give careful consideration to the rare ‘slip-ups’ of the parties, such as e-mail exchanges that are written ‘in a less guarded way with no expectation that they will ever see the light of day, much less the light of a trial with cross-examination’. The same is true of attention given to fragmentary or sporadic pieces of evidence that emerge during an investigation<sup>124</sup> (in follow-on actions) or that are in the hands of the claimant. It is common grounds that contemporaneous documents may be used to give evidence of the truth of their contents, with a soft interpretation of the rules of hearsay that apply in other matters.<sup>125</sup>

To the author’s knowledge, there does not seem to be an abundance of Italian case law dealing with the probative value of evidence in private antitrust cases in stand-alone cases. As in the EU law, the guiding principle is the free appreciation of all the evidence by the judge and the civil judge is alive to the difficulties of retrieving evidence, especially in cartel cases:

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<sup>122</sup> *Registrar of Restrictive Trading Agreements v W. H. Smith & Son Ltd. and others*, Court of Appeal [1969] 1 WLR 1460, 1466.

<sup>123</sup> *Bookmakers’ Afternoon Greyhound Services Limited v Amalgamated Racing Limited*, English High Court, Chancery Division [2008] EWHC 2688 (Ch), para. 18.

<sup>124</sup> *Bookmakers’ Afternoon Greyhound Services Limited v Amalgamated Racing Limited*, para. 18.

<sup>125</sup> Compare Practice Direction 32 on Evidence which supplements Part 32 of Civil Procedure Rules, para 27.2: ‘All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –  
(1) the court orders otherwise; or  
(2) a party gives written notice of objection to the admissibility of particular documents.’

It would be naïve to expect that evidence of an anti-competitive practice is found in a written document, especially since any means of evidence can be used, including presumptions [...].<sup>126</sup>

What can be noted is that, in the lack of any express provision endowing administrative decisions of the AGCM or other NCA with binding effect, the case law of the Italian civil judge has attributed very high probative value to administrative decisions in follow-on actions.<sup>127</sup> The Italian civil judge is free to evaluate evidence, but it usually considers previous administrative decisions issued on the same matter as a ‘prova privilegiata’.<sup>128</sup> This means that such evidence acts as a rebuttable presumption in favour of the claimant that the infringement has occurred and that it caused damages.<sup>129</sup> The assessment of the probative value of evidence, as a result, is considerably influenced by administrative decisions, which in turn, are considerably influenced by the EU Courts. Thus, it is hard to imagine that the rules judicially designed by the EU Courts will not affect the national judge’s consideration in analogous competition matters.

#### 4) THE BURDEN OF PROOF

Fact-finding is pivotal for performing the functions of a trial judge.<sup>130</sup> In both national and EU systems of law, the rules relating to evidence are crucial in order to adjudicate a dispute and, ideally, to ascertain the truth.<sup>131</sup> This is particularly true for antitrust law cases, that are often fact-intensive and full of technical and economic facts. In the private enforcement of competition law, the fact-pleading nature<sup>132</sup> of civil proceedings lays upon claimants the responsibility of verifying the facts alleged. In public enforcement, both the Commission

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<sup>126</sup> Court of Appeal of Milan, *Soc. Bluvacanze v Soc. I viaggi del Ventaglio, Soc. Turisanda, Soc. Hotelplan Italia*, 11 July 2003 (2004) *Foro italiano*, I, 597-615, 601-602.

<sup>127</sup> ALBERTO PERA, ‘Decisioni con impegni e private antitrust enforcement’ in *I rimedi civilistici agli illeciti anticoncorrenziali. Private Enforcement of Competition Law - Atti del III Convegno di Studio presso la Facoltà di Giurisprudenza dell’Università di Trento 15-16 aprile 2011* (Cedam 2012) 111.

<sup>128</sup> Court of Cassation, *Soc. Allianz v Buonocore*, 14 March 2011, decision no. 5942 (2011) *Foro italiano*, I, 1724 ff. (Article 2 of Law 287/1990); Court of Cassation, *ANCL v Inaz Paghe Srl*, 13 February 2009, decision no. 3640 (2010) *Foro italiano*, I, 1901 (Article 2 of Law 287/1990).

<sup>129</sup> Court of Cassation *Tommasselli v Soc. Axa Assicurazioni*, 4 March 2013, decision no. 5327 (2013) *Il Foro Italiano*, I, 1519-1520 (Article 2 of Law 287/1990); Court of Cassation, *Soc. Allianz v Palladino*, 20 June 2011, decision no. 13486 (2011) *Il Foro Italiano*, I, 2674 ff. (Article 2 of Law 287/1990).

<sup>130</sup> IDOT, ‘Access to Evidence and Files of Competition Authorities’ 259.

<sup>131</sup> CHESTER BROWN, *A Common Law of International Adjudication*, Oxford University Press (2007) 84. The Author highlights how rules of evidence before international courts have mostly been developed judicially, in the general lack of prescription for such rules in the constitutive instruments.

<sup>132</sup> See Introduction, fn. 67.

and the NCAs expend a great deal of their time and resources in the fact-finding process. In antitrust law, on hand hand, there is often a dearth of documental evidence (for instance, in cartel cases)<sup>133</sup> and economic evidence is not always conclusive;<sup>134</sup> on the other hand, the authority or claimant often lacks the necessary evidence to support their allegations. All Member States have rules about the allocation of the burden of proof upon the parties.

As a general rule, claimants must establish those facts that they allege.<sup>135</sup> Most systems of civil law have codified the maxim ‘he who asserts must prove’<sup>136</sup> in their civil procedure,<sup>137</sup> but the principle is recognised in systems of common law countries as well.<sup>138</sup> How importantly the obligation to adduce evidence reflects on the outcome of the proceedings will depend on the structure of the relevant norm, on the nature of the proceedings, and on the importance of the fact to be proved. If the evidence is insufficient to satisfy judge, the allegation will not be held to be proved. Given this, determining which party has to disclose evidence in a particular case is vital.

<sup>133</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final, para. 2.2: ‘Much of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant.’ The fact that cartels are investigated by the Commission years after the events took place also plays a role, compare SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 26.

<sup>134</sup> An example is provided by the lack of formulation of a final theory of harm in abuse of dominance cases. Compare also CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 557: ‘These [economic] reports often tend to make an interpretation of certain observed facts, and they are not, as such, facts. They are mainly economic argument or economic analysis of the facts which is certainly useful [...] but cannot be given some sort of scientific status.’ Compare also ERIC BARBIER and ANNE-LISE SIBONY, ‘Expert Evidence Before the EC Courts’ [2008] *Common Market Law Review* 968.

<sup>135</sup> WILLIAM MAWDESLEY BEST, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, Garland Publishing (1854) 332: ‘[...] the man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proofs, and not on the want of right or weakness of proof in his adversary.’

<sup>136</sup> The principle ‘he who asserts must prove’ makes its appearance also in the Pandects, where the quotation is reported at 22.3.2 from Paulus *Libro 69 Ad Edictum*. The Pandects or Digest (*Domini nostri sacratissimi principis Iustiniani iuris enucleate ex omni vetere iure collecti digestorum seu pandectarum*) is one of the book of the Corpus Iuris Civilis, the massive compilation of civil law ordered by Iustinian I in the 6<sup>th</sup> century A.D.

<sup>137</sup> For instance, such rule is contained in Article 2697 of the Codice Civile; in France at Article 9 of the Nouveau Code de Procédure Civile; in Spain at Article 1214 of the Code Civil. See NAZZINI, *The Foundations of European Union Competition Law* 291. As a counterpoint of this principle, the party who invokes an exception against the claimant’s assertion has the obligation to give evidence of the facts raising the exception: *quicumque exceptio invocat eiusdem probare debet*.

<sup>138</sup> Compare joined cases C-100 to C-103/80 *SA Musique Diffusion française v Commission* [1983] ECR 1825, Opinion of AG Slynn, at 1930: ‘a principle of law recognized in all Member States, that the legal burden of proving the facts essential to an assertion normally lies on the party advancing it’; and *M/V Saiga (No. 2)*, Saint Vincent and the Grenadines v Guinea, ITLOS, Separate Opinion of Vice-President Wolfrum, para. 7: ‘It is the prevailing principle governing the appreciation of evidence by adjudicating bodies in all main legal systems that the burden of proof lies on the party who asserts them (*actori incumbit probatio*). [...] *The principle actori incumbit probatio is recognized in all legal systems.*’ (emphasis added).



In EU law, the position was neatly encapsulated by Advocate-General Tesouro in his Opinion in *Blackspur DIY*:

In general, the Community judicial process has always been governed, as far as the *onus* of proof is concerned, by the principle that it is incumbent on the party who relies on particular facts to identify and produce evidence such as to convince the Court of the existence of those facts.<sup>139</sup>

It would contravene EU law for the Commission or a plaintiff to assert only the infringement, while requiring the defendants to prove their innocence.<sup>140</sup> If the Commission or a plaintiff do not manage to provide sufficient evidence of the infringement,<sup>141</sup> the defendant can simply say that the evidence does not meet the ‘requisite legal standard’.<sup>142</sup>

The recent abundant use of evidential presumptions, which will be illustrated below,<sup>143</sup> does not contradict this principle of law now embodied in Article 2 of Regulation (EC) 1/2003. Indeed, it is argued that evidential presumptions do not affect the allocation of the legal burden of proof, but simply operate on the *evidential* burden of proof. Such presumptions facilitate the discharge of the legal burden of proof. They shift the evidential

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<sup>139</sup> Case C-362/95 P *Blackspur DIY and Others v. Council and Commission* [1997] ECR I-4775, para. 26. The Advocate-General also quotes case C-44/76 *Milch-, Fett- und Eier-Kontor GmbH v. Council and Commission* [1977] ECR 393, para. 16: ‘[...] The applicant has not provided a scintilla of evidence in support of its allegation that the Commission had by its various communications led it to believe that proof of marketing in the country of destination could not be required’; and case C-346/82 *Pierre Favre v. Commission* [1984] ECR 2269, para. 32: ‘It should be noted in this connection that no evidence has been produced in support of that allegation. This submission must therefore be rejected.’ Compare also joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE v GlaxoSmithKline A EVE Farmakeftikon Proïonton, formerly Glaxowellcome A EVE* [2008] ECR I-7139, Opinion of AG Ruiz-Jarabo Colomer, para. 68.

<sup>140</sup> LENAERTS, ‘Some Thoughts on Evidence and Procedure in European Community Competition Law’ 1471; ORTIZ BLANCO, *European Community Competition Procedure* 162.

<sup>141</sup> Case T-110/07 *Siemens AG v Commission* [2011] ECR II-477, paras. 174-175: ‘[T]he general principle that the Commission is required to prove every constituent element of the infringement, including its duration [...], that is likely to have an effect on its definitive findings as regards the gravity of that infringement is not called into question by the fact that the applicant raised a defence of limitation, in respect of which the burden of proof rests, in general, with the applicant. [...] the duration of the infringement, which requires that the date on which it ended be known, is one of the essential elements of the infringement, which must be proved by the Commission, irrespective of the fact that the disputing of those elements also forms part of the defence of limitation.’

<sup>142</sup> Case C-185/95 P *Baustahlgewebe GmbH v Commission* [1998] ECR I-8417, para. 58: ‘[I]t must be pointed out that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.’

<sup>143</sup> See para. 5 below.



burden of proof to the other party; thus affecting the standard of proof, rather than the legal burden of proof.<sup>144</sup>

More precisely, the EU *evidential* burden of proof is not exactly the same as the equivalent idea in the common law tradition, and particularly in criminal law. In common law, the evidential burden of proof consists of the obligation on a party ‘to adduce sufficient evidence for the issue to go before the tribunal of fact’.<sup>145</sup> This evidential burden, also called ‘burden of production’ or ‘burden of evidence’, is placed on the party with the obligation to adduce evidence in order to persuade the judge to resolve an issue in their favour. Once the evidential burden has been discharged, the evidential burden of proof can, and normally does, shift to the other party.

The *legal* burden of proof, also called burden of persuasion, is defined as ‘the obligation imposed on a party by a rule of law to prove a fact in issue’.<sup>146</sup> The legal burden of proof, therefore, ‘determines which party bears the risk of the lack of proof of a material fact at the end of the proceedings’.<sup>147</sup> Generally, the legal burden does not shift from one party to the other in the proceedings. Whilst a distinction between *legal* and *evidential* burden of proof in these exact terms is not recognised in Romano-Germanic law, a somewhat distinct notion of burden of adducing evidence,<sup>148</sup> is widely accepted by the EU Courts.

In clearer terms, such ‘European’ evidential burden relates to ‘the need for a party to give evidence of a *prima facie* case, such evidence not being considered sufficient unless it

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<sup>144</sup> CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 518. The connection between the evidential burden of proof and the standard of proof is highlighted also by the famous opinion of Lord Hoffmann in *Secretary of State for the Home Department v Rehman*, House of Lords [2001] UKHL 47, para. 55, where he observed how ‘some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian [...] the question is always whether the tribunal thinks it more probable than not.’

<sup>145</sup> KEANE and McKEOWN, *The Modern Law of Evidence* 82; RODERICK MUNDAY, *Evidence* (Oxford University Press 2007) 85. Compare *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, para. 1: ‘An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant.’

<sup>146</sup> KEANE and McKEOWN, *The Modern Law of Evidence* 80.

<sup>147</sup> NAZZINI, *The Foundations of European Union Competition Law* 291.

<sup>148</sup> Compare for this opinion with regard to mergers, ANNE-LISE SIBONY, ‘Limits of Imports from Economics into Competition Law’ in IOANNIS LIANOS and D. DANIEL SOKOL (eds), *The Global Limits of Competition Law* (Stanford University Press 2012) 51–52. The Author explains how, applying the same standard of proof, it would take more ‘evidentiary effort’ to prove a fact that is considered to be intrinsically improbable (for instance, the harmful consequences of a conglomerate merger) than it would be to establish a fact that is considered to be highly probable (for instance, the harmful consequences of a horizontal merger).

is not successfully contested by the counterparty.<sup>149</sup> According to Lord Devlin in *Jayasena v Reginam*,<sup>150</sup> it is inaccurate and misleading to call the burden of adducing evidence a burden of proof,<sup>151</sup> because it can be discharged by the production of evidence which falls short of proof.<sup>152</sup> The same is valid also for the ‘European’ notion of evidential burden of proof, as suggested by Advocate-General Kokott, who clarifies that the shifting of the evidential burden of proof is nothing like an inversion of the burden of proof.<sup>153</sup>

The European Court of Justice has developed an autonomous notion of burden of evidence,<sup>154</sup> which forms ‘part of the EU law of evidence’.<sup>155</sup> In EU competition law, the difference between legal and evidential burden of proof was clarified by the Court of Justice in *Aalborg Portland*:

Although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.<sup>156</sup>

Subsequently, the expression ‘burden of adducing evidence’ was used by Advocate-General Kokott in her Opinion in *FEG*, where she explained how:

[T]he Commission naturally bears the burden of proving all the findings which it makes in its decision. However, *before there is any need to allocate the burden of proof at all, each party bears the burden of adducing evidence in support of its respective assertions.*  
A substantiated submission by the Commission can be overturned only by an at least

<sup>149</sup> ERIC BARBIER DE LA SERRE and ANNE-LISE SIBONY, ‘Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective’ (2007) *Revue trimestrielle de droit européen* 211. The translation is by the author of the present thesis.

<sup>150</sup> *Jayasena v Reginam*, Privy Council [1970] AC 618, 624.

<sup>151</sup> Whilst acknowledging Lord Devlin’s opinion, the expressions ‘evidential burden of proof’ or ‘burden of adducing evidence’ will still be used to refer exclusively to the ‘European’ notion of burden of adducing evidence to substantiate allegations.

<sup>152</sup> See KEANE and McKEOWN, *The Modern Law of Evidence* 82.

<sup>153</sup> Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission* [2006] ECR I-8725, para. 74.

<sup>154</sup> The evidential burden of proof requires the party who makes the assertion to substantiate it with evidence. It discourages the assertion of facts, which the party is not in the position to demonstrate. Compare VAN DER VIJVER, ‘Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuse?’ 123.

<sup>155</sup> NAZZINI, *The Foundations of European Union Competition Law* 290.

<sup>156</sup> Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA v Commission* [2004] ECR I-123, para 79.

equally substantiated submission by the parties. The rules governing the burden of proof are only applicable at all where both parties provide sound, conclusive arguments and reach different conclusions.<sup>157</sup>

There is great uncertainty in the literature about the principles interacting with the main principle ‘he who asserts must prove’. This uncertainty is, perhaps, due to the fact that not all legal traditions endorse the distinction between evidential and legal burden of proof. Judges do not generally adopt a clear theoretical approach to the burden of proving justifications or exemptions,<sup>158</sup> often preferring to resolve disputes by means of procedural devices such as disclosure, presumptions, ‘lower’ standards of proof or orders of measures of enquiry.<sup>159</sup> In EU competition law, the approach to the concept of restrictions of competition ‘by object’ can be explained in this fashion. Indeed, a reversal of the *evidential* burden of proof is embedded in restrictions ‘by object’, because the undertaking is always allowed to adduce evidence of the economic and legal context, which justify the finding that the alleged infringement is not liable to impair competition.<sup>160</sup> In addition, a finding of restriction of competition ‘by object’ does not necessarily exclude the possibility that the

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<sup>157</sup> *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, para. 73 (emphasis added). The expression ‘evidential burden’ was used by AG Kokott only later on, in case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 60, but it seems to have never been used by the European Courts to date.

<sup>158</sup> Some uncertainty in the distinction between the burden of adducing evidence and that of providing evidence of a justification, which, strictly speaking, does not instantiate a reversal of the evidential burden of proof (because, on the contrary, it is an application of the general *rule actori incumbit probatio*) can be observed in case *Microsoft Corp. v Commission*, para. 688: ‘The Court notes, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.’

<sup>159</sup> BARBIER DE LA SERRE and SIBONY, ‘Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective’ 217, referring to case C-526/04 *Laboratoires Boiron SA v Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales (Urssaf) de Lyon* [2006] ECR I-07529, para. 55. In those circumstances, ‘[I]n order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.’

<sup>160</sup> Joined cases C-403 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011], not yet published, para. 140.

undertaking meets the requisite conditions to fall under the umbrella of Article 101(3).<sup>161</sup> As a consequence, restrictions of competition ‘by object’ do not entail a reversal of the *legal* burden of proof, but only of the *evidential* burden of proof.

Such reluctance to define a clear ‘general theory of the burden of proof’ is very noticeable in the case law of the Court of Justice, which, operating in a mixed tradition, intentionally and artfully dodges the risk of espousing legal notions or principles which are entrenched in only one of the two big families of law which are most represented across the EU Member States - i.e. Romano-Germanic law and Common law.

Some commentators, after having noted that plaintiffs may rely, to the purpose of discharging their burden of proof, on a number of inferences and rebuttable presumptions of fact, argued, in a slightly contradictory passage,<sup>162</sup> that:

These [inferences and rebuttable presumptions of fact] do not, strictly speaking, shift the evidentiary burden onto the undertakings, because they arise only through common sense and not through force of law, and any such inferences may be accepted or rejected by the reviewing Court as it sees fit. The legal and evidentiary burden therefore remains on the Commission throughout to adduce sufficient evidence of all elements of the infringement. Despite this, certain inferences are commonly accepted by the Courts in the absence of evidence from the undertakings, thereby effectively requiring the undertaking to lead evidence in rebuttal *as if* the evidentiary burden had shifted onto them.<sup>163</sup>

It is submitted that this opinion is not convincing. When EU Courts operate a shift of the evidential burden of proof to alleviate the rigidity of the rule according to which the burden of proving a fact is placed on he who asserts it, they refer to another principle of EU evidence law. This is the proof-proximity principle, which is making its appearance in antitrust case law. It provides that the burden of proof is allocated upon the party in whose hands evidence is more likely to be available, that is assumed to be the party who is more likely to succeed in discharging that burden. The procedural transposition of the proof-

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<sup>161</sup> On this point see DAVID BAILEY, ‘Restrictions of Competition by Object under Article 101 TFEU’ (2012) 49 *Common Market Law Review* 559, 595. It must be pointed out, however, that the possibility for an agreement anti-competitive by object to benefit from an exemption is rather theoretical, see CSONGOR ISTVÁN NAGY, ‘The Distinction between Anti-competitive Object and Effect after Allianz: the End of Coherence in Competition Analysis’ (2013) 36 *World Competition* 541, 542.

<sup>162</sup> The Author’s view seems to be contradictory in that it is rather hard to understand how presumptions of fact that are not statutorily, but judicially established, would not shift the evidentiary burden of proof, but at the same time require the defendant to produce evidence *as if* the evidentiary burden of proof had shifted.

<sup>163</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 22 (emphasis added).

proximity principle is the relevant evidential presumption applied to the specific matter. Given that the legal burden of proof does not shift, presumptions of fact only affect the shifting of the *evidential* burden of proof. They trigger the obligation to provide counterevidence disproving the facts subsumed by the presumption. To use a traditional sporting metaphor, discharging an evidential presumption may be compared to scoring a break point,<sup>164</sup> rather than a match point;<sup>165</sup> the contestant still having the possibility to win the match.<sup>166</sup> In other words, the EU competition law system of allocation of the burden of proof seems to be governed by a balance of these two principles, as in a mixed system, in which both of them are referred to by the Courts. On one hand, from the principle ‘he who asserts must prove’ stems the general statutory presumption that the plaintiff is allotted the legal burden of proof and the defendant that of exemptions or justifications. On the other, from the proof-proximity principle arise all evidential presumptions which allocate the burden of evidence on the counterparty when a *prima facie* case is reached on the contested facts. In this view, it is contended that, in order to discharge the evidential burden of proof, mere allegations of the parties are not sufficient: the production of evidence is required.<sup>167</sup> The proof-proximity principle, its origins and the presumptions which embody it will be considered in the following paragraphs.

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<sup>164</sup> When evidential burden is successfully discharged, the burden shifts to the other party. Reference is made here exclusively to the *effect* that break points have in tennis: when evidential presumptions are won they result in a ‘break of service’ and the counterparty has the next move.

<sup>165</sup> When the legal burden of proof is successfully discharged, the party wins the trial: just like match points in the game of tennis, when the contestant wins the legal presumption, he or she also wins the match.

<sup>166</sup> Precisely for this reason the shifting of the evidential burden of proof does not violate the principle of presumption of innocence. Compare *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Opinion of AG Kokott, para. 93: ‘[T]he presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience and the undertakings concerned are at liberty to refute those conclusions. After all, classic criminal proceedings allow for the use of circumstantial evidence and recourse to principles derived from experience.’ With regard to the compatibility of the use of presumptions and the principle *in dubio pro reo*, see also *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (Napp 4)* [2002] CAT 1 (Chapter II prohibition), para. 111: ‘Presumptions [...] simply reflect inferences that can, in normal circumstances, be drawn from the evidence: they do not reverse the burden of proof or set aside the presumption of innocence [...] Article 6(2) of the ECHR does not prohibit a permissive or evidentiary presumption from which a trier of fact may (as opposed to must) draw an inference of guilt [...]. If a defendant undertaking seeks to rebut the presumption in question, the legal burden of proof remains on the Director to show that an abuse is established.’ This issue will be revisited in para. 5 G).

<sup>167</sup> Compare NAZZINI, *The Foundations of European Union Competition Law* 295, who stresses how the EU Courts seem to use the verb ‘to demonstrate’ rather than ‘to prove’ when talking about the evidential burden, as in case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, para. 69: ‘[A]n undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.’ It is contended here that, in order to discharge the evidential burden of proof, the production of evidence, and not the mere allegation of facts, is required. This view is strongly supported by the case law, see *Microsoft Corp. v Commission*, para. 688 and case C-521/09 P *Elf Aquitaine SA v Commission* [2011] ECR I-8947, para. 61: ‘[I]f, in order to rebut that presumption, it were sufficient for a party concerned to put forward mere unsubstantiated assertions, the presumption would be largely robbed of its usefulness.’

According to Article 2 of Regulation (EC) 1/2003, the burden of proving any infringement under Article 101 and Article 102 TFEU rests upon the party alleging it, and this is an application of the already mentioned general principle ‘he who asserts must prove’. A reversal of the legal burden of proof is intrinsic to the formulation of Article 101(3) TFEU, because it is for the undertaking to claim and prove the requirements for benefiting of the listed exceptions.<sup>168</sup> The problem arises of in favour of who a situation of *non liquet* would be decided in the case of sparse evidence. Some authors have envisaged the possibility to interpret such provision in the light of the presumption of innocence, therefore considering that, if the undertaking presents a *prima facie* case<sup>169</sup> that it fulfils the requirements of Article 101(3) TFEU and the public authority or the plaintiff does not succeed in proving that it does not, the application should then be dismissed. Conversely, it seems more sensible to interpret Article 101(3) TFEU as a procedural defence offered to the defendant: once the infringement has been established (in absence of which there is no need for the undertaking to provide a defence), the defendant has to yield evidence of its entitlement to benefit from that exemption. If it does not discharge such legal burden, the infringement of Article 101(1) TFEU stands and the case must be decided against it.<sup>170</sup>

As regards the allocation of the legal burden of proof for the application of Article 102 TFEU, the dominant undertaking does not bear the burden of proving the fact that it is not abusing its position in the market. It is for the Commission, the NCA or the claimant to demonstrate the existence of such an abuse and they will pay the legal consequences of failing to provide sufficient evidence.<sup>171</sup> The public authority or the private claimant bears the *legal* burden of proof as regards the abuse of dominant position, whereas the dominant undertaking only bears the *evidential* burden of showing that no abuse occurred, by means of yielding defences or objective justifications.<sup>172</sup> These defences do not serve the goal of discharging a legal burden of proof, which does not rest upon the undertaking. They rather dismiss the evidential burden that has been passed to it by means of reaching a *prima facie* case of abuse. The objective justifications return to three main categories: legitimate business behaviour or objective necessity, when the firm is efficiently competitive and had no alternative way to act; efficiency considerations, when the exclusionary conduct has

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<sup>168</sup> NAZZINI, *The Foundations of European Union Competition Law* 292. A similar reversal of the burden of proof operates for those vertical agreements which fall under the scope of the Block Exemption Regulation.

<sup>169</sup> See, for this notion, Introduction, fn. 69.

<sup>170</sup> ORTIZ BLANCO, *European Community Competition Procedure* 165.

<sup>171</sup> NAZZINI, *The Foundations of European Union Competition Law* 395.

<sup>172</sup> NAZZINI, *The Foundations of European Union Competition Law* 292.



efficiency effects beneficial to final consumers; public interest, when such interest might be at stake and justify an anticompetitive behaviour. The first of such justifications is by far the easier to prove.<sup>173</sup> In those cases where efficiencies outweighing anticompetitive effects are claimed to exist, the evidential burden of proof shifts to the undertaking, which has to demonstrate the benefits of its conduct for consumers.<sup>174</sup> If the undertaking succeeds in discharging this evidential burden, it is again for the counterparty to confute the justification.<sup>175</sup> If the undertaking does not succeed in proving the justification, the infringement of Article 102 TFEU is admitted.<sup>176</sup>

### A) Burden of Proof and Notorious Facts

The allocation of the burden of proof for notorious fact is, in competition matters, a rather unexplored topic. The proof is not required for those facts that are so well known that they do not require any evidence to be established. According to the judicial notice rule developed in the common law tradition,<sup>177</sup> the vast majority of scholars consider that notorious facts need not to be proved, unless they are specifically questioned. Deciding whether the facts are to be considered matter of public knowledge or not appertaining to the competent judge is a question of fact. Such observations were confirmed by the President of the Court of Justice, in the dismissal order of an appeal for an application to intervene in a case for annulment of an anti-dumping duty.<sup>178</sup> While the appellant argued that: ‘the economic situation of a region is a fact of economic geography, which is known or is liable to be known to everyone and which thus does not need to be proven’; the President clarified that it is usually within the responsibility of the person alleging facts in support of a claim to adduce proof of such facts. The Order stated that, even if the rule is derogated from when

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<sup>173</sup> VAN DER VIJVER, ‘Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuse?’ 121–122 and 132.

<sup>174</sup> PHILIP LOWE, ‘Taking Sound Decisions on the Basis of Available Evidence’ in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 164.

<sup>175</sup> *Microsoft Corp. v Commission*, para. 688. See Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings OJ C-45/7 [2009], para. 31.

<sup>176</sup> VAN DER VIJVER, ‘Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuse?’ 125.

<sup>177</sup> The judicial notice rule allows a fact to be introduced into evidence if the truth of it is so public and well-known, or authoritatively attested, that it cannot reasonably be doubted.

<sup>178</sup> AINDRIAS Ó CAOIMH, ‘Standard of Proof, Burden of Proof, Standard of Review and Evaluation of Evidence in Anitrust and Merger Cases; Perspective of Court of Justice of the European Union’ in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 276.



the allegation concerns facts which are ‘well known’, deciding whether the facts concerned can be considered as ‘well known’ is a task that competes to the General Court and which constitutes a finding of fact, non reviewable on appeal, except for the case where the facts or evidence are distorted.<sup>179</sup> Whether mainstream or well-established economic theories will ever be considered as notorious facts is hard to predict, but such conundrum is easily bypassed through the application of presumptions, which often enshrine those theories.

In one of the numerous lawsuit which arose out of the AGCM’s investigation in the motor insurance sector, the Italian civil judge showed a propensity not to consider information, however renowned, as proven. The AGCM had sanctioned the exchange of information between insurance companies in relation to the Italian compulsory car accident insurance. In 2011, the Court of Cassation had to pronounce itself upon a private antitrust action and stated that the defendant insurance company had not produced any specific counterevidence, but mere allegations, of the general situation of the insurance market at the time of the loss. According to the Court, the company should have produced its account-books to prove the losses.<sup>180</sup> Some commentators have argued that the general situation of the market should have been considered as notorious fact. For its proof, the production of two laws which attested the origins of the increase in prices in the sector and the AGCM’s decision should have been considered sufficient.<sup>181</sup> Contrariwise, the Court did not consider the crisis in the sector as a notorious fact, and rejected the appeal on grounds that sufficient evidence had not been adduced by the defendant.

## **B) Burden of Proof before the English Courts**

Even though sometimes the case law makes an ambiguous use of the terminology on the burden of proof,<sup>182</sup> it can be generally observed that the allocation of the evidential and legal burden of proof by the European Courts described above is dittoed by national courts in the application of Articles 101 and 102 TFEU.

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<sup>179</sup> Case C-464/07 P (I) *Provincia di Ascoli Piceno and Comune di Monte Urano v Apache Footwear Ltd and Others* [2008] ECR I-15, para. 9.

<sup>180</sup> Court of Cassation, *Soc. Allianz v Buonocore*, 14 March 2011, decision no. 5942 (2011) *Il Foro Italiano*, I, 1724 ff. (Article 2 of Law 287/1990).

<sup>181</sup> ALDO FRIGNANI, ‘L’onere della prova nelle cause risarcitorie da illecito antitrust’ in *I rimedi civilistici agli illeciti anticoncorrenziali. Private Enforcement of Competition Law - Atti del III Convegno di Studio presso la Facoltà di Giurisprudenza dell’Università di Trento 15-16 aprile 2011* (Cedam 2012) 65.

<sup>182</sup> NAZZINI, *The Foundations of European Union Competition Law* 293-294.

The allocation of the burden of proof is one of those issues that are governed by substantive uniform EU law, which removed it from the procedural autonomy of the Member States and from the scope of the conflict of laws rules in multi-jurisdictional proceedings. This is, however, in line with private international law considerations, which predominantly classify the topic as substantive and governed by the *lex causae*.<sup>183</sup> The reason why this solution is regarded as the most appropriate is that the burden of proof directly affect the outcome of the decision and it would not be appropriate to detach it from the substantive right which it seeks to affirm.<sup>184</sup> These reasons probably justify the fact that this is the only issue of evidence that has been expressly regulated by Article 2 of Regulation (EC) 1/2003. Such provision must be followed by all national competition authorities and courts.<sup>185</sup>

As a consequence, the burden of proof before English Courts is allocated according to the EU law. The legal burden of proof always rests on the public authority or the plaintiff (in line with Article 2 of the Regulation (EC) 1/2003) to prove the infringements alleged, and to establish causation and to prove losses. Such an approach is followed by the CAT when exercising its appellate jurisdiction over OFT decisions. It is for the appellant to convince the CAT that the challenged decision has to be overturned.<sup>186</sup> As regards both the burden and standard of proof applied by the English courts, the landmark case to make reference to is *Napp*.<sup>187</sup> In the occasion of the first appeal under the Competition Law Act 1998 against an infringement decision, the CAT clearly illustrated the burden and standard of proof to be applied for the imposition of fines at the national level. With regard to the allocation of the burden of proof, the usual ‘he who asserts must prove’ principle was applied, and on the OFT was placed the legal burden of discharging the legal burden of proof of the infringement.<sup>188</sup> The statement was corroborated by the application of the presumption of innocence, stemming from the asserted relevance in the matter of Article 6(2) of the ECHR, transposed into the English domestic system under the Human Rights Act 1998. The applicability of that provision (which refers to criminal charges and criminal

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<sup>183</sup> BRIGGS, *The Conflict of Laws* 192.

<sup>184</sup> GARNETT, *Substance and Procedure in Private International Law* 198.

<sup>185</sup> BRKAN, ‘Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?’ 502.

<sup>186</sup> *Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading* [2012] CAT 9: ‘It is, of course, true that the legal burden of proof rests on the OFT to prove the infringements alleged in its decision. [...] The onus is on an appellant to persuade the Tribunal that the decision being challenged should be set aside.’

<sup>187</sup> Recently upheld also by *North Midland Construction PLC v Office of Fair Trading* [2011] CAT 14 (Chapter I prohibition), paras. 14–15.

<sup>188</sup> *Napp 4*, para. 95.

offences) was due, according to the Tribunal, to the fact that a competition infringement decision can lead to the imposition of severe financial penalties. Interestingly, in the same paragraph, the CAT specified that such allotment of the persuasive burden does not impinge upon the use of evidential presumptions, which may well guide the allotment of the *evidential* burden.<sup>189</sup> The OFT is therefore entitled to rely on inferences or presumptions which normally flow from a given set of facts. The UK Tribunal made specific reference to different presumptions drawn on from the case law of the EU Courts, deeming them applicable by domestic courts when applying EU competition law provisions. The presumptions mentioned were: very high market shares as an indicator of a dominant position; sales below average variable costs may be predatory; attendance to a meeting with anti-competitive purpose shows participation in the cartel, unless otherwise proven.<sup>190</sup> These types of evidential presumptions do not reverse the legal burden of proof, nor set aside the principle of the presumption of innocence which must be respected at all times.<sup>191</sup> Presumptions will be considered thoroughly in the following paragraph.

In actions for damages, the burden of proof resting upon the plaintiff is considerably lighter in those circumstances where a decision of the OFT or of the European Commission (upheld on appeal if applicable) is already available, because the claimant can rely on that decision which is considered evidence of the infringement. In such follow-on actions, the plaintiff ‘only’ needs to prove causation and loss.<sup>192</sup>

### C) Burden of Proof before the Italian Courts

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<sup>189</sup> For further details on the interplay between evidential presumptions and the principle of presumption of innocence, refer to para. 5 G) below.

<sup>190</sup> *Napp 4*, para. 110: ‘That approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares [...] *Hoffman-La Roche v Commission* [...]; that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory (see the opinion of Advocate General Fennelly in [...] *Compagnie Maritime Belge v Commission* [...]; or that an undertaking’s presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged: *Montecatini v Commission* [...].’

<sup>191</sup> *Napp 4*, para. 111.

<sup>192</sup> BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 155. With regard to the numerous evidential hurdles that claimants encounter also in follow-on actions, see *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, para. 130: ‘[S]ince a finding of infringement does not require proof that damage has in fact been caused to a rival undertaking, the fact that an infringement has been established does not show, as a necessary implication, that such damage has been caused.’

With regard to the burden of proof applied by Italian courts, the above mentioned European allocation of the burden of proof has been confirmed in many occasions and substantially dittoes the general principle for the allotment of the legal burden of proof expressed by Article 2697 of the Italian Civil Code.<sup>193</sup> This allocation of the burden of proof is adopted by the administrative judge when reviewing AGCM's decisions,<sup>194</sup> with some alleviation due to the difficulties encountered by the parties in accessing evidence and the structure of the administrative procedure. In particular, before the administrative judge the leading principle is that he who asserts must produce a 'principio di prova' (*prima facie* evidence) of what he affirms, rather than 'prove'. Basically, the administrative judge is entitled to take into account which party has access to evidence in order to alleviate, where appropriate, the burden of proof.<sup>195</sup> This is nonetheless feasible only where substantial difficulties hinder the retrieval of evidence for the investigated undertaking, otherwise the application of the regular rule 'he who asserts must prove' is more suitable.<sup>196</sup>

In the private enforcement, the maxim 'he who asserts must prove' applies. In particular, private antitrust actions are categorized as tort law action, under the general clause of Article 2043 of the Civil Code, which, according to the case law, requires the victim of the infringement to adduce evidence of the infringement, or its assessment performed by the national competition authority, evidence of the loss suffered, of causation and of the fault of the infringer.<sup>197</sup> The judge will be empowered to ascertain causation by means of inferences and presumptions, if need be, under condition that all counterevidence provided by the defendant is thoroughly analysed.<sup>198</sup>

## 5) PRESUMPTIONS IN EU ANTITRUST LAW

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<sup>193</sup> GIAN LUCA ZAMPA and GIULIA ATTINÀ, 'Il riparto dell'onere della prova ai sensi dell'art. 2 Reg. 1/2003 anche con riferimento all'art. 101 § 3 TFUE' in LORENZO FEDERICO PACE (ed), *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 312.

<sup>194</sup> TAR Lazio, 6 October 1998, decision no. 1902, para. 6.

<sup>195</sup> CASETTA, *Manuale di diritto amministrativo* 766-767.

<sup>196</sup> For details on the proof-proximity principle, see below para. 6.

<sup>197</sup> It is also material to note how, under Italian tort law, the claimant is also required to provide evidence of the defendant's fault. Such an element has been examined above, see para. 1 C) a).

<sup>198</sup> Court of Cassation, *Soc. Allianz v Palladino*, 20 June 2011, decision no. 13486 (2011) *Foro italiano*, I, 2674 (Article 2 of Law 287/1990); Court of Cassation, *Soc. Allianz v De Cusatis*, 10 May 2011, decision no. 10211 (2011) *Foro italiano*, I, 2675 (Article 2 of Law 287/1990); Court of Cassation, *Soc. Azienda Agricola Fratelli Didonna v Soc. Allianz*, 20 January 2011, decision no. 1340 (2011) *Foro italiano*, I, 1724 ff. (Article 2 of Law 287/1990); Court of Appeal of Milan, *Soc. Bluvacanze v Soc. I viaggi del Ventaglio, Soc. Turisanda, Soc. Hotelplan Italia*, 11 July 2003 (2004) *Foro italiano*, I, 597-615 (Article 2 of Law 287/1990).

Presumptions in EU competition law affect the definition of the object of the proof and what needs to be established by the claimant. Inferences and presumptions are extremely common in competition law because evidence is often sparse and documentary evidence of infringements is extremely rare. Recently, the use of factual presumptions by the EU Courts has become more and more important, on grounds of their practical utility in helping judges to reach their decisions and of the paramount role acquired by economic evidence in competition law matters.<sup>199</sup> It is necessary to clarify that presumptions here examined are those inferences and presumptions of facts on which the party may rely in order to prove a state of affairs whose demonstration is needed to back up their claims.<sup>200</sup> Despite the lack of general consensus on a theoretical and terminological framework for presumptions,<sup>201</sup> the distinction between legal and factual presumptions is usually accepted. They allegedly differ in that legal presumptions, or presumptions of law, statutorily prescribe judges to presume a fact, when another fact is proved, even if the latter is not the necessary consequence of the former. To pick an example that is valid for both English and Italian law, a child is presumed to be legitimate if it is proved that: i) the child was born to the wife; ii) it was born during lawful wedlock or within the normal period of gestation after wedlock has ended; iii) the husband was alive at the date of conception. In EU competition law, there are no statutory presumptions, but legal presumptions are, for instance, contained in soft law instruments,<sup>202</sup> such as the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1), according to which an

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<sup>199</sup> LAURA PARRET, 'Sense and Nonsense of Rules on Proof in Cartel Cases' (2008) DP 4/2008 Tilburg Law and Economics Center (TILEC) Research Paper Series 17. For a detailed analysis of how economic evidence and economic expertise play a crucial role in competition law proceedings, see IOANNIS LIANOS, '“Judging” Economists: Economic Expertise in Competition Law Litigation: A European View' in IOANNIS LIANOS and IOANNIS KOKKORIS (eds), *The Reform of EC Competition Law*, Kluwer Law International (2010) 188 ff.

<sup>200</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 21.

<sup>201</sup> The most systematic attempts to classify presumptions in EU competition law so far seem to have been made by DAVID BAILEY, 'Presumptions in EU Competition Law' (2010) 31 *European Competition Law Review* 362–369; GINEVRA BRUZZONE and MARCO BOCCACCIO, 'Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix' (2009) 32 *World Competition* 465–484; and ODUDU, *The Boundaries of EC Competition Law - The Scope of Article 81* 113–127.

<sup>202</sup> Two examples of legal presumptions are also provided by the Notice on the Effect on Trade between Member States, in the context of Commission's proceedings. The Notice provides that, on the one hand, an agreement is presumed not to appreciably affect trade between Member states when the aggregate market share of the parties on any relevant market within the EU does not exceed 5 per cent and the aggregate annual European turnover in the products covered by the agreement does not exceed 40 million euros (negative presumption); on the other hand, an agreement, whose nature is capable of appreciably affect inter-state trade, is presumed to affect such trade if the market share of the parties exceeds 5 per cent or if the annual European turnover exceeds 40 million euros (positive presumption). See KOMNINOS, *EC Private Antitrust Enforcement* 65–66.

agreement is not likely to appreciably restrict competition if the aggregate market share for competitors is below 10%, and for non competitors is below 15%.<sup>203</sup>

Conversely, factual presumptions, or presumptions of fact, or inferences, often lack a formal legal status<sup>204</sup> and are induction-based presumptions of common sense, which rely on factual elements, or *indicia*, of a certain subsumed state of affairs.<sup>205</sup> The distinction appears to be very blurred, and it looks like it could be reduced to that presumptions of law are statutorily imposed, whereas presumptions of fact are left to the free evaluation of the judge. Presumptions addressed by this paragraph are judicial permissive presumptions which are aimed at establishing facts (often, the existence of an infringement), rather than the anti-competitive effects of the infringement,<sup>206</sup> and which, affecting the allocation of the evidential burden of proof, should be considered as inherently rebuttable.<sup>207</sup> In EU competition law, these presumptions have not been incorporated by statutory law yet. Examples will be set out below.

The peculiarity of presumptions is that they are aimed at obviating the need of evidence to establish a proposition.<sup>208</sup> They govern on whom the burden of proof must rest and usually operate to allow a decision to be taken notwithstanding the scarcity of evidence upon the facts. Since there is no hope to eliminate the total risk of judicial error, the choice of which kind of error is preferable is left to each legal system. The most blatant example is the presumption of innocence, which is ‘a corrective device [...] regulating in advance the direction of errors, where errors are believed to be inevitable.’<sup>209</sup> When the case is

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<sup>203</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [2001] OJ 368/13.

<sup>204</sup> See JOHN DYSON HEYDON, *Cross on Evidence* (9th edn, LexisNexis Butterworths 2013) 299, who beautifully describes them as ‘frequently recurring examples of circumstantial evidence’.

<sup>205</sup> ANTONY DUFF, ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ in ANDREW SIMESTER, *Appraising Strict Liability* (Oxford University Press 2005) 130. The Author explains how: ‘Legal presumptions (or ‘presumptions of law’) [...] go beyond what is sanctioned by extra-legal common sense: they mandate courts to presume that *q*, given proof of *p*, even if without such a legal rule, proof of *p* might not give us good enough reason to take *q* as true.’

<sup>206</sup> For a detailed analysis of this different type of presumptions in antitrust law, see GINEVRA BRUZZONE and MARCO BOCCACCIO, ‘Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix’ (2009) 32 *World Competition* 465–484.

<sup>207</sup> The author of the present thesis completely agrees with PETER MURPHY and RICHARD GLOVER, *Murphy on Evidence* (12th edn, Oxford University Press 2011) 686 that ‘[a]n irrebuttable presumption is a contradiction in terms’, because it is a rule of law improperly described as presumption. The fact that they are not always, in the practice, rebuttable is a partly different question, that will be examined when analysing the compliance of presumptions with the respect of fundamental rights. See, on this point, lett. G) of this paragraph.

<sup>208</sup> JACQUES-MICHEL GROSSEN, *Les présomptions en droit international public*, Delachaux & Niestlé (1954) 26: ‘[L]a présomption légale correspond à une dispense de preuve.’

<sup>209</sup> EDNA ULLMANN-MARGALIT, ‘On Presumption’ in WILLIAM TWINING and ALEX STEIN (eds), *Evidence and Proof*, Dartmouth (1992) 443.



particularly complex, the time and resources that judges, or the parties, expend on retrieving evidence produce very high costs. Therefore, the only efficient way to conduct fact-finding operations is by means of keeping the cost of procedures aimed at ensuring the accuracy of evidence and the cost of the harm that errors generate as low as possible.<sup>210</sup> Factual presumptions in competition law are apt to this purpose. They allow the judge to take a decision in those situations where the evidence available to the claimant is insufficient to exclude doubt, but they are based on life experience, so that the risk of error is kept as low as possible.<sup>211</sup> These ‘ready-made causal inferences’<sup>212</sup> are often not backed up by a strong theoretical construction<sup>213</sup> and there is uncertainty even as regards a definition:

The reason resides without any doubt in that the presumption is a reasoning process, some sort of machinery of the thought, whose functioning we manage to comprehend after some practice, but whose nature is difficult to describe with few, striking, and exact words..<sup>214</sup>

The main reasons why presumptions are created and adopted are:

- the likelihood of a fact: in those cases where experience showed that there is a high probability that the fact occurred, reversing the burden of adducing evidence on the other party the law avoid wasting time and resources;
- avoiding the risk of false positives:<sup>215</sup> minimizing such risk is one of the paramount objectives of continental legal systems;<sup>216</sup>
- avoiding the impasse of *non liquet*: ensuring that a decision can always be taken, also in those cases where the amount of evidence is too scarce or too evenly distributed;
- levelling information asymmetry:<sup>217</sup> equalizing the position of the parties in those cases where all factual evidence is in the hands of the defendant.<sup>218</sup>

<sup>210</sup> ALEX STEIN, *Foundations of Evidence Law*, Oxford University Press (2005) 214.

<sup>211</sup> DOUGLAS WALTON, ‘Presumption, Burden of Proof and Lack of Evidence’ (2008) 16 *L’analisi linguistica e letteraria* 49–71, 60: ‘[A] presumption arises from a rule that is established for procedural and/or practical purposes in a type of rule-governed dialog (like a trial).’

