

INTRODUCTION

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A. WHY A BOOK ABOUT EVIDENCE, PROOF AND JUDICIAL REVIEW?

Leaving aside efforts to strengthen private enforcement, the EU relies heavily on public enforcement in order to implement competition law. The Commission is at the centre of this regime. However, its procedures are sometimes considered unfair, judicial review by the EU Courts not thorough enough, and the system as a whole has been occasionally criticized for not sufficiently guaranteeing fundamental rights.¹ These criticisms are not new, and they are cyclical in nature. However, opinions were probably more nuanced in the past.² **1.001**

1 See, inter alia, D. Slater, S. Thomas and D. Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' GCLC Working Paper 04/08; J. Derenne and M. Merola, *The Role of the Court of Justice of the European Union in Competition Law Cases*, Bruylant, 2012; I. Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"', in C-D. Ehlermann and M. Marquis, eds, *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2011; I. Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 E.L.Rev. 185; U. Soltész, 'Due Process and Judicial Review— Mixed Signals from Luxembourg in Cartel Cases' (2012) E.C.L.R. 241.

2 For example, one leading private practitioner (and now judge) could still say in the 1990s that he favoured 'a system that functions well, even if it is burdened by certain apparent weaknesses (such as lack of formal independence)', while showing scepticism about the creation of an independent cartel agency: 'it seems that [an EC cartel office] would be subject to the same degree of direct and indirect lobbying as the Commission, without the benefit of thirty years of history behind it to handle such lobbying successfully,' (I. Forrester, in *European Competition Law Annual 1997*, C-D. Ehlermann and L.L.Laudati, eds, Hart 1998, 381).

1.002 Recent literature on the subject presents itself as a reaction to the increasing level of the fines and the ‘more aggressive’³ use by the Commission of its powers. Certainly enforcement has become more rigorous in recent times, and fines have necessarily increased to ensure deterrence. The ‘aggressiveness’ probably refers to the amount of fines, as the legal framework set out in the relevant regulations has not changed. If cases in the 1970s involved lower fines it is because the Commission was focusing on defining the law, rather than just punishing infringements. Cases in the 1970s involved more novel approaches than cases today. Moreover, focusing on abstract and absolute figures today does not provide an accurate picture of the real evolution of competition law enforcement. High figures, which get into the headlines of the newspapers, are not likely to cause financial difficulty for the undertakings in question. Those fines, high as they may be, are normally imposed on highly profitable multinationals. Everything is a matter of perception and the fines imposed in the earliest cartel cases were considered ‘heavy’,⁴ and nothing suggests that EU Courts would have applied a ‘lower’ standard of proof or review on account of the precise level of the fine in question. Focusing on fines omits mentioning the numerous annulments in cases where no fines were imposed.

1.003 This book will examine issues of evidence, proof and judicial review in EU competition law. It will do so by focusing on a systematic analysis of the case law of EU Courts, which have delivered a vast amount of judgments on the subject. While developing a historical perspective, the most recent case law will be explored in more detail, as it reflects the current understanding of the law and practice. The general rules on the assessment of evidence will be examined first, and then some specific issues such as duration, defences and fines will be covered. Attention will be devoted, in another chapter, to the assessment of the probative value of different types of evidentiary means which are traditionally seen in competition cases. Finally, two chapters are devoted to judicial review; the first one more focused on procedural questions, in particular those relating to the evidence, and the second one on the standard of judicial review, accompanied with extensive reflections on unlimited jurisdiction for the fines. The book focuses on such issues insofar as they relate to

3 Using this expression, H. Schweitzer, ‘Judicial Review in EU Competition Law’, in I. Lianos and D. Geradin, eds, *Handbook on European Competition Law – Enforcement and Procedure*, Edward Elgar Publishing 2013, 491–538, 495.

4 See Advocate-General Gand in *Quinine* (41/69, *ACF Chemiefarma*, EU:C:1970:51):

[the Court] has full power to consider the facts and, according to the view it takes as to the existence of the alleged infringements and their gravity, it may uphold, cancel or reduce the fine or, if necessary, increase it. I should add that this importance is in practice increased by the heavy fines imposed by the contested decision.

See also, in the same sense, Advocate-General Mayras in *Dyestuffs* (48/69, *ICI v Commission*, EU:C:1972:70, 673).

Commission decisions applying Articles 101 and 102 TFEU. Although sometimes case law on the application of such rules by national courts, on rejections of complaints, on Commission decisions on procedural infringements, or on merger cases, will be mentioned, this will be done for illustrative and comparative purposes, as some *rapprochement* is warranted in certain cases, but those other areas are not the main concern of the book.

The task is not an easy one. The issues covered must always be approached with caution. When it comes to assessing whether the Commission has proven something or the Court has exercised sufficient judicial review, one is normally not familiar with all the details of the evidence relied upon by the parties, and can only make an assessment on the basis of the reading of the judgment.⁵ Conversely, when one is too familiar with the case, the temptation to argue that courts apply ‘light’ or ‘heavy’ standards, depending on the outcome, is high when the person has represented the losing side. **1.004**

This is also an area where misunderstandings are common as different evidentiary concepts are used in different legal systems, and there has been a certain tendency, at least in the Anglo-Saxon literature, to generalize on the basis of common law notions. Debates on evidence tend to use expressions such as ‘legal burden of proof’, ‘burden of producing evidence’ or ‘standard of proof’, which do not always find equivalents in legal traditions of many countries. The attitude of judges in the context of judicial review also varies, and some of the debates on judicial review appear to be just a reiteration of debates which have developed in national law (mainly in France, Germany or the United Kingdom). This does not mean that some attempt to conceptualize issues of evidence is not necessary, but it is clear that it will be fraught with difficulties. Because EU law results from integration of numerous different legal systems, the EU Courts have been reluctant to develop very sophisticated abstract theories. This may be frustrating for those lawyers trained in a single legal tradition, where concepts are more consistently developed by the legislator or the judicature, and applied by the latter. However, it is simply in the nature of European integration that judges tend to be reluctant to develop general theories and would rather decide on the facts of the case. **1.005**

5 [M]aking a truly informed assessment of how the Court has performed its duty in a specific matter would require having access to all the arguments made by the applicant; ‘precise comparisons cannot be made by outside observers’ (E. Barbier de la Serre, ‘Standard of Review in Competition Law Cases: *Posten Norge* and Beyond’, in C