<sup>212</sup> IOANNIS LIANOS and CHRISTOS GENAKOS, ‘Econometric Evidence in EU Competition Law: an Empirical and Theoretical Analysis’ [2012] CLES Working Paper Series 6/2012, 76.

<sup>213</sup> HEYDON, *Cross on Evidence* 298; EDMUND M. MORGAN, Presumptions, *Washington Law Review*, 1937 255: ‘Every writer of sufficient intelligence to appreciate the difficulties of the subject has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair.’ The author of the present dissertation makes no exception.

<sup>214</sup> GROSSEN, *Les présomptions en droit international public* 15. This translation is of the author.

<sup>215</sup> False positives, or type I errors, consist in prohibiting a pro-competitive conduct; whereas false negatives, or type II errors, consist in allowing an anti-competitive conduct.

<sup>216</sup> Compare KEVIN M. CLERMONT, ‘Standards of Proof Revisited’ (2009) 33 *Vermont Law Review*, 471, who highlights how civilians ‘are much more willing to accept a false negative than a false positive.’



There are two main types of presumptions that are used in EU competition law as regards their effects: evidential presumptions and substantive presumptions.<sup>219</sup> Evidential presumptions are those presumptions which operate on the evidential burden of proof; they are reversed when the party adduce sufficient evidence to put into question the fact asserted by the counterparty. Conversely, the function of substantive presumptions (also called persuasive presumptions) is to allocate the legal burden of proof from the beginning. They operate unless the party who is shouldered with the burden of proof successfully discharges it, which normally determines the outcome of the proceedings.<sup>220</sup> Another major classification of presumptions is based on the possibility of the presumption of being successfully overturned by other evidence, and therefore one could distinguish between conclusive (or irrebuttable) presumptions and rebuttable presumptions. This distinction lacks consistency, in the author's view, because an irrebuttable presumption is a rule of law.<sup>221</sup>

When proving an infringement, the Commission and, as it will be illustrated later, private parties can rely on a number of inferences and rebuttable presumptions of facts which help them reaching a full proof, in those cases where there is little evidence available to support their actions.<sup>222</sup>

### A) The Presumption of Cartel Participation

One of the most commonly applied presumptions under Article 101 is the presumption according to which an undertaking is guilty of an infringement if it has participated in cartel

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<sup>217</sup> CHRISTOPHER DECKER, *Economics and the Enforcement of European Competition Law* (Edward Elgar Publishing 2009) 193–194, who, in regards to the use of rebuttable presumptions, argues that it might be helpful in addressing some of the ‘resource asymmetry issues’, even though he believes that, lacking other structural reforms, it will not improve decision-making alone.

<sup>218</sup> Some of these reasons echo the principles that should inform the application and use of presumptions according to BAILEY, ‘Presumptions in EU Competition Law’ 368–369.

<sup>219</sup> Compare BAILEY, ‘Presumptions in EU Competition Law’ 367, who also considers a different category, that of procedural presumptions. Those are presumptions which do not contain any substantive assessment, but are imposed by the law on grounds of convenience, speedy decision-making, and streamline procedure. An example would be that of Article 10(6) of the EU Merger Regulation. It provides that mergers with a Community dimension, in those cases where the Commission has not taken any decision within the time limits, are deemed compatible with the internal market.

<sup>220</sup> ANDREW L.-T. CHOO, *Evidence* (Oxford University Press 2009) 404.

<sup>221</sup> Compare fn. 207 above.

<sup>222</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 21.

meetings,<sup>223</sup> unless otherwise proven.<sup>224</sup> This presumption is justified by the likelihood that it will use the information obtained from its competitors. On the assumption that the undertaking who has not publicly distanced itself from the agreement leads the co-contractors to think that it will co-ordinate its market conduct,<sup>225</sup> it is procedurally more convenient to reverse the burden of proving such severance on the undertaking, which is also better situated to yield such proof. The General Court clarified that such an apportionment of the burden of proof varies according to whether the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it can be concluded that the burden of proof has been discharged. The General Court clarified that:

That apportionment of the burden of proof is likely to vary [...] inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged [...]. Where [...] the Commission has adduced evidence of the existence of an agreement, it is for an undertaking which has taken part in that agreement to adduce evidence that it distanced itself from that agreement, evidence which must demonstrate a clear intention, brought to the notice of the other participating undertakings, to withdraw from that agreement [...].<sup>226</sup>

In this passage, the General Court does not expressly refer to the application of any presumption and the reversal of the burden of proof seems not to be justifiable by means of any other compelling reason than the need to lighten the burden of proof borne by the Commission. Pursuant to the general rule of Article 2 of Regulation (EC) 1/2003, one would expect that the causal link between the exchange of information and the collusion or, at

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<sup>223</sup> *Aalborg Portland and others v Commission*, para. 81; case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para. 86; joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23, para. 63.

<sup>224</sup> Acceptable counterevidence is that showing that the participation to the meetings was without anti-competitive intent; or aimed at a different purpose which was clear to the other participants; or that exchanged information was not taken into account to determine the market conduct. See SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 23.

<sup>225</sup> *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, para. 53: '[I]n examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.'

<sup>226</sup> Case T-110/07 *Siemens AG v Commission* [2011] ECR II-477, para. 55 (emphasis added).

least, the fact that the undertaking made use of information exchanged in the occasion of the meeting should be imposed on the applicant. Instead, the General Court considers sufficient the proof of the contacts between competitors in the specific sector. It is then for the undertaking operating in that market to provide evidence of its publication of non-participation or non-compliance with the agreed collusive behaviour. It is also interesting to note the language adopted by the Court, according to which, the apportionment of the burden of proof may 'vary'. Reference is evidently made here to the evidential burden of proof, and not to the legal one, which by definition cannot shift from a party to the other along the proceedings.

### **B) The Presumption of Concurrence of Wills**

In opposition to previous decisions,<sup>227</sup> the EU case law provides many examples where the Courts consider that from the existence of parallel conduct of enterprises in the same market can be inferred their collusion, when concertation is the most plausible explanation for the conduct.<sup>228</sup> When direct evidence of the collusion exists, the EU Courts expect the undertaking to put forward evidence of its severance from the collusion or of the existence of alternative justifications. However, in the dearth of documentary evidence of the infringement, concerted practices can, in consideration of the specific circumstances, such as the nature of the products, the size and number of undertakings involved and the volume of the market,<sup>229</sup> be proved by circumstantial evidence only.<sup>230</sup> It is then for the Commission to show that no alternative plausible explanation exists for the conduct adopted, apart from

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<sup>227</sup> *Imperial Chemical Industries Ltd. (ICI) v Commission*, para. 8: 'Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice *if it leads to conditions of competition which do not correspond to the normal conditions of the market*, having regard to the nature of the products, the size and number of the undertakings and the volume of the said market' (emphasis added). The burden of proving abnormal conditions of the market rested on the Commission.

<sup>228</sup> Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless GmbH and Acciai speciali Terni SpA v Commission* [2001] ECR II-3757, para. 180. It must be noted, however, that presumptions play a minor role in the case of vertical concerted practice, as opposed to horizontal concerted practice. Indeed, whilst Article 81(1) undoubtedly punish both forms of collusion, it must be noted that, on one hand, vertical relationships are usually pro-competitive and, on the other, that relationships between suppliers and distributors, differently from those between competitors necessarily requires recurrent contacts and co-ordination of commercial policy. Moreover, the EU Courts' case law has established that for a finding of collusion to be adopted in vertical cases, the minimum requirement is evidence of at least implied participation or tacit acquiescence to the particular anti-competitive measure, rather than simple overall concurrence of wills. See, for further details, FAULL and NIKPAY, *The EC Law of Competition* 201–202 and 214–215.

<sup>229</sup> *Imperial Chemical Industries Ltd. (ICI) v Commission*, para. 66.

<sup>230</sup> FAULL and NIKPAY, *The EC Law of Competition* 213.

concertation.<sup>231</sup> In *CISAC v Commission*,<sup>232</sup> a recent case regarding a concerted practice by copyright collecting societies, the General Court partially annulled the Commission's decision on grounds that there was a lack of sufficient evidence to prove the concerted practice. The Commission had found that collecting societies had included territorial limitations in the reciprocal representation agreements for the conferral of copyright licences for the exploitation of musical works. CISAC argued that the Commission had failed to prove the concerted practice, because the relevant parallel conduct (namely, the inclusion in all reciprocal representation agreements of national territorial restrictions) could be explained by alternative factors. The General Court agreed that the Commission had failed to render implausible the applicant's argument that parallelism was not due to collusive behaviour but resulted from the need to prevent the unauthorised use of musical works. The General Court, referring to its reasoning in *PVC II*,<sup>233</sup> restated that if the Commission's finding of an infringement of Article 101(1) TFEU is based on the existence of documents, the applicants must challenge the facts established by the Commission by means of counterevidence. Conversely, if its decision is based on the mere finding of parallel behaviours (and thus, on circumstantial evidence) the Commission must also establish the absence of an alternative reason for the undertakings' parallel conduct and the applicants may simply prove 'circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission.'<sup>234</sup> In that occasion, the Commission did not have direct evidence of the territorial restrictions, and thus the General Court examined whether alternative explanation offered by the applicant for the parallelism were implausible. The Court observed how the lack of documentary evidence relating to the national territorial limitations was striking in light of the fact that the Commission had admitted that two out of the twenty-four participating collecting societies wanted to abandon those limitations. Given the circumstances,

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<sup>231</sup> Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, para. 124: 'The applicants take the view that, in light of those factors, the minutes of the meeting of 9 June 1992 do not provide sufficient proof of the Commission's allegation of the existence of an agreement contrary to Article 81(1) EC [...]. Inasmuch as the minutes in issue lend themselves to several interpretations, and since the alternative interpretation of the FETTCSA parties is a plausible one, the Commission's interpretation cannot be sustained in the absence of a firm, precise and consistent body of evidence [...].' Compare *SIRAGUSA and RIZZA, EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 23.

<sup>232</sup> Case T-442/08 *International Confederation of Societies of Authors and Composers (CISAC) v Commission*, not yet reported.

<sup>233</sup> *PVC II*, paras. 725–728.

<sup>234</sup> *International Confederation of Societies of Authors and Composers (CISAC) v Commission*, para. 99.

[I]t would have been in the interest of those collecting societies to cooperate with the Commission, by providing it with documentary evidence of the existence of concertation.<sup>235</sup>

The Court noted how, on grounds that the Commission, in its statement of objections, had demonstrated its intention to fine all the addressees of its decision, the collecting societies were all required to cooperate with it in their own interest, basically to avoid the risk of being fined, or, at least, to reduce the amount of the fine. The Court expected those collecting societies to submit evidence establishing that other collecting societies had put pressure on them in order to maintain the agreed national territorial limitations, and since they did not do so, the Court was entitled to infer their participation in the infringement. It is out of doubt that this case law of the CJEU, placing the burden of disproving any alternative justifications on the Commission, renders very hard to prove cartels by means of circumstantial evidence.<sup>236</sup> It can, however, be observed how, in the absence of documents of the infringement, the Court considered appropriate to rely on inferences, according to the argument that direct evidence would have been apt to be found in the applicants' hands. This approach seems to derive from the application of the proof-proximity principle, which will be analysed in the next paragraph.<sup>237</sup>

### C) The Presumption of Continuous Infringement

Another case in which the shift of the evidential burden of proof is found is where the burden of discharging the proof of a continuous infringement rests upon the undertaking, owing to the fact that evidence showing interruption<sup>238</sup> (such as, for example, any information in writing of its intention to cease its participation in the agreement) is more easily accessible by the undertaking rather than by the Commission<sup>239</sup> or the claimant.

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<sup>235</sup> *International Confederation of Societies of Authors and Composers (CISAC) v Commission*, para. 104.

<sup>236</sup> For criticisms to this approach adopted also by the Italian Council of State, see MARIO LIBERTINI, 'Adeguata istruttoria e standard probatori nei procedimenti antitrust' (2008) 10 *Giornale di diritto amministrativo* 1105–1109.

<sup>237</sup> See para. 6 of this Chapter.

<sup>238</sup> DAVID BAILEY, 'Single, Overall Agreement in EU Competition Law' (2010) 47 *Common Market Law Review* 473, 506–507.

<sup>239</sup> Case C-441/11 P *Verhuizingen Coppens NV v Commission*, not yet reported, para. 70: '[I]n the light [...] of the lack of evidence that, during that period, Coppens had publicly distanced itself from the content of that agreement [...] the Commission was justified in taking the view that Coppens could be found liable for participating in the agreement on cover quotas continuously throughout the entire period.' Compare also

However, one of the few cases where the defendant undertaking managed to prove to have publicly distanced itself from the agreement was the Italian Raw Tobacco cartel. In that matter, Romana Tabacchi had stopped attending meetings with the co-infringers for two or three years, which was acknowledged by the other participants. This was showed by means of an internal memorandum produced by the chairman of Romana Tabacchi, noting that the undertaking was being discredited by the other participants with the cigarette manufacturers and described as a maverick in the market.<sup>240</sup>

#### **D) The Presumption of Parental Liability**

A frequently applied evidential presumption is the one according to which parent companies are liable for infringements committed by their wholly owned subsidiaries. This is also known as ‘*Stora* presumption’, from the name of the case where the Court of Justice established it. In *Stora*, the Court of Justice held that the Court of First Instance had legitimately assumed, from the fact that the subsidiary was wholly owned, that ‘the parent company in fact exercised decisive influence over its subsidiary’s conduct’.<sup>241</sup> The Court of Justice held that the presumption shifted the burden of adducing evidence upon the appellant, who was therefore weighed down with the burden of rebutting said presumption. Clearly, this latter is better placed to gather evidence apt to demonstrate that the subsidiary acted independently from the parent company’s instructions. The presumption replies, ultimately, to the need of increasing deterrence, because the eventual fine will be calculated on the turnover of the company group rather than on that of the subsidiary alone. This presumption is often criticised on the grounds that is it, in the practice, irrebuttable.<sup>242</sup> In the

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BAILEY, ‘Single, Overall Agreement in EU Competition Law’ 478: ‘Instead of insisting on a detailed account of each party’s involvement in the cartel, the single, overall agreement enables the Commission to describe, in broad terms, how the cartel operated in circumstances when each party can be presumed to have taken part in the cartel.’

<sup>240</sup> Compare *Raw Tobacco Italy* (Case COMP/C.38.281/B.2) Commission Decision 2006/901/EC [2006] OJ L353, para. 302, fn. 263: ‘[D]a quanto riferitoci da alcune importanti manifatture, noi veniamo segnalati a quest’ultimo, sempre dalle tre multinazionali, come elementi di disturbo e di conflitto’. See, also, case T-11/06 *Romana Tabacchi Srl v Commission* [2011] ECR II-6681, para. 144. Compare BAILEY, ‘Single, Overall Agreement in EU Competition Law’ 507, who underscores how the Commission does not explicitly characterises Romana Tabacchi’s behaviour as ‘public distancing’.

<sup>241</sup> Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, para. 29.

<sup>242</sup> MANTAS STANEVIČIUS, ‘Portielje: Bar Remains High for Rebutting Parental Liability Presumption’ (2014) 5 *Journal of European Competition Law & Practice* 24, 24. Since the parent company can be held liable irrespective of its instructions, direct participation, or even awareness of the subsidiary’s infringement, some have talked of an objective responsibility of the parent’s company. See ANTOINE WINCKLER, ‘Parent’s Liability: New Case Extending the Presumption of Liability of a Parent Company for the Conduct of its Wholly Owned Subsidiary’ (2011) 2 *Journal of European Competition Law & Practice* 231, 233. Such opinion



recent *Portielje* case,<sup>243</sup> this difficulty has been confirmed. In its decision, the Commission had found that Portielje and its subsidiary Gosselin Group NV participated in a cartel in the international removal services sector in Belgium. Portielje was a foundation that owned, directly and indirectly, 100% of the Gosseling shares. The General Court annulled the Commission's decision which regard to the liability of Portielje. The Court of Justice overruled that judgement for two main reasons. On one hand, the legal form of the parent entity is irrelevant as long as they can be considered a single economic unity. On the other hand, in order for the undertaking to rebut the presumption, all relevant factors 'relating to the economic, organisational and legal links which tie [the] author [of the infringement] to its holding entity and [...] of economic reality'<sup>244</sup> must be taken into account. Within these factors, also 'personal links between the legal entities' may be relevant in founding the informal basis of the economic unit.<sup>245</sup> Moreover, the fact that it is difficult to adduce the necessary evidence to the contrary in order to rebut the presumption does not mean that that presumption is *de facto* irrebuttable, especially since, the entities against which it operates are those best placed to seek that evidence.<sup>246</sup>

It was in the recent case *Elf Aquitaine* that the Court of Justice referred more explicitly to this proof-proximity principle, and clarified that it is the undertaking's responsibility to rebut the presumption of parental liability. Even if the Court of Justice's arguments are more aimed at asserting the legitimacy of that presumption, repeatedly been impeached by defendants for being *de facto* irrebuttable and as such unlawful, the words used by the Court allow catching a glimpse of the principle lying behind:

[I]t should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those *best placed to seek that evidence within their own sphere of activity*.<sup>247</sup>

In a preceding passage, the Court stated:

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seems nevertheless ill-founded, given that the 'existence of a significant interference' on the part of the parent company in the subsidiary's strategy and commercial policy needs to be proved, see case C-90/09 P *General Química SA v Commission* [2011] ECR I-1, para. 104.

<sup>243</sup> Case C-440/11 P *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, not yet reported.

<sup>244</sup> *Commission v Portielje*, para. 66.

<sup>245</sup> STANEVIČIUS, 'Portielje: Bar Remains High for Rebutting Parental Liability Presumption' 68.

<sup>246</sup> *Commission v Portielje*, para. 71.

<sup>247</sup> *Elf Aquitaine SA v Commission*, para. 70 (emphasis added).



It should be borne in mind, moreover, that that presumption is based on the fact that, save in quite exceptional circumstances, a company holding all the capital of a subsidiary can, by dint of that shareholding alone, exercise decisive influence over that subsidiary's conduct and, furthermore, that *it is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found.*<sup>248</sup>

In her Opinion in *Akzo*, Advocate-General Kokott observed, in the same vein, how the facts and information necessary for the rebuttal of the presumption of exertion of decisive influence over the subsidiary originate mostly in the domain of the parent and subsidiary company. On these premises, requiring the latter to discharge the burden of adducing evidence to disprove the facts subsumed by the presumption appears perfectly rational and consistent with due process requirements.<sup>249</sup>

### **E) Other Presumptions under Article 102 TFEU**

Under Article 102 TFEU, a very commonly applied presumption is the one which connects a market share of 50 % with a finding of dominance.<sup>250</sup> Since its establishment in *Hoffmann-La Roche*,<sup>251</sup> the existence of high market shares has been considered as evidence of the existence of a dominant position, except for particular circumstances. Analogously, a market share of less than 40% has been considered as excluding such dominance. This presumption is now contained in the Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings at paragraph 14.<sup>252</sup> As specified in the same Guidance, however, market

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<sup>248</sup> *Elf Aquitaine SA v Commission*, para. 60 (emphasis added).

<sup>249</sup> *Akzo Nobel NV v Commission*, Opinion of AG Kokott, para. 75.

<sup>250</sup> Case C-97/08 P *Akzo Nobel NV v Commission* [2009] ECR I-8237, para. 60. This presumption is recurring also in national competition law. For example, the newly adopted amendment to the Gesetz gegen Wettbewerbsbeschränkungen (GWB, the German Antitrust Act) poses a rebuttable presumption of dominance for companies with a market share of 40%, whilst the presumption of dominance for oligopolies of two or three businesses with a combined market share of 50% already existed. The GWB amendment entered into force on 30 June 2013, bringing about important changes, in particular for merger control and antitrust fines, in order to align German merger control with EU law and to increase the efficiency of the German antitrust system.

<sup>251</sup> Case C-85/76 *Hoffmann-La Roche & Co. AG v Commission* [1978] ECR 461, para. 41.

<sup>252</sup> Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings OJ C-45/7 [2009] para. 14: 'The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant

shares provide a useful first indication for the Commission in relation to the market structure and the importance of the investigated undertaking, but they must be interpreted in the light of many other factors. In particular, the Commission must take into account the dynamics of the market; the extent to which products are differentiated and the trend or development of market shares over time.<sup>253</sup> The flexibility of the approach is attested also by the fact that EU Courts have excluded the existence of a dominant position in presence of very high market share and found dominance in cases where the market share was below that threshold.<sup>254</sup>

Another widespread presumption under Article 102 TFEU is the one that considers asserted a *prima facie* abuse of dominant position when a dominant undertaking charges prices below average variable costs.<sup>255</sup> It is always possible, for the undertaking, to claim that the predatory conduct created efficiencies or economies of scale with a view to expanding the market.<sup>256</sup>

#### **F) The Compatibility of Presumptions with the Effects-Based Approach**

When addressing presumptions in antitrust law it is necessary to tackle the issue of their compatibility with the now prevailing effects-based approach.<sup>257</sup> On one hand, if their use is not compatible with the currently prevailing economic approach they may be bound to lose importance and be progressively discarded by the EU Courts; on the other, if there are compatible, their application find no other major obstacle but the presumption of innocence. To this latter issue is devoted the following paragraph.

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market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission.'

<sup>253</sup> Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings OJ C-45/7 [2009] para. 13.

<sup>254</sup> PHILIP MARSDEN and LIZA LOVDAHL GORMSEN, 'Guidance on Abuse in Europe: the Continued Concern for Rivalry and a Competitive Structure' (2010) 55 Antitrust Bulletin 875, 889–890; BRUZZONE and BOCCACCIO, 'Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix' 478.

<sup>255</sup> For its assertion in a national context, compare *Napp 4*, para. 110.

<sup>256</sup> Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings OJ C-45/7 [2009] para. 74.

<sup>257</sup> In contrast with the formalistic approach, the effects-based approach was promoted by the Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ 2009 C 45/7. The effects-based analysis requires a deep economic investigation for the evaluation of the effects produced by the infringement on the market. It focuses on the effect of the undertaking's conduct, rather than on the factual elements of the infringement alone. For an overview of the Guidance, see GIORGIO MONTI, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of European Competition Law & Practice 2–11.

Reasons to consider the use of the presumptions here analysed compatible with the effect-based approach are numerous. Although they may be said to arise out of the need for certainty and of a structuralist approach, many presumptions are aimed at alleviating a burden of proof that is considered too severe. They operate as ‘evidential shortcuts’<sup>258</sup> to reach the proof on certain aspects of the infringement but they never rule out the evaluation of its effects, nor they exclude the full appreciation of the economic consequences of the undertaking’s conduct. In addition, all the analysed presumptions are rebuttable. Such quality is crucial. Indeed, the undertaking is always allowed to rebut the facts subsumed by the presumption and to bring economic considerations into the legal discourse. As observed also in the Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, these latter considerations are given a preminent role in the evaluation of the facts and are always apt to prevail over the presumption, if well-founded. Presumptions, after all, frequently arise out of established economic theories and play a major role in ensuring effectiveness. They are aimed at preventing the risk of type II errors and of under-enforcement. In this vein, their widespread adoption by national courts appears particularly meaningful and not in contrast with the effect-based approach.

### **G) The Compatibility of Presumptions with the Principle of Presumption of Innocence**

The principle of presumption of innocence is here touched upon because of its interplay with the evaluation of the evidence, and its strong connection with the allocation of the burden of proof and the procedural devices which alter it (such as the presumptions of fact).<sup>259</sup> As illustrated beforehand, the general principle *in dubio pro reo*, resulting from Article 6(2) of the ECHR and Article 48(1) of the Charter of Fundamental Rights, is safeguarded in the review control of Commission’s decisions, because any remaining reasonable doubt must favour the defendant. This principle does not conflict with the mechanism by means of which the allocation of the burden of proof shifts to the defendant under certain circumstances, due to the fact that such alterations of its allotment have to do

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<sup>258</sup> The expression is used by LUIZ ORTIZ BLANCO, ‘Standards of Proof and Personal Conviction in EU Antitrust and Merger Control Procedures’ in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 188.

<sup>259</sup> For presumptions, the protection of the presumption of innocence is, in the EU Courts’ mind, guaranteed by their irrebuttability. This assertion has been recently put into doubt particularly with regard to the parental liability presumption, and this debate is thoroughly addressed at lett. b) of this paragraph.

with the assessment of the probative value of the evidence, and therefore fall within the margin of free appreciation of the Commission. In the words of Advocate-General Kokott:

[T]he presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience and the undertakings concerned are at liberty to refute those conclusions. After all, classic criminal proceedings allow for the use of circumstantial evidence and recourse to principles derived from experience.<sup>260</sup>

A similar view is also taken by national jurisdictions. The CAT expressly acknowledged the compatibility of the principle, as embodied by the Human Rights Act 1998, with the application of evidential presumptions in *Napp*.<sup>261</sup> The CAT restated the importance of the principle ‘he who asserts must prove’, according to which it was upon the OFT to discharge the burden of proof of the infringement<sup>262</sup> and concluded that Article 6(2) was applicable due to the criminal nature of the proceedings under the meaning of that Article. The CAT expressed this choice in the following terms:

The fact that these proceedings may be classified as ‘criminal’ for the purposes of the ECHR gives *Napp* the protection of Article 6, and in particular the right to ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6(3) including the right ‘to examine or have examined witnesses against him and to obtain attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’ (Article 6(3)(d)).

Clearly, its intention was to broaden the interpretation of Article 6 ECHR as to encompass those proceedings, and to ensure full recognition to the appellant’s rights.

In the context of the analysis of the interplay between fundamental rights and EU antitrust law proceedings, the discourse will focus under Chapter III on the fundamental rights impinged upon by the gathering of evidence, which represents the most common situation and the one that seems to have drawn more attention in the literature. Nonetheless,

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<sup>260</sup> *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Opinion of AG Kokott, para. 93.

<sup>261</sup> Recently upheld also by *North Midland Construction PLC v Office of Fair Trading*, paras. 14-15.

<sup>262</sup> *Napp 4*, para. 111.

more recently, the phase of the assessment of evidence - namely the application of presumptions - raised concerns on the part of the commentators as to their compliance with the rights of defence and the presumption of innocence. Since the present thesis has dealt thoroughly with the phenomenon of the extensive use of presumptions by the Commission and their endorsement by the EU Courts, including the national courts, it seems appropriate to include these arising complexities in the scope of the analysis.

As previously observed, the use of presumptions, tampering with the allocation of the evidential burden of proof, may potentially impact on the safeguard of fundamental rights of defence, as interpreted by the ECtHR. Some commentators have argued that these presumptions must be curtailed, in order to avoid tensions with the system of protection of human rights.<sup>263</sup> Conversely, it is the opinion contended here that such administrative presumptions are too precious a tool for the enforcement of competition law to be ruled out. At the same time, developing awareness of the risks entailed by their automatic application is meaningful with a view to defining their boundaries and reducing any potential danger connected to their use. In particular, it seems that embedding presumptions in uniform substantive statutory or soft law would compel the EU institutions to take into account the respect of fundamental rights more seriously. At the same time it would establish clear conditions for their application and, with regard to their application in the private enforcement of competition law, would bypass the complexities arising from the conflicts of law rules. In this regard, acknowledging the proof-proximity principle would prove useful too.<sup>264</sup> This should be done, in particular, by means of endowing the judge with the power to make use of presumptions on a case-by-case basis, in flexible terms and within the reasonable limits advocated by the ECtHR.

As said before, the wide application of induction-based inferences in this area of law is likely to clash with the presumption of innocence, if one considers that such procedural guarantee primarily exists because in many cases it is extremely difficult for defendants to prove themselves innocent, even when they are.<sup>265</sup> Particularly so in the field of competition

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<sup>263</sup> MARCO BRONCKERS and ANNE VALLERY, 'No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law' (2011) 34 *World Competition* 535, 535.

<sup>264</sup> For the beneficial effects of this principle in easing the tension between presumptions and Article 6(2) ECHR, see text accompanying fn. 292 to 295.

<sup>265</sup> In *R v Oakes* [1986] 1 SCR 103, para. 57 and 59, the Canadian Supreme Court, dealing with the presumption of innocence, stated that: 'In general one must [...] conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence [...]. A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could

law, for the many times illustrated difficulties of producing evidence - a distinctive feature in antitrust proceedings – of the conditions of Article 101(3) TFEU or of defences under Article 102 TFEU.

In order to discuss the implications of the presumption of innocence, it is necessary to give reasons for application of Article 6 ECHR to EU antitrust proceedings. The remit of the present work does not allow to treat this topic extensively, but analysing it here provides justification for the references to this provision that have been and will be made throughout the text. Suffice it here to sum up the state of the debate, which has engaged the interest of many commentators.<sup>266</sup>

### *a) The ‘Criminal’ Nature of Competition Law Proceedings under Article 6 ECHR*

As it will be more thoroughly illustrated in Chapter III, before the entering into force of the Lisbon Treaty, the EU Courts were only constrained to the respect of international law and human rights provisions as general principles of Community law, whose interpretation, remained a matter for the Court of Justice. After the Lisbon Treaty, pending the accession of the EU to the ECHR, all rights that are both granted by the Charter of Fundamental Rights and by the ECHR should progressively be interpreted as those laid down in the ECHR, and the case law of ECtHR should become the exclusive point of reference in determining their meaning and their scope.<sup>267</sup> The change entailed by the Lisbon Treaty has been played down by some observers, on grounds that the ECHR principles had long been recognized; nonetheless, the case law of the ECtHR has undoubtedly grown more influential after December 2009.<sup>268</sup> After *Jussila*, the ECtHR has characterised competition law proceedings as ‘non-hard core’ criminal law cases, underscoring how proceedings falling under Article 6(1) ECHR can carry criminal charges of different weight and lead to different degrees of social stigma. Therefore, the guarantees provided for by Article 6 ECHR may apply with

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thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.’

<sup>266</sup> IAN FORRESTER, ‘Due Process in EC Competition Cases: a Distinguished Institution with Flawed Procedures’ (2009) 34 *European Law Review* 817, 823 ff.; MARCO BRONCKERS and ANNE VALLERY, ‘Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after *Menarini*?’ (2012) 8 *European Competition Journal* 283–299, 284; ALBERT SÁNCHEZ GRAELLS, ‘The EU’s Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?’ in VASILIKI KOSTA, NIKOS SKOUTARIS and VASSILIS P. TZEVELEKOS (eds), *The Accession of the EU to the ECHR* (Hart Publishing 2014), forthcoming.

<sup>267</sup> For the relationship between the CJEU and the ECtHR, see Chapter III, fn. 69.

<sup>268</sup> BRONCKERS and VALLERY, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ 536-537.



different stringency to ‘administrative penalties [...], prison disciplinary proceedings [...], customs law [...], competition law [...], and penalties imposed by a court with jurisdiction in financial matters [...]’.<sup>269</sup> Even if this judgment has been read as patently excluding the criminal nature of competition law proceedings, it seems more sensible to take other factors into account, namely the fact that the ECtHR has repeatedly considered national competition law modelled on EU competition law as being covered by Article 6 ECHR,<sup>270</sup> provided that one of these three alternative conditions is met: a) the competition law treats the charge or penalty inflicted as a criminal one; b) the nature of the offence punished is of general concern; c) the charge imposed operate as a punishment or deterrent, rather than as compensation for damages.<sup>271</sup>

Since the competition law infringements are undoubtedly against the public interest and the fines imposed are extremely severe, it seems reasonable to conclude that Article 6 ECHR is applicable to EU competition law too,<sup>272</sup> although it is still undertermined whether in full or in a less stringent way.<sup>273</sup> Moreover, ever since *Hüls*, the Court of Justice has recognized the applicability of the presumption of innocence in EU competition law procedures ‘relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments’.<sup>274</sup> Owing to the nature of the infringement and the severity of the consequences, such applicability is no more under discussion as part of the fundamental right to fair competition proceedings,

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<sup>269</sup> *Jussila v Finland*, para. 43.

<sup>270</sup> See *Fortum v Finland*, 15 July 2003, Application no. 32559/1996, paras. 36 and 44-45; *A. Menarini Diagnostics Srl v Italy*, 27 September 2011, Application no. 43509/2008, para. 44. *Contra* (owing to the specific characteristics of the Russian competition law) *Neste v Russia*, 3 June 2004, Application no. 69042/2001).

<sup>271</sup> These criteria are also called the *Engel* criteria, from the name of the case where the ECtHR first identified them. Compare *Engel v The Netherlands*, 8 June 1976, Application no. 5100/1971, 5101/1971, 5102/1971, 5354/1972, 5370/1972 [1976] ECHR A2, para. 82: ‘[T]he Court must specify [...] how it will determine whether a given “charge” vested by the State in question [...] with a disciplinary character nonetheless counts as “criminal” within the meaning of Article 6 [...] it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. [...] The very nature of the offence is a factor of greater import. [...] the degree of severity of the penalty that the person concerned risks incurring. [...]’.

<sup>272</sup> MARCO BRONCKERS and ANNE VALLERY, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ (2011) 34 *World Competition* 535, 537–541.

<sup>273</sup> Compare also the EFTA Court, case E-15/10 *Posten Norge AS v ESA*, 18 April 2012, para. 90: ‘Having regard to the nature and the severity of the charge at hand [...], while the form of administrative review provided [...] may influence, with regard to several aspects, the way in which the guarantees provided by the criminal head of Article 6 ECHR are applied, this cannot detract from the necessity to respect these guarantees in substance’.

<sup>274</sup> Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, para. 150.



regardless the criminal or non-criminal nature of the administrative procedure conducted by the Commission.<sup>275</sup>

***b) The ‘Reasonable Limits’ to the Application of Presumptions***

The question of the compatibility between the presumptions applied by the EU Courts and the presumption of innocence is ultimately a question of under which conditions the presumptions can be used without violating the principle enshrined by Article 6 ECHR. Indeed, any presumptions in any field of the law, for its nature and its functioning, is likely to impinge upon this procedural guarantee, due to the insurmountable observation that, put bluntly, even if the defendant is telling the truth, it will not necessarily be easy for him or her to produce evidence sufficient to shed doubt on the facts subsumed by a presumption, let alone to adduce cogent counterevidence to rebut that presumption.<sup>276</sup>

With regard to the application of the *Stora* presumption, Advocate-General Kokott, basing her premises on the previously illustrated distinction between evidential and legal burden of proof,<sup>277</sup> contended in *Akzo Nobel* that the presumption of innocence does not come into play, and the use of presumptions by no means interferes with the guarantee of the rights of defence.<sup>278</sup> This is due to the fact that the shifting of the evidential burden of proof tampers with the standard of proof, rather than with the allocation of the legal burden of proof.<sup>279</sup> According to some commentators, the distinction drawn by Advocate-General Kokott is ‘too subtle; [...] when the standard of proof imposed on a competition law

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<sup>275</sup> Joined cases C-209 to C-215 and C-218/78 *Heintz van Landewyck Sarl v Commission* [1980] ECR 3125, para. 8. See also joined cases C-201/09 P and C-216/09 P) *Commission v ArcelorMittal Luxembourg*, not yet reported, Opinion of AG Bot, para. 44: ‘I consider it indisputable that the Charter of Fundamental Rights of the European Union contains [...] the procedural guarantees in question [i.e. the guarantees recognised in Article 47 and 48 of the Charter and Article 6 ECHR] and that they are clearly binding on the Commission.’

<sup>276</sup> For the need of ‘cogent evidence to the contrary’ in order to rebut the presumption see *Akzo Nobel NV v Commission*, Opinion of AG Kokott, para. 74: ‘Since the parent company’s 100% shareholding in its subsidiary supports *prima facie* the conclusion that decisive influence is actually being exercised, it is for the parent company to rebut precisely that conclusion, adducing cogent evidence to the contrary; failing this, that conclusion is adequate to discharge the burden of proof.’

<sup>277</sup> Compare paragraph 4 of this Chapter.

<sup>278</sup> *Akzo Nobel NV v Commission*, Opinion of AG Kokott, para. 74: ‘Recourse to a presumption rule [...] does not lead to a reversal of the burden of proof that would be incompatible with the presumption of innocence. On the contrary, only the *standard of proof* which must be satisfied when attributing responsibility under antitrust law as between a parent company and its subsidiary is being laid down.’

<sup>279</sup> This distinction is described also by CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 518-519.

authority is relaxed, this will necessarily ease its burden of proving an infringement.’<sup>280</sup> The opinion according to which the distinction between legal and evidential burden of proof is blurred cannot be shared, for all the reasons illustrated above. It has, however, to be acknowledged that there is a strong connection between presumptions, burden and standard of proof. Thus, the line of reasoning adopted here compels to take into account the profound implications of the use of presumptions on the rights of defence. The outcome of such analysis is not to prove the incompatibility of presumptions with those rights,<sup>281</sup> but to underline the circumstances which would ensure their application in compliance with the rights of defence.

In the case of the presumption of parent’s company liability, commentators have noted how many national laws allow corporate veil to be pierced only when concurrent specific circumstances occur. Namely, besides the exercise of decisive influence on the conduct of the subsidiary, there are the bankruptcy of the subsidiary caused by the parent company, or the abuse or lack of good faith in the particular circumstances of the case. Nonetheless, it is hard to understand why EU competition law would not need to meet these other criteria,<sup>282</sup> and would be entitled to pierce the corporate veil to such an extent as to presume parental liability in the presence of 100% of shareholding.<sup>283</sup> Moreover, the argument according to which the rebuttability of the presumption would *per se* ensure its compliance with the presumption of innocence, recently upheld in *Elf Aquitaine*<sup>284</sup> and *Eni*,<sup>285</sup> is not conclusive, unless one makes sure that the relevant evidence is in the hands of

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<sup>280</sup> BRONCKERS and VALLERY, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ 549.

<sup>281</sup> This conclusion is reached by BRONCKERS and VALLERY, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ 569–570, who contend that the use of these presumptions is *de facto* incompatible as it is with the procedural guarantee contained at Article 6 ECHR.

<sup>282</sup> When such argument was first raised before the Court of Justice in Case T-299/08 *Elf Aquitaine SA v Commission* [2011] ECR II-2149, para. 72, the General Court rejected it on grounds that: ‘[A]s regards the arguments that the presumption of the exercise of decisive influence is contrary to the law applicable in some Member States of the European Union, [...] the laws of those States do not constitute the relevant legal framework by reference to which the lawfulness of the contested decision falls to be assessed.’

<sup>283</sup> BRONCKERS and VALLERY, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ 551.

<sup>284</sup> *Elf Aquitaine SA v European Commission*, paras. 171–172: ‘[T]he fact that the applicant did not, in the present case, adduce evidence capable of rebutting the presumption of the exercise of decisive influence does not mean that that presumption cannot be rebutted in any circumstance [...]. It follows that the Commission did not breach the presumption of innocence by presuming that the applicant exercised decisive influence over its subsidiary.’

<sup>285</sup> Case C-508/11 P *ENI SpA v Commission*, not yet reported, para. 50: ‘As regards ENI’s argument that that presumption of the exercise of an actual decisive influence runs counter to the principles of lawfulness, that penalties should be applied only to the offender, of personal liability and of legal certainty, it is sufficient to recall that that presumption seeks precisely to find a balance between the importance, on the one hand, of the

the defendant. On this point, reference must be made to the concept of proof-proximity principle, described in detail in the next paragraph.

Recently, the question of whether the presumption of parental liability is applied within reasonable limits, as required by the ECtHR in *Salabiaku*, was addressed by Advocate-General Bot in *ArcelorMittal*. The Advocate-General pointed out that, for the presumption to operate in compliance with the procedural guarantees of Articles 47 and 48 of the Charter and Article 6 ECHR, additional indicia were to be considered to exclude autonomy on the part of the subsidiary. The holding of the capital does not by itself express anything more than the existence of a group link.<sup>286</sup> Given that the presumption of parent's company liability is basically an exception to the principle of the presumption of innocence, it 'unquestionably affects the rights of defence' of the defendant.<sup>287</sup> Therefore, besides the criterion of actual rebuttability in the case under examination, the principles laid down in the ECtHR case law come into play: namely, the presumption must comply with the *Salabiaku*<sup>288</sup> and the *Janosevic*<sup>289</sup> criteria, which compel the Court to, respectively, i) verify whether the presumptions of fact or of law that it applies are confined within 'reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence';<sup>290</sup> and ii) apply a test of proportionality, aimed at striking a balance between the strict liability and the objective of effectiveness of the enforcement system.<sup>291</sup>

It seems that, for the expression 'reasonable limits' to acquire meaning in practice, one ought to look at the particular circumstances of the case. To meet this latter condition, according to Advocate-General Bot in *ArcelorMittal*, objective elements corroborating the facts subsumed by the presumptions must exist.<sup>292</sup> In the words of the Advocate-General:

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objective of penalising conduct contrary to the competition rules, in particular Article 101 TFEU, and to prevent its repetition and, on the other, the requirements of certain general principles of European Union law, such as, in particular, the principles of the presumption of innocence, that penalties should be applied only to the offender, legal certainty and the rights of the defence, including the principle of equality of arms. *It is particularly for that reason that it is rebuttable.*' (emphasis added).

<sup>286</sup> *Commission v ArcelorMittal Luxembourg*, Opinion of AG Bot, para. 204.

<sup>287</sup> *Commission v ArcelorMittal Luxembourg*, Opinion of AG Bot, para. 206.

<sup>288</sup> *Salabiaku v France* [1988] ECHR Series A no. 141-A.

<sup>289</sup> *Janosevic v Sweden* ECHR 2002-VII.

<sup>290</sup> *Salabiaku v France*, para. 28: 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. [...] It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'

<sup>291</sup> *Janosevic v Sweden*, para. 101: '[T]he means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.'

<sup>292</sup> *Commission v ArcelorMittal Luxembourg*, Opinion of AG Bot, para. 212.

[T]he presumption in question must, in each case, be corroborated by other elements of fact proving that the parent company exercised decisive influence over its subsidiary. [...] That would encourage the investigating authorities to undertake, in each case, a nuanced assessment of the economic, legal and organisational links between the parent company and its subsidiary.<sup>293</sup>

Arguably, however, the presumption is kept within ‘reasonable limits’ when its application when it is not applied mechanically and, more precisely, where it is *de facto* rebuttable. This latter condition is met when factual elements that would rebut the presumption, if they were to exist, would lie in the hands of the party against whom the presumption operates. Indeed, a ‘nuanced assessment’ of the circumstances of each case seems to be material in rendering any of the presumptions applied by the European Commission more in line with the rights of defence. It would seem advisable to take into account whether economic and rational explanations of the conduct are actually available in the hand of the competition authority or of the plaintiff. In order to take this circumstance into consideration when allocating the evidential burden of proof, the proof-proximity principle will provide guidance.<sup>294</sup>

Very recently, the EU Courts have started adhering to this much more nuanced way of assessment and thus seem to be slowly converging towards the interpretation of the ECtHR, even if the process has just started and it may take some time to identify a proper pattern. For instance, in *Air Liquide*,<sup>295</sup> *Edison*<sup>296</sup> and *Grolsch*<sup>297</sup> the General Court quashed the Commission’s decisions on grounds that the evidence presented by the defendants to support the argument for the autonomy of the parent company had not been analyzed thoroughly. The Commission had not given reasons for considering such evidence conclusive, thus depriving the applicant of the possibility to contest the validity of that imputation of responsibility on appeal. Examples of relevant evidence that the Commission neglected to consider and that therefore are deemed to possess particular probative value

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<sup>293</sup> *Commission v ArcelorMittal Luxembourg*, Opinion of AG Bot, para. 213.

<sup>294</sup> For the analysis of this emerging principle, refer to para. 6 of the present Chapter.

<sup>295</sup> Case T-185/06 *L’Air liquide v Commission* [2011] ECR II-2809, paras. 79–80.

<sup>296</sup> Case T-196/06 *Edison SpA v Commission* [2011] ECR II-3149, para. 88: ‘Inasmuch as the Commission contends, in the defence, that the contrary evidence relied on by the applicant was, in any event, inadequate to demonstrate Ausimont’s independence, no assessment by the Commission of the evidence at issue is apparent from the grounds of the contested decision. This impedes the review of the validity of the contested decision on this aspect.’

<sup>297</sup> Case T-234/07 *Koninklijke Grolsch NV v Commission* [2011] ECR II-06169, paras. 86 and 88: ‘[T]he Commission fails to state the reasons why it imputes to the applicant the participation in the cartel by its subsidiary [...] by virtue of the attendance of employees of the latter company at the contested meetings [...]. The contested decision thus ignores the economic, organisational and legal links between the applicant and its subsidiary and its grounds make no mention of the name of the subsidiary.’

are: letters stating changes in the delegation of the operational management; statements of the chairman of the undertaking giving evidence of the independence of this latter in matters of commercial policy; evidence of the fact that the subsidiary has its own departments (namely a commercial, a marketing, a human resources, an IT and an accounts department), which allows it to control its commercial conduct completely by itself; evidence of the avoidance of use of the parent's company name on official commercial documents;<sup>298</sup> or copies of the statute, in which the board of directors is vested, from a particular date onwards, with full powers for the ordinary and extraordinary management of the company – the full power being considered evidence of the complete decisional autonomy of the undertaking.<sup>299</sup> It is important to underline, for the purposes of the present thesis, that the mentioned evidence is often, but not always, easily accessible by the parent company, against which the presumption operates. Evidence may be, on occasions, more likely found in the hands of the subsidiary or more easily gathered by the competition authority during its investigation. In *Elf Aquitaine*, the CJEU rejected the presumption applied by the Commission and endorsed the *Salabiaku* and *Janosevic* criteria:

It follows from the case law [...] that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded.<sup>300</sup>

It is really too soon to tell whether this endorsement of the proportionality test for presumptions will be extended to all presumptions applied by the Commission, but it certainly could be read as an indication of the will of the CJEU to give up some of its 'steering space' in regard to the interpretation and application of fundamental rights in EU competition law proceedings, rendering the application of presumptions compliant with the case law of the ECtHR.

## H) The Application of EU Competition Law Presumptions by National Courts

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<sup>298</sup> *L'Air liquide v Commission*, para. 67.

<sup>299</sup> *Edison SpA v Commission*, para. 66.

<sup>300</sup> *Elf Aquitaine SA v European Commission*, para. 62.

In antitrust law, the shifting of the evidential burden of proof is triggered by the evidential presumptions that are judicially created, by means of crystallizing previously acquired knowledge. In public enforcement, such presumptions are applied by administrative regulatory bodies, the NCAs,<sup>301</sup> and the respect of the rights of defence must be safeguarded by the administrative judge when reviewing their decisions.

In private enforcement, the national judges are entitled to apply those presumptions even if they are not provided by any national law, owing to the fact that they are directly empowered to apply EU competition law. In theory, the allocation of the *evidential* burden of proof could be considered a matter of competence of national procedural rules,<sup>302</sup> because it has to do with the standard of proof, rather than with the strict application of Article 2 of Regulation (EC) 1/2003. This safeguarded matter of exclusive national competence is, however, steadily eroded by means of the judicial assertion at the European level of objective justifications (as opposed to mere defences, which are by definition potentially unlimited) on one hand, and evidential presumptions on the other, which the national courts tend to follow. Moreover, there is growing consensus to consider the allocation of the burden of proof in general, and presumptions in particular, as substantive issues governed by the law of the cause of action (or the uniform substantive law), due to ‘their closeness to the substantive right at stake in the litigation and their plainly outcome determinative effect’.<sup>303</sup> As already showed, this trend is confirmed also by Articles 18(1) and 22(1) of the Rome Regulations. The trend is confirmed also by the approach of the EU Courts, according to which presumptions become part of the substantive scope of the provisions of Articles

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<sup>301</sup> The AGCM, Italian competition authority, has made use of presumptions extrapolated directly by EU case law in many recent cases: I723 *Intesa nel mercato delle barriere stradali*, decision no. 23931 of 28 September 2012, para. 96; I722 *Logistica internazionale*, decision no. 22521 of 15 June 2011, paras. 246-249 (on participation to meetings); A423 *ENEL-Dinamiche formazione prezzi mercato energia elettrica in Sicilia*, decision no. 20705 of 27 January 2010, para. 24 (on parent company’s responsibility); I729 *Gara d’appalto per la sanità per le apparecchiature per la risonanza magnetica*, decision no. 22648 of 4 August 2011, para. 172 (on parallel conducts).

<sup>302</sup> *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm); [2011] 108(3) LSG 17, para. 94: ‘[...] Generally, as a matter of English private international law, the burden of proof is probably a procedural matter determined by the *lex fori* [...]’. Compare also *Fuld (Deceased) (No.3)*, *In the Estate of* [1968] P 675; [1966] 2 WLR 717, 696–697: ‘[...] I have come to the conclusion that the English Probate Court, if conducting its inquiry *de novo* and not merely giving effect to a probate, or its equivalent, already granted abroad, must in all matters of burden of proof follow scrupulously its own *lex fori*.’ See, for the opinion according to which presumptions applied in EU public enforcement should not be applied in national proceedings, BERNARDO CORTESE, ‘Piercing the Corporate Veil in EU Competition Law: the Parent Subsidiary Relationship and Antitrust Liability’ in BERNARDO CORTESE (ed), *EU Competition Law* (Wolters Kluwer 2014), International Competition Law Series 55, 93. This approach, however, does not seem to give due consideration to the case law of the EU Courts, which considered certain presumptions as forming ‘integral part of applicable Community law’. See, for further details, fn. 305 below.

<sup>303</sup> GARNETT, *Substance and Procedure in Private International Law* 201.



101 and 102 TFEU.<sup>304</sup> This has been made clear by the Court of Justice in *T-Mobile*. The Court of Justice restated that, when applying Article 101 TFEU, all the national courts of the Member States are compelled to apply the presumption of cartel participation. The Court examined that presumption (i.e. the presumption of causal connection), which the case law had long formulated within the scope of interpretation of the said Article. It confirmed that there is a rebuttable presumption according to which the undertakings participating in a concerted action and remaining active on the market afterwards will take account of the information exchanged with the other participants when determining their commercial and market policy. The responsibility for the rebuttal is borne by the undertaking against which the presumption operates. Moreover,

[I]t must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law.<sup>305</sup>

By making use of uniformed evidential presumptions, the EU case law<sup>306</sup> models the apportionment of the evidential burden of proof in competition cases, thus judicially addressing problems of asymmetry of information, encountered especially in the private enforcement, and overcoming the principle of procedural autonomy. Indeed, once the presumptions has been established by the EU Courts, they can easily spread in all Member States through the general guidance that the EU case law offers to national judges empowered to apply EU competition law. In practice, this process appears very smooth and there is no apparent resistance of national courts against the embodiment of European evidential presumptions, due to three major factors:

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<sup>304</sup> NAZZINI, *The Foundations of European Union Competition Law* 291.

<sup>305</sup> *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, para. 53.

<sup>306</sup> Presumptions in antitrust law are not exclusively judicially created: for instance, two examples of evidential presumptions are provided by the Notice on the Effect on Trade between Member States, in the context of Commission's proceedings. The Notice provides that, on one hand, an agreement is presumed not to appreciably affect trade between Member states when the aggregate market share of the parties on any relevant market within the EU does not exceed 5 per cent and the aggregate annual European turnover in the products covered by the agreement does not exceed 40 million euros (negative presumption); on the other hand, an agreement, whose nature is capable of appreciably affect inter-state trade, is presumed to affect such trade if the market share of the parties exceeds 5 per cent or if the annual European turnover exceeds 40 million euros (positive presumption). See KOMNINOS, *EC Private Antitrust Enforcement* 65-66.



- 1) the profound reluctance showed by national judges to embark on very detailed analyses of technical and economic evidence, which nonetheless characterise competition law matters, cajole them into embracing with relish the use of those shortcuts;
- 2) it is more convenient to resort to uniform substantive EU law to govern presumptions, rather than following a fragmented conflict of laws approach in multi-state lawsuit, which is likely to arise complexities;<sup>307</sup>
- 3) the application of presumptions increases deterrence and is in line with the principle of effectiveness limiting the procedural autonomy of the Member States.

### *a) Presumptions before the English Courts*

Evidence of the adoption of EU evidential presumptions by national Courts is provided by one of the landmark case of English public enforcement, the already mentioned *Napp*. The CAT made reference to different presumptions drawn on from the EU Courts' case law, thus showing to deem them immediately applicable by the English judge even when applying national competition law provisions:

That approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares (Case 85/76 *Hoffman-La Roche v Commission* [...]; that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory (see the opinion of Advocate General Fennelly in [...] *Compagnie Maritime Belge v Commission* [...]; or that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged: *Montecatini v Commission* [...]).<sup>308</sup>

Directly quoting and referring to the EU case law, the UK Tribunal clearly treated it as its direct guidance.<sup>309</sup> What is more, direct referral to the allocation of the evidential burden of proof of the EU Courts is made by the English judge also in the private enforcement, as

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<sup>307</sup> These difficulties have been illustrated under Chapter I.

<sup>308</sup> *Napp 4*, para. 110.

<sup>309</sup> See, also, *Claymore Dairies Ltd and Express Dairies Plc v Office of Fair Trading* [2003] CAT 18, para. 10 (Chapter I prohibition): '[T]he OFT may well be entitled to draw inferences or presumptions from a given set of circumstances, for example, that the undertakings were present at a meeting with a manifestly anti-competitive purpose, as part of its decision-making process'.

happened in *Chester City Council and Arriva*.<sup>310</sup> The case related to a Chapter II prohibition (i.e. a breach of Section 18 of Competition Act 1998, not of EU competition law), for an abuse of dominance in the bus market by predatory pricing. Both the presumption of dominance and that of predatory intent for pricing below average costs were referred to by the High Court, which mentioned the relevant case law of the EU Courts (*Akzo* and *Hoffman-La Roche*).<sup>311</sup>

### ***b) Presumptions before the Italian Review Courts***

As for the Italian judge, evidence of the application of identical presumptions is abundant. To mention a few examples, the Council of State specified, in a case of an Article 101 infringement where indirect evidence of a cartel was found, that it was for the undertaking concerned to provide evidence of the fact that the cartel had ended according to its manifest and concurrent will.<sup>312</sup> It is sufficient for the AGCM to produce evidence that the undertaking took part in meetings where an anticompetitive conduct was agreed upon, to prove that the undertaking participated to the agreement, unless it can provide evidence that it publicly distanced itself from the agreement,<sup>313</sup> i.e. manifestly opposed it.<sup>314</sup> Moreover, where it is established that an undertaking successfully concerted with another, and remained active on the market afterwards, it can be presumed that it took into account the information exchanged with the co-participants, unless the undertaking manages to rebut the presumption by means of showing that it did not make use of the relevant information,<sup>315</sup> or the market policy was determined by alternative factors, or, naturally, that the market conduct was inconsistent with the concerted behaviour.<sup>316</sup> With regard to the presumption of

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<sup>310</sup> *Chester City Council and Chester City Transport Limited v Arriva plc and Arriva Cymru Limited and Arriva North West Limited*, High Court Chancery Division [2007] EWHC 1373 (Ch).

<sup>311</sup> *Chester City Council v Arriva*, paras. 115, 165 and 194.

<sup>312</sup> Council of State, 30 August 2002, decision no. 4362, para. 5.1.9 *in fine*.

<sup>313</sup> Council of State, *Soc. C. v AGCM*, 16 September 2011, decision no. 5171 (2011) Repertorio del foro italiano 715; Council of State, *Anie v Soc. E.*, 20 May 2011, decision no. 3013 (2011) Foro amministrativo 1637; Council of State, *L.P.D. 1820 v AGCM*, 13 May 2011, decision no. 2921 (2011) Foro amministrativo 1620.

<sup>314</sup> MARIO SIRAGUSA, 'Antitrust and Merger Cases in Italy: Standard of Proof, Burden of Proof and Evaluation of Evidence' in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart 2011) 581–582.

<sup>315</sup> Council of State, *Rifornimenti aeroportuali italiani Srl and Rifornimenti aeroportuali milanesi v AGCM*, 20 Febbraio 2008, decision no. 594, para. 4.

<sup>316</sup> Compare Council of State, 12 February 2001, decision no. 652, para. 15.2, specifically referring to the case law of the Court of Justice, Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-04125, para. 121: '[S]ubject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market

parallel conducts, in presence of evidence of exogenous factors which might have provoked the alignment of the conducts in the market,<sup>317</sup> the Council of State tends to place the evidential burden of proof on the undertaking, in accordance with the EU case law.<sup>318</sup> This distinction between endogenous and exogenous factors, entailing a different allocation of the evidential burden of proof, is adopted by the Italian civil judge too.<sup>319</sup> Evidence of endogenous factors, connected to the inherently peculiar symmetrical behaviour of the undertakings or to the lack of alternative plausible explanations (i.e. evidence that, were the undertaking competing between each other, they would have plausibly adopted a different behaviour) must be borne by the competition authority.<sup>320</sup> Should such alternative plausible justifications not be ruled out by the AGCM, the concerted practice cannot be considered proven.<sup>321</sup> It is contended here, as it will be thoroughly illustrated in the following paragraph, that such conclusions derive from the implicit application of the proof-proximity principle, on the basis of the specific circumstances of the case, in which evidence of an alternative explanation were too difficult to be found by the defendants. Finally, the traditional presumptions of market share<sup>322</sup> and prices below average variable costs help the Italian competition authority in the enforcement of Article 102 TFEU.<sup>323</sup>

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take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period [...], according to the findings of the Court of First Instance.’ Compare also Council of State, decision no. 5733 of 8 November 2001, para. 3.3.2, quoting *Anic* again: ‘With regard to the burden of proof, in presence of reasonable circumstantial evidence of an anti-competitive practice, it is for the undertakings concerned to give evidence of the alternative plausible explanation for their conducts’. See, also, Council of State, decision no. 1397 of 16 March 2006, para. 6.1 where the court goes so far as to say that established and consistent case law exists confirming that evidence of the occurrence of a concerted practice must be assessed freely, not according to a rigid canon which would result incompatible with the *effet utile* of EU antitrust provisions, but according to a loose evaluation, which may well factor in *indicia*, when they are reliable and consistent.

<sup>317</sup> Council of State, *Rivoira SpA and others v AGCM*, 7 March 2008, decision no. 1006 (Article 2 of Law 287/1990); TAR Lazio, *Soc. Bristol Myers Squibb v AGCM*, 6 June 2008, decision no. 5578.

<sup>318</sup> Council of State, *Soc. S. v AGCM*, 23 May 2011, decision no. 2925 (2011) Repertorio del foro italiano 717.

<sup>319</sup> Court of Appeal of Naples, *Vitiello c. Soc. Lloyd Adriatico*, 17 January 2008 (2008) Foro italiano, I, 1303-1307, 1307 (Article 2 of Law 287/1990), see fn. 338.

<sup>320</sup> Council of State, *Soc. C. v AGCM*, 16 September 2011, decision no. 5171, para. 17, quoting Council of State, *Soc. H. Italia v AGCM*, 17 January 2008, decision no. 102; Council of State, 13 May 2011, decision no. 2925, para. 9.1.

<sup>321</sup> Council of State, *Rivoira SpA and others v AGCM*, 7 March 2008, decision no. 1006, para. 11.4.3 (Article 2 of Law 287/1990); Council of State, *Soc. H. Italia v AGCM*, 17 January 2008, decision no. 102.

<sup>322</sup> See TAR Lazio, *Telepiù v AGCM*, 11 September 2001, decision no. 7433, para. 7d: ‘It is established that, among the indicators of an abuse of dominance, high market shares is one of the most telling ([...] Hoffman La Roche/Commission [...] Akzo/Commission [...]). The higher the market shares of the undertaking, as in the case under examination, the stronger is the presumption.

<sup>323</sup> SIRAGUSA, ‘Antitrust and Merger Cases in Italy: Standard of Proof, Burden of Proof and Evaluation of Evidence’ 589.

## I) Presumptions in the Private Enforcement

Clearly, due in particular to the prevalence of follow-on actions, the use of presumptions in the private enforcement is less widespread. Nonetheless, presumptions are still very useful for the facilitation of proof<sup>324</sup> under two aspects: on the one hand, for the proof of the infringement, for which the claimant may rely on the binding effect of the previous decision of the Commission or the NCAs *tout court*, or on its particularly high probative strength; on the other, the proof of causation, which is especially hard to establish. Owing to such difficulty, the use of evidential presumption is pleaded by the Proposal for a Directive recently published by the Commission. As regards the issue of causation, in order to lighten the burden of proof resting upon the claimant, Article 16 of the Proposal for a Directive shifts the burden of proof upon the defendant, introducing a rebuttable presumption that anti-competitive infringements produce harm. Evidently, the Proposal is directed at facilitating the proof, and in order to do so, great recourse is made to the device of the shifting of the burden of proof. With regard to the pass-on defence, where the indirect purchaser has reached a *prima facie* case of the passing-on, proving that there has been an infringement upon the goods or services purchased which resulted in an overcharge for the direct purchaser of the defendant, the burden of proving that the overcharge did not pass-on to the indirect purchaser shifts to the defendant.<sup>325</sup> The extensive use of presumptions in antitrust law both at the EU and national levels is at present undeniable.

## 6) THE PROOF-PROXIMITY PRINCIPLE

Presumptions arise from the necessity of protecting certain interests, which are considered to take precedence (at least momentarily, for a rebuttal is admitted) on the application on the usual adversarial fact-finding process.<sup>326</sup> The main reasons for adopting evidential presumptions in antitrust law are two:

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<sup>324</sup> To the same objective of facilitating the proof is aimed the cooperation between plaintiffs, which can bring to ceding and bundling of claims, in order to obtain data from other consumers. Compare DANOV, BECKER, and BEAUMONT, *Cross-Border EU Competition Law Actions* 66–67.

<sup>325</sup> *Proposal for a Directive*, Article 13(2).

<sup>326</sup> GROSSEN, *Les présomptions en droit international public* 44–45.

- 1) the difficulty found in the retrieval of direct evidence of the infringement or of the relevant facts;<sup>327</sup>
- 2) the need to protect one of the parties in the proceedings, for different reasons.

The first reason is linked to the nature of antitrust matters, as already explained;<sup>328</sup> the second has to do with the need to favour the plaintiff, intended to be the financially weaker party, or the one with lesser bargaining power and resources. Whilst this idea of protection of the weaker party is intuitive in the private enforcement, it is less obvious if applied in the public enforcement, where the prosecutor, the Commission or the national competition authority, does not seem to call for any special protection. It is exactly in this sense that the acknowledgement of the proof-proximity principle lying behind evidential presumptions gathers importance, as a limit, or a counterbalance to the pursuit of the practical purposes of presumptions.

This principle operates when available evidence is insufficient<sup>329</sup> to form a full proof of the relevant facts. Since the collection of evidence is one of the most important phases of the proceedings, the interest of ensuring that decisions are taken after examining all available evidence makes it highly desirable to place the evidential burden of proof on the defendant, whenever he or she has an easier access to evidence. This holds valid for both the public and the private enforcement. On one hand, such allocation allows the Commission to deal better with its workload; on the other, it fosters private enforcement, where the difficulty of accessing evidence is considered to be one of the biggest hindrances to the development of a more effective compensation system. The mentioned principle has the function of compensating the imbalance existing between the parties' powers, in a quest for fairness and justice. Such balance is attained, in those situations where relying heavily on circumstantial evidence is inevitable, by means of allocating the evidential burden of proof on the party to whom the required evidence is available or who is better situated in order to adduce the evidence easily and promptly, thus eliciting the production of as much evidence as possible.

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<sup>327</sup> See, with regard to cartels, OECD, *Prosecuting Cartels without Direct Evidence of Agreement* [2006] DAF/COMP/GF(2006)7, 9.

<sup>328</sup> Refer to para. 3 of the Introduction.

<sup>329</sup> It is out of doubt that 'insufficiency' is a relative concept, which needs to be defined in conjunction with the establishment of a threshold for the required standard of proof. To the purpose of the present paragraph, nonetheless, insufficiency of evidence is intended as the situation where there is not enough evidence to meet the 'requisite legal standard' of proof usually applied by the EU Courts in antitrust cases.

Given the significant information asymmetry that characterizes antitrust cases, the necessity was felt by the EU Courts to enshrine previously acquired knowledge into rebuttable ‘mini-rules of common sense’,<sup>330</sup> to be deemed valid until rebutted. Such rebuttable mini-rules of common sense based on judicial experience or economic theories are the so-called *evidential* presumptions, which can be considered the most important device by means of which the proof-proximity principle is practically applied by the EU judicature.

Even the rationale of Article 101(3) (which is said to allocate the *legal* burden of proof) can be considered as an expression of such principle. In the words of commentators:

[T]he information required to prove that the conditions of Article 81(3) are satisfied is generally in the hands of the undertaking that seeks to rely on the defence. For instance, the parties to the agreement control the cost data and other information required to substantiate claims that the agreement gives rise to objective economic benefits. They are also in a better position to explain why the agreement is indispensable for producing efficiencies and to demonstrate the benefits passed on to consumers. If the burden of proof under Article 81(3) were to be placed on the party seeking to establish an infringement the prohibition could be undermined, thereby affecting the very substance of Article 81.<sup>331</sup>

The origins of the proof-proximity principle are undoubtedly national. According to the extensive interpretation of Article 340(2) TFEU, which makes reference to the ‘general principles common to the laws of the Member States’, principles considered valuable for the development and strengthening of the EU, even when not already applied in all 28 Member States, can be acknowledged as primary source of EU law and directly applicable across the EU. This Article might provide the legal basis for the application across the EU of the proof-proximity principle, which is now developed in some countries where disclosure is not widely admitted.<sup>332</sup> The principle is envisaged as a corrective device for the fair apportionment of the burden of proof, for all cases where the mechanical application of the

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<sup>330</sup> In competition law presumptions usually enshrine lessons learnt from juridical experience or crystallised mainstream economic principles. See DAVID BAILEY, ‘Presumptions in EU Competition Law’ (2010) 31 *European Competition Law Review* 362, 367 and SIBONY, ‘Limits of Imports from Economics into Competition Law’ 51, who refers to ‘shortcuts [...] based on economic consensus.’

<sup>331</sup> JONATHAN FAULL and ALI NIKPAY (eds), *The EC Law of Competition* (2nd edn, Oxford University Press 2007) 94–95.

<sup>332</sup> For the connection between a limited use of disclosure and the use of proof-proximity principle in another field of law, see STEFAN KROLL, ‘The Burden of Proof for the Non-Conformity of Goods under Article 35 CISG’ (2011) 59 *Belgrade Law Review* 162–180, 169.



principle of ‘he who asserts must prove’ could entail undue results. In such cases, it is considered more just to impose on the party who allegedly committed the violation the burden of proving that it did not, or that the conduct was otherwise justified or alternatively explainable.<sup>333</sup> The principle is particularly well-developed in the German tradition (*Beweisnähe*).<sup>334</sup> For instance, in Austrian civil proceedings, the case law established a reversal of the burden of proof where a party has easier access to certain types of evidence. Such a reversal is justified where the party encounters disproportionate difficulties in producing evidence, which the other party has access to.<sup>335</sup> A similar principle is applied also by Italian courts.<sup>336</sup> In a private enforcement case, the Court of Appeal of Naples considered that a cartel had been proven, on grounds that the Italian regulatory body (Autorità Garante della Concorrenza e del Mercato, AGCM) had found clear, serious and coherent evidence of frequent contacts between the participants and of an unjustified increase in prices. Such evidence was deemed sufficient to prove the cartel, the harm

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<sup>333</sup> UBALDO PERFETTI, ‘La responsabilità civile del medico’ in ORAZIO ABBAMONTE (ed), *L’evoluzione giurisprudenziale nelle decisioni della Corte di Cassazione - Volume VII - Raccolta di studi in memoria di Antonio Brancaccio*, Giuffrè Editore (2013) 128. Compare *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, Opinion of AG Kokott, para. 74: ‘[T]he undertaking concerned cannot refute the Commission’s findings simply by unsubstantiatedly disputing them. Rather, it falls to them to show in detail why the information used by the Commission is inaccurate, why it has no probative value, if that is the case, or why the conclusions drawn by the Commission are unsound. This requirement does not represent the reversal of the burden of proof [...] but the normal operation of the respective burdens of adducing evidence.’

<sup>334</sup> Compare German Federal Supreme Court, 30 June 2004, para. II 2) b), available in English at <http://cisgw3.law.pace.edu/cases/040630g1.html>.

<sup>335</sup> BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 23. Compare OGH 10Ob21/08y of 12 May 2009; OGH 4Ob217/09d of 19 January 2010, para. 3; OGH 10b190/06g of 17 October 2006, para. 2.4.2 available at <[www.ris.bka.gv.at/Jus/g](http://www.ris.bka.gv.at/Jus/g)>.

<sup>336</sup> For the application of the proof-proximity principle with regard to Article 18 and 19 of Law 287/1990, see Council of State, *Soc. P. v AGCM*, 9 May 2011, decision no. 2742 (2011) *Foro amministrativo* 1598. For an application of the principle in non-antitrust matters, see Court of Cassation *en banc*, 30 October 2001, decision no. 13533; Court of Cassation *en banc*, 10 January 2006, decision no. 141; Court of Cassation *en banc*, 10 January 2006, decision no. 141, para. 5: ‘[A]lso the way in which the trial develops, in the event that the success of the plaintiff’s initiative hinges upon the evidence presented, can affect the allocation of the burden of proof. Therefore, it happens sometimes that the appellant is required to show that his or her grounds of appeal are sound in order to have the court sustain them (23 December 2005 no. 28498). See, also, Court of Cassation *en banc*, 30 October 2001, decision no. 13533. In a labour law case, decision no. 20484 of 25 July 2008, the Court of Cassation found that it is on the employer to give evidence that the conditions required for the assignment of a productivity award are not fulfilled rather than on the employee to demonstrate their fulfilment: ‘The burden of proof must be apportioned, other than according to the rules applicable to the substantial facts under examination, the description of the facts substantiating the right and those objecting or demurring it, also according to the proof-proximity principle [principio della riferibilità o vicinanza, o disponibilità del mezzo]; a principle which originates from Article 24 of Italian Constitution, which links the right of action to the prohibition of interpreting the law in such a way that renders impossible or too difficult its exercise [...]. Evidently, it is the employer, and not the employee, who is in the knowledge of the competitiveness of the company and of the economic data attesting the productivity of the enterprise [...], with the consequence that only the former must bear the *onus probandi* of the negative fact.’ All translations are of the author.



suffered by the plaintiff and the causal link required for an award of damages. The burden of proving that the increase in prices was due to alternative exogenous factors was placed on the defendant.<sup>337</sup> The defendant insurance company contended that it was for the plaintiff to adduce evidence that no alternative justification for the increase in prices existed. The Court of Appeal rejected its argument, highlighting how the apportionment of the burden of proof proposed by the defendant was patently illogical and manifestly violated the principles of proof-proximity and of allocation of the (evidential) burden of proof.<sup>338</sup>

While not yet expressly formulated in EU jurisprudence, the proof-proximity principle seems to apply in numerous areas of EU law, which encourages thinking that it could be eventually recognized as a general principle of EU evidence law. Its use is abundant in those matters where the difficulty of retrieving the proof on the part of the claimant is particularly accentuated, such as in the field of discrimination, in the field of environmental liability or in the field of human rights.<sup>339</sup>

### A) The Proof-Proximity Principle in Other Areas of Law

In EU non-discrimination law, the use of the principle is based on considerations that are analogous to those held valid in competition law. Since discriminatory acts are not usually committed in the limelight, providing direct evidence of them can be an arduous task. In order to overcome such difficulty, EU non-discrimination law provides for a shared apportionment of the burden of proof, according to which the claimant needs to provide evidence sufficient to trigger a presumption that discrimination occurred, whereas the

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<sup>337</sup> The reasoning of the Court of Appeal in this case is strikingly similar to that of the Court of Justice in a 102 infringement case, C-395/87 *Ministère public v Jean-Louis Tournier* [1989] ECR 2521, para. 38: ‘When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.’

<sup>338</sup> Court of Appeal of Naples, *Vitiello c. Soc. Lloyd Adriatico*, 17 January 2008 (2008) *Foro italiano*, I, 1303-1307, 1307 (Article 2 of Law 287/1990): ‘Substantially, according to the defendant’s arguments (which are just analogous to the arguments of all insurance companies in similar cases) it is for the plaintiff to produce evidence that the increase in prices could not be the consequence of exogenous factors having nothing to do with the anti-competitive infringement and to produce a market study in order to demonstrate that those enterprises which did not take part to the cartel, did not raise their insurance premia (even more with regard to a mandatory form of insurance): and all that in clear contrast with both the proof-proximity principle and the allocation of the burden of proof, for all previously illustrated reasons’. The translation is of the author.

<sup>339</sup> Case C-303/06 *S Coleman v Attridge Law and Steve Law* [2008] ECR I-5603, para. 54; Case C-390/07 *Commission v United Kingdom* [2009] ECR I-214, paras. 44-45.

alleged infringer must prove otherwise,<sup>340</sup> owing to the fact that he or she is usually in possession of the evidence or information necessary to prove the discrimination.<sup>341</sup> The presumption is activated by the mere demonstration of the difference in treatment and of the substantial equality of the chosen comparable situation (for instance, the quality of the work performed).<sup>342</sup>

A similar reversal of the burden of proof is applied in the assessment of evidence of violations of human rights. The ECtHR considers that the apportionment of the burden of proof can depend on the circumstances of the case under examination. In *D. H. and Others v the Czech Republic*, it stated that *prima facie* evidence might be sufficient to shift the burden of proof onto the respondent State. The ECtHR, indeed, may rely on inferences drawn from the allegations of fact and submissions of the parties, and thus adopt conclusions according to its free evaluation of all evidence presented. It was confirmed that, pursuant to established case-law, proof may follow from the existence of ‘sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact’. The ECtHR went on to say that:

[T]he level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.<sup>343</sup>

In the same judgment, the Court also contended that the principle ‘he who asserts must prove’ must be flexibly interpreted, depending on where the relevant information is found. In particular, it has been recognised in the case law of the ECtHR that not all cases are apt to be decided according to a rigorous application of that principle and that, under specific conditions, namely when the facts in issue ‘lie wholly, or in large part, within the exclusive knowledge of the authorities’, a shift of the burden of proof is completely acceptable,

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<sup>340</sup> The shift of the burden of proof is envisaged by the Article 10 of the Employment Equality Directive, Article 19 of the Gender Equality Directive, Article 8 of the Racial Equality Directive, Article 9 of the Gender Goods and Services Directive.

<sup>341</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, Luxembourg (2011) 124.

<sup>342</sup> Case C-381/99 *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, para. 60: ‘If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a *prima facie* case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay.’

<sup>343</sup> *D. H. and Others v the Czech Republic* [2007] ECHR 922, para. 178.

compelling the national authorities to provide evidence of a plausible and satisfactory explanation for the events. The ECtHR made reference to *Nachova and Others*, noting how in that occasion it did not exclude the possibility of asking the respondent Government to disprove an allegation of discrimination, if the circumstances of the case required doing so.<sup>344</sup>

In the different context of inter-State litigation, it is interesting to note how the burden of proving an infringement has been associated with the control exercised over the territory in which the particular unlawful activity had been performed, even disregarding the general rule of allocation of the burden of proof upon the claimant. In the *Corfu Channel* case, the United Kingdom Government did not have any direct evidence of the fact that the minelaying had been done with the connivance of the Albanian Government (allegedly by the Yugoslav Government). Nonetheless, the International Court of Justice observed that the exclusive territorial control exercised by a State within its frontiers has a bearing upon the means of proof available to establish the knowledge of that State with regard to the facts. The International Court of Justice went on to say that:

By reason of this exclusive control, *the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.* This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.<sup>345</sup>

Particular consideration was given on that occasion to which of the two parties had the proof available in order to alleviate the burden of proof and admit the use of evidential presumptions, expressly endorsed as commonly accepted by all national legal systems.

## **B) Beneficial Effects of the Application of the Proof-Proximity Principle**

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<sup>344</sup> *D. H. and Others v the Czech Republic*, para. 179.

<sup>345</sup> *Corfu Channel* case (United Kingdom v Albania), judgment of 9 April 1949, ICJ Reports [1949] 18 (emphasis added). In that case, the International Court of Justice was requested to decide on the liability of Albania under international law for explosions of automatic anchored mines occurred in the international highway of the North Corfu Channel (in Albanian territorial waters) in 1946 which caused damage to two British ships and resulted in the death and injuries of over 80 members of the naval personnel.

The European Court does not make a rigid application of the two principles of apportionment of the burden of proof (*actori incumbit probatio* and proof-proximity principle). Rather, they combine according to the case under examination. For example, pursuant to a straitjacketed interpretation of those rules, the Court should turn to consider the submission of evidence of alternative explanations of a parallel conduct, or of the lack of negative effects on consumers and competition, or of objective justifications for an abuse of dominance only after (not in chronological but in logical terms) those behaviours have been ascertained. Evidently, this approach is not strictly followed by the EU case law, where the consideration of those elements is, in the court's reasoning, concurrent with the assessment of the evidence concerning the infringement.<sup>346</sup>

It is also necessary to specify that the application of evidential presumptions is channelled by the proof-proximity principle in the context of a flexible and contextual approach to evidence which is aimed primarily at reaching a decision upon the contended violation. Therefore, it is not to be interpreted as if the judge would not take into consideration any other probative element, unless the party has discharged its burden.<sup>347</sup> On the contrary, in the judicial review operated by the EU Courts or by the national courts, but also in private antitrust actions, the judge usually evaluates all evidence presented at the same point in time, after submission of the totality of evidence.

Undoubtedly, the propensity of the EU Courts to elicit all available evidence is connected to the inquisitorial nature of competition law proceedings before the Commission. Nonetheless, owing to the fact that presumptions become part of the substantive law as set forth by Articles 101 and 102 TFEU, or, anyway, that they are adopted by national judges in the exercise of their procedural autonomy in the pursuance of the effectiveness principle, such flexible interpretation of the apportionment of the burden of proof is followed by national judges when deciding civil adversarial proceedings.

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<sup>346</sup> Case T-434/08 *Tono v Commission*, not yet reported, para. 158: '[I]t must be found that the Commission has not proved to a sufficient legal standard the existence of a concerted practice relating to the national territorial limitations, since it has neither demonstrated that the applicant and the other collecting societies acted in concert in that respect, nor provided evidence rendering implausible one of the applicant's explanations for the collecting societies' parallel conduct [i.e. fight against unauthorised use of musical works]'.

<sup>347</sup> FERNANDO CASTILLO DE LA TORRE, 'Evidence, Proof and Judicial Review in Cartel Cases' 517, quoting BARBIER DE LA SERRE and SIBONY, 'Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective' 218: '[T]he evidential burden of proof does not change formally during the proceedings, the match is played as if both players were serving at the same time, and the judge would count the points at the end.'

Upon such considerations, it seems reasonable to conclude that the widespread application at the EU and national level of evidential presumptions should be accompanied by the assertion of the proof-proximity principle. More specifically, the proof-proximity principle should act as a rule of interpretation for the application of a ‘dynamic’<sup>348</sup> evidential burden of proof in antitrust cases and as a limit to the use of evidential presumptions. Increasing awareness of this principle allows defining the boundaries of its practical application (in this case, the use of presumptions) and correcting the risk of errors entailed by its application.

If there is a genuine difficulty in gathering the proof, the fairness of the principle triggers the use of the presumption which shifts the evidential burden of proof. But in those cases where the judge considers that the proof is available in the sphere of the competition authority or the party in whose favour the presumption operates, he or she should perhaps not trigger the mechanism of the reversal of the burden of adducing evidence. In such a case, the judge should do without the presumption, and should not shoulder the counterparty with an unnecessary and unfair burden. By doing so, indeed, the judge would patently favour the competition authority or the party who should have engaged in a more serious attempt to retrieve evidence necessary to establish the infringement. Similarly where, notwithstanding the presentation of enough evidence to trigger the presumption, the counterparty presents evidence which puts in doubt the facts covered by the presumption, the judge should not endorse the shifting of the burden of proof, but should refer to the general rule ‘he who asserts must prove’ and embark on an overall assessment of the evidence presented. Not doing so heightens the risk of incurring Russel’s teapot-like reasoning.<sup>349</sup> Indeed, it is not coherent to draw the conclusion that the competition authority’s decision or the plaintiff’s claim is founded on the grounds that the undertaking could not prove it wrong, if the relevant evidence is not available in this latter’s hands. The central question becomes then whether, espousing the rational actor model and leaving out behavioural economics biases, one ought to consider that an undertaking operating in the

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<sup>348</sup> For further details on the modern theory of the dynamic burden of proof, elaborated especially in Southern America (*teoría de la carga dinámica de la prueba*), see CARLOS ANDRÉS PÉREZ GARZÓN, ‘Aspectos generales sobre la carga de la prueba en el derecho probatorio colombiano’ (2013) 1 *Justicia y Derecho* 46, 61 ff.; GUSTAVO CARVALHO CHEHAB, ‘O princípio da não discriminação e o ônus da prova’ (2010) 76 *Revista do Tribunal Superior do Trabalho* 52, 57 ff.; JULIANA PÉREZ RESTREPO, ‘La carga dinámica de la prueba en la responsabilidad administrativa por la actividad médica’ (2011) 68 *Estudios de Derecho* 203–225.

<sup>349</sup> BERTRAND RUSSELL, ‘Is There a God?’ [1952] commissioned but not published by *Illustrated Magazine*.

market is very likely to cheat to increase its profits, which, in turns, can ultimately be reduced to a question of policy of competition law enforcement.

Evidence of this kind of concerns can be found in the *Seamless Steel Tubes* case. In that case the Commission managed to prove the existence of a cartel, but also acknowledged the existence of certain international agreements which had prevented the cartel from having anti-competitive effects on trade in the Community. In that case, the burden of proving that those agreements were in force until at least the end of the infringement would have benefited the participant undertakings, but evidence was without doubt in the sphere of availability of the Commission, which had concluded those agreements with the Japanese Government, and should have retained the relevant documentation. Nonetheless, the Commission were unable to provide evidence of the date on which they had ended. The Court of Justice underscored that, in general, it is not possible for an applicant to make the burden of proof shift to the counterparty just by means of invoking circumstances of facts or a certain state of affairs that he or she is not in a position to establish; nonetheless, in that particular occasion it did not seem reasonable to make the Commission profit from the application of the burden of proof mechanisms with regard to the date of cessation of the international agreements that it had concluded. The fact that the Commission was incomprehensibly unable to produce evidence of such date of cessation, and thus of a fact that concerned it directly, prevented the Court of Justice from taking a decision with a full knowledge of the facts. The Court of Justice concluded that:

It would be contrary to the principle of sound administration of justice to cause the consequences of that inability on the part of the Commission to be borne by the addressees of the contested decision which, in contrast to the defendant institution, were not in a position to produce the missing evidence. In those circumstances, it must be considered, by way of exception, that it was incumbent on the Commission to produce evidence of that cessation. [...] <sup>350</sup>

For the allocation of the risk of error in the proceedings to be fair, it needs not only to be impartial, but also ‘unbiased in some principled way, rather than adventitiously’.<sup>351</sup> In order to satisfy this condition, the allocation of the risk of error needs to affect both parties equally and the system of justice must not ‘expose the claimant to a greater risk of error than the defendant, or vice versa.’ To reach such goal of primary equality in risk-allocation, the

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<sup>350</sup> *JFE Engineering v Commission*, paras. 343–344.

<sup>351</sup> STEIN, *Foundations of Evidence Law* 216.



adjudicator should not admit unbalanced distribution of the risk of error, unless the marginal costs of a particular allocation offset the marginal costs of the harm produced by the error.<sup>352</sup> The proof-proximity principle would then act as a corrective device for the inequality caused by the use of presumptions, because it requires the judge to make sure that the party bearing all the risk of error is also the one which is better situated to prevent him or her from committing errors in the adjudication. The reason is that evidence is available in that party's sphere. While the application of presumptions is imposed by an evidentiary rule which aspires to efficiency, the proof-proximity principle aspires to fairness.<sup>353</sup> Only if committed to the respect of both rules, the system can achieve desirable results.<sup>354</sup> The rebuttable nature of evidential presumptions could *per se* suffice to ensure that each litigant is only exposed to the risk of error that inherently attaches to his or her own allegations. It would not be sufficient, however, in those cases where presumptions allocate the risk on the party who is not *de facto* in the availability of evidence, and where, thus, the proof-proximity principle becomes necessary.<sup>355</sup> The rules of tennis are aimed not to favour the luckier player, or the one who is better at playing the challenge system,<sup>356</sup> but to allow the better player to win the match; by the same token, antitrust law proceedings should aim at assessing the facts and punishing the infringers, rather than favouring the party which more heavily and strategically relies on the existence of presumptions.

The assertion of the proof-proximity principle would act as a guarantee of the fair application of evidential presumptions. On the basis of the principle of free and unfettered evaluation of evidence, which is a general principle of EU evidence law, and on the basis of analogous national principles, the judge is free to evaluate the evidence presented and

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<sup>352</sup> STEIN, *Foundations of Evidence Law* 215-217.

<sup>353</sup> The need for balance between efficiency and fairness and the role of presumptions in this regard is attested by the words of the Court of Justice in *Elf Aquitaine SA v Commission*, para. 59: 'The purpose of the presumption of actual exercise of decisive influence is, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct, and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms. It is for that reason, among others, that, [...] the presumption is rebuttable.'

<sup>354</sup> STEIN, *Foundations of Evidence Law* 218. Stein argues that the goal of equality in the risk-allocation might even clash with the accurate implementation of substantive law, see at 220.

<sup>355</sup> Such corrective principle could also be used by the judge to 'punish' defendants who engage in withholding and tampering of evidence, thus deserving to fully bear the risk of error.

<sup>356</sup> Analysis shows that an optimal use of the three challenges available can increase a tennis player's chance of winning a set by 5% in an otherwise even contest. For more details see STEPHEN R. CLARKE and JOHN M. NORMAN, 'Optimal Challenges in Tennis' (2012) 63 *Journal of the Operational Research Society* 1765, 1772.



decide whether it triggers or not the application of a presumption. Such evaluation would not be subject to challenge before the General Court, because the Commission or the national judges are the only arbiter of the assessment of the facts and evaluation of evidence.<sup>357</sup> Nonetheless, if such evaluation were so unreasonable or unfair to be considered as a violation of the proof-proximity principle, and thus of the rules on the burden of proof, the defendant would be entitled to appeal the decision before the CJEU on the grounds of infringement of a rule of law according to Article 263(2) TFEU.<sup>358</sup> The judicial formulation of such a principle would therefore inspire the application of evidential presumptions and avoid the risk of their misuse.

Finally, one might argue that stating that the evidential burden of proof should be placed on the party who is more likely to succeed in discharging it becomes an exercise in circular reasoning, since it is impossible to decide *a priori* where evidence is more easily found. It would kill legal certainty. In reply, it can be useful to mention that, in the lack of a rule of law, a flexible parameter empowering the judge to look at the circumstances of the case (equity) might be a polar star. In many cases, it is easy to foresee where evidence is apt to be found. Ultimately, a flexible application of the evidential burden of proof is guided by the need to reach the requisite standard of proof, which, as it will be showed below, is left to the evaluation of the judge on a case-by-case basis.

## 7) THE STANDARD OF PROOF

The burden of proof defines which side must prove the facts; the standard of proof identifies to what extent the facts must be proven, and it relates to the degree of persuasion necessary to reach judicial conviction.<sup>359</sup> Whilst the notion of burden of proof is commonly used also

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<sup>357</sup> Case C-182/99 P *Salzgitter AG v Commission* [2003] ECR I-10761, Opinion of AG Stix-Hackl, para. 44: ‘The situation, for the most part, is that a ground of appeal termed “failure to consider evidence” simply means that one party is complaining that the Court of First Instance misconstrued other evidence produced in the proceedings by, for example, considering its substance to be absolute proof of certain facts even though other conflicting (‘unconsidered’) evidence was tendered. However, such criticism of the appraisal of evidence by the Court of First Instance - subject to any allegation of distortion – renders a ground of appeal inadmissible’.

<sup>358</sup> Case C-239/11 P, C-489/11 P and C-498/11 P *Siemens v Commission*, not yet reported, paras. 129-130: ‘[T]he appraisal by the General Court of the probative value of the documents submitted to it cannot, save where the rules on the burden of proof and the taking of evidence have not been observed or the evidence has been distorted, be challenged before the Court of Justice [...]. By contrast, the question whether the General Court observed the rules relating to the burden of proof and the taking of evidence in its examination of the rules relied on by the Commission to support the existence of an infringement of the competition rules of the European Union constitutes a question of law which is amenable to judicial review on appeal.’

<sup>359</sup> BARBIER DE LA SERRE and SIBONY, ‘Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective’ 208.

in civil law countries, the one of standard of proof derived from the common law and is mainly taken into consideration by judicature and scholars of common law tradition.<sup>360</sup> For example, the German Code of Civil Procedure only establishes that the court shall decide at its free conviction, by taking into account the proceedings and the outcome of any taking of evidence.<sup>361</sup> The French Code of Civil Procedure does not contain any specific provision for the standard of proof, but the Code of Criminal Procedure requires the judge to decide according to his or her ‘*intime conviction*’.<sup>362</sup> In Italy, the Code of Civil Procedure does not provide any indication, but the case law has identified in the preponderance of evidence the benchmark for the standard of proof in civil matters.<sup>363</sup>

In the common law, the standard of proof for the burden of persuasion has two main connotations: the first one, namely the preponderance or balance of probabilities, is softer, applied in general to civil matters, and it requires the party to show the court that the adduced fact is more likely than unlikely; the second one, usually applied to criminal matters, is defined as conviction beyond a reasonable doubt.<sup>364</sup> Conversely, the standard of proof for the burden of production is remarkably lesser,<sup>365</sup> and it has been depicted as a ‘scintilla of evidence’.<sup>366</sup> The notion of ‘preponderance’ is not to be interpreted statistically or mathematically (that is to say, as a probability of more than 50%),<sup>367</sup> but rather as the

<sup>360</sup> BARBIER DE LA SERRE and SIBONY, ‘Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective’ 208.

<sup>361</sup> German Code of Civil Procedure, Article 286(1).

<sup>362</sup> French Code of Criminal Procedure, Article 427.

<sup>363</sup> For an illustration of the ‘*principio del più probabile che non*’, see Court of Cassation *en banc*, 11 January 2008, decision no. 581. Compare also LUIGI TRAMONTANO, STEFANO ROSSI, and RANIERO BORDON, *La nuova responsabilità civile* (Wolters Kluwer Italia 2010) 269; COMOGLIO, *Le prove civili* 159–160.

<sup>364</sup> PER HELLSTRÖM, ‘A Uniform Standard of Proof in EU Competition Proceedings’ in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*, 2010, 148 and TONY REEVES and NINETTE DODOO, ‘Standards of Proof and Standards of Judicial Review in European Commission Merger Law’ (2006) 29 *Fordham International Law Journal* 1034, 1038–1039.

<sup>365</sup> HENRY PRAKKEN and GIOVANNI SARTOR, ‘A Logical Analysis of Burdens of Proof’ in HENDRIK KAPTEIN and others (eds), *Legal Evidence and Proof: Statistics, Stories, Logic* (Ashgate Publishing 2009) 224–225.

<sup>366</sup> The expression ‘scintilla of evidence’ has been used by the European Court of Justice for the first time in *Milch-, Fett- und Eier-Kontor GmbH v Council and Commission of the European Communities*, para. 16.

<sup>367</sup> See, however, JOHN MAYNARD KEYNES, *A Treatise on Probability* (MacMillan and Co. Ltd. 1921) 84–85: ‘It is difficult to see [...] to what point the strengthening of an argument’s weight by increasing the evidence ought to be pushed. We may argue that, when our knowledge is slight but capable of increase, the course of action, which will, relative to such knowledge, probably produce the greatest amount of good, will often consist in the acquisition of more knowledge. But there clearly comes a point when it is no longer worth while to spend trouble, before acting, in the acquisition of further information, and there is no evident principle by which to determine how far we ought to carry our maxim of strengthening the weight of our argument. A little reflection will probably convince the reader that this is a very confusing problem.’ The statistical interpretation of probability is mainly advocated by Northern American scholars. On the risks entailed by such

conviction of the judge deriving from the belief in the existence of a fact. Although it should not be a mere subjective intuition, a rational and strongly justified personal belief is required.<sup>368</sup>

Within these benchmarks, the standard of proof applied in specific cases may vary, depending on a number of factors.<sup>369</sup> The setting of such standards aims at keeping false negative and false positive as low as possible, so that the risk of errors is minimized.

In civil law the standard of proof is reflected by the judge's *intime conviction*. Such *intime conviction* is identified with the judge's profound conviction,<sup>370</sup> whose definition inevitably results in a tautology. It takes as much evidence as necessary to make a judge form his or her personal persuasion, according to the standard he or she freely considers appropriate in the specific case. Commentators have defined it as 'inner and deep-seated conviction of [the] truth'.<sup>371</sup> The final goal of such standard is to prevent the risk of false positives.<sup>372</sup>

The common law system embraces a more neutral standard of proof, relying on the concept of probability; whereas the civil law system embraces a much more un-objective and personal standard of proof.<sup>373</sup> Such different approaches are in line with the tradition of the two legal systems, given that historically common law always relied more on the judge (and on jury trials) than on the sheer law, whereas civil legal systems rely highly upon

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interpretation compare MICHELE TARUFFO, 'Rethinking the Standards of Proof' (2003) 51 *The American Journal of Comparative Law* 659, 669–670.

<sup>368</sup> MORITZ BRINKMANN, 'The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure' (2004) 9 *Uniform Law Review* 875, 878 and 881.

<sup>369</sup> Compare Lord Denning J. in *Bater v Bater*, Court of Appeal [1951] P 35, 36-37 who highlights how the difference between the criminal and civil standards of proof may be blurred, according to the circumstances of the case under examination: 'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but *there may be degrees of probability within that standard*. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.' (emphasis added).

<sup>370</sup> The same notion, with regard to the assessment of evidence, can be found in most European legal systems: for instance, in Italy 'libero convincimento', in France 'intime conviction', in Germany 'freie Überzeugung', in Spain 'apreciación según conciencia'.

<sup>371</sup> CLERMONT, 'Standards of Proof Revisited' 471.

<sup>372</sup> CLERMONT, 'Standards of Proof Revisited' 471.

<sup>373</sup> LIANOS and GENAKOS, 'Econometric Evidence in EU Competition Law: an Empirical and Theoretical Analysis' 67–68.

written laws. This has been said to be connected with the quest for certainty that is typical of the civil law tradition, in which the legitimacy of the judicature is a pillar of the system.<sup>374</sup>

Nonetheless, the two systems ultimately tend to converge given that, besides the wording and the motivations, both systems of law stress the importance of dealing with the proof with accuracy and diligence in every single case.<sup>375</sup> The two approaches can be synthesized as does Article 21(2) of the ALI/UNIDROIT Principles of Transnational Civil Procedure: '[f]acts are considered proven when the court is reasonably convinced of their truth'.<sup>376</sup> As for the notion of 'reasonably convinced', the comment clarifies that it is the standard applied in most legal systems, and it substantially coincides with the notion of 'preponderance of evidence'. Moreover, even in those civil law systems which do not expressly provide for a different standard of proof in civil and criminal matters, the intine conviction of the judge is guided by the circumstances of the case and is higher in very serious matters. As a result, the standard is analogous to the one applied in the common law tradition.<sup>377</sup> Besides, as already explained, the allocation of the evidential burden of proof and the existence of presumptions play a major part in the definition of the standard of proof, thus influencing its application and the outcome of the proceedings.<sup>378</sup>

With regard to EU competition law, in contrast with the rules laid down to determine the apportionment of the legal burden of proof, there is, in principle, no provision setting a fixed standard of proof at the European level. Whilst Regulation (EC) 1/2003 regulates the allocation of the burden of proof, it does not expressly set any standard of proof. Recital (5) provides that the

[...] Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

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<sup>374</sup> CLERMONT, 'Standards of Proof Revisited' 472.

<sup>375</sup> BRINKMANN, 'The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure' 891.

<sup>376</sup> The ALI/UNIDROIT Principles of Transnational Civil Procedure are available on the UNIDROIT website at <[www.unidroit.org/english/principles/civilprocedure/main.htm](http://www.unidroit.org/english/principles/civilprocedure/main.htm)>.

<sup>377</sup> See, for instance, Italy, where the case law established a difference in the standard of evaluation of causation, according to the matter under examination. Whilst for civil matters the standard is that of the preponderance of evidence, for criminal matters it is the one of beyond reasonable doubts. See COMOGLIO, *Le prove civili* 157–160.

<sup>378</sup> LIANOS and GENAKOS, 'Econometric Evidence in EU Competition Law: an Empirical and Theoretical Analysis' 68.

The debate upon the existence of a standard of proof in EU competition law dates back a long time. At the outset, it is worth re-stating that that of standard of proof is mostly a common law concept and, consequently, it seems to be more a concern of jurists of common law traditions than of trying to detect which standard of proof is applied by the EU Courts.<sup>379</sup> The quest for a pre-defined threshold arises out of the ambiguous meaning of the expression ‘sufficiently proved’,<sup>380</sup> which is recurrent in the case law and lends itself to be interpreted as if it implied the existence of some prefixed standard to be met. Indeed, different expressions have been used by the EU Courts to describe the degree of persuasion that the evidence presented by the Commission is supposed to reach, but none of those expressions precisely identifies a unique standard.<sup>381</sup> The CJEU used the expression ‘standard of proof’ a few times for practical reasons, but the notion does not seem to have been adopted by the European judicature. As an example, the first judgement where the expression has been used was *Sumitomo*,<sup>382</sup> but the notion was mentioned only in that part of the judgement summarizing the requests of the parties and it is only reproductive of the wording of the party’s plea. This happened in more recent cases as well.<sup>383</sup> Conversely, the CJEU has on numerous occasions, both in Article 101 and 102 infringements, used expressions relating to a standard of proof such as, ‘specific and credible evidence indicating with reasonable probability’ the infringement,<sup>384</sup> ‘sufficiently precise and consistent evidence’,<sup>385</sup> ‘convergent and convincing evidence’.<sup>386</sup>

It is a common belief that there is no fixed standard of proof for antitrust infringements at the European level, and that the EU Courts deliberately avoid to precisely

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<sup>379</sup> ERIC GIPPINI-FOURNIER, ‘The Elusive Standard of Proof in EU Competition Cases’ in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*, 2011 297.

<sup>380</sup> *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, paras. 135–136.

<sup>381</sup> LIANOS and GENAKOS, ‘Econometric Evidence in EU Competition Law: an Empirical and Theoretical Analysis’ 72.

<sup>382</sup> Joined cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission* [2007] I-729, paras. 26–28.

<sup>383</sup> See, for instance, Case C-89/11 P *E.ON Energie AG v Commission*, not yet reported, para. 70: ‘According to the Commission, E.ON Energie is seeking, by producing an argument relating to the standard of proof, to take the attention of the Court of Justice away from the fact that E.ON Energie has never succeeded in seriously calling in question the performance of the seal at issue [...]’. Compare, also, Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v Commission and Commission v Alliance One International Inc. and others*, not yet reported.

<sup>384</sup> *KME Germany AG, KME France SAS and KME Italy SpA v Commission*, para. 86.

<sup>385</sup> *JFE Engineering v Commission*, para. 57.

<sup>386</sup> Case T-314/01 *Coöperatieve Verkoop-en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission* [2006] ECR II-3085, para. 97. For further expressions see GIPPINI-FOURNIER, ‘The Elusive Standard of Proof in EU Competition Cases’ 301.

define what the ‘requisite legal standard’<sup>387</sup> exactly means, in order not to take a stand which might contrast with the legal tradition of one or another Member State.<sup>388</sup> The Court of Justice clarified its ‘non-position’ in a famous merger case, *Tetra Laval*, in which it specified that, even if the Court of First Instance had found that, in order to establish the anti-competitive conglomerate effects of a merger it is necessary to examine thoroughly the circumstances of the case and the produced evidence must be convincing, this is not tantamount to affirm the existence of a new condition to be met. The Court of First Instance only aimed at drawing attention to the pivotal role played by the evidence, which need to ‘establish convincingly the merits of an argument’ for the decision to be taken.<sup>389</sup> When the evidence adduced qualifies as precise and consistent, it can be said that ‘sufficient’ evidence has been presented to back up the decision.<sup>390</sup> Naturally, the sufficiency of evidence to meet the requisite legal standard of proof<sup>391</sup> must be evaluated according to, on one hand, the probative value to be attributed to it, and, on the other hand, the contextual assessment of all other evidence presented by both sides.<sup>392</sup> Such considerations are true to the point that the General Court, followed on this point by national appellate/review courts, holds that a single item of evidence alone is sufficient to conclude that an infringement has occurred, owing to the unquestionability of its probative strength.<sup>393</sup>

Even though the lack of a predetermined standard may appear too uncertain to jurists of common law tradition, the judge’s *intime conviction*, however undefined, is by no means

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<sup>387</sup> Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, para. 61: ‘According to case-law, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement’.

<sup>388</sup> *SIRAGUSA and RIZZA, EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 24.

<sup>389</sup> *Commission v Tetra Laval BV*, para. 41. The same absence of a predefined standard of proof can be observed for other fields of EU law.

<sup>390</sup> *SIRAGUSA and RIZZA, EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 649.

<sup>391</sup> *Baustahlgewebe GmbH v Commission*, para. 58: ‘[I]t must be pointed out that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.’

<sup>392</sup> *JFE Engineering v Commission*, para. 219: ‘[A]ccording to the case-law of the Court of First Instance, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.’

<sup>393</sup> *Cimenteries CBR and others v Commission*, para. 1838: ‘It should however be pointed out that there is no principle of Community law which precludes the Commission from relying on a single piece of evidence in order to conclude that Article 85(1) of the Treaty has been infringed, provided that its evidential value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question.’



a lesser or an arbitrary standard. In *Dunlop Slazenger*, the Court of First Instance (now, General Court), stressed the importance of the requirement of legal certainty, stating that it

entails that when there is a dispute concerning the existence of an infringement of competition law the Commission, which bears the burden of proving infringements which it finds, must adduce evidence which will sufficiently establish the existence of the facts constituting the infringement.<sup>394</sup>

Recently the EU Courts have made reference to some sort of standard of probability,<sup>395</sup> the normal civil standard of proof in common law, and the amount of evidence required is always affected by a number of factors, which renders the standard of proof applied, if any, even more flexible. The fact that all these factors, that are connected with the specific characteristics of the single case under consideration, affects the degree of persuasion to be reached by the applicant, corroborates the theory that there is no standard of proof *ex ante* predefined to which the EU Courts adhere, but rather it is only possible to infer *ex post* the reasons driving the reasoning of the judge in each particular case.<sup>396</sup>

### A) Factors Determining the Standard of Proof

Besides what already said about the evaluation of the probative value assigned to specific items of evidence, which, of course, concurs to the definition of the standard to be applied, and acknowledging the fact that both the allocation of the evidential burden of proof and the existence of presumptions strongly affect the definition of a standard of proof, a number of factors may be identified.<sup>397</sup> Although the flexibility conveyed by referring to a 'requisite legal standard' should suffice, it is convenient to briefly give account of the factors that are generally considered to determine the level of proof that the European judicature applies to competition cases.

The first factor is allegedly represented by time: it is affirmed that it is generally harder to prove future facts than past facts<sup>398</sup> and, consequently, whilst the standard of proof

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<sup>394</sup> Case T-43/92 *Dunlop Slazenger International Ltd v Commission* [1994] ECR II-441, para. 79.

<sup>395</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 24–25.

<sup>396</sup> GIPPINI-FOURNIER, 'The Elusive Standard of Proof in EU Competition Cases' 297.

<sup>397</sup> GIPPINI-FOURNIER, 'The Elusive Standard of Proof in EU Competition Cases' 303.

<sup>398</sup> *Contra* MARIATERESA MAGGIOLINO, 'Standard probatori: alcuni spunti di riflessione per e da il diritto della concorrenza' (2013) 40 *Giurisprudenza commerciale* 51, 98 ff.



of past facts requires a reasonably high standard, the one of future facts should be less severe. This would also allow drawing a distinction between the standard applicable in antitrust cases and that applicable in merger cases.<sup>399</sup> The party cannot be required to give precise and consistent proof of what could (but might not) happen and, therefore, it seems reasonable to affirm that a lower effort can be required in order to prove the anticompetitive effects of the conduct of an enterprise.<sup>400</sup> Such considerations seem to be supported by the EU case law.<sup>401</sup> It is also worth noting that, this less high level of proof as regards the effects of a conduct can be observed also when the effects constitute one of those elements whose existence is required to ascertain an infringement. This is made clear by the case law on the effects on trade between Member States, required by the provision of Article 101 TFUE. As specified by the EU Courts<sup>402</sup> and by the Guidelines on the Effect on Trade

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<sup>399</sup> REEVES and DODOO, ‘Standards of Proof and Standards of Judicial Review in European Commission Merger Law’ 1047–1048.

<sup>400</sup> ANNE-LISE SIBONY, *Le juge et le raisonnement économique en droit de la concurrence* (L.G.D.J. 2008) 749. Compare also GIPPINI-FOURNIER, ‘The Elusive Standard of Proof in EU Competition Cases’ 304 ff, who holds that the distinction is not between past facts and future effects, but rather between personal acts and their consequences, or unwanted external circumstances, whose standard of proof is significantly less stringent of that of the conduct of the enterprise.

<sup>401</sup> *BPB plc v Commission*, paras. 300–301: ‘[C]onsideration of the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. [...] the assessment of the influence of factors other than that voluntary decision of the undertakings concerned in the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable. Therefore, [...] the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti-competitive object even though it does not quantify that impact or provide any assessment in figures in this respect. Consequently, the actual impact of a cartel on the market must be regarded as having been sufficiently demonstrated if the Commission is able to provide *specific and credible evidence indicating with reasonable probability* that the cartel had an impact on the market’ (emphasis added). Compare para. 311, where the Court of First Instance concluded: ‘The Court therefore considers that the Commission has demonstrated to the requisite legal standard that the cartel had an actual impact on the market concerned as regards prices.’ See also case T-69/04 *Schunk GmbH, Schunk Kohlenstoff-Technik GmbH v Commission* [2008] ECR II-2567, para. 168: ‘In order to assess the gravity of the infringement, the decisive point is whether the cartel members did all they could to give concrete effect to their intentions. What then happened at the level of the market prices actually obtained was liable to be influenced by other factors outside the control of the members of the cartel.’

<sup>402</sup> Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para. 170: ‘[...] It should also be remembered that, to be capable of affecting trade between Member States, it is not necessary to demonstrate that the conduct complained of actually affected trade between Member States in a discernible way; it is sufficient to establish that the conduct is capable of having that effect’. See also case C-19/77 *Miller International Schallplatten GmbH v Commission* [1978] ECR 131, para. 15: ‘In prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition Article 85 (1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect. The Commission, basing its assessment on Miller’s position on the market, its scale of production, ascertainable exports and price policy, has provided appropriate proof that in fact there was a danger that trade between Member States would be appreciably affected.’

Concept Contained in Articles 81 and 82 of the Treaty<sup>403</sup> the requirement of the effects on trade between Member States is to be interpreted loosely, since the proof that the agreement or practice is capable of having an effect on trade between Member States is sufficient.

The second notion that has been indicated as a softening factor of the level of the proof is that of economic normality, and more precisely, the judge's opinion of economic normality.<sup>404</sup> The judge's consideration is very likely to affect the threshold to be reached by the party before a fact or conduct can be maintained as fully proven. As an example, the judge is far more inclined to apply a severe standard of proof to evidence of a conglomerate merger than to an abuse of dominant position and that has mainly to do with the general attitude of the judge, who is (inevitably) affected by personal views, experiences and knowledge. In the general perception, the conduct of an enterprise, which takes advantage of a situation where it has few or no competitors, is far more reproachable than one where it decides to merge with another firm involved in a totally unrelated field of business.<sup>405</sup>

The foregoing observations are strongly connected with the third factor which has been identified as affecting the standard of proof required by EU competition law decisions: the impact of the decision and the risk of error. The judge is clearly influenced by the interests lying behind the parties and the possible consequences of the decision on the market or on the sector affected. Therefore, he or she will potentially raise or lower the threshold also in consideration of the impact of the decision that he or she foresees to take, especially when dealing with a particularly difficult case.

Besides these three major factors, there are other criteria that have been identified, according to the case law of the EU Courts, as possibly determining a change in the standard of proof adopted. Between the factors that undoubtedly affect the approach of the EU Courts, there is the type of remedy sought after by the applicant. For hard-core infringements like cartels, the evidentiary threshold to be met can be higher, also because the judgement may lead to hefty penalties. The type of remedy sought after by the plaintiff or envisaged by the Court may play a role. The more the remedy is invasive or structural, the more evidence is needed to obtain it.<sup>406</sup> In this regard, the Court, however, specified that

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<sup>403</sup> Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81, para. 26.

<sup>404</sup> The list of factors under examination was originally proposed by SIBONY, *Le juge et le raisonnement économique en droit de la concurrence* 749–751; and then elaborated by GIPPINI-FOURNIER, 'The Elusive Standard of Proof in EU Competition Cases' 309 ff.

<sup>405</sup> GIPPINI-FOURNIER, 'The Elusive Standard of Proof in EU Competition Cases' 309.

<sup>406</sup> LOWE, 'Taking Sound Decisions on the Basis of Available Evidence' 166.

no different threshold should be applied according to the nature of the infringement, but of course the general context of the case cannot be disregarded.<sup>407</sup> Taking into account the quasi-criminal nature of some competition cases, the EU Courts have thus highlighted the importance of respecting the principle of the presumption of innocence.<sup>408</sup> While taking into due consideration circumstantial evidence, the EU Courts strongly leaned towards the respect of the principle *in dubio pro reo*, so that any existing doubt should act as a deterrent and should prevent the taking of an adverse decision.<sup>409</sup> As already hinted at, civil law tradition is wary of false positives, which are to be avoided also by means of heightening the degree of persuasion to be reached in those cases where only circumstantial evidence is available. The principle of presumption of innocence comes into play, when applying Article 101 and Article 102 TFEU, because their enforcement might bring to the imposition of fines. Nonetheless, the standard of proof to be met is not the full criminal one, both because the nature of the Commission's procedure is 'non-hard core' criminal<sup>410</sup> and because the EU Courts have effective powers of review.<sup>411</sup>

Fifthly, timing may be relevant. A decision taken at a very early stage of the proceedings might well be subject to a lower standard of proof, in consideration of the fact that sometimes urgency is required, or that the decision to be taken is not final. This

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<sup>407</sup> Case C-260/09 P *Activision Blizzard Germany GmbH v Commission* [2011] ECR I-419, paras. 71-72: 'It should be pointed out at the outset that [...] it is not true that, as a matter of principle, the standard of proof required for the purposes of establishing the existence of an anti-competitive agreement in the framework of a vertical relationship is higher than that which is required in the framework of a horizontal relationship. It is indeed true that factors which, in the context of a horizontal relationship, can sometimes suggest the existence of an anti-competitive agreement between competitors may prove inadequate for the purposes of establishing the existence of such an agreement in the framework of a vertical relationship between a manufacturer and a distributor, given that, in such a relationship, a certain measure of contact is lawful. However, the fact nonetheless remains that, for the purposes of assessing whether there is an illegal agreement, regard must be had to all the relevant factors, as well as to the economic and legal context specific to each case. The question whether it can be inferred from certain evidence that an agreement contrary to Article 81(1) EC has been concluded cannot therefore be addressed in abstract terms, according to whether the relationship involved is vertical or horizontal, with that evidence being considered separately from the context and the other factors characterising the case.'

<sup>408</sup> Compare *Rhône-Poulenc SA v Commission*, Opinion of AG Vesterdorf, at II-954: 'There must be a sufficient basis for the decision and any reasonable doubt must be for the benefit of the applicants according to the principle *in dubio pro reo*' and at II-991: '[C]onsiderable importance must be attached to the fact that competition cases of this kind are in reality of a penal nature, which naturally suggests that a high standard of proof is required.'

<sup>409</sup> LIANOS and GENAKOS, 'Econometric Evidence in EU Competition Law: an Empirical and Theoretical Analysis' 72.

<sup>410</sup> Compare SIRAGUSA, 'Antitrust and Merger Cases in Italy: Standard of Proof, Burden of Proof and Evaluation of Evidence' 582, who casts doubt on the view according to which, since personal freedom is not entangled by antitrust sanctions, the criminal standard of proof is not appropriate. Conversely, the Author maintains that the application of a higher standard of proof might be more adequate in consideration of the increasing level of the fines inflicted at the European level.

<sup>411</sup> LOWE, 'Taking Sound Decisions on the Basis of Available Evidence' 166.

happens frequently when the authority has to grant interim measures, which can undergo a less severe standard of proof.

Some authors have observed that the theory of harm embraced by the judge also affects the standard of proof applied,<sup>412</sup> in the sense that the less approximation it requires, the less evidence is needed to reach the proof and vice versa.<sup>413</sup> In its case law, the CJEU, however, specified that the complexity of the theory of competitive harm accepted by the Commission must not have repercussions on the standard of proof applied to the case.<sup>414</sup>

As seen before, a part is also played by the objective difficulty of retrieving evidence in the specific case. In the attempt of levelling the information asymmetry that is characteristic of some competition matters, the EU Courts established a number of presumptions which allow the judge to lower the standard of proof.

The absence of a fixed standard of proof in EU competition law matters is consistent with the civil law tradition of most of the Member States. The variety of factors described above, affecting the amount of evidence required by the EU Courts to discharge the legal burden of proof, encourages believing that the appreciation of the EU judges is free and that the standard is customized for each specific cases under examination.<sup>415</sup> It stands to reason that, in the end, this lack of any standard determined *ex ante* is perfectly logical and inherent to the EU system, characterized by the principle of free evaluation of evidence. If any standard can be extrapolated from the European case law, it is the one of the judge's *intime conviction*, which varies for each case in issue, along with the factual elements of the case. Therefore, as for the EU Courts, the judges need to be persuaded of the truth of the facts

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<sup>412</sup> REEVES and DODOO, 'Standards of Proof and Standards of Judicial Review in European Commission Merger Law' 1065.

<sup>413</sup> LOWE, 'Taking Sound Decisions on the Basis of Available Evidence' 166.

<sup>414</sup> Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, para. 51: '[I]t cannot be deduced [...] that the Commission must, particularly where it pursues a theory of collective dominance, comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving them. That case-law merely reflects the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the case of the control of concentrations, to support the conclusions underpinning the Commission's decisions [...]. Furthermore, the fact that an issue of collective dominance does, or does not, arise, cannot of itself have an impact on the standard of proof which applies. In that regard, the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration is a factor which must be taken into account when assessing the plausibility of the various consequences such a concentration may have, in order to identify those which are most likely to arise, but such complexity does not, of itself, have an impact on the standard of proof which is required.'

<sup>415</sup> In the words of GIPPINI-FOURNIER, 'The Elusive Standard of Proof in EU Competition Cases' 302: '[T]he level of proof required is quite simply the one that is convincing to the Court, and it is not amenable to prior formalistic standardization. The qualitative and quantitative level of the required evidence does not fit into pre-established models because it varies from case to case and from issue to issue.'

asserted and that happens when they attain their personal conviction of the facts under examination.<sup>416</sup>

## B) The Standard of Proof before the CAT

In the judicial control of OFT decisions, the general assumption of the Tribunal is that the correct standard of proof to be applied is the usual civil standard of the balance of probabilities. The possibility of applying the higher criminal standard is excluded due the nature of the factual issues that are presented before the court in competition cases. Usually, these factual issues might relate, for instance, under Article 102 TFEU, to the determination of the relevant market, the assessment of the existence of dominance and the evaluation of the material conduct connoted as abusive in order to verify whether it was economically justified. These kind of issues normally involve a complex assessment of economic data and expert evidence. Therefore, in the words of the CAT:

It seems to us more likely that Parliament would have intended us to apply the civil standard of proof to issues of this kind, rather than the time-honoured criminal standard of ‘proof beyond the reasonable doubt’.<sup>417</sup>

To such pragmatic observations connected with the nature of the particular competition law matter, the Tribunal adds the more general argument that nothing allows concluding that the proceedings should be governed by criminal procedure rules, neither in the law (ECHR or Human Rights Act 1998),<sup>418</sup> nor in the case law<sup>419</sup> (in particular, *Han*).<sup>420</sup> In the Tribunal’s view, the correct standard to be applied should therefore be determined according to the ‘normal rules of the United Kingdom domestic legal systems’.<sup>421</sup> The Tribunal further specifies that it is well possible to adjust the ‘intensity’ of the civil standard to match the

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<sup>416</sup> GIPPINI-FOURNIER, ‘The Elusive Standard of Proof in EU Competition Cases’ 298.

<sup>417</sup> *Napp 4*, para. 106.

<sup>418</sup> *Napp 4*, para. 103.

<sup>419</sup> *Napp 4*, para. 101.

<sup>420</sup> *Han (t/a Murdishaw Supper Bar) v Customs and Excise Commissioners*, Court of Appeal (Civil Division) [2001] EWCA Civ 1048, para. 88: ‘The classification of a case as criminal for the purposes of Article 6(3) of the Convention on Human Rights, using the tests established by the Strasbourg jurisprudence, is a classification for the purposes of the Convention only. It entitles the defendant to the safeguards provided expressly or by implication by that article. It does not make the case criminal for all domestic purposes [...]’

<sup>421</sup> *Napp 4*, para. 104.

gravity of the allegation,<sup>422</sup> in such a way that it takes strong and convincing evidence to prove Chapter I and II infringements. In this basis, the UK Tribunal also notes that the practical results will not be sensibly different, and the said distinction is more academic than juridical.<sup>423</sup>

After *Napp*, the use of the balance of probabilities standard was subsequently confirmed (and partly corrected) in *JJB Sports plc. v OFT*. The Tribunal upheld the argument of the OFT that the civil standard of proof is flexible, and needs to be adapted to the circumstances of the case. In that specific matter, the UK Tribunal was required to take into account that cartels, by their very nature, are secret or concealed to the public, and that therefore most evidence is indirect or circumstantial or entirely springing from a sole source (usually an informant). Chances to retrieve documentary evidence are extremely low.<sup>424</sup> The CAT made reference to its observations in *Claymore Dairies v OFT*, where it stated that there is no rule of law compelling the OFT to rely only on written or documentary evidence in order to establish an infringement under Chapter I. The most important factor is, indeed, the credibility of evidence. As a consequence, oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement, if the circumstances of the case allow concluding so. In such a case, if the OFT has no choice but to rely exclusively, or primarily, on a witness rather than on documentary evidence, it is advisable that it also collect for corroborating evidence in the surrounding circumstances. In the same vein, there is no rule of law prescribing that evidence must emanate from a participant in the cartel:

Although evidence at one remove [...] may be less compelling than direct evidence of what was said or done by a person present at a particular meeting, indirect evidence and circumstantial evidence generally, may well have a powerful role to play in the factual matrix of a case.<sup>425</sup>

The CAT recalled the words of Lord Bingham of Cornhill CJ, who, in *B v Chief Constable of Avon and Somerset*, held that it should be acknowledged how the civil standard of proof

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<sup>422</sup> Compare *Napp 4*, para. 107, citing *In Re H. and Others (Minors) (A. P.)*, House of Lords [1996] AC 563, 586 which on its turn cites *Re Dellow's Will Trust, also known as: Lloyds Bank v Institute of Cancer Research*, Chancery Division [1964] 1 WLR 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'. For a less recent case see *Hornal v Neuberger Products Ltd*, Court of Appeal [1957] 1 QB 247, para. 264: 'Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.'

<sup>423</sup> *Napp 4*, paras. 108 and 113.

<sup>424</sup> *JJB Sports Plc and Allsports v Office of Fair Trading*, para. 167.

<sup>425</sup> *Claymore Dairies Ltd and Express Dairies Plc v Office of Fair Trading*, paras. 8–9 (Chapter I prohibition).



does not always correspond to a ‘bare balance of probability’, but it might well be a flexible standard applicable with greater or lesser strictness according to the seriousness of the case of the consequences stemming from the eventual decision.<sup>426</sup> In that occasion, performing an overview of the more recent case law at the time, the CAT also referred to the argument that claiming unlikely events requires stronger evidence, as vividly depicted by the example of Lord Hoffmann in *Secretary of State for the Home Department v Rehman*:

I think that a “high civil balance of probabilities” is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But [...] some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the *tribunal thinks* it more probable than not.<sup>427</sup>

Expressed in this way, there seems to be a very little, if any, divide between the balance of probabilities and the intine conviction standard. Upon such premises, the CAT therefore concluded that the amount and quality of evidence must satisfy the court to the extent of convincing it that the facts are more likely than not. The Tribunal also upheld that the flexibility of the civil standard allowed adapting to the circumstances of case under examination,<sup>428</sup> in particular as regards the seriousness of the allegations.<sup>429</sup> Such view is also taken on the basis that many issues in competition law matters involve appreciation of economic concepts, to which the criminal standard would not be applicable.<sup>430</sup>

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<sup>426</sup> *B v Chief Constable of Avon & Somerset Constabulary*, Queen’s Bench Division [2000] EWHC 559 (QB), para. 30.

<sup>427</sup> *Secretary of State for the Home Department v Rehman*, House of Lords [2001] UKHL 47, para. 55 (emphasis added).

<sup>428</sup> Compare, for a family law case, *Bater v Bater* 36–37.

<sup>429</sup> *JJB Sports Plc and Allsports v Office of Fair Trading*, para. 188. In the CAT’s mind, the cogency of the evidence must be directly proportional to the seriousness of the allegations, and to their consequences. This is relevant, for instance, for cases from which can derive the disqualification of directors. See para. 201.

<sup>430</sup> *JJB Sports Plc and Allsports v Office of Fair Trading*, para. 193. The CAT mentions economic assessment of ‘whether an agreement “distorts” competition, the extent of the relevant market, whether dominance is established, whether certain conduct is “objectively justified”, whether an agreement satisfies Article 81(3) and [...] “economic progress”, “allowing consumers fair share of the economic benefits” and whether restrictions are “not indispensable” [...]’. Compare *Aberdeen Journals Limited v OFT*, para. 125: ‘We bear in mind [...] that an issue such as the relevant product market may require a more or less complex assessment of numerous interlocking factors, including economic evidence. Such an exercise intrinsically involves an element of appreciation and the exercise of judgment. On such issues it seems to us that the question whether



In *JJB Sports plc v OFT*, the Tribunal drawn a distinction between the balance of probabilities test and the nature of the evidence required to satisfy it. The cogency of the evidence that is required to satisfy the applied standard is left to the consideration of the judge and it is the linchpin of the flexibility of the standard. In other words, the Tribunal championed a protean civil standard commensurate to the cogency, quality and weight of the evidence presented, for example taking into consideration that fraud is less likely to occur than negligence;<sup>431</sup> or that, in general, reproachable behaviours are less likely than honest behaviours (being the defendant entitled to benefit from the presumption of innocence).<sup>432</sup> Clearly, such presumption operates in favour of the alleged infringer, so that:

If in a borderline case the decision is finely balanced and the Tribunal finds itself to-ing and fro-ing, the correct analysis is that the evidence is not sufficiently strong to satisfy the Tribunal on the balance of probabilities that the infringement occurred.<sup>433</sup>

On the subject of the cogency of evidence, the Tribunal also observed that in certain cases, such as that of price fixing, a finding of infringement may be based on a single item of evidence or on circumstantial evidence only, which would be sufficient to meet the required standard. To corroborate such observations, the CAT made reference to the case law of the EU Courts, and in particular *Aalborg Portland v Commission*:

In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.<sup>434</sup>

In the CAT's mind, especially due to the decentralisation operated by Regulation (EC) 1/2003 and the new role attributed to national competition authorities and courts in the application of the EU competition law, the standard of proof to be applicable by English

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the Director has "proved" his case involves asking ourselves: Is the Tribunal satisfied that the Director's analysis of the relevant product market is robust and soundly based?

<sup>431</sup> *In Re H. and Others (Minors) (A. P.)*, para. 73.

<sup>432</sup> *JJB Sports Plc and Allsports v Office of Fair Trading*, para. 199.

<sup>433</sup> *JJB Sports Plc and Allsports v Office of Fair Trading*, para. 200.

<sup>434</sup> *Aalborg Portland and others v Commission*, para. 57.

judges should ‘not be out of line’ with that applied by the CJEU when deciding on appeals against Commission’s decisions.<sup>435</sup>

### C) The Standard of Proof before the Italian Review Judge

Even if a notion of standard of proof is not identifiable as such in the Italian case law of the appellate courts, it can be observed that the criminal standard is not required, i.e. proof beyond any reasonable doubt. The TAR Lazio and the Council of State tend to require the AGCM to adopt a civil standard of proof, expressed as a ‘reasonable certainty’ of the infringement, to rely on clear, precise and consistent circumstantial evidence of the facts.<sup>436</sup> Given the importance attributed to the conviction of the judge upon the facts, it can be concluded that the standard adopted is the same as the European (and English) one. In a recent case, the benchmark of the intime conviction has been implicitly endorsed by the Council of State, which has underlined the importance of the contextual evaluation of evidence. The lodestar for the Italian administrative judge is the coherence of the version presented (the so-called ‘congruenza narrativa’): the standard of proof is satisfied when the ‘story’ proposed by the AGCM is the only convincing one, capable of giving sense to all gathered factual elements of the case.<sup>437</sup> The ‘story’ is subject to a reality check which requires i) corroboration by other evidence; and ii) the application of a cumulative redundancy test which rules out all alternative hypothesis.<sup>438</sup>

### D) The Standard of Proof in the Private Enforcement

Finally, turning to private enforcement, setting a standard of proof is theoretically a matter of national jurisdictions that is left to the procedural autonomy of each Member State. When national judges are required to apply EU competition law provisions they are bound to

<sup>435</sup> *JJB Sports Plc and Allsports v Office of Fair Trading*, para. 207. In this regard the Tribunal also refers to *Napp 4*, para. 112 *in fine*: ‘We have no reason to suppose that the standard of proof we propose to follow is any different from that followed in practice by the courts in Luxembourg.’

<sup>436</sup> Council of State, 13 May 2011, decision no. 2925, para. 9.1: ‘The Court, well aware of the rarity of direct evidence (the so-called smoking gun or bleeding hand) considers valid proof of collusion, other than documental evidence, also circumstantial evidence that proves to be serious, precise and consistent’; Council of State, 8 November 2001, decision no. 5733, para. 3.3.3.

<sup>437</sup> Council of State, *AGCM v Acea SpA, Suez Environnement SA, Federutility-Federazione Imprese Energetiche ed Idriche*, 24 September 2013, decision no. 5067, para. 5.1; TAR Lazio, 18 June 2012, decision no. 5559, para. 10; Council of State, *Soc. Ataf v AGCM*, 25 March 2009, decision no. 1794, para. 10.5.

<sup>438</sup> Council of State, *Soc. Trambus v AGCM*, 9 April 2009, decision no. 2201 (2009) Repertorio del foro italiano, 838 (Article 2 of Law 287/1990).

decide according to the degree of persuasion required by their own legal system. Therefore, this is one of those topics where discrepancies between the Member States are likely to occur, especially between the two blocks of countries of common law and civil law tradition.<sup>439</sup> Both the allocation of the burden of proof and the setting of the standard of proof are nonetheless subject to the principle of the *effet utile* of private enforcement rights and must respect the equivalence and effectiveness principles. Moreover, the standard of proof tends to converge towards a European standard of proof, due to the fact that many connected issues of evidence (such as the evidential burden of proof, the assessment of the probative value of evidence, admissibility) are substracted from the scope of national procedural law and fall within the scope of substantive EU competition law, as established by the case law of the EU Courts and identified in the preceding paragraphs.

In follow-on actions, the burden and standard of proof applicable by national judges are rather easily identifiable. Actions following a Commission's decision will often match the burden and standard applied by the European regulatory body with regard to the finding of infringement, given that national decisions cannot contradict the Commission's decision.<sup>440</sup> The same happens in those Member States where domestic rules provide for the judge to be bound by the national competition authority's decisions, such as the UK and Germany. In those cases, it will suffice for the plaintiff to illustrate how the case decided by the Commission presents all elements required for an action for civil liability under the national rules. Usually it is necessary to add evidence to prove an element of the infringement required under domestic rules, such as, for instance, fault or the foreseeability of the damages in damages actions. Conversely, the most effective line of defence for the defendant is to argue that one of those 'national elements' is missing.<sup>441</sup>

In stand-alone actions, the obstacle of information asymmetry is particularly cumbersome. To safeguard the principle of the *effet utile*, the national court should undertake to use its powers in such a way to guarantee to the maximum extent that all existing evidence is made available to the plaintiff. In those countries where the disclosure

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<sup>439</sup> Compare, in an international perspective, *Velásquez-Rodríguez v. Honduras*, (Ser. C) no. 4, IACrHR, 29 July 1988, paras. 127-128, where the Inter-American Court of Human Rights, after having pointed out that 'international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment', goes on by stating that '[t]he standards of proof are less formal in an international legal proceeding than in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.'

<sup>440</sup> Regulation (EC) 1/2003, Article 16.

<sup>441</sup> VAN DER VIJVER, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuse?' 131.

of evidence is not allowed, some help could be provided by a sensible use of presumptions and proof-proximity principle by the judge.<sup>442</sup> A problem which might arise in this kind of actions is that it might be difficult in practice for a national court, which is normally required to decide on the claim filed by the applicant, to undertake a thorough examination of the possible defences presented by the counterparty in order to rebut a *prima facie* infringement. Moreover, it will be very difficult to prove such defences to the required standard. Therefore, even when the undertaking's conduct might have had positive effects or beneficial social impact, the national court is normally not very well situated to assess them<sup>443</sup> and the defendant is usually not well placed to prove them.

Overall, it can be observed that the standard of proof adopted by English and Italian courts in private enforcement match the one adopted by the EU Courts. In *Arkin*,<sup>444</sup> the High Court confirmed the 'buttressed/reinforced' civil standard for anti-competitive violations, quoting the words of Lord Bridge in *Khawaja v Secretary of State for the Home Department*, and underlining how the gravity of the charge and the legal consequences of the decision must affect the standard of proof. When the former are serious, the court should seek to apply 'probability of a high degree'.<sup>445</sup> Such adaptive standard of proof has been confirmed by the High Court in *Attheraces Limited v The British Horseracing Board Limited* where the court held that, without prejudice to the applicability of the ordinary civil standard of the balance of probabilities, the specific circumstances of the case, namely the severity of the allegations, might require that 'the proof or evidence [...] be commensurately cogent and convincing'.<sup>446</sup>

Such quest for a European 'standardized standard' was enounced also in a non-competition case, *Shearson Lehman Hutton Inc. v Watson Co. Ltd.*, where the High Court established the principle that the standard of proof applicable in national proceedings should be a standard of proof known to the English courts and consistent with the test established

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<sup>442</sup> The interplay between presumptions and proof-proximity principle, and how they could be used in order to overcome the difficulties due to the strong information asymmetry which characterizes private antitrust actions, has been analysed in paras. 5 and 6 above.

<sup>443</sup> VAN DER VIJVER, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuse?' 132.

<sup>444</sup> *Arkin v Borchard Lines Ltd. & others* [2003] EWHC 687 (Comm), para. 392.

<sup>445</sup> *Khawaja v Secretary of State for the Home Department*, House of Lords [1983] UKHL 8, para. 111.

<sup>446</sup> *Attheraces Limited v The British Horseracing Board Limited*, English High Court (Chancery Division) [2005] EWHC 3015 (Ch), para. 126.

by the EU Courts case law,<sup>447</sup> in particular those of the sufficiently precise and coherent proof<sup>448</sup> and that of the certain and unassailable foundation.<sup>449</sup>

This ‘European’ standard of proof was confirmed also in a very recent case of private enforcement, *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited*, where the CAT made reference to the standard set in *JJB Sports plc v OFT*.<sup>450</sup> Not only the CAT refers to its own public enforcement case law when deciding private antitrust matters, but also the English courts refer to the case law of the CAT in private enforcement cases.<sup>451</sup>

In Italian private antitrust cases, no defined standard of proof is expressly embraced. Nonetheless, indications with regard to the criteria applicable by the national judge to decide the matter at hand are provided in the case law, and they substantially coincide with those applied by the EU Courts. In the application of presumptions, the judge is constrained to take into account only those factual elements which are ‘serious, precise and consistent’, according to the wording of Article 2729 of the Civil Code. These three characters have been explained by the case law as referring to the use on the part of the judge of probabilistic reasoning, which should make him or her reach conviction upon unknown facts.<sup>452</sup> The national judge often resorted to such ‘probabilistic reasoning’ – i.e. a way of reasoning which reach a conclusion based on what usually occurs in analogous circumstances, the so-called *id quod plerumque accidit* – in antitrust cases. Direct reference to it is made in *Bluvacanze*, where the Court of Appeal of Milan concluded that some tour operators had colluded in order to prevent Bluvacanze from continuing its policy of granting

<sup>447</sup> *Shearson Lehman Hutton Inc. v Maclaine Watson & Co. Ltd. and others*, English High Court, Queen’s Bench Division (Commercial Court) [1989] 3 CMLR 429, para. 283.

<sup>448</sup> Joined cases C-29/83 and C-30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679, para. 20.

<sup>449</sup> Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215, Opinion of AG Roemer, at 262.

<sup>450</sup> *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (Chapter II prohibition), para. 62: ‘[W]here (as here) an allegation of conscious wrongdoing is made, we consider that JJB Sports provides a helpful guide to the evaluation of the evidence.’

<sup>451</sup> *Chester City Council and Chester City Transport Limited v Arriva plc, Arriva Cymru Limited and Arriva North West Limited* [2007] EWHC 1373 (Ch) (Chapter II prohibition), para. 10: ‘In applying that standard [balance of probabilities] it is [...] settled that it is necessary to factor into the assessment the seriousness of the particular allegation being considered, the short point being that the more serious the allegation, the less probable it is that it is well founded and therefore the stronger must be the evidence to make it good. [...] This is in line with the approach adopted by *Blackburne J in Ineos Vinyls Limited and others v Huntsman Petrochemicals (UK) Limited* [2006] EWHC 1241, paras. 210 and 211, applying the principle explained by the Competition Appeal Tribunal in *Napp* [...] para. 109.’

<sup>452</sup> Court of Appeal of Naples, *Vitiello c. Soc. Lloyd Adriatico*, 17 January 2008 (2008) *Foro italiano*, I, 1303-1307, 1307 (Article 2 of Law 287/1990).

flat discounts to its customers for the sale of ‘travel packages’. The Court of Appeal sentenced that:

[...] in order to prove a restrictive practice it is sufficient to give evidence of a number of coherent and conclusive elements [indicia] which pleads, even by means of presumptions, for the existence of a practice/agreement aimed at excluding a competitor from the market or barring it from entering the market, and even if, as in the instant case, it is located at a different level of the product distribution chain. [...] The free evaluation of evidence, according to which the judge infers from a known fact an unknown fact, has to be based on the *id quod plerumque accidit* [...].<sup>453</sup>

A similar test has been frequently applied also to infer causation, an element which is very hard to demonstrate, but necessary for the award of compensation. In several occasions, the judge restated its entitlement to infer the causal link between the infringement and the suffered damage by means of applying highly probabilistic reasoning or presumptions and making sure not to neglect evaluating any elements or information offered by the alleged infringer which are aimed at disproving presumptions or proving the intervention of alternative causative factors, capable alone of inflicting the damage or to concur to its causation.<sup>454</sup>

Even if no reference is made to a fixed standard of proof, by way of recalling such criteria Italian judges reach similar results to those attained by the EU and English Courts: eliminating inconsistent evidence, they only rely on convincing evidence, until the point where they are intimately convinced that the matter has been ‘sufficiently proved’. It seems plausible to conclude that a noticeable convergence also under this aspect has been attained in the EU competition law enforcement.

## 8) ECONOMIC EVIDENCE

Economic expertise enters proceedings in two different ways: as a source of law, or as evidence.<sup>455</sup> In the first way, economic analysis affects the result of proceedings by means

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<sup>453</sup> Court of Appeal of Milan, *Soc. Bluvacanze v Soc. I viaggi del Ventaglio, Soc. Turisanda, Soc. Hotelplan Italia*, 11 July 2003 (2004) *Foro italiano*, I, 597-615, 601-602.

<sup>454</sup> Court of Appeal of Naples, *Vitiello c. Soc. Lloyd Adriatico*, 17 January 2008 (2008) *Foro italiano*, I, 1303-1307 (Article 2 of Law 287/1990).

<sup>455</sup> LIANOS, “‘Judging’ Economists: Economic Expertise in Competition Law Litigation: A European View” 187.



of hard law (an example is provided by block exemption regulations, which embody economic analysis into the law and therefore bypass the use of economic evidence) or of soft law instruments at the European level. These latter are mostly non-binding guidelines (the so-called Notices), aimed at clarifying economic notions. In the second way, economic analysis enters competition law proceedings directly via the formation of evidence,<sup>456</sup> in the guise of expert evidence.<sup>457</sup> In its turn, such economic evidence can take the form of:

- testimony, in order to prove certain facts that are peculiarly marked by technical details and that only an expert can bring out;
- technical consultancy or advice, in order to provide the adjudicator with a technical point of view on the facts, in the sense that the advisor fills those gaps in the adjudicator's knowledge that could not be otherwise overcome.<sup>458</sup> In this latter function, experts acquire their fundamental importance, translating into simple terms those technical concepts that the adjudicator cannot or has no time to study and comprehend alone.<sup>459</sup>

One of the factors contributing to the rise in importance of economic expertise in European competition law was the decentralization process accomplished by Regulation (EC) 1/2003, given that interpreting Articles 101 and 102 TFEU necessarily implies mastering economic concepts. The national judges are responsible for the enforcement of European competition

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<sup>456</sup> Economic data can be presented to the judge under different degree of certainty: judges might have to attribute a certain probative value to the expert opinion, in those cases where economic notions are not expressly mentioned in the law but may be relevant according to the community of experts and the legal literature (economic authority); or judges might have to endorse the opinion of the expert since it is so well established that it reflects the general view on the issue (economic fact); or judges might have to obey the law that has already incorporated the economic notion in itself (economic law) or, finally, the judge might have to take into account those economic concepts that are referred to by the law but that are not crystallized yet, as they are defined only as theories by the scientific community (economic transplants). As for the economic authority, examples are the notions of abuse of dominant position or restrictions of competition, because they are not self-contained but need to be defined through other public policy concepts that give them content. Economic facts are that category of concepts which are applied daily by professionals, and are mainly descriptive, such as variable or fixed costs. Economic laws are to be given for granted and not questionable, and they constitute firm points of reference for judges and economists, like the law of supply and demand. Finally, economic transplants are those notions that are indirectly incorporated by sources of law, in the sense that they operate as guiding principles but are not established yet; these are, for example, market power, consumer welfare and so forth. It is immediately noticeable that the judge will be more likely not to conform to economic transplant than to economic facts or laws, given their considerably lower degree of certainty. This analysis is performed by LIANOS, "Judging" Economists: Economic Expertise in Competition Law Litigation: A European View' 237 ff.

<sup>457</sup> The other main function of the expert in the process, that of ascertaining directly and *ex ante* a fact by way of experiment, survey or research does not apply to the role of economists in competition law proceedings and therefore is excluded by the present analysis.

<sup>458</sup> COMOGLIO, *Le prove civili* 849–850.

<sup>459</sup> LIANOS, "Judging" Economists: Economic Expertise in Competition Law Litigation: A European View' 192.

law directly and, in order to do that accurately, they may need to be flanked by economic experts.<sup>460</sup> A ‘more economic approach’, based on the effects of the infringements on the market, is fostered by the EU Courts.<sup>461</sup> Such a change of perspective, at the beginning, arose out of the criticisms levelled at an excessively rigid ordoliberalist<sup>462</sup> approach taken by the European Commission. The attitude of the Commission was disapproved of in that it would consider any restriction of economic freedom as a restriction of competition. On the contrary, in order to prevent a too broad and formalistic application of competition law, only unreasonable and unlawful restraint of trade must fall within the scope of the prohibition.<sup>463</sup>

Many problems are connected to this strong economic trend emerging in EU competition law. They relate to, on one hand, the information asymmetry between the parties and the asymmetry of knowledge of the judge and the expert;<sup>464</sup> on the other hand, to the more general lack of uniform procedural rules governing economic evidence in competition litigation.<sup>465</sup> As opposed to direct evidence of the infringement (mainly documental), economic evidence is considered to be a form of circumstantial evidence.<sup>466</sup> The Commission has expressly inserted economic evidence among the category of indirect evidence:

The notion of indirect or circumstantial evidence [...] comprises of evidence which is appropriate to corroborate the proof of the existence of a cartel by way of deduction,

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<sup>460</sup> LIANOS, “‘Judging’ Economists: Economic Expertise in Competition Law Litigation: A European View’ 234.

<sup>461</sup> NICHOLAS FORWOOD, ‘The Commission’s “More Economic Approach” - Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review’ in by by CLAUS-DIETER EHLERMANN and MEL MARQUIS, *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 255–256.

<sup>462</sup> Very briefly, ordoliberalism is the German school, born in Freiburg in pre-World War II, which sought to promote moralistic and humane values by combining economic and legal understanding into a comprehensive account of a just and liberal social order. As for competition law, it fostered individual economic freedom, which was considered a core obligation of the state. DANIEL A. CRANE and HERBERT HOVENKAMP (eds), *The Making of Competition Policy - Legal and Economic Sources* (Oxford University Press 2013) 252–254.

<sup>463</sup> JONES and SUFIN, *EU Competition Law: Text, Cases, and Materials* 192.

<sup>464</sup> LIANOS, “‘Judging’ Economists: Economic Expertise in Competition Law Litigation: A European View’ 189.

<sup>465</sup> ANDREW I. GAVIL, ‘The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience’ (2008) 4 *Journal of Competition Law & Economics* 177, 177.

<sup>466</sup> Examples of indirect evidence are, for instance, for an infringement of Article 101 TFEU travel orders, travel expenses or diary entries in relation to the attendance at a meeting, e-mail exchanges and telephone records (when they are only illustrative of the fact of contacts and do not constitute direct proof of the violation), meeting invitations, constitution of trade associations, all economic evidence.

common sense, economic analysis or logical inference from other facts which are demonstrated.<sup>467</sup>

Even if no pre-established hierarchy exists among different types of evidence,<sup>468</sup> direct evidence is undoubtedly preferred by the EU Courts.<sup>469</sup> The highest probative value has to be attributed to documental evidence (such as contemporary documents, gentlemen's agreements, minutes or notes of meetings, budget notes and the like); high evidential strength is attributed to corporate statements gathered in the context of leniency applications followed by, at a distance, other oral evidence. Therefore, economic analysis cannot in general override the probative strength of documentary evidence.<sup>470</sup> Preference for a certain type of evidence over another is mainly accorded with respect to the object of the proof and the circumstances of the case. This lack of a predefined pecking order among evidence in the EU competition law system is confirmed by the Commission, with regard to the process of defining the relevant market in the Notice on the Definition of Relevant Market, as follows:

There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available

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<sup>467</sup> European Commission, Roundtable on Prosecuting Cartels without Direct Evidence of Agreement - Global Forum on Competition - Session II, 8 February 2006, para. 26.

<sup>468</sup> The absence of hierarchy between different types of evidence is confirmed also by the CAT, in the English system: *Aberdeen Journals Limited v OFT*, para. 127.

<sup>469</sup> See *Rhône-Poulenc SA v Commission*, Opinion of AG Vesterdorf, at 957: 'Economic analysis often make up an important part of the evidence in competition cases and can be of great value to the Court in understanding the relevant economic context. It is thus important to obtain information about how an oligopolistic market might react in different circumstances. But - and this is the important point - *the findings of economic experts cannot take the place of legal assessment and adjudication*. [...] It is for the Court to consider what is prohibited under Article 85(1) and the evidence for the commitment of prohibited acts, and not for economic theorists. [...] It is the content of the documentary evidence which must show whether the persons attending the meetings had the intention of influencing prices or whether they simply wished to tell each other what they thought were reasonable prices on the basis of market evaluation and it is the Court which must determine were necessary whether it is unlawful for parties to inform one another over a very long period of time about what they think the market can bear' (emphasis added).

<sup>470</sup> *JFE Engineering v Commission*, para. 89.

information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.<sup>471</sup>

But since direct evidence is rarely available, economic evidence is gathering greater importance in demonstrating infringements, both in the public and the private enforcement. The phenomenon is made more visible by the extensive use made by the European Commission and the national competition authorities of economists and economic experts.<sup>472</sup>

In the public enforcement, the most frequent use of economic evidence is the production by the investigated undertaking of economic reports either to defend itself, as a form of counterevidence when evidence adduced by the Commission is weak, or to claim that the infringement had no adverse effects on the market,<sup>473</sup> thus deserving a reduction of the fine, providing alternative explanation for parallel conducts or satisfying the conditions to benefit from a justification.

A certain caution in considering the deployment of economic analysis can be generally observed in the EU case law, accompanied by the recurring remark that an overall view of evidence presented is always necessary. For instance, in *Bolloré*, the General Court endorsed the attitude of the Commission, which did not respond ‘point by point’ to the arguments presented by the defendant undertaking. The Court considered, in particular, that the Commission was ‘not obliged to refute the analysis [stating that the agreements did not have any effect on the increase in prices] in the first Nera report submitted by AWA’.<sup>474</sup> In several occasions the EU Courts rebutted the probative strength of the economic evidence presented.<sup>475</sup> Sometimes the Court seems to even consider inadequate to the circumstances of the case the use of complex economic assessment:

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<sup>471</sup> Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law OJ [1997] C 372/5, para. 25.

<sup>472</sup> LIANOS, “‘Judging’ Economists: Economic Expertise in Competition Law Litigation: A European View” 186.

<sup>473</sup> CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 557.

<sup>474</sup> *Bolloré SA and others v Commission*, para. 451. AWA had submitted two reports by Nera (National Economic Research Associates). The first one was submitted during the administrative procedure, whilst the second one was commissioned for the purposes of the judicial proceedings. They both aimed at demonstrating that the prices resulting from the offending agreements could not have exceeded those which would have been observed under normal conditions of competition and thus denied any actual impact of the infringement on the market.

<sup>475</sup> Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and others v Commission* [2006] ECR II-5169, paras. 303-305. Compare para. 303: ‘The expert thus limited the subject-matter of his study to an examination of certain specific questions, and his analysis did not concern all the potential effects of the agreements on the market. The report cannot therefore demonstrate the absence of any

[I]t would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved.<sup>476</sup>

### A) The Standard of Judicial Review for Economic Evidence

The intensity of the EU Courts' review is limited with regard to complex economic assessments for two main reasons: economic evidence in competition law matters often involves value judgements, so that there is no way to verify it objectively; and the jurisdictional and procedural rules allowing the CJEU to test the credibility of oral evidence of complex facts is very restrained.<sup>477</sup> In the judicial review of the EU Courts, this type of evidence plays a unique role, for it is often subject to an intense review by the CJEU. Under the four grounds provided for by Article 263(2) TFEU, the review applied by the General Court, and in second instance, by the Court of Justice, assume two forms. It is comprehensive when the CJEU is empowered to control the legality of an administrative decision. The CJEU has full control over the correctness of the facts and the correct application of the law. It is marginal, when the CJEU is bound to verify 'whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has

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actual impact of the cartel on the market.' See also case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, paras. 126-128: 'In order to demonstrate that the overall market-sharing agreement had no effect on the market, the applicant relies, finally, on a study carried out by the Lexecon company, which is alleged to show that the actual impact of the agreement on the fares of routes from Denmark was minimal. Apart from the fact that that study, commissioned by the applicant, was supplied only at the reply stage without the applicant explaining why that evidence was submitted late [...] it is sufficient to note that the infringement which was found consists in the sharing of markets, and thus does not directly concern the fares charged by parties to the agreement, and that the parties adopted a line of conduct in accordance with that market-sharing. Moreover, the study deals only with the impact of the agreement on the prices charged by SAS, whereas the non-competition clause was reciprocal and it had also been agreed that SAS would not fly on routes operated by Maersk Air to and from Billund. Clearly, in the absence of an agreement, SAS would have been able to exercise a significant competitive constraint on Maersk Air. Neither the study nor the applicant have put forward anything to demonstrate that the agreement had no impact in that regard. Even if the study does tend to show that SAS fares on routes from Denmark, affected by the overall market-sharing agreement, remained stable in relation to those charged by SAS on routes from Sweden and Norway, which were not covered by that agreement, it compares only the prices charged on 20 chosen routes among the 105 destinations served by SAS and does not establish that competitive conditions on the affected market and the unaffected market were comparable. [...]'

<sup>476</sup> *Raiffeisen Zentralbank Österreich AG and others v Commission*, para. 286.

<sup>477</sup> BAILEY, 'Scope of Judicial Review under Article 81 EC' 1336.

been any manifest error of appraisal or a misuse of power'.<sup>478</sup> In EU competition law, the CJEU has long established to apply a full review to non-complex economic assessments and a marginal review to 'complex economic assessments'.<sup>479</sup> In other words, the CJEU does not interfere with the exercise of the Commission's margin of appreciation of economic (and now also technical) matters and, in both antitrust law and merger control, this latter enjoys wide discretionary power.<sup>480</sup> The case law shows that the CJEU is reluctant to interfere with the discretionary power of the Commission, owing to the complex economic nature of the matter examined, by confining the judicial review 'to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom'.<sup>481</sup> So restricted by the leeway of appreciation exercised by the Commission, the broadness of the General Court's review seems to be limited, in complex economic matters, to the correction of manifest errors of appraisal. Nonetheless, since the case law is inconsistent on this point, it has been observed that the intensity of the review may vary according to the provision enforced.<sup>482</sup>

The complexity of the assessment does not coincide with its degree of difficulty. The CJEU does not restrain itself from a detailed review of evidence. It examines the facts in considerable detail even if it requires engaging its own experts, or reviewing a great deal of evidence produced by different sources.<sup>483</sup> To clarify,

'complexity' refers more to the nature of assessment that needs to be made, rather than its technical or evidential difficulty. Article 81(3) assessments, to the extent that they involved making value judgments, such as to whether a 'fair' share of benefits of a restrictive agreement are likely to be passed to consumers, or other judgments of a similar apples and orange nature, exemplified this sort of assessment. By contrast, whether an agreement was or was not restrictive of competition within Article 81(1), or

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<sup>478</sup> Case C-42/84 *Remia BV and others v Commission* [1985] ECR 2545, para. 34. See, also, C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, para. 78; Joined cases C-142 and C-156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, para. 62.

<sup>479</sup> The first case where the Court of Justice clarified the boundaries of the Commission's discretion was case C-56/64 *Consten and Grundig v Commission* [1966] ECR 299, 347.

<sup>480</sup> JAMES VENIT, 'Human All Too Human: the Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82' in by by CLAUS-DIETER EHLERMANN and MEL MARQUIS, *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 243.

<sup>481</sup> Case C-56/64 *Consten and Grundig v Commission* 347. The Court of Justice referred in that case to the Commission's power to grant exemptions under art. 81(3).

<sup>482</sup> JONES and SUFIN, *EU Competition Law: Text, Cases, and Materials* 1140–1141.

<sup>483</sup> FORWOOD, 'The Commission's "More Economic Approach" - Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review' 264–268.



whether a company was dominant or its conduct abusive, would not require the Court to depart from its default approach of a ‘comprehensive review’.<sup>484</sup>

This approach of the EU Courts as to the extent of their jurisdiction may result to be very ‘conservative’.<sup>485</sup> A turning point could be seen in the Court of First Instance’s reasoning in *Microsoft*, where, after having extended the Commission’s margin of appreciation to complex technical appraisals, for which the CJEU has no power to substitute its assessment to that of the Commission,<sup>486</sup> went on to say that that does not mean that the CJEU must decline to review the Commission’s interpretation of economic or technical data. Conversely, the CJEU should evaluate the evidence thoroughly and establish both whether it is ‘factually accurate, reliable and consistent’ but also whether ‘the evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it’.<sup>487</sup>

Broadly speaking, English<sup>488</sup> and Italian judicial review follows this blueprint. The Competition Act 1998 empowers the CAT to fully review an OFT decision on the merits, which implies by it can remit a decision to the OFT, but also substitute its assessment to the impugned decision. In practice, nonetheless, the CAT considers the merits of the case building upon the OFT decision, to which some deference is clearly owed.<sup>489</sup> With regard to the role played by economic evidence, it has been observed that sometimes specialised tribunals, like the CAT, critically evaluate the expert evidence presented and, when they do not consider it convincing, they apply their own economic assessment of that evidence. Non-specialised tribunals, contrariwise, normally highly rely upon the expert’s opinion.<sup>490</sup> Such off-track assessment of economic methods operated by specialised tribunals is perceived as a undue diversion from the judge’s institutional role, which might entrain the

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<sup>484</sup> FORWOOD, ‘The Commission’s “More Economic Approach” - Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review’ 267–268.

<sup>485</sup> The wording belongs to D. SLATER, S. THOMAS, D. WELBROECK, *Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need For Reform?*, in *European Competition Journal*, 2009, 5, 43.

<sup>486</sup> *Microsoft Corp v Commission*, para. 88.

<sup>487</sup> *Microsoft Corp v Commission*, para. 89.

<sup>488</sup> *Aberdeen Journals Limited v OFT*, para. 125.

<sup>489</sup> KELYN BACON, ‘Standard of Proof, Standards of Review and Evaluation of Evidence in UK Antitrust and Merger Cases’ in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 673: ‘[I]n a case where the regulator has reached a robustly reasoned decision on what may be a complex factual or economic issue, the CAT is entitled and indeed bound to place weight on that in reaching its decision.’

<sup>490</sup> IOANNIS LIANOS, ‘Observations of Ioannis Lianos’ (presented at the Workshop on the Quantification of Antitrust Harm in Actions for Damages European Commission Directorate-General for Competition January 26, 2010) 24.

risk of preventing the acceptance and diffusion of new theories, or of transposing legal values and policy goals into scientific economic methodology.<sup>491</sup> One example of this propensity is offered by *Albion Water*. The CAT refused to apply the “Efficient Component-Pricing Rule” to the purpose of computing profit margins in a margin squeeze case. In short, Albion Water Limited appealed to the Tribunal against the decision of the water services regulatory authority that the first access price offered by Dŵr Cymru to Albion Water Limited for the carriage of non-potable water did not constitute abuse of a dominant position under English competition law. To take its decision the water regulatory authority had applied the Efficient Component Pricing Rule (“ECPR”), which is a way of calculating optimal costs for access to monopoly (also called bottleneck) facilities. The rule basically states that the appropriate access charge is calculated by means of adding to the direct costs of providing access to the service the monopolist’s opportunity costs of providing access to the competitor providers, including forgone revenues from the concomitant reduction in the monopolist’s sales of the complementary component. The ‘seductive logic’ of ECPR lies in that it ensures that only at least as efficient competitors as the monopolist will be allowed to provide the service.<sup>492</sup> The CAT refused to apply the ECPR approach to access pricing, on grounds that the ECPR methodology was a controversial one, which had been criticised in other cases for having adverse effects on competition,<sup>493</sup> and that it was not a ‘safe methodology to use’ in the specific case.<sup>494</sup> This seems nonetheless to be an isolated episode and the general rule is that the CAT pay respect to the economic assessment performed by the OFT. Moreover, it is natural that the court, when appreciating the probative value of evidence presented, especially if endowed with the power to review the merits, take a stand

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<sup>491</sup> Compare LIANOS, ‘Observations of Ioannis Lianos’ 25: ‘Even an “expert” judge needs [...] to respect the institutional constraints of her role, in particular if the “expert” authority maintains a discretionary power to make policy choices. [...] [T]he objectives and values of legal decision-making are different from those of scientific research and [...] this approach may affect the admissibility of relatively new, non-tested, theories, even if they are generally accepted by the specific scientific community.’

<sup>492</sup> NICHOLAS ECONOMIDES and LAWRENCE J. WHITE, ‘Access and Interconnection Pricing: How Efficient is the “Efficient Component Pricing Rule”?’ (1995) 40 *The Antitrust Bulletin* 557, 559.

<sup>493</sup> *Albion Water Limited v Water Services Regulation Authority (formerly Director General of Water Services)* [2006] CAT 23 (Chapter II prohibition), para. 31.

<sup>494</sup> *Albion Water Limited v Water Services Regulation Authority (formerly Director General of Water Services)*, para. 44: ‘The Tribunal’s conclusion on ECPR is that the ECPR approach in the Decision was not a safe methodology to use in this case for the purpose of determining the reasonableness of the First Access Price because: (i) the ‘retail’ price used in the calculation is not shown to be cost-related as regards the distribution element; (ii) the evidence strongly suggests that that price is itself excessive; (iii) the particular method of ECPR used in the Decision would eliminate the existing competition and in effect preclude virtually any competitive entry, because the resultant margins are insufficient; and (iv) the approach of the Authority to avoidable costs in its evidence and submissions was not the same as that in the Decision. None of the justifications advanced by the Authority for an ECPR approach persuaded the Tribunal that it could safely rely on the ECPR approach set out in the Decision in the circumstances of the present case.’

upon which economic theory it considers to be more convincing, because the assessment of evidence is reserved to it.

In Italy, the judicial review is exercised by the administrative judge in the same terms of the EU Courts. According to the case law, when the AGCM interprets complex economic concepts which are not precisely defined (such as that of relevant market) it is endowed with a great margin of appreciation, due to the fact that most economic theories are a matter of opinion.<sup>495</sup> Over technical economic matters, the intensity of the judicial review is lesser and the substitution of the assessment of evidence of the court to that of the NCA is prohibited. It is, however, admitted a control over the consistency of the statement of reasons, for the correction of manifest errors of appraisal.<sup>496</sup> Such control must be thorough and encompass the adequacy of the statement of the reasons, the accuracy of the statement of facts, the existence of manifest error of appraisal or of misuse of power.<sup>497</sup> With regard to the revision of fines, the scope of the review extends to the merits and the assessment of the judge can substitute that of the AGCM.<sup>498</sup>

It is interesting to note that, due to the deferential attitude toward a certain margin of regulatory autonomy showed by the review courts,<sup>499</sup> on the one hand, and the binding effect or high probative value of the decisions of competition authorities in follow-on actions before national courts, on the other, the assessment of complex economic matters performed by competition authorities is less likely to be put into question. The system, as it is, tends to crystallize such assessment and the almost exclusive adjudicator of certain complex assessments of the fact will consistently be the competition authority (European or national) both for the public and the private enforcement, with the only exception of the rare (for the time being) stand-alone actions.

## **B) Economic Evidence in the Private Enforcement**

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<sup>495</sup> TAR Lazio, 14 July 2010, decision no. 25434, para. 3.1.

<sup>496</sup> Court of Cassation *Soc. ind. Farmaceutiche Menarini v Reg. Toscana*, 17 March 2008, decision no. 7063 (2008) *Giurisprudenza italiana*, 2052 (Article 2 of Law 287/1990).

<sup>497</sup> TAR Lazio, 2 December 2009, decision no. 12319, para. 3.1; TAR Lazio, 22 September 2009, decision no. 9171, para. III.2.1.

<sup>498</sup> TAR Lazio, 22 September 2009, decision no. 9171, para. IX.2.

<sup>499</sup> CAROL HARLOW and RICHARD RAWLINGS, *Law and Administration* (3rd edn, Cambridge University Press 2009) 311. The Authors, nonetheless, also observe that the CAT is an example of a new regulatory model in which, being it a specialist regulatory court, the CAT's 'hard look' creates 'tension' rather than 'deference'. Due to its specialism and its full review of the merits, it secures effective legal accountability and avoid risks of non-compliance with Article 6 ECHR (which would arise from the limitations of judicial review). See at 321-322.

In the private enforcement, national courts usually do not perform any economic analysis from scratch and bank on the decisions of the Commission or the national authority. Of course, civil judges are not required to be economic experts themselves. Their education is based on the law and, even though these two social sciences are intertwined and basic notions of economics appropriately constitute sound background for jurists, judges throughout European Union rarely possess the necessary instruments to understand and apply autonomously economic theories in competition litigation. Such observation does not diminish the importance of economic evidence, but it implies that economic evidence must be handled with care.<sup>500</sup> Economic evidence is vividly capable of explaining and interpreting the facts under examination, and is highly valuable in strengthening the judge's conviction upon the facts. It is, however, not necessarily conclusive and notoriously uncertain.<sup>501</sup> The judge, when deciding stand-alone actions, is entirely free to evaluate economic evidence and is under no obligation to align with the opinion of the expert, which is to be weighed up altogether with all other evidence.

The role of expert evidence and the way the problem of epistemic asymmetry is dealt with are different in the civil<sup>502</sup> and in the common legal systems, and therefore differences are likely to be appreciable in the jurisdictions of the Member States. This issue is particularly important in private enforcement of EU competition law because, absent any harmonized regulation of the use of expert evidence in national proceedings, the risk of discrepancies among Member State as to the admissibility and assessment of this type of evidence is especially high. Concomitantly, greater use of economic expertise in national proceedings may also indirectly contribute to harmonising courts' decisions across the EU, improving the predictability of their outcome.<sup>503</sup> In common law systems expert witnesses

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<sup>500</sup> The argument according to which economic evidence is better understood by judges who deal repeatedly with antitrust cases is advocated for those who are in favour of the adoption of specialised courts. With regard to the judicial review, see DOUGLAS H. GINSBURG and JOSHUA D. WRIGHT, 'Antitrust Courts: Specialists versus Generalists' (2013) 36 *Fordham International Law Journal* 788–811.

<sup>501</sup> FORWOOD, 'The Commission's "More Economic Approach" - Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review' 257: '[E]conomic analysis is a notoriously uncertain science – some would even say "art" – and few economists would deny that economic assessments are never matters on which there is room for reasonable differences of view.'

<sup>502</sup> The French, Italian, German and Spanish civil law traditions define very thoroughly the assessment of the expert evidence (*technicien, consulente tecnico, Beweis durch Sachverständige, perito*) in their codes of civil procedure. See, for extensive comparative analysis, COMOGLIO, *Le prove civili* 852, fn. 54.

<sup>503</sup> DENIS WAELBROECK, DONALD SLATER, and GIL EVEN-SHOSHAN, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules - Comparative Report' (Ashurst August 31, 2004) 10: 'Greater recourse to greater expertise could improve predictability in the application of the law. Such expertise could come from a variety of quarters, such as the creation of courts specialised in competition matters and/or the training of judges [...].'

play an ‘adversarial’ role, offering a one-sided opinion on the facts and supporting the party’s argument. In civil traditions, the role of the expert is more neutral and is played mostly in the form of court-appointed experts which should provide the judge with impartial and neutral insights on the facts.<sup>504</sup> It is convenient now to briefly analyse the two most wide-spread models of integration of economic evidence in competition law litigation.

*a) Expert witness*

Expert witnesses are characteristic of common law legal systems and sometimes they are used in civil law countries in the form of shadow experts, i.e. a party-appointed expert adviser which acts to balance the opinion of a court-appointed expert. The main issues arising out in conjunction with the use of this type of expert are the costs connected to it, which may hinder the protection of the rights of defence of the party which has fewer means; the increased length of litigation which would result from the appointment of experts by the parties; and the biased evidence that would be allowed to enter proceedings. It has been observed how the first two set of issues are not specific of expert-witnesses and would be encountered also if neutral expert were used. Impartiality, on the other hand, is inherent to this kind of economic expertise.<sup>505</sup>

The risk of allowing biased opinions enter the proceedings is tangible because the knowledge possessed by the expert allows him or her selecting the favourable data and way of analysis among the available ones and presenting to the judge a picture which has been already manipulated in order to convey consensus upon the party’s arguments. In a way that it is no different from the way lawyers choose to present the most convenient evidence to support their allegations, the appointed economist receives remuneration for helping the claimant or the defence to support their argumentations.

In the attempt of rendering the expert witness as impartial as possible, the ‘hot tub’ procedure is particularly effective. It consists of a pre-trial confrontation of experts in order to allow a maieutical search for the scientific ‘truth’. In the ‘hot tub’ procedure economists are invited, once they have received written evidence available, to submit their written observations before the oral hearing. At the end of the oral proceedings, and before the counsel’s submissions, they may be asked to participate in a short seminar or debate before

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<sup>504</sup> LIANOS, ‘Observations of Ioannis Lianos’ 2.

<sup>505</sup> CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 558.

the court. The experts are not cross-examined by the lawyers, but are interrogated directly by the judge, who can, this way, form its opinion. In the following part of the proceedings, the expert witnesses go back to their partial role and are cross-examined as usual. Among the advantages of such procedure there is the limitation of partisanship, the narrowing of the debate to real issues, and the stimulus of scientific debate among experts.

### ***b) Court-appointed expert***

An independent expert appointed by the court avoids all risk of a biased outcome. Usually, national civil procedural rules empower the parties to ask questions and submit observations to the neutral court-appointed expert. The downside of the use of court-appointed forensic economists consists mainly in the elevated risk of error, especially in cases where the appointed expert is not competent or not genuinely neutral, but also because the expert, even when acting in good faith, will most likely tend to endorse a particular theory or to follow his or her ‘school’ ideas.<sup>506</sup> An expensive solution to this problem would be the appointment of a panel of experts, instead of an individual, as already happens in the context of the WTO dispute resolution.

### ***c) Economic Evidence in England***

Expert evidence is governed by Part 35 of CPR or, before the CAT, by paragraphs 12.8 to 12.11 of the CAT Guide to Proceedings 2005. Experts (in competition law, they are most likely economists or forensic accountants) can be used in the proceedings with the permission of the court. They have a duty to help the court with the matter of expertise and such duty prevails upon any obligation towards the party by which the expert has been appointed. In competition matters, both before the High Court and the CAT, expert evidence is usually given in the form of a written report. After the exchange of the written reports, the expert can be addressed questions by the counterparty in written form. Only when necessary, experts can also be cross-examined and re-examined at trial. Even if the complexity of the case in competition matters normally suggest not doing so, the court can also employ a single expert appointed jointly.<sup>507</sup> In England, appointed experts have a

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<sup>506</sup> LIANOS, ‘Observations of Ioannis Lianos’ 10.

<sup>507</sup> On the Court’s power to direct that evidence is given by a single joint expert, see Rule 35.7 of CPR.



general obligation, or rather a duty, to assist the court along the proceedings, which overrides any other obligations they may have to fulfil towards the person who appointed them or by whom they are paid.<sup>508</sup> Parties cannot appoint or make use of an expert in the proceedings, unless so authorised by the court.<sup>509</sup> Expert reports for which the parties have not received directions from the court must be excluded as inadmissible evidence. Expert evidence must be restricted to what is reasonably required to resolve the proceedings.<sup>510</sup> Such principles are applied also by the CAT.<sup>511</sup> Informal statements by experts are also permitted.<sup>512</sup> According to the case law, two main principles guide the judge in dealing with expert evidence: the expert must be needed to help the court in the decision-making;<sup>513</sup> and the issue must concern an area where there is a body of recognised expertise.<sup>514</sup>

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<sup>508</sup> Rule 35.3 of CPR.

<sup>509</sup> Rule 35.4 of CPR.

<sup>510</sup> Rule 35.1 of CPR. See, before the CAT, how it may be considered appropriate to organise a structured discussion to focus on the main points of dispute: *Genzyme Ltd v OFT* [2005] CAT 32, paras. 149–154.

<sup>511</sup> Compare paras 12.8 and 12.9 of the CAT's Guide to Proceedings: 'As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings. It may be appropriate to organise, prior to, or at some stage during the hearing, a structured discussion, in the presence of the Tribunal, between the parties and their experts, in an endeavour to focus on the main points of dispute [...] Informal statements by experts may be permitted [...] Other procedures, including putting written questions to the experts, discussions between experts, the appointment of a single joint expert, or of the Tribunal's own expert, can equally be envisaged. The Tribunal considers that, as under Part 35 of the CPR, it is the duty of the expert to help the Tribunal on matters within his expertise: that duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. Expert evidence presented to the Tribunal should be, and should be seen to be the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion. Where necessary, the expert must make it clear if a particular question or issue falls outside his expertise.'

<sup>512</sup> *Claymore Dairies Limited and Arla Foods UK plc v OFT* [2005] CAT 30.

<sup>513</sup> *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp*, Chancery Division [1979] Ch. 384, 402: 'As to this, I have heard the evidence of a number of practising solicitors. Mr. Harman modestly contented himself with calling one; but Mr. Gatehouse - mindful, no doubt, of what is said to be the divine preference for big battalions - called no less than three. I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. [...] Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court [...]'

<sup>514</sup> *Barings Plc (in liquidation) and another v Cooper & Lybrand & others*, High Court Chancery Division [2001] Lloyd's Rep PN 379, paras. 44–45: '[T]he test whether expert evidence in any particular case is to be received is a two stage test, the first stage being whether the evidence is admissible as "expert evidence" [...], and the second stage whether the Court should admit it as being relevant to any decision which the Court had to arrive at, that is, helpful to the Court for that purpose. [...] [E]xpert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issue in the case justly. Such evidence

The problem of partisanship of expert evidence is strongly felt in England, which has recently engaged in a civil procedure reform with regard to this aspect. As early as 1980, Lord Wilberforce expressed his concerns and the need for neutral expertise in a civil litigation case:

While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.<sup>515</sup>

To overcome such problems, a reform of the UK Civil Procedure Rules has instituted the ‘single joint expert’, whose function is exactly the same as that of the expert witness, with the difference that the joint expert is chosen in agreement by the parties, usually under direction of the court, which also decides the manner in which the expert should be selected or selects him or her directly from the list proposed by the parties in the event that these latter cannot agree on whom to choose.<sup>516</sup> In practice, the appointment of single joint expert tends to be extremely rare. Notwithstanding such trend of legislative reform, to date the full-scale adversarial nature of the proceedings stays untouched and the role of the expert in English civil litigation is still ‘one of the principal weapons used by litigators’.<sup>517</sup>

One of the tools offered by the UK Civil Procedure Rules to ease the process of narrowing the issues and improving the use of expert evidence is the power of the court, at any stage along the proceedings, to direct a discussion between the experts in order to identify and have them discuss the relevant issues in the specific matter and to explore the possibility of reaching an agreed opinion on those issues, whenever feasible.<sup>518</sup> Nonetheless, the parties need to give their consent to refer to the content of the discussion during the trial

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will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence.’

<sup>515</sup> *Whitehouse v Jordan and another*, House of Lords [1981] 1 WLR 246, 256–257.

<sup>516</sup> Compare Rule 35.7 of CPR.

<sup>517</sup> HARRY WOOLF, ‘Access to Justice’, July 2006, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, Ch. 13, para 7. At the same paragraph Lord Woolf warns against the risk of a ‘universal application of the full, “red-blooded” adversarial approach’: ‘The purpose of the adversarial system is to achieve just results. All too often it is used by one party or the other to achieve something which is inconsistent with justice by taking advantage of the other side’s lack of resources or ignorance of relevant facts or opinions. [...] The present system allows [...] to withhold from their opponents material which may be damaging to their own case or advantageous to their opponents. This practice of non-disclosure cannot be justified, because it inevitably leads to unnecessary cost and delay, and in some cases to an unfair result.’

<sup>518</sup> Rule 35.12 of CPR.

and to be bound by the opinion of the agreed experts; otherwise, the contentions of the experts cannot be used against them. Two main criticisms are levelled to this procedural device. The first one is that meetings can ultimately result useless if the experts are instructed by the parties or their counsels not to agree anything. The second one is represented by the high costs entrained by such meetings, especially if attendance is required for the parties and the lawyers, instead of the experts alone. The proposed solution to the first problem is to consider unprofessional conduct for the experts to accept instructions for the meetings. The proposed solution to the second one is to cut costs of travelling expenses, by way of allowing the meetings to be held via conference calls or telephone and compelling attendance of the experts alone.<sup>519</sup>

Another tool offered by the UK Civil Procedure Rules is the appointment of assessors, aimed at assisting the court in the decision-making process. The CPR provide that the court is empowered to appoint an assessor, to the purpose of dealing with a matter in which the assessor has skill or experience by means of preparing a report for the court's use or attending the trial or a part of it to advise the court on the matter.<sup>520</sup> The assessor's main function is therefore that of 'educating' the judge in a technical subject matter,<sup>521</sup> without being subject to cross-examination or any other adversarial device.

The above stated about the methods for integrating economic evidence in civil proceedings, let's consider now the issues of the admissibility and the assessment of economic expertise in English private antitrust cases. In the course of the case *2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited*, the defendant applied to exclude certain evidence that 2 Travel Group plc wanted to adduce before the CAT. Mr. Harrison was, as well as an accountant, also a member of the Tribunal's ordinary panel. In support of its claim, 2 Travel Group plc relied upon Mr. Harrison's written witness statement, which substantially referred the circumstances under which reports on the defendant's business had come to be written by Pricewaterhouse Coopers. In refusing to exclude Mr. Harrison's written statement, the CAT had the occasion to restate the distinction between expert witnesses and witnesses of fact. The defendant objected to the adducing of Mr. Harrison's statement on grounds that he was an expert witness and not a witness of fact, and that his dual status was likely to give rise to biased conclusions. The Tribunal drawn the distinction between expert evidence given by a witness of fact, and

<sup>519</sup> WOOLF, 'Access to Justice' 13 paras. 43-50.

<sup>520</sup> Rule 35.15 of CPR.

<sup>521</sup> LIANOS, 'Observations of Ioannis Lianos' 14.

genuine expert evidence, which is also recognised by the Civil Evidence Act 1972 at Section 3(1). English law considers opinions based on experience or previously acquired knowledge of the witness, whenever they are drawn from facts perceived through senses, as facts.<sup>522</sup> On this premise, the Tribunal concluded that the evidence brought by the chartered accountant, which Cardiff City Transport Services Limited aimed at excluding, was factual and as such admissible. With regard to the bias objection, the Tribunal observed that all steps were taken to ensure Mr. Harrison's dual status would not arise difficulties (for instance, the three members of the Tribunal had never met Mr. Harrison). Since there was no real danger of bias on the part of the constituted Tribunal,<sup>523</sup> the CAT concluded for the rejection of the application, in line with the general *favor probationis* that is recurrent in competition matters.

#### ***d) Economic Evidence in Italy***

In Italy, the use of economic evidence by private parties is at a very early stage of its development (as is, overall, private enforcement itself). Given that the majority of actions have been to date follow-on actions, the use of this type of evidence would have proved particularly relevant in the quantification phase for damages actions, but Italian judges have often resorted to equity to avoid embarking on complex quantification calculations. Among the reasons for the reluctance on the part of the Italian civil judge to use econometric models are often mentioned the epistemic asymmetry between the economists and judges; the inaccuracy of the econometric models; the fact that they can introduce biased assertions in the decision-making process; the lack of independent econometric experts.<sup>524</sup> None of these reasons, however, is conclusive and they can be easily overcome in the furtherance of a more economic approach to competition law enforcement. Occasionally, such as in

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<sup>522</sup> *2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited* [2011] CAT 44 (Chapter II violation), para. 6: "Take the example of a brain surgeon accused of negligence, giving evidence in his defence. Such evidence, justifying sophisticated conduct alleged to have been negligent, will in content often be indistinguishable from "expert" evidence. But it will not *be* expert evidence, because the witness will be explaining, as a matter of fact, precisely what he did during the course of a particular operation, drawing on his expertise to give that factual explanation. This distinction between "expert" evidence given by a witness of fact, and genuine expert evidence, is one which is regularly drawn by the Tribunal [...] and is one which is expressly recognised in section 3(1) of the Civil Evidence Act 1972, which provides: "Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.""

<sup>523</sup> *2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited*, para. 13.

<sup>524</sup> PAOLO BUCCIROSSI, 'Chi ha paura dell'econometria?' in *I rimedi civilistici agli illeciti anticoncorrenziali. Private Enforcement of Competition Law - Atti del III Convegno di Studio presso la Facoltà di Giurisprudenza dell'Università di Trento 15-16 aprile 2011* (Cedam 2012) 204–208.

*Telsystem v SIP*,<sup>525</sup> the Italian court appointed experts to assist it in the quantification of damages. In that case, in the above mentioned *Bluvacanze*, and in *Albacom*,<sup>526</sup> the Italian courts of appeal applied the ‘but for’<sup>527</sup> economic model for the quantification, mitigated by a cautious assessment. The ‘but for’ test is the basic test for causation. The test is performed in two steps: first of all, it is necessary to eliminate all irrelevant causes; secondly, it must be verified whether the identified cause is the effective one, because but for it, the damage would not have occurred. The way in which the ‘but for’ test operates in practice in competition law cases is by means of mentally eliminating the alleged violation, and trying to verify whether, absent the infringement, the suffered losses would disappear as well. The reasoning is very similar to that used to build the counterfactual. The judge ought to conjecture what would have happened in the ‘but for’ world. In *Bluvacanze*, the Court of Milan made use of ‘before and after’ test for the evaluation of lost profits, explaining its choice as follows:

The quantification of lost profits can also be made on the basis of presumptive criteria of the lost profit as derived by the unlawful conduct of the defendant, by means of forecasting the amount of money that could have been earned absent the unlawful conduct and by using projections of recorded past data which could have likely be referable to subsequent periods.<sup>528</sup>

In doing so, clearly the court refused to go into complex economic analysis, adopting a very simple method that it could verify without the assistance of any expert. This case law and that of the English courts can be read in line with the tendency of the EU Courts (and other

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<sup>525</sup> Court of Appeal of Milan, *Telsystem v SIP SpA and Telecom Italia SpA*, 18 July 1995 (1996) *Danno e responsabilità*, I, 105-110.

<sup>526</sup> Court of Appeal of Rome, *Soc. Albacom v Soc. Telecom Italia*, 20 January 2003 (2003) *Foro italiano*, I, 2474 ff. (Article 3 of Law 287/1990).

<sup>527</sup> Compare *Arkin v Borchard Lines Ltd. & others*, para. 536 and *Galoo Ltd (in liquidation) and others v Bright Grahame*, Court of Appeal [1994] 1 WLR 1360, 1372 where the Court of Appeal makes reference to a very similar Australian case decided by the Court of Appeal of New South Wales, *Alexander v Cambridge Credit Corporation Ltd* [1987] 9 NS WLR 310, and quotes the words of Judge Mahoney J.A. At para. 333, the judge beautifully describes the issue of causation as follows: ‘If a defendant promises to direct me where I should go and, at a cross-roads, directs me to the left road rather than the right road, what happens to me on the left road is, in a sense, the result of what the defendant has done. If [...] because I am there, a car driving down that road and not down the right road strikes me, my loss is, in a sense, the result of the fact that I have been directed to the left road and not the right road. But [...] in relation to losses of that kind, the fact that the breach has initiated one train of events rather than another is not, or at least may not, be sufficient in itself. It is necessary, to determine whether there is a causal relationship, to look more closely at the breach and what (to use a neutral term) flowed from it.’

<sup>528</sup> Court of Appeal of Milan, *Soc. Bluvacanze v Soc. I viaggi del Ventaglio, Soc. Turisanda, Soc. Hotelplan Italia*, 11 July 2003 (2004) *Foro italiano*, I, 597-615, 612.

national courts) to ‘keep it simple’: adopting their decision based on other evidence available and resorting to economic evidence only if no alternative is left or only for those issues, like quantification, where it is necessary to do so. As a result, the economic assessment of evidence is an almost exclusive prerogative of the competition authorities. Moreover, according to the signposting of the Court of Justice, a strong propensity for the contextual evaluation of evidence can be observed,<sup>529</sup> which can be seen in the light of a general alignment on the part of national courts to the case law of the EU Courts with regard to the assessment of evidence. Indeed, given the role played by economic evidence in competition law proceedings, it is not an issue that can be easily severed from those of the probative value of evidence and ultimately of the standard of proof. Indeed, economic evidence is always considered as circumstantial evidence corroborating other evidence.

## 9) THE STANDARD OF REVIEW FOR EVIDENCE

In the same way in which the notion of standard of proof is not familiar to jurists of civil law tradition, also the notion of standard of review is mainly entrenched in common law jurisdictions. The standard of review is defined as ‘the intensity of the scrutiny exercised by courts of law over the legality of the act subject to review’.<sup>530</sup> Naturally, the fact that Commission’s decisions are scrutinised by the General Court and, in second instance only with regard to issues of law, by the Court of Justice, affects the decision-making itself of that institution, whose legitimacy is strictly influenced and calibrated by the review. The two standards of proof and of review are clearly differentiated in their functions. Nonetheless, it is undeniable that they can be seen as two sides of the same coin, because what it takes for the competition authority to convince the judge (standard of proof) reflects on what it takes for it to win a challenge in the review phase (standard of review).<sup>531</sup>

The standard of review applied by the General Court focuses primarily on questions of facts and law concerning the general consistency of the Commission’s reasoning and on manifest errors of assessment, directed to the control of the credibility of the body of evidence which make the Commission’s case.<sup>532</sup> Together with the review of legality,

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<sup>529</sup> Court of Cassation, *Pesce v Axa Assicurazioni*, 18 December 2009, decision no. 26748 (2010) *Danno e responsabilità*, 815.

<sup>530</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 644.

<sup>531</sup> CASTILLO DE LA TORRE, ‘Evidence, Proof and Judicial Review in Cartel Cases’ 561.

<sup>532</sup> See Introduction, para. 3 C).



according to Article 261 TFEU and Article 31 of Regulation (EC) 1/2003, the EU Courts are endowed with unlimited jurisdiction over Commission's competition decisions imposing a fine. The EU Courts may review, cancel, reduce or even increase the amount of the fine. In practice, the control in antitrust law has taken four main forms: i) interpretation of substantive law; ii) test of due process; iii) review of the amount of imposed fines; iv) test of evidence.<sup>533</sup> Whilst the respect of the defendant's fundamental rights is dealt with in the following Chapter, the test of evidence is considered below, as part of the currently discussed topic.

The review of evidence is aimed at verifying the accuracy, reliability and sufficiency of the body of evidence presented by the Commission in its role as public prosecutor. Since the Commission, when acting as an adjudicator, enjoys a certain margin of discretion with regard to technical or economic complex assessments, how thorough the review control is in antitrust cases also depends on the relevant competition provision enforced: hard-core violations do not require a complex economical assessment of their effects, because they are considered prohibited 'by object' according to Article 101(1) TFEU; whereas other infringements, such as the abuse of dominance, may require more detailed economic analysis. As a consequence, the standard of review applied to evidentiary issues is very close to that of a strict scrutiny in cartel cases,<sup>534</sup> whereas in other cases it might be variably less stringent.

Detecting the appropriate standard of review to be applied, however, is not so easy in the practice: the distinction of what must be considered fact, law and complex economic assessment is not always straightforward.<sup>535</sup> With regard to the standard of judicial review for factual evidence, it has been established that a full review is performed both for the review of the legality under the four grounds of Article 263(2) TFEU and under the unlimited jurisdiction under Article 31 of Regulation (EC) 1/2003 in relation to fines. The evidence test carried out by the General Court is aimed at checking 'meticulously the nature and import of the evidence taken into consideration by the Commission in the decision'.<sup>536</sup> As emphasised by Advocate-General Tizzano in a merger case,

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<sup>533</sup> For further details, refer to the Introduction, text accompanying fn. 126 to 138.

<sup>534</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 645. Note also that, for this reason, the analysis of the case law stemming from cartel cases is particularly relevant when analysing issues of evidence, and therefore it is significantly predominant in the current discourse.

<sup>535</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 112.

<sup>536</sup> *Società Italiana Vetro v Commission*, para. 95.

with regard to the finding of facts, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained. By contrast, with regard to the complex economic assessments made by the Commission, review by the Community judicature is necessarily more limited, since the latter has to respect the broad discretion inherent in that kind of assessment and may not substitute its own point of view for that of the body which is institutionally responsible for making those assessments.<sup>537</sup>

The standard of review applied to evidence tackles different aspects which may be generally traced back to four main rules of evidence: a) the principle of free evaluation of evidence; b) the sufficiency of evidence to meet the required standard of proof; c) the principle of presumption of innocence; d) the principle of contextual evaluation of evidence.<sup>538</sup> All of these issues have been tackled above, also in the national context.

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<sup>537</sup> C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, Opinion of AG Tizzano, para. 86.

<sup>538</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 645–652.



## **Chapter III – The Gathering of Evidence in EU Antitrust Litigation: Mechanisms for Cooperation and the Respect of Fundamental Rights**

Whilst a high degree of convergence has been attained with regard to the rules on evaluation of evidence by means of the signposting of the EU case law, the rules on the gathering of evidence spread from the European to the national level by influence of other factors. In other words, the procedural autonomy of the Member States in relation to the evaluation of evidence is limited by the principle of effectiveness, which, as set out above, erodes the leeway of autonomy of the States under different aspects (for instance, the use of presumptions, the probative value of evidence, the admissibility of evidence and so on). The procedural autonomy in relation to the gathering of evidence, while still aimed at preserving the *effet utile*, is more clearly limited by two other factors. The factors fostering convergence in the gathering of evidence for EU antitrust cases are: the mechanisms of cooperation for the taking and handling of evidence available within the EU, on the one hand; and the respect of those fundamental rights on which the gathering of evidence might have an impact, on the other. It will be shown how differences in procedural enforcement rules are found mainly in administrative procedures, whereas, as far as judicial proceedings are concerned, they tend to be overcome by the judicial review of the EU Courts and national courts (in the public enforcement) or by the statutory instruments available (in the private enforcement). In particular with regard to evidence, progressive convergence in the EU Member States is attained either by means of the recognition of fundamental rights of the investigated undertakings, which is compelled by the envisaged accession of the EU to the ECHR, or by the recognition of a full right to compensation promoted by the CJEU (for instance, ensuring the right to access antitrust files). On the front of cooperation, convergence is all the more important for the ‘free circulation of evidence’ envisaged by Article 12 of Regulation (EC) 1/2003. In this regard, statutory instruments play a major role. The cooperation regime within the ECN will be analysed, along with the existing tools for cooperation with regard to evidence in the private enforcement, namely the EU Evidence Regulation.

### **1) FREE MOVEMENT OF EVIDENCE IN EU ANTITRUST LAW: CROSS-BORDER INVESTIGATIONS AND COORDINATION BETWEEN JURISDICTIONS**

In the modernised and decentralised system created by of Regulation (EC) 1/2003, cooperation is provided for between the European Commission and national competition authorities or national judges on one hand (vertical cooperation), and, on the other, between NCAs of different Member States (horizontal cooperation). The functions of the European Competition Network have already been briefly illustrated in Chapter I,<sup>1</sup> but it is necessary here to specify how the cooperation is developed with specific regard to evidence. This paragraph is devoted to the illustration of the vertical and horizontal cooperation between competition authorities within the public enforcement.

Given the existing multi-level and national/supra-national framework of the competition law enforcement in Europe, substantial differences can be observed in the way each Member States implement EU rules, particularly with regard to the procedure, either in the investigation phase, i.e. the exercise of inspection powers and the gathering of evidence, or in the evaluation of evidence. The point where discrepancies are minimized is reached only when due process rights and other fundamental rights come into play, because, as it will be explained in the next paragraphs, all Member States are required to adhere to a common standard of fundamental rights, according to the interpretation provided by the ECtHR. In the phase of the assessment of evidence, however, the case law of the EU Courts is playing a major role in reaching harmonised solutions that pierce the shield of the procedural autonomy granted to each Member State, in the name of the principle of effectiveness. Conversely, the phase of the gathering of evidence and the cooperation between authorities with regard to evidence is still marked by strong diversity between the different systems, which need to be managed in order to strike the right balance between effectiveness and legitimacy.<sup>2</sup> More importantly, the full recognition of some fundamental rights may conflict with the principle of effectiveness and, therefore, in this phase, the polar star of *effet utile* falls foul of the process of convergence, instead of fostering it. For instance, the recognition of a right of access to the file may diminish the effectiveness of leniency programs; the recognition of a full right to non-self incrimination may hinder investigations; and so does the recognition of the professional legal privilege. The balance between convergence and procedural autonomy is therefore very delicate.

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<sup>1</sup> See Chapter I, para. 2 A) b).

<sup>2</sup> DAMIEN MB GERARD, 'Regulation 1/2003 (and Beyond): Balancing Effective Enforcement and Due Process in Cross-border Antitrust Investigations' in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2012) 368.

Since, to some extent, procedural differences between systems cannot be ruled out, cooperation between authorities at the European and national level raises complexities connected to the circulation of evidence gathered according to the rules of one system. More specifically, difficulties arise out with regard to the possibility for a NCA to make use of evidence collected abroad, which it would not have been possible to collect according to its procedural rules. To address such issues it is necessary to take into consideration the existing rules on cooperation between competition authorities, and to understand whether the objectives of almost unconditioned circulation of evidence set forth in Recital (16) of Regulation (EC) 1/2003<sup>3</sup> correspond to a real (and legitimate) state of affairs.

#### **A) The Binding Effect of Final Decisions of Competition Authorities within the European Competition Network**

With regard to the intersection between public and private enforcement and the cooperation between administrative and judicial authorities, it must be analysed, at the outset, the effect of final decisions of competition authorities in private antitrust actions. Such effect does not only have consequences on the interaction between NCAs (or the Commission) and national judges; but also on the interaction between national judges of different Member States and between different NCAs, or between national judges and NCAs. Naturally, that the burden of proof weighing upon private claimants will be considerably reduced, if they can rely on an administrative decision, which not only contains a declaratory judgment upon the infringement but also the probative results of the NCA's investigation.<sup>4</sup>

##### ***a) The Binding Effect of Commission's Decisions***

Article 16 of Regulation (EC) 1/2003 addresses the control over a uniform application of EU competition law. Its first paragraph provides that national courts cannot take decisions running counter decisions already adopted by the Commission on identical subject-matters. Such obligation of conformity extends also to decisions which potentially fall foul of a

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<sup>3</sup> Regulation (EC) 1/2003, Recital (16): 'Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. [...]'

<sup>4</sup> ALBERTO PERA and GIULIA CODACCI PISANELLI, 'Decisioni con impegni e private enforcement nel diritto antitrust' (2012) 1 Mercato concorrenza regole 69, 79.



decision contemplated by the Commission and may oblige the relevant national court to stay its proceedings. The second paragraph, which is devoted to the conformity of decisions between Commission and competition authorities, provides that they cannot decide contrariwise what already decided by the Commission on the same matter. The extent to which such bindingness operates has been limited by the restrictive interpretation given by the English House of Lords in *Inntrepreneur Pub Company v. Crehan*, according to which conflicting decisions are only those relating to exactly the same infringement by the same parties and not to similar ones, or to other violations in the same market.<sup>5</sup> Nevertheless, in that occasion the House of Lords also specified that the Commission's decision constitutes, before national judges, admissible evidence 'which, given the expertise of the Commission, may well be regarded by that court as highly persuasive.' Absent any rule of law imposing an estoppel on the English judge, he or she can well depart from the Commission's finding.<sup>6</sup>

Article 16 is thus aimed at avoiding conflicts between decisions of the Commission and of the judges of the 28 Member States in the parallel or subsequent application of EU antitrust law to the same case.<sup>7</sup> Commission's decisions have binding effect, and can be considered as a binding proof, by NCAs and judges deciding a follow-on action for damages. Such binding effect of Commission's decisions had already been recognised by the CJEU in *Masterfoods*,<sup>8</sup> and that principle has been applied on a voluntary basis by some Member States with regard to NCAs' decisions.

### ***b) The Binding Effect of NCAs' Decisions***

In its White Paper, the Commission's proposal was to take into consideration the possibility of endowing all NCAs' decisions with binding effect over national jurisdictions. According to the Commission, it was advisable that NCAs' decisions had a binding effect before every judge of the European Union: namely, to consider it as a proof of the alleged infringement.<sup>9</sup> The beneficial effects of bestowing probative value to NCAs' decisions in all Member States are multiple: not only to ensure legal certainty, but also to enhance the

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<sup>5</sup> *Inntrepreneur Pub Company and others v Crehan* [2006] UKHL 38, para. 64.

<sup>6</sup> *Inntrepreneur Pub Company and others v Crehan*, para. 69.

<sup>7</sup> ALDO FRIGNANI and STEFANIA BARIATTI (eds), *Disciplina della concorrenza nella UE* (Cedam 2012) 700.

<sup>8</sup> See Chapter I, fn. 31.

<sup>9</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final, 6 and Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules SEC (2008) 404, para. 144 ff.

implementation of a right to damages, by means of ensuring the circulation and recognition of decisions taken by national competition authorities. Such circulation of the final decisions has also the power of lightening considerably the burden of proof resting upon the private claimant in follow-on damages action. The more recent Proposal for a Directive, at Article 9, suggests that, in private antitrust actions under Article 101 and 102 TFEU or under national competition law, national courts should not take decisions running counter final infringement decisions taken by NCAs or review courts of a Member State. It must be noted that the Proposal does not solve the problem of the legal effect to be attributed to the NCA's decision. Namely, in a system which recognises the principle of free and unfettered evaluation of evidence, it is hard to imagine that the administrative decision may be considered as an irrebuttable proof, legally binding for the civil judge. Such an interpretation would entail two serious risks: on the one hand, the risk of producing mechanically binding evidence which would hinder the search for the truth in follow-on proceedings; on the other, the risk of transforming the NCA in a producer of ready-made evidence for use in private antitrust actions. To avoid such adverse pitfalls, Article 9 of the Proposal for a Directive should be read as providing for a binding effect over the facts assessed by the NCA and not on their juridical characterisation, thus leaving a margin of appreciation to the national civil judge to re-qualify the elements of fact (not anymore questionable) according to his or her own discretion. The other issue that the Proposal for a Directive does not address (nor it could have, given that it deals with damages actions exclusively) is that of the status to be attributed for recognition of a decision of a NCA by the NCA of a different Member State. As a consequence, such a decision might be taken into consideration as providing evidence of the facts, but the administrative decision of the NCA does not produce any binding legal effect for other NCAs, pursuant to a strictly territorial effect of administrative decisions. A practice of *de facto* recognition of decisions issued by other NCAs is, however, considered to exist.<sup>10</sup> A 'Masterfoods effect', according to which national courts are bound by decisions taken by a foreign NCA, is recognised, for the time being, only in Germany<sup>11</sup> and Sweden.<sup>12</sup>

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<sup>10</sup> JÜRGEN BASEDOW, 'Recognition of Foreign Decisions within the European Competition Network' in *International Antitrust Litigation - Conflict of Laws and Coordination* (Hart Publishing 2011) 395–396.

<sup>11</sup> In Germany, decisions of the Bundeskartellamt, and of all other NCAs, are statutorily binding in damages cases, according to Section 33(4) of the German Act Against Restraints of Competition: 'Where damages are claimed for an infringement of a provision of this Act, or of Article 81 or 81 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority – or a court acting as such – in another Member State of the European Community.'

In England, according to Section 58A of the Competition Act 1998, as amended by Section 20 of the Enterprise Act 2002, findings of infringements of UK or EU competition law by the OFT and the CAT on appeal are binding for English judges, when deciding upon damages actions, once the time of any appeal has expired or any appeal has been unsuccessful. With respect to the CAT, Section 18 of the Enterprise Act 2002 introduced a new Section 47A into the Competition Act 1998, which provides that the CAT is bound by any EU competition law infringement decisions taken by the OFT or the European Commission, once the time for appealing has expired or if any appeal made has been unsuccessful.<sup>13</sup> As regards OFT's decisions, both the High Court and the CAT must uphold the OFT's finding of facts, unless they direct otherwise (in the sense that they make use of their margin of appreciation in order to expressly depart from the decision taken by the regulator),<sup>14</sup> and the findings of infringement, unless they have been appealed. For a definition of what constitutes a finding of fact, reference must be made to *Enron Coal Services v English Welsh and Scottish Railway*, where Lord Justice Lloyd clarified that the party seeking to rely on a finding of fact must demonstrate that the regulator has made a clearly identifiable finding of fact to a given effect. It is not sufficient, for that party, to point to passages in the decision from which a finding of fact might arguably be inferred.<sup>15</sup>

In Italy, as seen beforehand when talking about the probative value of evidence, there is no express statutory provision which attributes binding effect to administrative decisions of the AGCM or other NCA. Nonetheless, administrative decisions are considered as 'prova privilegiata' by the Italian judges, although subject to the unfettered discretion of the civil judge, and seems to operate as a rebuttable presumption in favour of the claimant.<sup>16</sup> According to the correct interpretation, however, the civil judge should be allowed to depart from the qualification of the facts proposed by the competition authority, especially since no probative value is statutorily assigned to that evidence. A 'prova privilegiata' is not different from any other evidence, which, as such, should be subject to the free and unfettered evaluation of the judge.

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<sup>12</sup> DANOV, BECKER, and BEAUMONT, *Cross-Border EU Competition Law Actions* 4.

<sup>13</sup> GEORGE CUMMING and MIRJAM FREUDENTHAL, *Civil Procedure in EU Competition Cases before the English and Dutch Courts*, vol. 42 (Kluwer Law International 2010), International Competition Law Series 219.

<sup>14</sup> Competition Act 1998, Section 58(1).

<sup>15</sup> *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd*, para. 56.

<sup>16</sup> Court of Cassation *Tommasselli v Soc. Axa Assicurazioni*, 4 March 2013, decision no. 5327 (2013) II Foro Italiano, I, 1520 (Article 2 of Law 287/1990); Court of Cassation, *Soc. Allianz v Palladino*, 20 June 2011, decision no. 13486 (2011) II Foro Italiano I 2674 ff. (Article 2 of Law 287/1990).

With regard to the provision contained in the Proposal for a Directive in this respect, concerns have been raised also with regard to the level of protection of procedural safeguard, which might be played down by the recognition process. In particular, it has been noted how inconsistent it appears to require, for the recognition of a judgment, under Article 34(2) of Brussels I Regulation that the defendants are served with the document which instituted the proceedings in sufficient time and in such a way as to enable them to arrange for their defence, and not to require a similar condition for the recognition of an administrative decision, which is all the more likely to tamper with the rights of defence of the individual.<sup>17</sup>

### *c) Circulation of Decisions from the Public to the Private Enforcement*

Due to the cooperation within the ECN, decisions can circulate quite efficiently and swiftly from the public enforcement to the private enforcement in most Member States. As mentioned before, this mechanism, however useful, is bound to raise tensions in relation to the nature of the proceedings, and, in particular, the adequacy of the safeguards offered by the administrative procedure for the formation of proof which will be evaluated in civil adversarial proceedings. The transposition of the already evaluated evidence from the administrative procedure to the civil proceedings and the prevailing effect of the administrative decision undoubtedly poses serious concerns about the neutrality of the administrative authority and the protection of the rights of defence.<sup>18</sup> Particular attention, in this context, must be devoted to ensuring the highest level of protection of the rights of the investigated undertaking in the administrative procedure, also with a view to the possibility that from that procedure will stem civil proceedings, where the claimant will enjoy a considerably more favourable position. As *Otis* seems to suggest,<sup>19</sup> contrary to the Proposal for a Directive, the defendant should be always be allowed to prove that no direct causal link exists between the competition law infringement and the loss suffered by the claimant.

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<sup>17</sup> BASEDOW, 'Recognition of Foreign Decisions within the European Competition Network' 397.

<sup>18</sup> MUNARI, 'Antitrust Enforcement after the Entry into Force of Regulation (EC) 1/2003: the Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts' 122.

<sup>19</sup> Case C-199/11 *Europese Gemeenschap v Otis NV and others*, not yet reported, para. 65.

## **B) Cooperation between European Commission, National Competition Authorities and National Courts as regards Evidence**

Regulation (EC) 1/2003 provides for a number of ways for the exchange of evidence and information between authorities. Its Chapter IV, which is devoted to Cooperation, starts with Article 11 which regulates the transmission of documents from the Commission to the national competition authorities and from the latter to the Commission. With regard to the horizontal cooperation, Article 22(1) regulates cooperation between NCAs in the gathering of evidence, whereas Article 12 regulates cooperation between NCAs after evidence has already been collected, either before the case was reallocated to a different competition authority or while helping a different competition authority in its investigations.<sup>20</sup> These two are the most important management rules with regard to cooperation, and by themselves constitutes the cooperation mechanisms for cross-border antitrust investigations. As already mentioned, the EU public enforcement of competition law inlays the ECN which, in the scheme of a decentralised application of competition law, gathers all national competition authorities and manages their exchange of information for use in evidence in national proceedings. A few more provisions in this regard have been produced by the ECN and are contained in the Network Notice.<sup>21</sup>

Article 22 of Regulation (EC) 1/2003 provides that national competition authorities may be asked to carry out inspections or other investigations under their national law ‘on behalf and for the account of the competition authority of another Member State’. In the same horizontal dimension, Article 12 provides that:

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

<sup>20</sup> CHALMERS, HADJIEMMANUIL, MONTI, and TOMKINS, *European Union law* 965.

<sup>21</sup> See Network Notice, mentioned at fn. 33.

Paragraph 3 of the same Article regulates such exchange of information, according to the use for which the shared evidence will be transmitted. If the use of evidence is purported to the imposition of sanctions on natural persons, precautionary measures are taken to avoid a too broad exchange of information, whereas evidence for the imposition of sanctions on legal persons is more liberally administered. To the end of imposing sanctions on physical persons, evidence can be exchanged only if:

[...] — the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

— the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

The reason why these safeguards are adopted can be found in that some Member States (for instance, the United Kingdom) impose criminal sanctions for national competition law infringements.<sup>22</sup> The same wariness is not applied when evidence is used by the receiving authority to impose sanctions on legal persons, for whose application it is sufficient that the exchanged evidence is collected in compliance with the national law of the transmitting authority, provided that evidence is used for the purpose for which it has been collected. As obvious, but restated by the Network Notice, Article 12 takes precedence over any contrary national laws of the Member States.<sup>23</sup> To determine whether evidence was gathered lawfully, the transmitting authority must have acted in compliance with its national law.<sup>24</sup> When it transmits evidence whose gathering was contested or may still be, the transmitting authority must advise the receiving authority about that.<sup>25</sup> Where NCAs act on behalf of another NCA, they act pursuant to their own rules of procedure and can only display their

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<sup>22</sup> CHALMERS, HADJIEMMANUIL, MONTI, and TOMKINS, *European Union law* 965. See, for further details, Introduction, para. 5.

<sup>23</sup> Network Notice, para. 27. Compare Regulation (EC) 1/2003, Recital (16): '[...] When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent.'

<sup>24</sup> Network Notice, para. 27.

<sup>25</sup> Network Notice, para. 27.

own powers of investigation.<sup>26</sup> This is confirmed by the provisions contained in the Network Notice, namely by paragraphs 27 to 29. The only other relevant provision included in the Network Notice appears to be the one of paragraph 4, which provides that NCA remains fully responsible for ensuring due process in the cases it deals with.<sup>27</sup> Evidence exchanged through the Network can however be always used as intelligence, when it cannot be used in evidence by the receiving authority.<sup>28</sup>

In the context of vertical cooperation for the private enforcement, Article 15 of Regulation (EC) 1/2003 provides that national judges may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of Articles 101 and 102 TFEU. Coordination is ensured also by means of the transmission of copy of judgments adopted by national courts to the Commission and of observations by national competition authorities or the Commission to national courts. Article 22(2) obliges NCAs to undertake inspections at the request of the Commission, acting in compliance with their national laws.

Such pyramidal system ensures the rapid circulation of information and evidence, to enable a more effective enforcement of the EU competition law at every level (European and national). The exchange of information is based on the reciprocal trust that each Member States have in the fairness and procedural guarantees offered by the others' legal system. Nonetheless, from the point of view of the protection of fundamental rights, the circulation of evidence, gathered by a different authority outside the context of the proceedings in which it will be used, may create issues about the compatibility with the rule of law and fundamental rights protection.<sup>29</sup> One major source of concerns is represented by the fact that the circulating evidence may not only be evidence in its rough, unevaluated state, but also the assessment of that evidence.<sup>30</sup> If so interpreted, the Regulation would open the doors to a flow of proof (in the sense of evaluated evidence) across the Member States. This phenomenon, however compatible with a speedy and efficient enforcement of competition at the EU level, would need to be subject to particular guarantees in order to

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<sup>26</sup> Network Notice, para. 29.

<sup>27</sup> Network Notice, para. 4.

<sup>28</sup> WOUTER P.J. WILS, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189–213, 210.

<sup>29</sup> MUNARI, 'Antitrust Enforcement after the Entry into Force of Regulation (EC) 1/2003: the Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts' 117.

<sup>30</sup> ROBERTO BONATTI, 'La libera circolazione della prova nel nuovo regolamento europeo sulla concorrenza' [2006] *Rivista trimestrale di diritto e procedura civile* 193–214, 203.



bring it into line with the European standard of protection of fundamental rights on one hand, and, on the other, with the respect of the procedural autonomy principle which preserves the authority of Member States in that field. According to some commentators, the wording of Article 12, which allows exchanging ‘any matter of fact or of law, including confidential information’<sup>31</sup> refers not only to evidence in its rough state, but also to its evaluation pursuant to the law.<sup>32</sup> Although detaching the two elements is in certain occasions extremely difficult, this opinion cannot be shared. First of all, it is based exclusively on the wording of Article 12, which is not alone decisive, especially in the English version, in order to allow such broad interpretation. The second argument is that the exclusive circulation of matters of national law, not accompanied by factual elements, for the purpose of applying Article 101 and 102 TFEU, would be irrelevant, given the direct applicability of EU competition law by national authorities and its consequent harmonized interpretation.<sup>33</sup> This interpretation is not convincing. The expression ‘matter of law’ may refer to information regarding the national procedural laws under which the specific evidence was collected, which may help in providing the context to evaluate it. In addition, for instance, pursuant to Article 12(3), the receiving authority may need to verify the sanctions and guarantees provided for by the national law of the transmitting authority. The approach according to which the expression ‘matter of fact or of law’ must be interpreted more as a hendiadys than as a dyad seems not correct. This, however, does not mean that risks connected to the existence of a freedom of movement of *proof* are completely averted. Analogous to the circulation of the assessment of evidence, for example, is the binding effect of the administrative assessment in the national civil proceedings, or the high probative value attributed to that assessment. The result is that the evaluation of factual elements circulates across Europe, guiding the assessment of evidence in an indirect manner, from the public to the private enforcement. Such an approach, according to which not only the rough factual elements but also the appreciation and evaluation attached to it can circulate, leads to conclude that the appreciation and evaluation of the receiving adjudicator should not run counter that of the transmitting competition

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<sup>31</sup> The French version adopts the expression ‘tout élément de fait ou de droit’; the Italian version ‘qualsiasi elemento di fatto o di diritto’; the German version ‘einander tatsächliche oder rechtliche Umstände’.

<sup>32</sup> BONATTI, ‘La libera circolazione della prova nel nuovo regolamento europeo sulla concorrenza’ 204.

<sup>33</sup> BONATTI, ‘La libera circolazione della prova nel nuovo regolamento europeo sulla concorrenza’ 204, fn. 25.

authority. It would, thus, completely elide confrontation and the adversarial nature of the proceedings.<sup>34</sup>

Against this backdrop, the legislative limits provided for by Article 12 of the Regulation do not appear to be adequate. On the one hand, the limit *ratione materiae* according to which exchanged information can be used in evidence only for the subject-matter for which it was collected, i.e. the purpose of applying Articles 101 and 102 TFEU, does not ensure that the information transmitted is reliable or the assessment accurately performed. On the other hand, the subjective limit, which provides that for the imposition of sanctions on individuals the legal system of the receiving authority must make provision for similar sanctions for individuals constitutes a very formal limit, which does not really ensure a substantial equal level of protection. Such an analysis is nonetheless performed at a later stage, if the two systems do not foresee similar sanctions.<sup>35</sup> The risk of abuse is real, if due consideration to fundamental rights is not ensured.<sup>36</sup>

### C) The EU Evidence Regulation

In the private enforcement, cooperation with regard to evidence is mainly attained by means of Regulation (EC) 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. The EU Evidence Regulation entered into force on 1 July 2001 and is applicable to EU antitrust cases. The primary objective of this instrument is to simplify and accelerate the taking of evidence in the internal market.<sup>37</sup> In order to facilitate the taking of evidence in a different Member State, the Regulation allows the court of a Member State<sup>38</sup> to take evidence directly in another Member State or to request transmission and execution of requests to the competent court of another Member State.<sup>39</sup> Requests must be made to obtain evidence intended for use in judicial proceedings, commenced or contemplated.<sup>40</sup>

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<sup>34</sup> PAOLO BIAVATI, 'Il diritto processuale e la tutela dei diritti in materia di concorrenza' [2007] Rivista trimestrale di diritto e procedura civile 97, 108.

<sup>35</sup> BONATTI, 'La libera circolazione della prova nel nuovo regolamento europeo sulla concorrenza' 204-207.

<sup>36</sup> See BIAVATI, 'Il diritto processuale e la tutela dei diritti in materia di concorrenza' 114-117, who advocates for the allocation of antitrust cases before Italian civil, rather administrative, judges.

<sup>37</sup> Regulation (EC) 1206/2001, Recital (2).

<sup>38</sup> The EU Evidence Regulation is not applicable to Denmark, compare Regulation (EC) 1206/2001, Article 1(3).

<sup>39</sup> Regulation (EC) 1206/2001, Article 1(1).

<sup>40</sup> Regulation (EC) 1206/2001, Article 1(3).

With regard to the applicability of the EU Evidence Regulation, some authors<sup>41</sup> have argued that its use might be extended to procedure involving regulatory authorities, i.e. to the public enforcement. In particular, it has been suggested that the Regulation could apply to procedures conducted by NCAs, when the competition authority exercises a first instance competence against which an appeal can be lodged before a judicial court. Given that the cooperation with regard to evidence in the public enforcement falls under the scope of Regulation (EC) 1/2003, applicability of the EU Evidence Regulation to those matters results in a useless duplication. The wording of the EU Evidence Regulation ('judicial proceedings', 'court') supports the idea that its scope is limited to disputes opposing private parties before judicial courts<sup>42</sup> and, in competition matters, to private enforcement.<sup>43</sup>

From the formulation of Article 4, the EU Evidence Regulation focuses on two main types of evidence: testimony and the inspection of documents or objects. The Practice Guide for the EU Evidence Regulation drawn up by the Commission Services in consultation with the European Judicial Network in Civil and Commercial Matters specified that, in the lack of a definition of the term 'evidence', it includes 'hearings of witnesses of fact, of the parties, of experts, the production of documents, verifications, establishment of facts, expertise on family or child welfare'.<sup>44</sup> Requests for the production of documents falls within the scope of the EU Evidence Regulation.<sup>45</sup> The Council of the European Union, however, in its Declaration accompanying the Regulation, has specified that pre-trial disclosure is expressly excluded from the scope of the Regulation.<sup>46</sup> This exclusion, in line with the objective of avoiding the risk of 'fishing expeditions', has led some commentators

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<sup>41</sup> THOMAS HABU GROUD, 'Coopération entre les juridictions des Etats membres dans le domaine de l'obtention des preuves en matière civile ou commerciale', *Jurisclasseur Droit International* 22.

It has been also submitted that requests to foreign NCAs for taking evidence in support of private proceedings could be made under the EU Evidence Regulation, see DANOV, BECKER, and BEAUMONT, *Cross-Border EU Competition Law Actions* 139.

<sup>42</sup> ARNAUD NUYTS and JOE SEPULCHRE, 'Taking of Evidence in the European Union under EC Regulation 1206/2001' (2004) 5 *Business Law International* 305, 310–311.

<sup>43</sup> FRANCO DE STEFANO, *Gli strumenti di prova e la nuova testimonianza scritta* (Giuffrè 2009) 191. See, also, IDOT, 'Access to Evidence and Files of Competition Authorities' 265: 'If the action is brought, not before a competition authority but before an ordinary court, with the end purpose of examining the validity of a legal document or compensation for harm caused, the answer [to the question of whether Regulation (EC) 1206/2001 may cover actions based on the infringements of Articles 101 and 102 TFEU] is assuredly affirmative.'

<sup>44</sup> Practice Guide for the Application of the Regulation on the Taking of Evidence, para 8.

<sup>45</sup> NUYTS and SEPULCHRE, 'Taking of Evidence in the European Union under EC Regulation 1206/2001' 312.

<sup>46</sup> Council of the European Union, 'Declaration to be included in the minutes of the Council that will adopt this Regulation - Annex III - Note of the Presidency to the Coreper', May 17, 2001.

to conclude that all other forms of disclosure are also ruled out.<sup>47</sup> It has also been noted that it would be difficult in the practice to use the Regulation in order to obtain the *production* of a document, in absence of suitable standard forms and guidance. Whilst this latter observation is not conclusive, the express exclusion of pre-trial disclosure could be read in the light of a general propensity of EU instruments for civil law procedural devices and in continuity with the reservation provided for under Article 23 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

To shed some light on the applicability of the EU Evidence Regulation, the Opinion of Advocate-General Kokott in *Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Ltd*<sup>48</sup> is useful. In that case, a reference for preliminary ruling was addressed to the CJEU as to whether a request from an Italian court to the English High Court fell within the scope of the EU Evidence Regulation. Mr. Tedesco claimed that RWO Marine Equipment Ltd, a UK company, had infringed his patent, protecting a harness system he had invented. Mr. Tedesco obtained by the Italian court an order requesting the English court to perform a description of RWO's product at its premises, specifying that the description was to encompass also 'other evidence of the contested conduct, such as by way of example, however, not exhaustively: invoices, delivery notes, payment orders, commercial offer letters, advertising material, computer archive data and customs documents'.<sup>49</sup> The question for the CJEU was whether such search and seizure order was a 'taking of evidence' for the purposes of the EU Evidence Regulation. According to the Advocate-General, the order for the description of goods issued by the Italian judge constituted a measure for the taking of evidence under the EU Evidence Regulation that the English court must execute, unless grounds for refusal exist. Objections to the application of the Regulation stemmed from the fact that, according to the United Kingdom Government, the taking of evidence must be distinguished from investigatory measures prior to the actual act of obtaining evidence. In this regard, the Advocate-General specified that the Declaration contained in the Council minutes may be taken into account in the interpretation

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<sup>47</sup> PAOLO BIAVATI, 'Civil law e common law sullo sfondo del diritto dell'Unione Europea: un incontro alla pari?' (2009) in 'Due iceberg a confronto: le derive di common law e civil law' Rivista trimestrale di diritto e procedura civile 135, 137-138.

<sup>48</sup> Case C-175/06 *Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* [2007] ECR I-07929.

<sup>49</sup> Case C-175/06 *Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* [2007] ECR I-07929, Opinion of AG Kokott, para 16. The CJEU did not pronounce itself on the subject-matter of the dispute, because the referring Italian court terminated the case and, as a result of that, the questions referred became devoid of purpose.

of a legal act inasmuch as its content is referred to also in the wording of the act and if it clarifies a general concept. In the case of the EU Evidence Regulation, the statement indicated that evidence must be described with a sufficient degree of precision that the link to the proceedings commenced or contemplated is evident and that the judicial cooperation may relate only to the items themselves which are capable of constituting proof and not to circumstances which are linked only indirectly to the judicial proceedings.<sup>50</sup> Thus, in order to prevent excessive requests for disclosure (the so-called ‘fishing expeditions’), a distinction must be drawn between disclosure of documents leading to the *identification* of items which are potentially capable of serving as evidence, but not in themselves serving an evidential function in the proceedings and disclosure aimed at the *production* of documents, described with precision and directly linked to the subject-matter of the dispute. Whilst the first type of disclosure, the so-called ‘train of enquiry’, is inadmissible; the second type of disclosure is perfectly admissible under the EU Evidence Regulation.<sup>51</sup>

Recently, the English Court of Appeal was required to decide upon three appeals in two separate follow-on actions in *Secretary of State for Health v Servier Laboratories Limited and National Grid Electricity Transmission plc v ABB Limited*.<sup>52</sup> In the *Servier* case, the French company was accused of engaging in anti-competitive agreements with generic drug manufacturers in order to delay their entry into the market of Perindopril, a drug used mainly in the treatment of hypertension and heart failure. In the *ABB Limited* case, the French defendant was guilty of participating to a cartel in the gas insulated switchgear market. The French appellants in the two appeals sought to discharge the orders for disclosure and inspection of documents on grounds that compliance with those interlocutory orders would have put them in breach of the French ‘blocking’ stature. Under French Law 68-678 it is prohibited to natural and legal persons to disclose documents or information of an economic, commercial, industrial, financial, or technical nature, with a view to establishing evidence in foreign judicial or administrative proceedings.<sup>53</sup> Criminal sanctions are imposed for any breach. The appellants argued that the English Court should

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<sup>50</sup> *Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Ltd*, Opinion of AG Kokott, paras. 69–70.

<sup>51</sup> *Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Ltd*, Opinion of AG Kokott, paras. 72–73.

<sup>52</sup> *Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Ltd* [2013] EWCA Civ 1234.

<sup>53</sup> Loi no. 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d’ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères, Article 1bis.

have resorted to the EU Evidence Regulation for the taking of that evidence, because the orders for disclosure involved a violation of French law, and therefore affected ‘the powers of the Member State’, according to the interpretation of the CJEU in *ProRail BV v Xpedys NV*.<sup>54</sup> The Court of Appeal dismissed the appeals, holding that matters such as disclosure are governed by the *lex fori*, i.e. English law, to which the French defendants had submitted, and that the risk of prosecution under French law had been thoroughly taken into account by the High Court. Due to the procedural nature of the orders, regardless of whether compliance with those orders is illegal under French law, the English court has jurisdiction to make them, in its discretion, without resorting to the EU Evidence Regulation.<sup>55</sup> Although, according to the Court of Appeal, the case did not entail any application of the EU Evidence Regulation, to the purposes of the present discourse one of the arguments arisen is particularly interesting. With regard to the applicability of the EU Evidence Regulation, Lord Justice Rimer stated that:

[N]othing in the regulation was intended to limit, or reduce, the options already available to Member States in the way of obtaining evidence or disclosure from the parties to the litigation before it. If, therefore, before the introduction of the regulation, it was lawful for a Member State, applying the *lex fori*, to make orders [for disclosure], it was not the purpose of the regulation to deprive Member States of such judicial power.<sup>56</sup>

According to the Court of Appeal, and pursuant to the interpretation of the EU Courts in *Lippens v Kortekas AAS*,<sup>57</sup> the EU Evidence Regulation is not the exclusive means by which a court in one Member State should seek to obtain information and evidence located in another Member State. A national court is entitled to use its national procedural law, for instance, to summon as a witness a party residing in another State.<sup>58</sup> An order for ordinary disclosure does not fall within the EU Evidence Regulation and it is a matter for the *lex fori*. The case, however, is useful to show how increasing multi-jurisdictional actions may arise complexities, which the EU instruments cannot solve unless in coordination with the

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<sup>54</sup> Case C-332/11 *ProRail BV v Xpedys NV and Others*, not yet reported, paras. 47–48.

<sup>55</sup> *Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Ltd*, paras. 99 and 117.

<sup>56</sup> *Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Ltd*, para. 101.

<sup>57</sup> C-170/11 *Maurice Robert Josse Marie Ghislain Lippens and others v Hendrikus Cornelis Kortekaas and Others*, not yet reported, para. 39. See also *ProRail BV v Xpedys NV and others*, para. 54.

<sup>58</sup> *Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Ltd*, para. 113.



national systems. This point does not seem to have been satisfactorily addressed by the Proposal for a Directive.<sup>59</sup>

It appears that the EU Evidence Regulation guarantees a sufficient degree of protection of fundamental rights. Article 10(2) provides that the requested court shall execute the request in accordance with the law of its Member State. The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, but the requested court shall not comply with such a requirement if that procedure is incompatible with its national law or if major practical difficulties exist.<sup>60</sup> In addition, evidence can be taken directly only if the requested measure does not violate fundamental principles of law in the requested Member State.<sup>61</sup> Interferences of a more serious nature, like the use of coercive measures affecting the rights of the person concerned, are determined exclusively in accordance with the *lex fori* of the requested court, under Article 13.

It seems that the use of the EU Evidence Regulation in the private enforcement of competition law fosters convergence with the mechanisms of cooperation provided for the public enforcement. In particular, some symmetry with the provisions contained in Regulation (EC) 1/2003 for the cooperation between NCAs, namely with Articles 12 and 22, can be detected. On one hand, Article 22, read in conjunction with the Network Notice,<sup>62</sup> provides that NCAs must conduct inspections and fact-finding according to their own rules of procedure, and under their own powers of investigation. On the other hand, the Network Notice establishes that it is for the NCA handling the case, and deciding on its merits, to ensure due process, according to the standards provided by its own national law.<sup>63</sup> This ‘cumulative approach’, according to which the law of the requesting Member State must govern the compliance with due process rights, and that of the requested Member State must govern the actual taking of evidence, is the most suitable to manage diversity whilst ensuring consistency.

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<sup>59</sup> LAURA C. ATLEE, ‘The English Unblocking of the French “Blocking Statute”’: Companies are Ordered to Disclose Information that Claimants Requested in Follow-On Civil Cases’ (Steptoe & Johnson LLP, 8 November 2013) <<http://www.steptoelaw.com/publications-9151.html>> accessed 6 December 2013.

<sup>60</sup> Regulation (EC) 1206/2001, Article 10(3).

<sup>61</sup> See, for the direct taking of evidence, Regulation (EC) 1206/2001, Article 17(5)(c).

<sup>62</sup> Network Notice, para. 29.

<sup>63</sup> Network Notice, para. 4.



## 2) CONVERGENCE OF FUNDAMENTAL RIGHTS STANDARDS IN THE GATHERING OF EVIDENCE

As noted above, when illustrating the allocation of the burden of proof and the recent wide application of factual evidential presumptions at the EU level, the best evidence is often found in the sphere of activity of the alleged infringer. In order to investigate anti-competitive infringements and to gather evidence of the infringement, the European Commission and the NCAs usually conduct inquiry through three fashions: directly, by means of inspections, dawn raids and the use of physical force; or indirectly, either by means of the deterring effect of sanctions for the refusal to cooperate, or by means of the persuading effect of leniency programmes. It is a widespread opinion that an efficient enforcement of antitrust law should deploy all these methods.<sup>64</sup>

Whilst defining the investigatory powers of NCAs is a matter for national law, the twin principles of equivalence and effectiveness must be respected at all times. As a result, Member States must ensure that the enforcement of EU competition law by their NCAs and courts is conducted in an analogous and as effective way as that of the national competition law. When the Commission and the NCAs make use of investigatory powers in order to gather evidence to make a case before issuing their administrative decisions, they necessarily impinge on a number of fundamental rights usually protected both at the European and the national level. For stand-alone actions in the private enforcement, the compliance with fundamental rights is less strongly felt, due to, of course, the less invasive powers of the private individual in the gathering of evidence. Whilst the risk of violating a number of fundamental rights arise out of the gathering of evidence in the public enforcement; for the private enforcement the main risks may arise out of the denial of access to the competition authority's file and out of *inter partes* disclosure mechanisms, which will be examined.

With particular regard to the rights guaranteed by the ECHR, it is crucial to recall that, after Lisbon, Article 6(2) TEU provides for the accession of the European Union to the ECHR, whilst Article 6(3) TEU provides that fundamental rights, as guaranteed by the ECtHR, and therefore as interpreted by the case law produced by this latter, and as they result from the constitutional traditions common to the EU Member States, qualify as

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<sup>64</sup> WOUTER P.J. WILS, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: the Interplay between European and National Legislation and Case-law' (2006) 29 World Competition 3, 4.

‘general principles of the Union’s law’. Pending the accession, the relationship between fundamental rights protection afforded by the EU and the ECtHR will be governed by the case law.<sup>65</sup> Although the principle of equivalent protection<sup>66</sup> had been established since *M. & Co. v Federal Republic of Germany*<sup>67</sup> and *Bosphorus v Ireland*,<sup>68</sup> it is a matter of debate whether the Commission is bound, strictly speaking, in the exercise of its power of investigations, by the respect of the fundamental rights of the ECHR as interpreted by the ECtHR or as interpreted by the Court of Justice.<sup>69</sup> This debate is fuelled by the approach adopted by the ECtHR, which seems to have passed

from an overall attitude of trust towards the degree of protection provided at Community level to an increasing willingness to hold the Contracting States to account for allegations that Convention rights were not effectively protected in the EC context.<sup>70</sup>

This divergence has no significant impact on the national enforcement of EU competition law, because, on one hand, decisions of NCAs may be challenged under the ECHR, and, on the other, national judges in private antitrust cases are bound to apply ECHR provisions as per the interpretation given by the ECtHR, given that all Member States are signatories of the Convention.<sup>71</sup> Moreover, national judges can go beyond the interpretation provided by

<sup>65</sup> PAUL CRAIG, ‘EU Accession to the ECHR: Competence, Procedure and Substance’ (2013) 36 *Fordham International Law Journal* 1114, 1135.

<sup>66</sup> For an exhaustive examination of this principle, see PAUL DE HERT and FISNIK KORENICA, ‘The Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union’s Accession to the European Convention on Human Rights’ (2012) 13 *German Law Journal* 874–895.

<sup>67</sup> *M. & Co. v Federal Republic of Germany*, European Commission of Human Rights, Decision on admissibility no. 13258/87, 9 February 1990.

<sup>68</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, 45036/98 [2006] 42 EHRR 1.

<sup>69</sup> On the relationship between the CJEU and the ECtHR, see SIONAIDH DOUGLAS-SCOTT, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ (2006) 43 *Common Market Law Review* 629, 665, who argues: ‘The current European human right *acquis* leaves room for possibilities behind the binary poles of certainty and chaos [...] not the constricting “Either/Or” of a formal mechanistic jurisprudence, but the “Both/And” of a less clockwork-like world.’ Compare also the more recent CRAIG, ‘EU Accession to the ECHR: Competence, Procedure and Substance’, 1141–1142. The Author highlights how ‘[t]he ECJ has always regarded the ECHR as an important source of inspiration for its decisions on fundamental rights [...]’. Note, however, that in the recent preliminary ruling C-617/10 *Åklagaren v Hans Åkerberg Fransson*, not yet reported, para. 44, where the Court has restated that the ECHR ‘does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.’

<sup>70</sup> ANDREANGELI, *EU Competition Enforcement and Human Rights* 10.

<sup>71</sup> It must be noted that Protocol no. 16 to the ECHR, opened for signature in October 2013 and requiring ten signatures for its entry into force, provides that highest courts and tribunals of the Contracting Parties shall be empowered to request the Court to give (non-binding) advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR and the Protocols.

the Strasbourg Court, extending the reading of the relevant Article to different situations.<sup>72</sup> It is evident, however, that Member States comply with common fundamental right standards in their own ways,<sup>73</sup> and that therefore remnants of inconsistency may be found in the due process guarantees for each individual case, because each State designs its law enforcement system autonomously in compliance with the common standard.<sup>74</sup> The above stated, the analysis will focus on the standard of due process set by the EU Courts for proceedings before the European Commission, because in such context a tension between the case law of the ECHR and the CJEU can be more easily appreciated. In antitrust matters, as it will be showed below, the Luxembourg courts have frequently been unwilling to apply Strasbourg case law and the case law of the former was actually at odds with the ECtHR interpretation.<sup>75</sup> Only the accession of the EU to the ECHR envisaged by Article 6 TEU will make all cases fall under the direct jurisdiction of the ECtHR, with the consequence that this latter Court will get the last word on matters involving EU law and ECHR rights.<sup>76</sup> Even for actions taken on grounds of the Charter of Fundamental Rights, the polar star will be the case law of the ECtHR, due to the acknowledgment of primacy contained in Article 52(3) of the Charter, and only wider interpretations will be acceptable.<sup>77</sup>

With regard to the rules of evidence, a conflict with fundamental rights may have two outcomes: i) *ex ante*, existing evidence cannot be collected by the Commission or by

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<sup>72</sup> WILS, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', 208, fn. 88.

<sup>73</sup> For the divergence between the procedure before the Commission and before the Polish competition authority with regard to the guarantees of the presumption of innocence, the privilege against self-incrimination, the legal professional privilege, and the proportionality of inspections, see MACIEJ BERNATT, 'Convergence of Procedural Standards in the European Competition Proceedings' (2012) 8 Competition Law Review 255, 264-265.

<sup>74</sup> See, now, Protocol no. 15 amending the ECHR and introducing an express reference to the principle of subsidiarity and the doctrine of the margin of appreciation. The Protocol states that the Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and that they, in doing so, enjoy a margin of appreciation, subject to the supervisory jurisdiction of the ECtHR. See, also, GERARD, 'Regulation 1/2003 (and Beyond): Balancing Effective Enforcement and Due Process in Cross-border Antitrust Investigations' 375. For the margin of appreciation of the Member States in general, see HOWARD C. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996).

<sup>75</sup> DOUGLAS-SCOTT, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' 643-644.

<sup>76</sup> CRAIG, 'EU Accession to the ECHR: Competence, Procedure and Substance' 1146-1147.

<sup>77</sup> The requirement to implement the ECHR in the Member States is reinforced by the provision contained by Article 52(3) of the Charter of Fundamental Rights of the EU, which is granted the same legal value as the Treaties: 'In so far as this Charter contains right which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down in the said Convention. This provision shall not prevent Union law providing more extensive protection.'

the NCAs, because its gathering would result in an infringement of a fundamental right; ii) *ex post*, collected evidence is considered inadmissible at the proceedings, because its gathering violated a fundamental right.<sup>78</sup> Such limits significantly constrain the exercise of the power of investigation of the competition authorities, taking the form of rules of exclusion of evidence which ultimately guide the fact-finding process. By means of the process of review, the EU Courts have ‘generated a body of evidential rules’ with regard to the right to withhold information or to have information excluded from the proceedings.<sup>79</sup> In *Roquette Frères*, the Court of Justice clarified that unlawfully gathered evidence is sanctioned with exclusion from the proceedings. The Court of Justice has stated that an undertaking against which the Commission has ordered an investigation is entitled to bring an action against the Commission’s decision before the EU Courts according to Article 230(4) TFEU. If the decision of the Commission is quashed by the General Court, the Commission is

prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature [...].<sup>80</sup>

The protection of conflicting fundamental rights therefore circumscribes the enforcement powers of the competent competition authority. Procedural requirements are imposed by different sources of law to Commission’s investigations: the general principles of EU law; the ECHR; the Charter of Fundamental Rights of the EU; and some provisions contained in EU regulations, like Regulation (EC) 1/2003 and Regulation (EC) 773/2004.<sup>81</sup> The same holds true for all Member States,<sup>82</sup> where these instruments are directly applicable to

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<sup>78</sup> For the inadmissibility of evidence, refer to Chapter II, para. 2.

<sup>79</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 205-206.

<sup>80</sup> *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes and Commission*, para. 49.

<sup>81</sup> This latter Regulation contains, especially, many rules protecting the rights of the defence during an investigation, see ANGUS MACCULLOCH, BARRY RODGER, KIRSTY MIDDLETON, and JONATHAN GALLOWAY, *Cases & Materials on UK & EC Competition Law* (2nd edn, Oxford University Press 2009) 46; WILS, ‘EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights’ 212.

<sup>82</sup> With regard to the Charter of Fundamental Rights of the EU, Poland and the United Kingdom secured a protocol on the application of the Charter of the Fundamental Rights in their countries. Protocol no. 30 provides that Polish, British courts and EU Courts cannot declare any laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom inconsistent with the fundamental rights recognized by the Charter and that Title IV of the Charter, which addresses economic and social rights, does

investigations conducted by national competition authorities. It is always possible that national laws envisage a broader protection of fundamental rights, provided that the general principles of equivalence and effectiveness are respected.<sup>83</sup>

Recital 37 of the Preamble of Regulation (EC) 1/2003 is devoted to the respect of fundamental rights:

This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

Such multi-level system of protection of human rights, however, has created non negligible difficulties in the definition of the respective jurisdiction of the CJEU and the ECtHR on one hand, and in reconciling the positions adopted by the two judiciaries in their case law upon fundamental rights in this field,<sup>84</sup> on the other. As observed by one commentator:

Both EU Courts have emphasized that the legal protection provided as a matter of Community law, although autonomous and ultimately governed by Community objectives, should nonetheless as far as possible comply with a ‘European standard’, and so draw upon analogies from the Convention system and from Member State public law.<sup>85</sup>

The fundamental rights which run the risk of being violated at the administrative stage of the EU competition procedures are presented here below, along with the more recent case law of the EU Courts and the state of the debate. At the end of this section, the legitimacy of the most effective means of gathering evidence available to claimants will be set out.

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not create justiciable rights. The Protocol, which is considered to be interpretative, and not instantiating a full opt-out, should not lead to a different application of the Charter in those two Member States when compared with the others.

<sup>83</sup> WILS, ‘EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights’ 209.

<sup>84</sup> DOUGLAS-SCOTT, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ 650: ‘The ECJ has been unwilling [...] to transpose certain ECHR rights, such as the right against self-incrimination, to an EC corporate, competition law context. So transplants may not always be an exact fit [...] in the EU human rights context, such as the minor quakes and quivers produced by *Hoechst* and *Orkem*.’

<sup>85</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 206-207.

### A) Right to Private and Family Life

The Commission is empowered to carry out inspections in business and non-business premises (like private homes of directors, managers, and other members of staff of the undertaking). Similarly, all NCAs are vested with the power to carry out their inspections in business premises, while most of them are vested with the power to carry out their inspections also in private premises. This is not the case of Bulgaria, Denmark, and Italy.<sup>86</sup>

Article 8 ECHR protects the right to private and family life. Its second paragraph provides that interferences with the right to privacy by a public authority are lawful only when justified by a legitimate aim and necessary to a democratic society in the interests of, as far as competition law enforcement is concerned, the economic well-being of a country or the prevention of crime.<sup>87</sup> In contrast with the case law of the ECtHR, the CJEU has traditionally held that a right to the inviolability of the home only applied to searches of private homes and not to business premises. The potential clash with the ECHR provision is relevant only for Article 20(4) of Regulation (EC) 1/2004 *decisions*, because, under Article 20(3) of Regulation (EC) 1/2003, the undertaking is allowed to refuse the inspection without incurring in any financial sanction.<sup>88</sup> According to the interpretation of the CJEU, Article 8(1) ECHR concerns the development of individuals' personal freedom and may not be referred to business premises. Such discrimination is due to the considerable divergences existing between the nature and degree of protection of private homes and business premises in the legal systems of the different Member States. The 'protection against arbitrary and disproportionate intervention by public authorities', however, is recognized as a general principle of EU law, thus extending to all persons, including legal ones:

[I]n all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate

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<sup>86</sup> ECN Working Group Cooperation Issues and Due Process, 'Investigative Powers Report' 31 October 2012, 22.

<sup>87</sup> Other justifications considered are national security, public safety, the protection of health or morals, or the protection of the rights and freedoms of others.

<sup>88</sup> Under Article 20(3) of Regulation (EC) 1/2003 the Commission can carry out the inspection at the premises simply on production of a written authorization, either giving advance notice or without warning. The undertaking is under no legal obligation to submit to the inspection. Under Article 20(4), conversely, undertakings must actively cooperate in pursuance of the Commission's decision.



intervention. The need for such protection must be recognized as a general principle of Community law.<sup>89</sup>

The ECtHR, however, subsequently affirmed the inviolability of business premises from arbitrary interferences of public authorities under Article 8 ECHR in *Niemietz v Germany*;<sup>90</sup> and the necessity of prior judicial authorization for inspections in competition law cases in *Société Colas Est and others v France*.<sup>91</sup> In *Roquette Frères*, a preliminary ruling filed by the French Court of Cassation to clarify the point, the CJEU extended the applicability of Article 8 ECHR to legal persons, and therefore to inspections conducted on business premises.<sup>92</sup>

If business premises are encompassed by Article 8 ECHR, inspections conducted by NCAs must satisfy the conditions of Article 8(2) ECHR. They must be conducted in accordance with the law, they must have a legitimate purpose and they must be necessary to a democratic society, i.e. the interference by the public authority must be counterbalanced by the protection of relevant interests. Whilst the first two conditions are, by implication, satisfied by EU competition law matters, for the investigations are based on accessible legal rules and they are aimed at detecting anti-competitive violations, the satisfaction of the third requirement is a matter of debate.<sup>93</sup> It is often objected that the Commission's powers may not be compliant with this third 'proportionality' requirement.<sup>94</sup> The position taken by the EU Courts has contributed to fuel the debate according to which judicial review would not be sufficient to satisfy the conditions required by the ECtHR. Namely, the CJEU does not require prior judicial authorization, unless so provided by the national law of the country where the investigation was conducted, on the (controversial) grounds that *ex post* review is always allowed and sufficient alone to ensure adequate protection against abuses. In his

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<sup>89</sup> *Hoechst AG v Commission*, paras. 17-19.

<sup>90</sup> *Niemietz v Germany*, decision no. 13710/88 [1992] ECHR 80; 16 EHRR 97, para. 31: 'More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities [...]'.

<sup>91</sup> *Société Colas Est and others v France*, decision no. 37971/97 [2002] ECHR 421; [2004] 39 EHRR 17, para. 46: '[...] The inspectors entered the premises of the applicant companies' head or branch offices, without judicial authorisation, in order to obtain and seize numerous documents containing evidence of unlawful agreements. It therefore appears to the Court that the operations in issue, on account of the manner in which they were carried out, constituted intrusions into the applicant companies' "homes" [...]. The Court considers that [...] "the interference complained of is incompatible with Article 8 [...]"

<sup>92</sup> *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes and Commission*, para. 29.

<sup>93</sup> CHALMERS, HADJEMMANUIL, MONTI, and TOMKINS, *European Union law* 945.

<sup>94</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 189.



Opinion in *Roquette Frères*, Advocate-General Mischo specifically addressed this concern, clarifying that the fact that the proportionality of the inspection is reviewed only *ex post* does not reduce the degree of protection of fundamental rights, since ‘the ECtHR expressly acknowledges that results obtained on the basis of a warrant or decision which is subsequently declared unlawful cannot be used’.<sup>95</sup>

For the conduction of inspections in business premises, in the EU and in all Member States, either a decision of the competition authority or a court warrant<sup>96</sup> is required. In particular since prior judicial authorization is not expressly required by Regulation (EC) 1/2003 for inspections of business premises but only for non-business premises,<sup>97</sup> it is a matter of debate whether, in those Member States where no prior judicial authorization is required for dawn raids, those inspections are conducted in violation of Article 8 ECHR, for the potential lack of observance of one of the safeguards required by the ECtHR case law. Consequently, it would be debatable that evidence obtained through those dawn raids is transmissible through the cooperation network or admissible in evidence before the EU Courts.<sup>98</sup> It seems that, however, sufficient guarantees are offered to the investigated undertaking. Not only the undertaking can oppose an inspection, which compels the authority to request for a court order; but when such order is issued (ascertaining the non-arbitrariness of the inspection) the undertaking can still seek annulment of the final decision before the EU Courts on grounds of an infringement of Article 8 ECHR.<sup>99</sup>

Article 21 of Regulation (EC) 1/2003 specifically provides that for the inspection of private premises, judicial authorization is required, on grounds that inspections conducted in

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<sup>95</sup> *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes and Commission*, Opinion of AG Mischo, para. 47.

<sup>96</sup> A court warrant is required in Austria, Bulgaria, Germany, Denmark, Estonia, France, Hungary, Ireland, Lithuania, Latvia, Poland, Portugal, Sweden. Dawn raids do not require prior judicial authorization and an inspection decision issued by the competition authority is sufficient in, among the others, Italy, Belgium, Czech Republic, Greece, Spain, Finland and the United Kingdom (but in some of these jurisdictions a court warrant might be needed in case opposition is encountered on the part of the undertaking, or the use of coercive measures is required). In Slovenia, where for the inspection of private premises a court order is required, whilst for business premise an order of the competition agency suffice, the Constitutional Court has recently declared the national competition authority’s regime of inspections not in line with the Slovenian Constitution, setting a one year deadline to the Parliament to change the dawn raids regulation, which currently clashes with the protection of the inviolability of dwelling of legal persons. See EVA ŠKUFCA, ‘Constitutional Court Ruling on Lawfulness of Antitrust Inspections’ (Legal Insights - Schonherr) <[www.schoenherr.eu/news-publications/legal-insights/slovenia-constitutional-court-ruling-on-lawfulness-of-anti-trust-inspections](http://www.schoenherr.eu/news-publications/legal-insights/slovenia-constitutional-court-ruling-on-lawfulness-of-anti-trust-inspections)> accessed on 15 January 2014. Compare also ECN Working Group Cooperation Issues and Due Process, ‘Investigative Powers Report’ 8 ff.

<sup>97</sup> Article 21(3) of Regulation.

<sup>98</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 182.

<sup>99</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 190.

such dwellings are more likely to interfere with the right to privacy and the inviolability of home. The inspection must be authorized by a court order, and it has to be needed due to the suspect of a serious anti-competition infringement. The officials performing it cannot seal premises, book or records, nor they can ask for information or on the spot explanations.<sup>100</sup>

Finally, it is important to underline that the divergences existing between national rules on the conduct of investigations might be exploited by undertakings in order to hinder or bar the effectiveness of dawn raids. In particular in the case of multi-State cartels, jurisdictions offering higher procedural guarantees might be strategically chosen as the ‘epicenter’ of the cartel, so that relevant evidence is located where it is harder to access.<sup>101</sup> In this context, the importance of procedural convergence is all the more evident.

### **B) Privilege against Self-Incrimination**

In competition law cases, with regard to the types of evidence which can be gathered and used in the proceedings, the EU general principle of protection against arbitrary and disproportionate intervention of public authority established in *Hoechst* may take two other forms: the privilege against self-incrimination and the right to confidentiality,<sup>102</sup> this latter with regard to professional secrecy and business secrets respectively. The reason why these rights are relevant to the present discourse is that, under certain circumstances, their protection is strongly conflicting with the enforcement of competition law in general, and the collection of evidence in particular, allowing the investigated undertaking ‘to withhold crucial evidence and thus significantly impede the construction of a prosecution case’.<sup>103</sup> The exercise of the power to take statements and to ask questions on the spot by the competition authorities may conflict with the privilege against self-incrimination and the professional legal privilege. Other limitations to these powers are, in less common circumstances, found in data protection and banking secrecy.<sup>104</sup>

The landmark cases for the recognition of a right to silence in the competition law field are *Orkem* and *Solvay*. In those occasions, the CJEU denied the existence of a general

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<sup>100</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 182–183.

<sup>101</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 196.

<sup>102</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 208.

<sup>103</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 209.

<sup>104</sup> ECN Working Group Cooperation Issues and Due Process, ‘Investigative Powers Report’ 31.

principle, common to the traditions of the Member States, granting a right to non-self incrimination to legal persons in relation to competition law infringements, or more generally, to infringements in the economic sphere. The Court of Justice considered that ‘the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings’.<sup>105</sup> Yet, the Court of Justice drew a very subtle distinction. On the one hand, it confirmed the power of the Commission to compel an undertaking to provide all necessary information concerning the facts as they are known to it and to disclose, if necessary, documents in its possession, even if those documents may be used to establish, against it or another undertaking, an infringement. On the other, it stated that:

[...] the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.<sup>106</sup>

Given the vagueness of the principle enunciated, the case law of the EU Courts provided some indications with regard to the ‘blacklisted’ information that the Commission is not entitled to request to undertakings. A distinction must be made according to the nature of the Commission’s request, and, in particular, according to how aware the Commission is to be close to the truth: exploratory questions, which seek for factual information (such as which undertakings and which persons participated in a meeting, the dates of the meetings or the subject-matter discussed) are admitted; whereas leading questions,<sup>107</sup> which seek to detect the purpose of the undertaking’s behaviour or details of conducts already assessed to be illegal (such as details of any system or method for sales targets or quotas),<sup>108</sup> do not have to be answered on grounds that they violate the undertaking’s right to non-self incrimination.<sup>109</sup> Basically, questions of factual nature can be asked, even if the information may be used to establish liability, whereas requests for information seeking admission of guilt should not be asked.<sup>110</sup>

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<sup>105</sup> *Orkem v Commission*, para. 29.

<sup>106</sup> *Orkem v Commission*, paras. 34-35.

<sup>107</sup> Leading questions are questions concerning the objective and purpose of the behaviour adopted by the investigated undertaking. Compare ANDREANGELI, *EU Competition Enforcement and Human Rights* 132.

<sup>108</sup> *Orkem v Commission*, para. 39.

<sup>109</sup> HARDING and JOSHUA, *Regulating Cartels in Europe* 209.

<sup>110</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 134.

Since determining whether a particular question infringes the right as interpreted by the Court of Justice is sometimes hard, reference is made to ‘whether an answer from the undertaking to which the question is addressed is in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence’,<sup>111</sup> having regard exclusively to the nature of the question.<sup>112</sup> In particular, no questions regarding the target and object of an undertaking’s conduct should be addressed, if they may cause the undertaking to admit responsibility for an anti-competitive infringement; as well as general ‘fishing’ questions, aimed at determining whether the infringement has been committed or not, instead of at gathering evidence of an already suspected infringement.<sup>113</sup> This distinction according to the nature of the evidence is purported now by Recital 23 of the Preamble of Regulation (EC) 1/2003, according to which undertakings, when are required to comply with a decision of the Commission, during the investigation process, cannot be forced to admit commission of an infringement. Nonetheless, they are obliged to respond to factual questions and to produce the required documents, regardless of whether the information yielded may be relevant in order to found or corroborate a finding of infringement on their part or on the part of another undertaking. The right to remain silent is recognized in such terms from the very beginning of proceedings, i.e. during the preliminary investigation of the Commission before a statement of objections is issued.<sup>114</sup>

This approach of the EU Courts may conflict with the interpretation of Article 6 ECHR established by the ECtHR,<sup>115</sup> although steps are taken in the direction of a position which is more convergent with the approach of the ECtHR. In *Funke v France*<sup>116</sup> and *Saunders v United Kingdom*,<sup>117</sup> the Strasbourg Court recognized a full right not to incriminate oneself, deriving from Article 6(1) ECHR. This right, in the interpretation of the ECtHR, does not cover the use in criminal proceedings of evidence which has ‘an existence independent of the will of the suspect, such as, *inter alia*, documents acquired pursuant to a warrant’.<sup>118</sup> But it may cover, in the broader interpretation of the Strasbourg Court, not only

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<sup>111</sup> *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission*, para. 273.

<sup>112</sup> FAULL and NIKPAY, *The EC Law of Competition* 866.

<sup>113</sup> SIRAGUSA and RIZZA, *EU Competition Law - Cartel Law - Restrictive Agreements and Practices between Competitors* 136.

<sup>114</sup> *Orkem v Commission*, para. 28.

<sup>115</sup> JONES and SUFIN, *EU Competition Law: Text, Cases, and Materials* 1060.

<sup>116</sup> *Funke v France* [1993] A256-A, 16 EHHR 297.

<sup>117</sup> *Saunders v United Kingdom* ECHR 1996-VI; [1997] 23 EHRR 313.

<sup>118</sup> *Saunders v United Kingdom*, para. 69.

directly incriminating information, but all types of factual information. The rationale of this right lies precisely in the objective of protecting the accused against improper compulsion by the authorities which may contribute to miscarriages of justice, in violation of the aims of Article 6 ECHR.<sup>119</sup> The right is applicable as a general requirement of due process,<sup>120</sup> and thus to administrative procedures falling within the autonomous concept of ‘criminal charge’ contained at Article 6 ECHR.<sup>121</sup> Even if the CJEU, after *Funke* and *Saunders*, was forced to modify its position on the right to silence, for example in *Roquette Frères*, it still applied ECHR to EU law only ‘by analogy’, thus showing not to be formally bound by the Convention.<sup>122</sup> In particular, Commission proceedings address only legal persons, and not private individuals, which allegedly justifies restrictions of their right against self-incrimination.<sup>123</sup>

From the viewpoint of an efficient process of fact-finding, some criticism has been levelled to the developing recognition of a full right to silence. The already scarce availability of documents and other evidence, for some infringements, would be exacerbated by an excessive use of this procedural guarantee, which should not be exercised in contrast with the protection of consumers’ welfare and general economic interests. These arguments might be well-founded to a certain extent, but practical difficulties in the retrieval of evidence are not sufficient to justify averting procedural guarantees that are integral part of the common constitutional traditions of the Member States. Competition law proceedings may not qualify as ‘hard-core’ criminal proceedings, but serious reasons to consider them ‘at the periphery of criminal law’<sup>124</sup> in a ‘*Jussila* sense’, undoubtedly exist and call for full compliance with the procedural safeguards. Since evidence withheld by means of invoking the right of non-self incrimination is always found in the sphere of activity of the accused undertaking, the recognition of the principle is also strongly intertwined with the proof-proximity principle illustrated above.<sup>125</sup> Any hindrance posed to the investigation process might bring adjudicators to overcome them by deploying alternative strategies (such as the use of presumptions, adverse inferences, or other procedural devices) which may bypass the

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<sup>119</sup> *Saunders v United Kingdom*, para. 68.

<sup>120</sup> Commission’s Green Paper on the Presumption of Innocence COM (2006) 174 final, para. 2.4.

<sup>121</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 166.

<sup>122</sup> SIONAIDH DOUGLAS-SCOTT, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ (2006) 43 *Common Market Law Review* 629, 649.

<sup>123</sup> FAULL and NIKPAY, *The EC Law of Competition* 864.

<sup>124</sup> BRONCKERS and VALLERY, ‘No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law’ 540.

<sup>125</sup> See Chapter II, para. 6.

obstacle for the furtherance of an effective search for the truth. This renders the role of judicial review even more crucial and suggests setting the boundaries of recognition of this right within reasonable limits, with a view to searching for a proper balance.

After *Funke* and *Saunders*, the CJEU acknowledged the developments of the ECtHR case law, but at the same time, distanced itself from it, reiterating the lack of jurisdiction *ratione personae* for the application of the ECHR<sup>126</sup> and choosing to build an autonomous notion of the privilege against self-incrimination. First of all, under EU law, the privilege is not violated by the Commission's requests for information, which, unlike Commission's decisions, do not compel the investigated undertaking to provide a reply and thus does not instantiate coercion, on the part of the authority, to obtain information from a suspect.<sup>127</sup> Secondly, the recipient of a Commission's request for information

is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission.<sup>128</sup>

The importance of preserving effectiveness has been more recently confirmed by the Court of Justice;<sup>129</sup> after restating that the undertaking is granted no right to evade the investigation, the Court has stressed the importance of the duty to actively cooperate which rests upon the investigated undertaking during the fact-finding process.<sup>130</sup> Such duty implies that the undertaking must provide the Commission with all information which is relevant to the subject-matter of the investigation.<sup>131</sup>

Generally, the Court of Justice is trying to make the safeguard against self-incrimination converge to a large extent with the one shaped by the ECtHR and is

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<sup>126</sup> T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, para. 59. See ANDREANGELI, *EU Competition Enforcement and Human Rights* 132.

<sup>127</sup> *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission*, para. 455.

<sup>128</sup> *Mannesmannröhren-Werke v Commission*, para. 77.

<sup>129</sup> Case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission* [2010] ECR II-1255; Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829.

<sup>130</sup> The privilege against self-incrimination may be invoked in two occasions along the investigations conducted by the Commission: on one hand, when the Commission requires information by means of binding decisions pursuant to Article 18(3) of Regulation (EC) 1/2003; on the other, when the Commission requests information during on-the-spot inspections pursuant to Article 20(4) of Regulation (EC) 1/2003. Compare FAULL and NIKPAY, *The EC Law of Competition* 865.

<sup>131</sup> Case C-301/04 P *Commission v SGL Carbon AG* [2006] ECR I-5915, para. 40.



compatible with it.<sup>132</sup> It is nonetheless undeniable that the circumstances under which evidence is covered by the privilege in EU law are limited if compared to those protected by the Convention.<sup>133</sup> The distance between the privilege as guaranteed in the EU public enforcement, and, on the other side, in the national public enforcement and in the private enforcement, resides specifically in that, in the context of Commission's investigation, pre-existing *incriminating* documents can be gathered, as well as information of factual nature requested during on-the-spot inspections of the business premises to the undertakings' representatives.<sup>134</sup>

In *Otto v Postbank*,<sup>135</sup> a reference for a preliminary ruling required the Court of Justice to clarify whether the *Orkem* criteria were directly applicable by national judges when enforcing EU competition law. The Court of Justice restated the procedural autonomy of the Member States in applying the right to remain silent in their national *civil* proceedings. It also specified that such national rules might differ in national administrative and civil proceedings, and that, EU law does not require to grant a party the privilege against self-incrimination in competition litigation. The *Orkem* criteria are, according to the Court of Justice, not transposable directly into national civil proceedings.<sup>136</sup> It seems that the same approach<sup>137</sup> is nonetheless taken by the Court of Justice for national administrative proceedings. For instance, in *Hoechst*, the Court of Justice affirmed that it is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials,<sup>138</sup> i.e. in national administrative proceedings. A common procedural convergence, however, should be attained in pursuance of the effectiveness, given the profound implications that the recognition of the privilege has on this latter principle. Commentators have noted how its recognition directly impacts on the NCAs' and claimant's capacity to obtain the enforcement of EU competition law.<sup>139</sup>

In England, whilst not directly in a competition law case, the question of the compatibility of this right with the principle of effectiveness was raised before the House of

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<sup>132</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 181–183.

<sup>133</sup> ANDREANGELI, *EU Competition Enforcement and Human Rights* 135.

<sup>134</sup> ANDREANGELI, *EU Competition Enforcement and Human Rights* 143.

<sup>135</sup> Case C-60/92 *Otto BV v Postbank NV* [1993] ECR I-5683.

<sup>136</sup> *Otto BV v Postbank NV*, para. 20.

<sup>137</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 184.

<sup>138</sup> *Hoechst AG v Commission*, paras. 33-34.

<sup>139</sup> SCORDAMAGLIA-TOUSIS, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 184.

Lords. This could give an idea of how an English court might approach the issue, if prompted in a private enforcement case. In *Rio Tinto Zinc Corp v Westinghouse Electric Corp*, this latter was considered liable for a breach of contract in the US, according to which it had the obligation to build power stations and supply them with uranium. Its main defence was that a supervening circumstance, the steep increase in price of uranium, had rendered impossible to comply with the terms of the contract. Such increase in price was allegedly due to the existence of a cartel, which kept the price of uranium artificially high. Westinghouse Electric Corp wanted to adduce evidence of the cartel before the English court, therefore a US court issued letters rogatory to the High Court seeking orders requiring legal representative of an English company, Rio Tinto Zinc Corp to attend for oral examination in London and to produce the required document for use at the trial before the US court. Rio Tinto Corp invoked privilege against such orders, because the requested evidence might have exposed it to sanctions for infringements of EU competition law. The claim for privilege was upheld by the House of Lords, which specified that under section 14(1)(a) of the Civil Evidence Act 1968<sup>140</sup> the interpretation of ‘penalty’ extends to ‘fines imposed by an administrative body’<sup>141</sup> and that the privilege covered both directly and indirectly incriminating evidence. This interpretation offered by English courts is much broader than the one established by the CJEU in *Orkem*, and a clash with the EU principle of effectiveness could arise.<sup>142</sup>

### C) The Protection of the Legal Professional Privilege

Article 28(2) of Regulation (EC) 1/2003, whilst addressing the obligation of confidentiality *lato sensu* imposed upon Commission and NCAs’ staff, makes reference to the necessity of respecting information covered by ‘professional secrecy’. The notion is nonetheless undefined, and there has initially been some uncertainty with regard to whether information exchanged between undertakings and their lawyers were to be classified as protected

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<sup>140</sup> Civil Evidence Act 1968, Section 14(1)(a): ‘[T]he right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty – (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law.’

<sup>141</sup> *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* House of Lords [1978] AC 547; [1978] 2 WLR 81, 612.

<sup>142</sup> GEORGE CUMMING and BRAD SPITZ (eds), *Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts*, vol. 24 (Kluwer Law International 2007), International Competition Law Series 107.

evidence or not. The argument for convergence upon this privilege was raised during the process of formation of Regulation (EC) 1/2003, but the amendment, which did not win the favour of the Commission, was rejected by the Parliament and did not see the light of day.<sup>143</sup> In *AM & S Europe*,<sup>144</sup> the Court of Justice held that exchange of written information between undertakings and counsels were to be safeguarded and legitimately withheld from competition authorities, in observance of a right to protection of confidentiality which is common to all legal traditions of the Member States and, as such, protected as a general principle of EU law.<sup>145</sup> In particular, information exchanged between the two is covered by the legal professional privilege,<sup>146</sup> when directly referring to the subject-matter of the investigation – i.e. evidence usually drafted *ex post* to inform the counsel of the facts and to allow him or her preparing the defence;<sup>147</sup> and when the lawyer is acting independently – i.e. is not employed by the undertaking requiring assistance.<sup>148</sup> More specifically, the categories of evidence covered by the privilege according to EU law are those ‘prepared for the purposes and in the interests of the client’s right of defence and in the framework of obtaining legal advice in relation to the subject-matter of the procedure’.<sup>149</sup> These categories encompass: written communications with independent lawyers after initiation of the investigation; preceding communications with independent lawyers which are directly connected with the subject-matter of the investigation; internal documents reporting the content of legal advice provided by independent lawyers and preparatory documents drawn up for the purpose of requesting legal advice from independent lawyers in the exercise of

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<sup>143</sup> WILS, ‘Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: the Interplay between European and National Legislation and Case-law’ 20. Compare Amendment No. 10 contained in the Report on the Proposal for a Council Regulation on the Implementation of the Rules on competition laid down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No. 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 – Committee on Economic and Monetary Affairs, Jonathan Evans, PE 296.005, A5-0229/2001, 21 June 2001. The Amendment was accompanied by the following justification: ‘Legal privilege for in-house counsel exists already before the national competition authorities in several Member States. This creates inequality in the Union, which will become even more problematic in the light of the exchange of confidential information that is expected according to the new enforcement system.’

<sup>144</sup> Case C-155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575.

<sup>145</sup> FAULL and NIKPAY, *The EC Law of Competition* 868.

<sup>146</sup> Legal professional privilege is a principle established in English law, which means that confidential communications between lawyer and client with a view to giving legal advice are privileged and protected from disclosure. Compare JONES and SUFIN, *EU Competition Law: Text, Cases, and Materials* 1064 and the statutory formulation by the Police and Criminal Evidence Act 1984, Section 10(1).

<sup>147</sup> CHALMERS, HADJIEMMANUIL, MONTI, and TOMKINS, *European Union law* 944.

<sup>148</sup> *AM & S Europe Ltd v Commission*, para. 21.

<sup>149</sup> FAULL and NIKPAY, *The EC Law of Competition* 869.

the right of defence.<sup>150</sup> The recognition of the right derives from the principle that ‘any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice’<sup>151</sup> and it is limited to ‘lawyers who are not bound to the client by a relationship of employment’.<sup>152</sup> The rationale for such limited protection resides in the existence of professional codes of discipline regulating the legal profession, which must be exercised independently and confidentially.<sup>153</sup> For the same reason the recognition of the privilege does not extend to in-house lawyers who, in most Member States, are not subject to deontology provisions and, even when admitted to the bar, in their quality of salaried employees do not act in a sufficiently independent fashion.<sup>154</sup> This limitation has been criticized by commentators on grounds that the exclusion of in-house lawyers from the privilege is unjustified, and the EU Courts seem to lean towards its reconsideration, following to the developments in the regulation of the legal profession throughout Europe.<sup>155</sup>

When an undertaking claims legal privilege with regard to a specific item of evidence, it is entitled not to show it to the Commission, but it has to yield relevant documentation supporting such claim, for instance showing the sender or the addressee of the communication, the subject and the lack of attachments consisting in pre-existing documents. When the Commission is in doubt as to whether the document classifies as privileged, the ‘envelope procedure’ may be followed, in order to allow the undertaking the

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<sup>150</sup> JON TWEEDALE and KATE MENIN, ‘Legal Professional Privilege: EU Rules OK Says European Court of Justice’ (Resolve - Litigation Newsletter Early Autumn 2010) <[www.addleshawgoddard.com/view.asp?content\\_id=5195&parent\\_id=5184](http://www.addleshawgoddard.com/view.asp?content_id=5195&parent_id=5184)> accessed on 14 January 2014.

<sup>151</sup> *AM & S Europe Ltd v Commission*, para. 18.

<sup>152</sup> *AM & S Europe Ltd v Commission*, para. 21.

<sup>153</sup> *AM & S Europe Ltd v Commission*, para. 24.

<sup>154</sup> This position has been more recently confirmed by the Court of Justice of the European Union in *Akzo Nobel NV v Commission*, paras. 45-49. The Court, confirming the Opinion expressed by AG Kokott at paras. 60-61, held that ‘[a]n in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.’ In that case, the Commission’s right to seize e-mails exchanged between the general manager of Akros and an Akzo in-house lawyer, member of the Netherland’s bar, was questioned. The linchpin of the discrimination between lawyers and in-house counsels was identified in the relationship of employment bounding these latter, thus preventing them from ignoring the commercial strategy of the employer-undertaking.

<sup>155</sup> Joined cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission* [2003] ECR II-4771, Order of the President of the Court of First Instance, para. 125: ‘[T]he role assigned to independent lawyers of collaborating in the administration of justice by the courts, which proved decisive for the recognition of the protection of written communications to which they are parties [...] is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct.’

time to adequately support its claim, and consenting the Commission to take the decision of returning the document or opening the envelope at a later set time.<sup>156</sup>

With specific regard to the (denied) legal privilege of in-house counsels, a conflict may arise between the position adopted by the CJEU and the laws of some Member States which extend the privilege to such non-independent lawyers.<sup>157</sup> Among these, there is the national law of the United Kingdom, which provides that in-house lawyers enjoy the same protection as lawyers in private practice when they are acting in their capacity as legal adviser and not as executive administrators for the company. The scope of the legal professional privilege was analyzed in *Three Rivers District Council v Bank of England*, where the House of Lord held that legal privilege must extend to all legal advice provided by solicitors in their quality as counsels,<sup>158</sup> even if not directly related to the subject-matter of the case – i.e. also for advice given in the preparation and presentation of evidence before a Government inquiry.<sup>159</sup> Since the discoverable or confidential status of information exchanged is determined by the instrument immediately authorizing the investigation, either at the national or at the European level, knowing which rules apply to the specific investigation is relevant to identify whether the specific item of evidence can be considered admissible or not. As shown when illustrating the cooperation tools within the European Competition Network (ECN), information collected by a NCA can be exchanged via the ECN and used by a different NCA either as intelligence or as evidence. The receiving NCA is entitled to use information collected by a transmitting authority in evidence to impose sanctions on legal persons if the item of evidence has been collected in compliance with the

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<sup>156</sup> FAULL and NIKPAY, *The EC Law of Competition* 871–872. The procedure of putting the documents in a sealed envelope, not to be opened until the prefixed amount of time has elapsed, was followed in the *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* case. See joined cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2003] ECR II-4771, Order of the President of the Court of First Instance, paras. 6-10.

<sup>157</sup> In Portugal, Ireland, and the United Kingdom, the legal professional privilege covers both in-house counsels and independent lawyers. Compare ECN Working Group Cooperation Issues and Due Process, ‘Investigative Powers Report’ 18.

<sup>158</sup> BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 159.

<sup>159</sup> *Three Rivers District Council & others v The Bank of England* [2004] EWCA Civ 218, para. 29, quoting Taylor LJ in *Balabel v Air India* [1988] Ch 317: ‘Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships [...] there will usually be [...] an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.’

law of the transmitting authority, even if such gathering violates the law of the receiving authority. As a consequence, the OFT is empowered to lawfully use in evidence correspondence exchanged between an undertaking and its in-house counsel, even if the national law prohibits its collection, provided that it receives it from a transmitting NCA, whose law does not recognize the legal professional privilege to in-house counsels.<sup>160</sup> Commentators are divided on this issue: some consider such exchange of evidence as a potentially harmful circumvention of the recognition of fundamental rights; others underscore how the area where the risk is run is very limited, i.e. restricted only to the in-house counsels' legal privilege, and even in that regard, it does not appear to lead to irreparable consequences. On the one hand, only rights of legal persons are jeopardized and the human rights guarantees applicable in the EU Member States (arising from the general principles of EU law, from the ECHR or from the Charter of Fundamental Rights of the EU) are more than sufficient to provide a reasonably high level of protection of fundamental rights. On the other, the practical consideration that undertakings employing in-house lawyers are surely capable of affording independent lawyers considerably reduce the fears connected to the adumbrated erosion of fundamental rights.<sup>161</sup> Notwithstanding such pragmatic considerations, however, it is undeniable that a uniform definition of the scope of fundamental rights safeguards would be desirable across the multi-level system of protection of such rights in the EU, and that the argument regarding legal persons is weak, if one considers the high level of pecuniary sanctions imposed. In addition, in the perspective of the accession of the EU to the ECHR, the problems entailed by such discrepancies are more serious and call for a harmonized solution.

#### **D) Disclosure and Conflicting Rights**

With regard to the interaction between rules on the gathering of evidence and human rights, it is time to take into consideration the instruments available in the private enforcement. The most relevant tools offered to the claimants for the gathering of evidence are essentially

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<sup>160</sup> WILS, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', paras. 210-211.

<sup>161</sup> WILS, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', paras. 211-212.



two: disclosure and the right to access the file of the competition authority. These two instruments will be analysed below.

There is no specific rule governing the disclosure of evidence in the hands of the defendant, at the European level. Apart from the harmonisation envisaged by the Proposal for a Directive, which encourages the Member States to implement disclosure between the parties, whether or not parties are allowed to ask counterparty to produce evidence is a procedural question which must be solved according to each relevant national law. The only proviso to be respected is the principle of equivalence and effectiveness.<sup>162</sup> Naturally, the differences existing between national civil procedures and the procedural devices they offer to claimants in order to retrieve, or elicit the retrieval, of evidence strongly affects their preference for a forum against another, a phenomenon that is commonly referred to as ‘forum shopping’. Since disclosure of evidence in the hands of the counterparty falls under the *lex fori*, those systems, such as that of England, where ‘disclosure’ is more effective are preferred by claimants. That is not to say that measures for the disclosure of documents do not exist in continental legal systems, but they usually require the involvement of the judge and are far more limited.

#### *a) Disclosure in England*

To describe how disclosure operates, it is convenient to take into consideration its application in the private enforcement in the United Kingdom. As anticipated, although many other legal systems of the Member States feature court-ordered production of documents, one of the characteristic of the English (and Wales) system of law, which makes its particularly plaintiff-friendly,<sup>163</sup> is the possibility of making use of broad disclosure obligations towards the counterparty. In the common law tradition, disclosure can be conducted by the parties with minimal supervision by the judge. This tool reduces information asymmetry inherent to competition matters.

Disclosure is the process by means of which a party (or a potential party) to a claim is under an obligation to inform the other party of the existence of all documents in his or her control which might be relevant to the proceedings, pursuant to the other party’s request. The party requiring disclosure is then entitled to access the disclosed documentation and

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<sup>162</sup> IDOT, ‘Access to Evidence and Files of Competition Authorities’ 263.

<sup>163</sup> DANOVA, BECKER, and BEAUMONT, *Cross-Border EU Competition Law Actions* 37.

take copies of it, except for those documents which are covered by privilege rights. Before the High Court, the applicable rules are contained at Part 31 of CPR. Parties may benefit from three different categories of disclosure: pre-action disclosure, standard disclosure, and specific disclosure.

### I) Pre-Trial Disclosure

Besides the possibility of asking for disclosure in the course of proceedings, claimants can ask for disclosure before initiating litigation, provided that the request is made before the final hearing on the merits. This device is aimed at clarifying what the claim is about, allowing both sides to evaluate the merits of the case and, thus, promoting settlements. Rule 31.16 of CPR provides that, before proceedings start, the claimant may apply for disclosure, supporting his or her application with evidence. The court can, at its discretion, uphold the application only if both the applicant and the respondent are likely to be a party to subsequent proceedings and the pre-action disclosure seems desirable<sup>164</sup> (and this is a cumulative requirement, not an alternative one) in order to dispose fairly of the anticipated proceedings, or assist the dispute to be resolved without proceedings, or save costs. The court's order granting pre-action disclosure must specify the documents or the classes of documents to be disclosed and the time and place for inspection and disclosure. In the words of the Court of Appeal in *Black v Sumitomo*:

Clearly, the narrower the disclosure requested and the more determinative it may be of the dispute in issue between the parties to the application, the easier it is for the court to find the request well founded, and vice versa.<sup>165</sup>

If the documents are no longer in the hands of the respondent or if they are covered by a right or duty to prevent disclosure, the respondent must let the court know. For the collection of evidence through pre-trial disclosure, all costs (including the costs of the respondent) are usually covered by the claimant. The court, when evaluating a pre-action disclosure application should not embark on a thorough analysis of all potential issues that

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<sup>164</sup> As to the meaning of 'desirable' in this context see *Hutchinson 3G UK Limited v O2 (UK) Limited, Orange Personal Communications Services Limited, T-Mobile (UK) Limited, Vodafone Limited* High Court of Justice Queen's Bench Division Commercial Court [2008] EWHC 55 (Comm), para. 53: 'By "desirable" [...] is meant "to be wished for as reasonably necessary or at least useful".'

<sup>165</sup> *Black and others v Sumitomo Corporation and others*, Court of Appeal [2001] EWCA Civ 1819, para. 72.

could arise in the subsequent proceedings, but it should rather perform an overall assessment of the application, appreciating the nature of the matter, the arguments of the parties and the appropriateness of disclosure at an early stage rather than in the usual course of proceedings, when the case has been pleaded out.<sup>166</sup> It is particularly important that the plaintiff does not ask for ‘fishing’ pre-action disclosure, because the court requires the claimant to have a clear idea of which documents he or she is seeking for. In *Hutchinson 3G UK Limited v Vodafone, O2, Orange and T-Mobile*, the claimant’s application was denied on grounds that the request for pre-action disclosure was overly broad. Hutchinson pleaded that the UK system of mobile telephone number portability constituted a significant barrier to entry of new operators in the UK mobile phone market. It therefore sought an order for pre-action disclosure against its four principal competitors, which allegedly had prevented the development of an efficient alternative mobile number portability system, thus restricting and distorting competition. Hutchinson asked for the disclosure of all documents illustrating the history of each respondent’s attitude to the development of the portability system between 1999 and 2006. In that case, the court agreed with the respondents that, even though the disclosure of classes of documents is permitted, it is not possible to call for classes of documents in which only some documents would then be discoverable, or to require respondents to identify which documents are within the scope of such disclosure.<sup>167</sup> In pre-trial disclosure, all documents and classes of documents must potentially fall within the scope of standard disclosure.<sup>168</sup> The application must be detailed and specific; it cannot encompass categories of documents which might prove irrelevant afterwards, or relevant only to the purpose of a subsequent train of inquiry.<sup>169</sup> In that occasion, the request lacked in

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<sup>166</sup> *Total E&P Soudan SA v Edmonds*, Court of Appeal [2007] EWCA Civ 50, para. 29: ‘Generally when considering an application under CPR Rule 31.16 [...] application are in the nature of case management decisions requiring the judge to take a “big picture” view of the application in question. This obviously involves the judge taking a broad view of the merits of the potential claim, but should not necessitate an investigation of legally complex and debateable potential defences or grounds for stay.’

<sup>167</sup> *Hutchinson 3G UK Limited v O2 (UK) Limited, Orange Personal Communications Services Limited, T-Mobile (UK) Limited, Vodafone Limited*, para. 38.

<sup>168</sup> Rule 31.16 (c) of CPR provides that if proceedings had started, the respondent’s duty by way of standard disclosure would extend to the documents or classes of documents of which the applicant seeks pre-action disclosure. Therefore it is a requirement for the exercise of discretion that the documents (or classes of documents) of which the applicant seeks disclosure would be encompassed in due course within the standard disclosure if proceedings were started. The documents have to comply with Rule 31.6 of CPR. Compare *Hutchinson 3G UK Limited v O2 (UK) Limited, Orange Personal Communications Services Limited, T-Mobile (UK) Limited, Vodafone Limited*, para. 44: ‘In my view the test is indeed more stringent. The applicants have to show that it is more probable than not that the documents are within the scope of standard disclosure in regard to the issues that are likely to arise.’

<sup>169</sup> *Hutchinson 3G UK Limited v O2 (UK) Limited, Orange Personal Communications Services Limited, T-Mobile (UK) Limited, Vodafone Limited*, para. 40.

specificity and was not focused,<sup>170</sup> on grounds of which the court concluded that pre-action disclosure was not desirable, also upon consideration of the fact that the cost-benefit analysis favoured the respondents and there was no serious probability of settlement originating from the disclosure.<sup>171</sup>

## II) Standard Disclosure

According to Rule 31.6 of CPR, standard disclosure requires the parties to disclose, without any specific order to do so, the documents on which the party relies; the documents which the party is required to disclose by a relevant practice direction; and the documents which adversely affect his or her own case, or adversely affect another party's case, or support another party's case.<sup>172</sup> Standard disclosure consists of the exchange of schedules or list of identified documents by the parties, usually after the allocation of the proceedings to the appropriate case management track (which takes place after pleadings have closed, i.e. after the service of claim, defence and any replies). Disclosure, under Rule 31.17 of CPR, may be sought also from third parties (i.e. a person who is not a party to the proceedings) when documents or classes of documents are likely to support the case of the applicant or adversely affect the case of one of the parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. Privileged documents cannot be disclosed, but they are nonetheless listed in the disclosure statement. These privileged documents are those protected by legal professional privilege, privilege against self-incrimination, documents protected on grounds of public policy and without prejudice communications (such as, for instance, pre-negotiations offers). The solicitor has a proper duty to ensure that the client discloses all documents requested, preserving all originals for future use. When the documents are not privileged but still contain commercially sensitive information, they are disclosed only to a certain 'confidentiality ring', whereby only

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<sup>170</sup> *Hutchinson 3G UK Limited v O2 (UK) Limited, Orange Personal Communications Services Limited, T-Mobile (UK) Limited, Vodafone Limited*, para. 35: '[T]he schedule of documents sought in the present application [...] runs to eight pages for each of the Respondents with very few specific documents identified: the vast bulk are groups or classes of documents.' and para. 47: 'The request is so lacking in specificity, that it is not possible to accept that the entirety of the classes of documents are "likely" or "may well" fall within standard disclosure. As already noted, the request runs to 8 pages covering an overall period of 7 years. It contains numerous categories within which something like 80 classes of documents are identified without any limitation whatsoever on the documents, correspondence, reports, notes or communications referred to and without any regard to the potential limitations in the search as provided in CPR 31.7.'

<sup>171</sup> *Hutchinson 3G UK Limited v O2 (UK) Limited, Orange Personal Communications Services Limited, T-Mobile (UK) Limited, Vodafone Limited*, paras. 58 and 61–62.

<sup>172</sup> BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 157.

professionals or other specified persons (legal advisers, lawyers, and external experts) are allowed to see the document. The applicant's access to such confidential documents, on the other hand, is precluded.

### III) Specific Disclosure

Specific disclosure is a form of disclosure which is addressed to those documents that have not been disclosed as part of standard disclosure. It is provided for by Rule 31.12 of CPR, which states that with an order for specific disclosure the party must disclose the documents or the class of documents specified, or disclose any documents located as a result of a search granted by the order itself.

### IV) Disclosure before the CAT

For the sake of completeness, since the CAT can hear private damages actions, it is useful to clarify that the rules for disclosure before the CAT and, more generally, for the gathering of evidence, are analogous to those contained in the CPR, but sometimes more relaxed than before the High Court. The main difference is that, whilst the disclosure requirements contained in the CPR are automatic, disclosure before the CAT must be ordered.<sup>173</sup> The CAT may give directions for the disclosure, exercising full discretion with regard to which documents must be disclosed and on the time of the disclosure. Even if the procedure is not constrained by as rigid rules as those contained in the CPR, the CAT in practice tends to conform to some general principles, normally ordering disclosure after close of the pleadings, according to its own discretion.<sup>174</sup> Another significant difference is that, under English procedural law, ordinary English courts do not have any express power to prevent documents from disclosure on grounds of their confidentiality. Nonetheless, as seen above, if a party claims secrecy the court may order a restricted form of disclosure, by letting only the lawyers examine the documents. In a public enforcement case, *Aquavitae (UK) Limited v the Director General of the Office of Water Services*, the Tribunal observed:

[I]t is a general principle of proceedings before the Tribunal, as indeed before any Court in this country, that a party to the case should not withhold documents that might

<sup>173</sup> BLANKE and NAZZINI, *International Competition Litigation - A Multijurisdictional Handbook* 157.

<sup>174</sup> *Aquavitae (UK) Limited v The Director General of the Office of Water Services* [2003] CAT 4 (Chapter II prohibition) 2: '[D]isclosure is not [...] automatic and should, in the view of the Tribunal, be done only if it is necessary for a fair and just disposal of the case before it.'

adversely affect his case or might support the case of his opponent. That is essentially the underlying principle of disclosure of documents as now set out in Part 31 of the CPR.<sup>175</sup>

Both standard and specific disclosure can be sought for before the CAT, which can give directions according to CAT Rule 19(2)(k). Follow-on actions before the CAT must be complete of the claim form, a copy of the decision on the basis of which the claim for damages is brought and, as long as practicable, a copy of all essential documents on which the claimant relies.<sup>176</sup>

In line with the High Court's reasoning in *Total E&P Soudan SA v Edmonds*, the CAT commits to take a big picture view of the disclosure application, which has to be rejected any time that the specified documents do not meet the requirements of relevance and necessity for the management of the case. The principles governing disclosure before the CAT are, in the end, very close to those applied by the High Court. In another public enforcement case, *Albion Water*, the CAT expressly stated that obtaining production of specified documents, under Rule 19(2)(k), must be the only object of a disclosure application. The application for disclosure must be specific and relevant, and application of fishing and speculative nature must be avoided. The Tribunal specified that, whilst the criteria of relevance and necessity are individually considered, the matter is considered as a whole for the decision-making.<sup>177</sup>

### ***b) Disclosure in Italy***

Powers of disclosure of Italian judges are considerably less pervasive. Italian law does not provide for a formal right to disclosure.<sup>178</sup> Nevertheless, under specific conditions and upon application of the party, the court may order the counterparty, or third parties (including the competition authority), to disclose specific documents in their possession.<sup>179</sup> Such order of disclosure is contained in Article 210 of the Italian Code of Civil Procedure, which also provides that regard must be had to conflicting rights. In particular, the disclosure should not be ordered where it could cause serious damage to the counterparty/third party, or where

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<sup>175</sup> *Aquavitae (UK) Limited v The Director General of the Office of Water Services* 3.

<sup>176</sup> CAT Rule 32 (4) (b).

<sup>177</sup> *Albion Water Limited, Albion Water Group Limited v Water Services Regulation Authority* [2008] CAT 3, paras. 41–43.

<sup>178</sup> VALERINI, 'Il giudizio di merito nell'azione antitrust' 240.

<sup>179</sup> Article 210 of Italian Code of Civil Procedure.



it could entail the violation of Articles 200 and 202 of the Italian Code of Criminal Procedure, which protect professional and State secrets.<sup>180</sup> Such orders may entail disclosure of legal advice given by in-house lawyers but not by external legal advisers. Disclosure is granted on condition that the documents requested are described in detail; and that the documents requested are not in possession or otherwise accessible to the party requesting it, subject to a proportionality test. If the counterparty refuse to cooperate without any reasonable grounds, adverse inferences may be drawn from such behaviour.<sup>181</sup> If it is the requested third party who refuse to cooperate, a small fine may be imposed.<sup>182</sup>

### *c) Disclosure in the Proposal for a Directive*

The recent Proposal for a Directive provides that national courts can order to any party or to third parties to produce any type of evidence admissible<sup>183</sup> before the relevant national court, provided that it is plausible that an infringement has occurred and that the plaintiff has suffered harm from it.<sup>184</sup> According to the Proposal for a Directive, the national judge should play a major role in the fact-finding and in ensuring the effectiveness of the private enforcement. Chapter II of the Proposal for a Directive concerns the disclosure of evidence. The rules contained in the proposals are to be applied without prejudice to Regulation (EC) 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters.<sup>185</sup> Article 5 prescribes that Member States should implement rules allowing national judges, where the claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he or she suffered harm as a result of a competition law infringement, ordering disclosure to the defendant or third parties. The order should be issued regardless of whether the evidence is

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<sup>180</sup> Article 118 of Italian Code of Civil Procedure, referred to by Article 210.

<sup>181</sup> Article 118(2) of Italian Code of Civil Procedure.

<sup>182</sup> Article 118(3) of Italian Code of Civil Procedure.

<sup>183</sup> Arguably, given the extensive provision of the Proposal, an order for disclosure could theoretically enclose the identity of witness for certain facts, other types of non-documental evidence, or information that is part of the file of the NCA, excluded leniency and settlement submissions. FREDERIC LOUIS, STEFAN OHLHOFF, and ERIC MAHR, 'EU Commission Presents Package to Facilitate Private Actions for Antitrust Damages', (Wilmer Hale - Publication & News, 14 June 2013) <[www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421594](http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421594)> accessed on 18 January 2014.

<sup>184</sup> Article 5(1) of Proposal for a Directive.

<sup>185</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters [2001] OJ L174/1.

also included in the file of a NCA, subject to the two conditions that evidence for which disclosure is requested is:

- relevant for substantiating the claim; and
- identified as precisely and narrowly as possible.<sup>186</sup>

National courts shall limit disclosure of evidence to that which is proportionate. The criteria taken into consideration to determine whether disclosure is proportionate are: (i) the likelihood of the infringement; (ii) the scope and costs of disclosure; (iii) confidentiality of information to be disclosed; (iv) the specificity of the request with regard to the nature, object and content of the documents in cases where the infringement is being or has been investigated by a competition authority.<sup>187</sup> The Member States should ensure that legal privilege and other rights are respected. Among evidence which are contained in the file of a NCA, leniency corporate statements and settlement submissions cannot be disclosed.<sup>188</sup> Information prepared by a party for the purpose of administrative proceedings and information gathered by a NCA in the course of its proceedings are not blacklisted, and can be disclosed after the NCA has closed its proceedings or taken a final decision.<sup>189</sup> All other types of evidence are in the white list, and can be disclosed at any time.<sup>190</sup> Disclosure can be sought also by the defendant.<sup>191</sup>

Article 7 requires *inter alia* the Member States to consider inadmissible leniency corporate statements and settlement submissions obtained solely through access to the file of a NCA, while Article 8 prescribes that the national courts impose sanctions on parties, third parties and lawyers when they fail to comply with a disclosure order, or when they fail to protect confidential information. If the party is responsible for obstruction of justice, Member States shall ensure that the judge may draw adverse inferences from such behaviour, with consequences on the allocation of the burden of proof. Namely, the judge may presume that sufficient proof had been adduced in order to dismiss the claims and defences.

If the Directive will be enacted, which is the traditional means by which the EU legislator seeks for the *rapprochement* of laws across the EU, a certain degree of convergence will be reached in the gathering of evidence in the private enforcement. A

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<sup>186</sup> Proposal for a Directive, Article 5(2).

<sup>187</sup> Proposal for a Directive, Article 5(3).

<sup>188</sup> Proposal for a Directive, Article 6(1).

<sup>189</sup> Proposal for a Directive, Article 6(2).

<sup>190</sup> Proposal for a Directive, Article 6(3).

<sup>191</sup> Proposal for a Directive, Article 5(1).

minimum level of disclosure will be ensured, uniform solutions to the interaction between access to the file, set out below, and leniency programmes will be provided. Nevertheless, on the one hand, forum shopping issues are by no means averted, because national laws may provide for broader means of access to evidence (and the UK disclosure may remain particularly attractive);<sup>192</sup> on the other hand, the Proposal does not solve problems arising out of the multi-jurisdictional nature that private damages actions may often have. Conflicts between the taking of evidence abroad and the protection of fundamental rights, as recently shown by *Secretary of State for Health v Servier Laboratories Limited and National Grid Electricity Transmission plc v ABB Limited*,<sup>193</sup> can still arise and are not tackled by the Proposal for a Directive.

#### ***d) Disclosure Abroad***

Different problems arise when the evidence sought for is physically located in the territory of another Member State, other than the one where the case is brought. In such cases, reference must be made to existing instruments applicable to competition law matters providing solutions to overcome the principle of territoriality: in particular, Regulation (EC) 44/2001 and the EU Evidence Regulation.<sup>194</sup> Article 31 of Regulation (EC) 44/2001 could prove useful in those cases where the disclosure of specific item of evidence could be traced back to the category of ‘provisional or protective measures’.<sup>195</sup> In the *Saint Paul Dairy* case,<sup>196</sup> where a Belgian claimant addressed directly a Dutch court in order to obtain the hearing of a witness residing in the Netherlands pursuant to the Dutch Civil Procedure Code, the Court of Justice excluded that the request for the hearing of a witness fitted that category (provisional or protective measures). It is contended, however, that Article 31 of Regulation (EC) 44/2001 could be used for the gathering of evidence in a different Member State and that the measure was denied in *Saint Paul Dairy*, due the particular circumstances of the case. In that case, the claimant lodged a request for a ‘measure *in futurum*’, which, as

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<sup>192</sup> Compare Proposal for a Directive, Article 5(8): ‘[...] this Article shall not prevent the Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.’

<sup>193</sup> *Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Ltd* [2013] EWCA Civ 1234.

<sup>194</sup> IDOT, ‘Access to Evidence and Files of Competition Authorities’ 264–265.

<sup>195</sup> Regulation (EC) 44/2001, Article 31: ‘Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter’.

<sup>196</sup> C-104/03 *St. Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I-03481.

such, has to be rejected, given the existence of a specific instrument covering those measures: the EU Evidence Regulation.<sup>197</sup>

The EU Evidence Regulation covers both the taking of evidence in civil and commercial matters following a request by a requesting court and the direct taking of evidence by this latter. The first method is modelled on the model of the letters rogatory, based on the cooperation between two courts of different Member States, by means of which the requested authorities will comply with the request applying its own law.<sup>198</sup> According to the second method the requesting authority is empowered to obtain evidence abroad directly. The terms in which the EU Evidence Regulation applies in EU competition matters and the question of whether it covers disclosure have been discussed above.<sup>199</sup>

### **E) The Access to Evidence and Files of Competition Authorities by Third Parties within the EU**

Evidence may be in the hands of the defendant undertaking or third parties (in which case the appropriate device is an application for disclosure, as shown above); or in the hands of the investigating regulatory body. The importance of access to evidence in private actions is self-evident: the extensive powers of investigation of the competition authorities guarantee that their files are much richer in evidence, data and information than those which a private claimant may manage to collect on his or her own. For this reason, private parties often consider more convenient denouncing anti-competitive behaviour to public authorities, rather than bringing a stand-alone actions.<sup>200</sup>

In the lack of any statutory provision governing the access to file at the EU level, the question as to the existence of a right to access antitrust files and its limits has been left to date to the discretion of the domestic rules of the each Member States.<sup>201</sup> Nonetheless, a certain degree of convergence has been attained by means of the case law of the EU Courts, as it will be set out below. It is appropriate here to analyse the right of access to the file of the competition authority and its interplay with conflicting rights, in particular with a view to preserving the effectiveness of leniency programmes. Reference is not made, conversely,

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<sup>197</sup> IDOT, 'Access to Evidence and Files of Competition Authorities' 265–266.

<sup>198</sup> IDOT, 'Access to Evidence and Files of Competition Authorities' 266.

<sup>199</sup> See para. 1 C) of this Chapter.

<sup>200</sup> ULF BÖGE, 'Leniency Programmes and the Private Enforcement of European Competition Law' in JÜRGEN BASEDOW (ed), *Private Enforcement of EC Competition Law*, vol. 25 (Kluwer Law International 2007), International Competition Law Series 222.

<sup>201</sup> IDOT, 'Access to Evidence and Files of Competition Authorities' 260.

to the right of access to file by the party to the proceedings as an expression of the principle of equality of arms.<sup>202</sup> This right is not strictly connected to the rules of management of evidence and, as a result, falls out of the scope of the present discourse on evidence.<sup>203</sup> Conversely, the third party's right to access to the file of the competition authority will be analysed. Access to file concerns the disclosure of documents and the interaction between public and private enforcement in the gathering of evidence, or, more precisely, in preparing damages actions.

With the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases,<sup>204</sup> leniency programmes were introduced, in order to foster the disclosure of information by whistleblowers in exchange for immunity (full or partial) from fines. The existence of a right to access the antitrust file poses many problems with regard to the effectiveness of leniency programmes, which are one of the pillars of EU antitrust enforcement.<sup>205</sup> Leniency programmes proved to be highly beneficial in increasing the deterrence of antitrust infringements. Yet, their use may conflict with self-incrimination privilege and confidentiality rights, on the one hand; and with the right of access to file (with regard to cartel cases), on the other. Evidence collected through leniency applications might be relied on by private individuals seeking for compensation, easing the difficult burden of proving the infringement that is normally placed on them. Allowing the plaintiffs to use such shortcut (i.e. founding its case upon the evidence collected by the competition authority) evidently undermines the attractiveness of leniency programmes. In other words, immunity will look far less alluring if leniency applications may pave the way to an almost surely successful private damages action. If corporate statements are circulated and rendered accessible to claimants or national courts, applications for leniency will be strongly penalised. To balance these conflicting interests, the Commission's Proposal for a Directive recommends ensuring protection to leniency applicants in private enforcement actions, by means of preventing corporate statements from disclosure. As mentioned above, Article 6 of

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<sup>202</sup> On this topic, compare the Commission Notice on the Rule for Access to the Commission's File [2005] OJ C325/7. For a detailed analysis of the right of access to file of the undertaking involved, see GIANNAKOPOULOS, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings* 174 ff.

<sup>203</sup> To be more precise, in the context of the public enforcement the issue of access to evidence is relevant from the point of view of the exchange of information among competition authorities, as addressed by Regulation (EC) 1/2003 and in the bosom of the European Competition Network at the European level; and of bilateral cooperation agreements and other soft law instruments at the international level. All these topics have been analysed in the present Chapter under the respective paragraphs.

<sup>204</sup> Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases OJ C 298/17.

<sup>205</sup> BÖGE, 'Leniency Programmes and the Private Enforcement of European Competition Law' 218.

the Proposal for a Directive requires Member States to ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose leniency corporate statements and settlement submissions. After a competition authority has closed its proceedings or taken a final decision, two categories of evidence may be disclosed: i) information prepared by a natural or legal person specifically for the proceedings of a competition authority; ii) information drawn up by a competition authority in the course of its proceedings. In its attempt to foster deterrence and bring up well-concealed cartels, the Commission's White Paper went further than ensuring such 'documental immunity', suggesting the possibility of limiting civil liability for those leniency applicants whose request was accepted. Practically, the Commission suggested they should face fixed or anyway predictable compensation for damages, so that they would be in the position to calculate upfront the consequences of filing for leniency.<sup>206</sup> The more recent Proposal of a Directive does not include any limit to civil liability, but it proposes a blanket rejection of any disclosure of leniency statements, in line with the preceding White Paper. This categorical elimination of any possibility for the party to get hold of leniency documents contained in the authority's file is somehow counterbalanced by the provision of a proper system of court-ordered disclosure.<sup>207</sup> Article 7 of the Proposal for a Directive deals with the limits on the use of evidence obtained solely through access to the antitrust file. Corporate statements and settlement applications are in the 'black list' and should not be admissible in actions for damages. Information prepared by a natural or legal person specifically for the proceedings of a competition authority or information drawn up by a competition authority in the course of its proceedings are in the 'grey list' and may be admissible only after the competition authority has closed its proceedings or taken a decision. All other evidence, obtained solely through access to the file of a competition authority, can be used in actions for damages brought by the person who successfully obtained the access.

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<sup>206</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final 10. Compare the opinion submitted by JOSEF DREXL, BEATRIZ CONDE GALLEGU, STEFAN ENCHELMAIER, MARK-OLIVER MACKENRODT, and RUPPRECHT PODSZUN, 'Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law on European Commission's White Paper' (2008) 39 *International Review of Intellectual Property and Competition Law* 799, 811 in which the Authors endorse the limitation of disclosure and, in contrast, consider too generous the reduction of the civil liability of immunity recipients, on grounds that the purpose of deterrence served by leniency programmes must be kept separated from the objective of compensation served by damages actions.

<sup>207</sup> FREDERIC LOUIS, STEFAN OHLHOFF, and ERIC MAHR, 'EU Commission Presents Package to Facilitate Private Actions for Antitrust Damages', (Wilmer Hale - Publication & News, 14 June 2013) <[www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421594](http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421594)> accessed on 18 January 2014.



Pending the adoption of the Directive, two distinct problems may arise with regard to access to the competition authority's file: a) whether the party can use evidence in its possession which is also contained in a competition authority's file; b) whether a right of access to the competition authority's file exists.

***a) The Right to Use Evidence Contained in the Competition Authority's File***

With regard to the first issue, the leading case is *Postbank v Commission*. In that case, the Commission transmitted the statement of objections and the minutes of the hearing containing business secrets to third parties, who aimed at producing those documents in national legal proceedings. The addressees of the statement of objections brought an action for annulment before the General Court against the Commission's letter granting permission to make use of the evidence. The Commission argued that the business secrets contained in the statement of objections had become public when transmitted to third parties.<sup>208</sup> The General Court ruled that the Commission should have, before transmitting the evidence, given the parties an opportunity to submit their views concerning the presence of business secrets in the file and should have obviated any risk of disclosure of business secrets.<sup>209</sup> If the matter is investigated by a NCA, national rules apply.

***b) The Right of Access to the Competition Authority's File***

With regard to the more important question of the existence and limits of a right of access to file, as an expression of the right to an effective remedy, tensions arise due to the fragmented application of procedural enforcement rules across the EU Member States. As noted above, there is no provision ensuring such right in competition law. Although Article 15 of Regulation (EC) 1/2003 provides for requests for opinion or for information, these are available to national courts, and not to the parties directly. They were conceived to coordinate autonomous or parallel proceedings, rather than consecutive proceedings.<sup>210</sup> On grounds of such lack of specific provisions, parties wishing to access the Commission's file have sometimes referred to the general provisions on public access to EU documents, laid

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<sup>208</sup> Case T-353/94 *Postbank v Commission* [1996] ECR II-921, para. 82.

<sup>209</sup> *Postbank v Commission*, paras. 94–95.

<sup>210</sup> IDOT, 'Access to Evidence and Files of Competition Authorities' 271.

down by Regulation (EC) 1049/2001.<sup>211</sup> In this regard, the General Court pointed out that applicants in an action for damages can found their claims on this Regulation.<sup>212</sup> Nonetheless, the use of this instrument to cover the granting of a right for which it was not designed arises considerable complexities,<sup>213</sup> and the Commission has called for its exclusion as a basis for a right of access to evidence.<sup>214</sup>

Recently, in the *Bundeswettbewerbsbehörde v Donau Chemie AG* case,<sup>215</sup> the Court of Justice of the European Union has been asked by the Austrian Higher Regional Court (Oberlandesgericht), sitting as Cartel Court, to clarify whether a national law prohibiting third party access to documents submitted before a national competition court, without the explicit consent of the parties to the proceedings, is compatible with EU law. The Austrian Cartel Court had previously sanctioned a number of undertakings in the printing chemicals sector which had applied for leniency for having taken part to a cartel; its decision was then confirmed by the Austrian Supreme Court. Verband Druck & Medientechnik, an association representing the interests of undertakings in that market, submitted a request for access to the cartel documents with the purpose of bringing damage actions against the cartel participants. The Austrian Federal Law on Cartels and other Restrictions of Competition of 2005 prohibits third parties' access to files of competition authorities without the consent of all the parties to the proceedings;<sup>216</sup> and, thus, Verband Druck & Medientechnik was not granted access to the relevant documents on account of the predictable refusal of the participants. The Austrian Cartel Court questioned the compatibility of the national law with the principles of equivalence and effectiveness, and in particular of the provision which made the file disclosure strictly conditional on consent of all the parties to the proceedings. In its preliminary ruling, building on the landmark case *Pfleiderer*,<sup>217</sup> the Court of Justice concluded that such a national law violates the principle of effectiveness. The Austrian law made the right to compensation of those who suffered harm from the cartel excessively difficult to be exercised, because the access to competition authority's file would be the only

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<sup>211</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents [2003] OJ L145.

<sup>212</sup> Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

<sup>213</sup> IDOT, 'Access to Evidence and Files of Competition Authorities' 271–272.

<sup>214</sup> Explanatory Memorandum on the pre-draft Directive on damages actions, para. 104.

<sup>215</sup> Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, not yet reported.

<sup>216</sup> Compare paragraph 39(2) of the 2005 Austrian Law on Cartels (Kartellgesetz).

<sup>217</sup> Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

way to obtain evidence necessary to back up their claim.<sup>218</sup> Moreover, national courts must be empowered to weigh up conflicting interests – for disclosure of information and for its protection under leniency programmes – on a case-by-case basis. This way, the courts can successfully manage to reconcile the protection of the right to compensation of third parties and the effectiveness of leniency programmes, which could otherwise be jeopardised. In particular, potential leniency applicants may be prevented from resorting to the programmes owing to the fact that

they will find themselves in a less favourable position in actions for civil damages, due to the self-incriminating statements and evidence which they are required to present to the authority, than the other cartel members which do not apply for leniency.<sup>219</sup>

The rationale for the consideration of each request on a case-by-case basis is to allow the judge to balance the necessity for the requesting party to get hold of certain documents for the purpose of initiating action with the public interest to effective enforcement of competition law and with the eventual harmful consequences which may arise from granting the access. The Court underscored that the risks entailed by the interaction between granting access to file and the recourse to leniency programmes could not justify *tout court* the systematic refusal to grant access to evidence.<sup>220</sup> Only if there is a risk that a given document may actually undermine the public interest, non-disclosure may be justified.<sup>221</sup>

The friction generated by the interaction between leniency programmes and private enforcement was clearly highlighted by the *Pfleiderer* preliminary ruling, where the plaintiff, a purchaser of décor paper, asked for full access to the documents retained by the

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<sup>218</sup> *Bundeswettbewerbshörde v Donau Chemie AG and others*, para. 32: ‘On the one hand, it is clear that a rule under which access to any document forming part of competition proceedings must be refused is liable to make it impossible or, at the very least, excessively difficult to protect the right to compensation conferred on parties adversely affected by an infringement of Article 101 TFEU. This is the case *inter alia* when only access to the documents relating to the proceedings before the competent national competition authorities enables those parties to obtain the evidence needed to establish their claim for damages. Where those parties have no other way of obtaining that evidence, a refusal to grant them access to the file renders nugatory the right to compensation which they derive directly from European Union law.’

<sup>219</sup> *Pfleiderer AG v Bundeskartellamt*, Opinion of AG Mazàk, para. 38.

<sup>220</sup> *Bundeswettbewerbshörde v Donau Chemie AG and others*, para. 46: ‘[A]s regards the public interest of having effective leniency programmes referred to by the Austrian Government in the present case, it should be observed that, given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union [...], the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence.’

<sup>221</sup> *Bundeswettbewerbshörde v Donau Chemie AG and others*, para. 48.

Bundeskartellamt. In contrast with the decision of this latter, the local tribunal of second instance, Amtsgericht Bonn, delivered a decision by which it ordered to grant access to the file, through Pfeleiderer's lawyer, on grounds that the aggrieved party has a legitimate interest in obtaining access to the documents and compensation.<sup>222</sup> Only access to confidential business information and internal documents (like correspondence exchanged under the aegis of the ECN) was restricted.<sup>223</sup> Anticipating what then became the '*Pfleiderer* formula'<sup>224</sup> set by the Court of Justice, the Amtsgericht Bonn contended that various interests needed to be balanced in defining the extent of the right of access, namely, 'the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'.<sup>225</sup>

It is interesting to note how, in its Opinion on the case, Advocate-General Mazàk repeatedly invoked the fundamental right to an effective remedy recognized by Article 47, in conjunction with Article 51(1), of the Charter of Fundamental Rights of the European Union, as well as the right to a fair trial of Article 6(1) ECHR,<sup>226</sup> to found the claimant's absolute right to access pre-existing documents. Contrary to what one would expect, no reference to such principles was nonetheless reported by the Court of Justice in its statement of reasoning, which mentioned equivalence and effectiveness exclusively.<sup>227</sup> By way of deciding to refer to the equivalence and effectiveness principles rather than to a right of access to file stemming from Articles 47 and 51 of the Charter on Fundamental Rights and Article 6(1) of the ECHR, the Court of Justice reiterates its reluctance to explicitly (or exclusively) base its decision on the recognition of fundamental rights. Holding a position that is very similar to the one adopted in *Hoechst* and *Orkem*, the Court of Justice refused to explicitly compel the Member States to follow its guidance in the interpretation of EU fundamental rights when they might clash with national procedural rules. Whilst confirming the procedural autonomy of the Member States, the Court of Justice restrained itself to restating the equivalence and effectiveness principles.

Founded on equivalence and effectiveness, however, the argument of the Court of Justice loses considerable momentum. On the one hand, even if access to documents is

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<sup>222</sup> *Pfleiderer AG v Bundeskartellamt*, para. 14.

<sup>223</sup> *Pfleiderer AG v Bundeskartellamt*, para. 15.

<sup>224</sup> ANTONELLO SCETTINO, 'Il difficile rapporto tra *public* e *private enforcement*: il caso dell'accesso agli atti nei programmi di clemenza' (2013) VIII Studi sull'integrazione europea 153, 157.

<sup>225</sup> *Pfleiderer AG v Bundeskartellamt*, para. 30.

<sup>226</sup> *Pfleiderer AG v Bundeskartellamt*, Opinion of AG Mazàk, para. 3.

<sup>227</sup> VÖLCKER, "'Case C-360/09, Pfeleiderer AG v. Bundeskartellamt, Judgment of the Court of Justice (Grand Chamber) of 14 June 2011'" 706.

surely valuable for claimants, it is less easy to image cases where, without that access, obtaining compensation will prove to be ‘practically impossible’. On the other hand, it is valid only for NCAs and courts, but not for the European Commission, which is not, this way, bound to recognize a fundamental right to access. Namely, Article 51 of the Charter ensures that institutions and bodies of the European Union are constrained to follow its provisions and in this case, Article 47. Article 6(1) ECHR, as already illustrated, does not bind the European Commission yet, but the accession of the EU to the ECHR championed by Article 6 TEU will give rise to an obligation for the EU institutions to converge with the dicta of the ECtHR. The argument of the Court of Justice reposed entirely on the twin *Courage/Manfredi* proviso, thus also avoiding the conundrum of identifying which of the rights or freedoms identified by the Charter would need to be violated to trigger the safeguard of an effective remedy pursuant to Article 47(1).<sup>228</sup> No reference was made to the proposal formulated by the Advocate-General of distinguishing between voluntarily submitted pre-existing documents (drafted before the submission of application for leniency), always discoverable,<sup>229</sup> and voluntary self-incriminating declarations drafted for the purposes of the leniency application (i.e. corporate statements), which should never be disclosed.<sup>230</sup> Whilst this distinction has been criticised as artificial and ill-founded, if aimed at avoiding the risks entailed by US-style indiscriminate disclosure,<sup>231</sup> it nonetheless appears interestingly modelled on the CJEU’s interpretation of the protection of the privilege against self-incrimination. In other words, it is analogous to the distinction among evidence of different nature established as a safeguard of that privilege.

In *Bundeswettbewerbsbehörde v Donau Chemie*, a solution based on Article 47 of the Charter of Fundamental Rights and Article 19(1) TEU was advocated by Advocate-

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<sup>228</sup> VÖLCKER, “‘Case C-360/09, Pfleiderer AG v. Bundeskartellamt, Judgment of the Court of Justice (Grand Chamber) of 14 June 2011’” 706–708. The Author underlines how some commentators have suggested that reference could theoretically be made to the right to property, but that that idea is not entirely convincing. In particular, the argument clashes with the fact that even if the overcharge paid by private parties as a consequence of an anti-competitive violation causes harm to their assets, they have engaged in the commercial transaction from which the harm derived on a voluntary basis. Another option would be to base the right to compensation on the provision of Article 101 TFEU directly, but in that case the right would be guaranteed exclusively from national rules that make its exercise impossible or excessively difficult, according to the *Courage/Manfredi* decisions. Upon such considerations, it seems not to have been established as a full right.

<sup>229</sup> The discoverability of such documents could be limited, according to the Advocate-General, in those jurisdictions where final decisions of the NCA have binding nature, therefore allowing the plaintiffs to rely on them as proof of the anti-competitive violation. In those jurisdictions, indeed, the right to an effective remedy is not jeopardised by the existence of leniency programmes. Compare *Pfleiderer AG v Bundeskartellamt*, para. 47 fn. 75.

<sup>230</sup> *Pfleiderer AG v Bundeskartellamt*, Opinion of AG Mazàk, para. 47.

<sup>231</sup> VÖLCKER, “‘Case C-360/09, Pfleiderer AG v. Bundeskartellamt, Judgment of the Court of Justice (Grand Chamber) of 14 June 2011’” 709–710.

General Jääskinen, according to whom it is not sufficient to ensure that claims are not practically impossible or excessively difficult, but they have to be made in an ‘accessible, prompt and reasonably cost effective’ way.<sup>232</sup> The CJEU limited itself to restating the principles of equivalence and effectiveness and the need for a case-by-case evaluation of the single document to be disclosed. This case-by-case evaluation falls foul of the Proposal for a Directive, which prohibits any access to corporate statements. The Proposal for a Directive ensures legal certainty, by ruling out the possibility of a case-by-case evaluation. Which of the two solutions is preferable is hard to tell, but it appears that the solution adopted by the Proposal for a Directive risks to hamper the private enforcement. As noted above, however, the elimination of any possibility for the party to access leniency applicants’ self-incriminating statements could be counterbalanced by the provision in the Proposal for a Directive of other measures facilitating the retrieval of evidence.<sup>233</sup> According to the CJEU, although very unlikely, the possibility that a claim can be based exclusively on evidence from the case file exists.<sup>234</sup>

### *c) Access to the File in England*

From the viewpoint of national jurisdictions, in one of the first cases brought before the English judiciary after *Pfleiderer, National Grid Electricity Transmission Plc v ABB Ltd*,<sup>235</sup> the High Court chose to protect against disclosure corporate statements and other documents drafted for the purposes of the leniency application. In the aftermath of *Pfleiderer*, National Grid amended its application, requesting disclosure of the confidential version of the Commission’s decision and of the pre-existing (the so-called ‘contemporaneous’) documents submitted to it directly to the defendants, rather than to the Commission in application of Article 15 of Regulation (EC) 1/2003. After having heard the Commission as *amicus curiae*, the English judge concluded that the ‘*Pfleiderer* formula’ was applicable in the case at hand, even if the documents disclosed were in the availability of the European Commission and not of a national authority;<sup>236</sup> and that the disclosure of leniency material is

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<sup>232</sup> *Bundeswettbewerbshörde v Donau Chemie AG and Others*, Opinion of AG Jääskinen, para 47.

<sup>233</sup> See fn. 207 above and NICHOLAS HIRST, ‘*Donau Chemie*: National Rules Impeding Access to Antitrust Files Liable to Breach EU Law’ (2013) 4 *Journal of European Competition Law & Practice* 484, 486.

<sup>234</sup> *Bundeswettbewerbshörde v Donau Chemie AG and others*, para. 39.

<sup>235</sup> *National Grid Electricity Transmission Plc v ABB Ltd and others* [2011] EWHC 1717 (Ch).

<sup>236</sup> *National Grid Electricity Transmission Plc v ABB Ltd and others*, para. 36.



in such cases a matter of national jurisdiction.<sup>237</sup> In evaluating the trade-off between disclosure and public interest the English judge took into account the gravity and duration of the infringement, as well as the amount of the fine imposed, thus adhering, in the exercise of its procedural autonomy, to the guidelines provided by the EU Courts.

#### ***d) Access to the File in Italy***

Third parties do not have any explicit right of access to the file of the AGCM. In particular, according to Statement no. 21092 of 6 May 2010 of the AGCM, access to file concerning both infringement of Article 2 of Law 287/1990 and Article 101 TFEU is expressly precluded to third parties. Third parties cannot obtain disclosure of self-incriminating statements, nor of other evidence.<sup>238</sup> Such access is precluded also as a consequence of the provisions of Article 24(7) of Law 241/1990 and Article 13 of D.P.R. 217/1998. The former ensures the access to documents of public administrative bodies in order to preserve the right to an effective remedy; whereas the latter protects the confidentiality of commercial, industrial and financial information. As TAR Lazio clarified, this latter provision always prevails, unless disclosure is essential to guarantee the rights of defence.<sup>239</sup> Third parties, however, can always rely on other instruments provided for by the national procedural rules in order to obtain access to evidence, such as those mentioned above when talking about disclosure in Italy.<sup>240</sup> These instruments always require the involvement of the judge. Italian courts, upon application of the party, may order disclosure to the AGCM under Articles 210 of the Italian Code of Civil Procedure (which allows parties to request such order of disclosure against the counterparty or third parties).<sup>241</sup> Alternatively, Article 213 of the Italian Code of Civil Procedure allows the judges, also of its own initiative, to request the AGCM to provide information relating to documents and evidence in its possession that are relevant and necessary to bring a claim. The court cannot adopt such orders where the disclosure of information and evidence would cause the party serious adverse consequences

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<sup>237</sup> *National Grid Electricity Transmission Plc v ABB Ltd and others*, para. 26.

<sup>238</sup> AGCM, 'Modifica alla comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'art. 15 della legge 10 ottobre 1990, no. 287 (Programma di clemenza nazionale)', Provvedimento no. 21092 of 6 May 2010, Article 10bis. Such Declaration constitutes an amendment to a previous Declaration (Provvedimento no. 16472 of 15 February 2007) for the enactment of Article 15(2bis) of Law 287/1990.

<sup>239</sup> TAR Lazio, 10 February 2012, decision no. 1344, para. 7.

<sup>240</sup> See para. 2 D) d) of this Chapter.

<sup>241</sup> TAR Lazio, 2 November 2009, decision no. 10615, para. 3 (Article 3 of Law 287/1990).

or when they entail breach of professional or State secrets.<sup>242</sup> This state of affairs was recently confirmed, albeit only for the party to the proceedings, in *Alitalia v AGCM*. TAR Lazio explicitly admitted that, in those cases where access granted by the authority does not allow the party to make good of its right in civil proceedings, the party can make use of those tools provided for by the Italian system which allow disclosure, namely Article 210 and 213 of the Code of Civil Procedure.<sup>243</sup> When the AGCM does not follow suit a request under this latter provision, without any compelling reason, a violation of the right of access of the party occurs. It must be noted, however, that the provision is often considered deprived of practical significance due to the mild consequences connected to its violation.<sup>244</sup> Indeed, the AGCM seems to exercise a considerable margin of appreciation in executing such orders, especially when public interests come into play.<sup>245</sup> The Italian judge has ordered disclosure to the AGCM in a few cases.<sup>246</sup> It seems that, to date, greater importance has been attributed by Italian courts to the rights of defence and to the access to the file requested by the party to the proceedings,<sup>247</sup> rather than to the right to an effective remedy and to the access to the file requested by the private claimant. Against this backdrop, a voluntary convergence of the Italian court towards to the approach of the EU Courts, in order to strike the appropriate balance between confidentiality rights and right to an effective remedy, would be beneficial, in the lack of a EU uniform legislative solution.

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<sup>242</sup> For this exclusion, reference must be made to Article 118(1) of the Italian Code of Civil Procedure.

<sup>243</sup> TAR Lazio, 10 February 2012, decision no. 1344, para. 11.

<sup>244</sup> ALBERTO PERA and GIULIA CODACCI PISANELLI, 'Decisioni con impegni e *private enforcement* nel diritto antitrust' (2012) 1 *Mercato concorrenza regole* 69, 93.

<sup>245</sup> Compare Court of Milan, 20 May 2011, decision no. 52997, where the court had to appoint an expert to verify which documents were relevant to a follow-on action arising out of an investigation of the AGCM. The investigation concerned Vodafone's abuse of dominance in the telecommunication sector. See ALBERTO PERA, 'Le decisioni con impegni e il rilievo per l'*antitrust private enforcement*' in LORENZO FEDERICO PACE (ed), *Dizionario sistematico del diritto della concorrenza* (Jovene 2013) 385–386.

<sup>246</sup> See, for an application of Article 210 of the Italian Code of Civil Procedure, Court of Palermo, 15 July 2011, quoted by PERA, 'Le decisioni con impegni e il rilievo per l'*antitrust private enforcement*' 385 fn. 20. For Article 213 of the same Code, Court of Appeal of Rome, 8 May 2011 (I124 *Raffineria di Roma/Fina Italiana/ERG Petroli/Monteshell*). Compare PERA and CODACCI PISANELLI, 'Decisioni con impegni e *private enforcement* nel diritto antitrust' 93 ff., who also underlines the more favourable approach of French and Dutch courts and national competition authorities towards requests for disclosure.

<sup>247</sup> Council of State, *Soc. Colabaton v AGCM*, 29 September 2010, decision no. 5864; Council of State, 6 September 2010, decision no. 6481 (2010) *Giornale di diritto amministrativo* 1207; TAR Lazio, *Soc. Reckitt Benckiser Holdings v AGCM*, 22 April 2010, decision no. 8015.

## Conclusions

Following the decentralisation of the EU system of enforcement of competition law and the direct involvement of NCAs and national judges in the application of both Article 101 and 102 TFEU, there has been no statutory harmonisation of the national procedural rules. In EU antitrust law enforcement, the task of ensuring the effective implementation of the substantive provisions of EU law is delegated to the institutional and procedural frameworks of the Member States, which pursue the same objectives with very diverse approaches. Whilst some differences must be cherished by the principle of procedural autonomy, the diversity inherent to each national system, in particular with regard to the gathering and evaluation of evidence, may hinder the procedural convergence that is called forth by Regulation (EC) 1/2003. Both the Regulation (EC) 1/2003 and the case law of the EU Courts proclaim the protection of the procedural autonomy of the Member States, provided that the principles of equivalence and effectiveness are respected. Such state of affairs, however, seems to be changing and, under the aegis of the ECN, efforts to promote a voluntary convergence have been made for different aspects of antitrust enforcement.<sup>1</sup>

In this multifarious system, evidence-related issues struggle to find their position. The traditional substance-procedure dichotomy is not sufficient to characterise evidence, which straddles the two realms of procedural and substantive law. On the one hand, only one evidential issue, the allocation of the burden of proof, is dealt with by Regulation (EC) 1/2003, which can be characterised as a procedural regulation, given that most of its content prompts procedural convergence for the implementation of Articles 101 and 102 TFEU. On the other hand, the case law of the EU and national courts seems to be advocating for harmonised solutions to procedural and substantive evidential issues such as the admissibility of evidence; the assessment of the probative value of evidence; the application of presumptions, and the standard of proof.

The traditional dichotomy between procedural and substantive evidential issues is indeed blurred, if at all existing. There is no distinction between the two body of rules: some evidential issues are patently considered to appertain to the sphere of substantive law, or are directly regulated by EU law (for instance, under Article 2 of Regulation (EC) 1/2003), or are classified as substantive law by EU instruments (namely, by Articles 18 and 22 of the

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<sup>1</sup> To name a couple, see the ECN Model Leniency Programme - Report on Assessment of the State of Convergence As Revised in November 2012 for the harmonisation of leniency programmes and the Proposal for a Directive in relation to damages actions.

Rome Regulations). The legal burden of proof (clearly a matter of uniform EU substantive law) is, however, closely linked to the definition of the standard of proof, a procedural issue, and the two aspects must be considered together. Presumptions affect the allocation of evidential burden of proof and are, ultimately, a matter of standard of proof. Yet, the evaluation of the probative value of evidence and the hierarchy between different means of proof should be considered a matter for national procedural law, but the EU case law seems to be followed by some (i.e. those examined in the present analysis) national review courts, and by the civil judges in private antitrust cases.

This purpose of uniformity and consistency is rather natural insofar as it is limited to providing interpretation to the legal notions or economic concepts implied by the EU law. As appears from the preceding analysis, however, procedural convergence is also attained by Regulation (EC) 1/2003, and is advocated for the furtherance of an effective enforcement system. In this line, a strong propensity for a ‘healthy imitation process’<sup>2</sup> is noticeable from the analysed systems of law (England and Italy), with regard to evidence. On numerous evidential issues of EU competition law, the case law of the Luxembourg courts influence the evaluation of evidence of the two jurisdictions analysed. It is submitted that the peculiarities of the enforcement of EU competition law and the crucial role played by evidence in this field are the major reasons promoting such imitation process well beyond the *effet utile* standard. Even more interestingly, convergence guides a judicial operation, the evaluation of evidence, which is traditionally reserved to the national judge. The national case law of the chosen countries often adopt solutions which are analogous to those adopted by the EU Courts. This phenomenon, which is evident from the analysis of the evaluation of evidence in England and Italy, has the potential to pave the way for future statutory harmonisation and to avoid the numerous complexities arising out of the divergences between different legal systems in relation to evidence. It has also the advantage of completing a process of procedural harmonisation with regard to EU antitrust law which has already concerned the powers of investigation of the NCAs, commitment decisions and leniency programmes.<sup>3</sup> With regard to the rules on proof, convergence models the phase of

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<sup>2</sup> This wording is employed by KRIS DEKEYSER and MARIA JASPERS, ‘A New Era of ECN Cooperation - Achievements and Challenges with Special Focus on Work in the Leniency Field’ (2007) 30 *World Competition* 3, 12.

<sup>3</sup> For the substantial procedural convergence on aspects different from evidence, see DEKEYSER and JASPERS, ‘A New Era of ECN Cooperation - Achievements and Challenges with Special Focus on Work in the Leniency Field’ 12; HANS VEDDER, ‘Spontaneous Harmonisation of National Competition Laws in the Wake of the Modernisation of EC Competition Law’ (2004) 1 *Competition Law Review* 5, 7–10.

the assessment of the evidence, which is usually a matter for the competent judge. National judges are therefore provided with a EU blueprint to follow not only with regard to ‘what law to apply’ (and how it must be interpreted), but also to ‘how to apply it’ (i.e. how evidence should be assessed, which probative value must be attached to it, what needs to be proven and by who, against what standard and to what extent). Many aspects of the evaluation of evidence, even if not strictly classifiable as substantive law and often characterised as procedural by conflict of law rules, are being attracted by the gravitational pull of a European substantive convergence, which, by means of the case law of the EU Courts and helped sometimes by soft law tools such Commission Notices, is in the process of modelling a ‘EU law of evidence of antitrust law’. This uniform law of evidence, to which no resistance seems to be offered by national procedural frameworks, appears to be developing because of the specificities of this field of law and in the name of the principle of *effet utile*. As a result, legal and evidential burden of proof are allocated in analogous ways by the EU Courts, by NCAs and by national judges; a similar standard of proof will be applied, as a result of the use of the same presumptions; the rules of admissibility will be the same, as well as the criteria for the evaluation of the probative value of evidence, for the assessment of economic evidence and so on.

Following the approach of the EU Courts in the evaluation of evidence in EU antitrust law, and uniformly solving procedural issues connected to them, national courts contribute to giving origin to a quite unique phenomenon: EU case law provides guidance for the national judges on how to evaluate evidence when enforcing EU competition law. In a way that finds little correspondence in other fields of EU law (apart from the statutory reversal of the legal burden of proof, in EU non-discrimination law), the Luxembourg Courts are laying down, by means of their case law, a code of evidence law to which any authority in charge of enforcing EU competition law can resort to. Not even in EU criminal matters, where great harmonization of the law of evidence is occurring, the process has gone so far, sticking to the more strictly procedural aspects of cross-border gathering and handling of evidence, but certainly not of its assessment.

Beside those embodied by statutory provisions such as Article 2 of Regulation (EC) 1/2003 (‘he who asserts must prove’), it appears there is a number of rules of EU law of evidence in antitrust matters. These are:

- the *favor probationis*: the only relevant criterion for admitting and evaluating evidence is its reliability;

- the evaluation of evidence by the judge is free and unfettered;
- the evaluation of evidence must be performed taking into account the general context (contextual evaluation);
- only evidence on which the parties have had the opportunity to express their views can be considered;
- facilitating the evidential burden of proof is an admissible judicial operation, if it is aimed at eliciting more information and factual elements of the case and if it is mitigated by the proof-proximity principle;
- presumptions should be subject to the proportionality test and should always be rebuttable;
- great probative value is assigned to documents drawn up in close connection with the events, or by direct witnesses, or which run counter to the interest of the declaring party;
- the evaluation of evidence performed by competition authorities (Commission or NCAs) is authoritative and must be taken into account.

One might object that all such rules and principles do not derive from the case law of the EU Courts and are applied by national judges by virtue of their existence in their respective domestic legal systems and of the procedural autonomy principle. This argument is, however, contradicted by the above analysis. First, in most cases, the national judges cite the jurisprudence of the CJEU in order to support their views, rather than their domestic case law. The CJEU case law is followed, sometimes, also in contrast with national procedural rules.<sup>4</sup> Secondly, the principles of evidence law drawn from the CJEU are autonomous and do not belong to neither the common law nor the civil law tradition, but appear to be a syncretistic elaboration of the two. In particular, they all seem to derive by the balance stricken between the two models (Romano-Germanic and Anglo-Saxon respectively) of legal certainty/predictability and equity.<sup>5</sup> For instance, with regard to the *favor probationis*, the probative value of evidence, the admissibility of evidence, the availability of discovery<sup>6</sup> and the use of presumptions, it is clear how the adversarial

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<sup>4</sup> An example is provided by the consideration given by the Italian judge to the ‘argomento di prova’ in antitrust matters, see Chapter II, text accompanying fn. 113 to 118. Another example is the presumption of fault which the Italian judge draws directly from the EU case law, see Chapter II, para. 1 C) a).

<sup>5</sup> For an analysis of these two models in the different context of the European private international law, see FRANCESCO SALERNO, ‘La cooperazione giudiziaria in materia civile’ in *Diritto dell’Unione Europea - Parte speciale* (3rd edn, Giappichelli 2010) 482.

<sup>6</sup> In relation to the availability of discovery, see RILEY, ‘Beyond Leniency: Enhancing Enforcement in EC Antitrust Law’ 384, who asserts: ‘In states of the Civilian tradition, civil litigation is a truly private matter, in



approach is mitigated by the goal of promoting justice. The need for legal certainty is extenuated by having regard to the particular circumstances of the case. This reconciliation is, in the field of competition law, favoured by the circumstance that Articles 101 and 102 TFEU must be directly applied by administrative authorities and civil judges. As a result, some features of administrative procedures are transposed in civil proceedings: these latter lose their marked adversarial nature to gain a more fact-oriented, streamlined and purposive approach, typical of the common law tradition. Thirdly, the argument for the convergence towards the EU case law, rather than for an application of domestic principles, is corroborated by the fact that procedural harmonisation in the furtherance of effectiveness is needed in the EU competition law enforcement framework. The judicial harmonisation could be read as a response to such need and to avert the complexities raised by the substantive and procedural nature of evidence.

All in all, progressive convergence of the rules on proof in EU antitrust law is created, both on a horizontal and vertical dimension. This spontaneous convergence between the EU and the national systems, however, follows different dynamics. Whilst in the evaluation of evidence, a quite consistent imitation process is triggered in the name of the respect of the principle of effectiveness, in the process of gathering of evidence, convergence is inspired by other factors. In that phase, convergence of rules on proof is called for by, on one hand, the mechanisms of cooperation provided by Regulation (EC) 1/2003 (i.e. in particular, the binding effect of Commission decisions and the circulation of evidence) and, on the other, the adoption of common standards for fundamental rights. In particular with regard to this latter aspect, the principle of *effet utile* can be considered as an obstacle, rather than as a catalyst. As a consequence, it is crucial to be mindful of such different drives within the system. For the time being, national (administrative and civil) judges are best placed to strike the right balance, adopting a case-by-case approach, either in their review function, or directly. They are entitled to make use of the margin of discretion left by the procedural autonomy principle to adhere as much as possible to the signposting provided by the EU Courts, while preserving the rights of defence. This judicial activism towards convergence, however commendable and positive, will have to be exercised in the full awareness of the risks enrooted in the system. National courts, as the guardians of the correct formation of the proof and of the respect of all due rights of defence, will have to

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which the procedural rules should leave the parties to argue their case before the courts. By contrast, the Anglo-Saxon view is that the promotion of justice is a value the procedural rules should support with rules as discovery.’

pay special attention when transposing certain rules on proof from the public to the private enforcement. Due to the significant differences in structure of administrative procedures and civil proceedings, a great degree of caution in waiving the national procedural autonomy must be applied.

As shown when analysing the cooperation mechanisms and the process of gathering of evidence, the importance of the recognition of fundamental rights is all the more vital in this respect if one considers the risks entailed by the enhanced transmission of the evidence, and by the recognition of foreign decisions. In particular, if the phase of the assessment of evidence is harmonised at the supranational and national level, the circulation of evidence-related concepts (such as standard of proof, burden of proof, contextual approach to evidence) encapsulating values that are designed at the EU level will transpose such values directly into national systems of law. As a result, and the risk is particularly accentuated in the private enforcement of EU antitrust law, due to its direct impact on the rights of physical persons, the national judges are compelled to apply principles which were modelled by EU institutions. These latter, and the Commission in particular, are much more involved in the furtherance of general policy goals than it would be appropriate to accept in national adversarial proceedings. To give just one example of this risk, it will suffice to think about the significant role played by the European Commission in the creation of presumptions of facts of ‘plainly outcome determinative effect’.<sup>7</sup> Such presumptions are crafted by an institution acting as a prosecutor, in pursuance of administrative goals which have little to do with the needs for protection of the procedural guarantees of the defendant, required in national adversarial proceedings. Even if undoubtedly useful to the purpose of enhancing deterrence, one might wonder whether directly importing them into national review systems or applying them in private antitrust proceedings is appropriate. Another example is the binding effect attributed, in follow-on actions, by national judges to administrative decisions. Hence, it is crucial that the dimension of the protection of rights of defence and of all other fundamental rights is fully recognised, in order to prevent major miscarriages of justice and the violation of fundamental principles. In other words, it should be ensured that the horizontal and vertical convergence with regard to evidence in EU antitrust law, both in the public and the private enforcement, and the uniform development of the rules of management of evidence is in keeping with fundamental rights as enshrined in EU law. Filling in the gaps of the case law (which, for instance, applies presumptions but does not

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<sup>7</sup> For this expression, see GARNETT, *Substance and Procedure in Private International Law* 201.

expressly address their legitimacy yet), the protection of procedural guarantees and fundamental rights will allow building a harmonised law of evidence in this field, making it more coherent and vesting it with legal certainty.

In conclusion, the case law of the EU Courts is softly shaping evidentiary rules for any decisional body vested with the power to decide competition law matters according to EU rules, filling the gaps left behind by EU Regulations and Notices. This process can be welcomed and must be developed paying a great deal of attention to its impact on fundamental rights. Spontaneous harmonisation improves the effectiveness of the management of evidence and, ultimately, the effectiveness of the public enforcement. It rectifies discrepancies created by the application of conflicts of law rules in the private enforcement. Given the paramount importance of procedural advantages for a claimant to conduct a trial in one Member States rather than another, the adoption of a uniform body of EU rules of evidence in this area would prevent dangerous ‘litigation tourism’<sup>8</sup> pitfalls.<sup>9</sup> In addition, harmonisation may enhance compliance with fundamental rights.

Having been already tested via their application at the European and national level, the uniform rules are likely to be easily accepted by the Member States. A code of EU rules on proof in competition law would provide a testing ground for the adoption of standard rules of evidence also in other areas of EU law, having regard to any relevant differences. Harmonisation of national procedural rules in relation to evidence is currently occurring in EU competition law. Although differences in civil procedure reflect the diversity of the Member States’ legal traditions and should not be completely eliminated, since they are the result of a valuable process of norms production<sup>10</sup> and of important policy considerations,<sup>11</sup> convergence on a number of paramount principles and rules of evidence is desirable, provided that due consideration is given to the interests at stake.

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<sup>8</sup> PATRICK L. KRAUSKOPF and ANDREA TKACIKOVA, ‘Competition Law Violations and Private Enforcement: Forum Shopping Strategies’ (2011) 4 *Global Competition Litigation Review* 26, 30.

<sup>9</sup> DANOV, BECKER, and BEAUMONT, *Cross-Border EU Competition Law Actions* 43: ‘[K]ey procedural questions such as standard of proof and the availability of disclosure [...] vary depending on the Member State in which the claim is litigated. This may encourage strategic use of particular jurisdictions where rules are the most favourable to claimants, or even pre-emptive applications to jurisdictions where procedure most favours defendants.’

<sup>10</sup> FRANCISCO MARCOS and ALBERT SÁNCHEZ GRAELLS, ‘Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?’ (2008) 16 *European Review of Private Law* 469, 481.

<sup>11</sup> LASOK, ‘Some Procedural Aspects and How They Could/Should be Reformed’ 207.



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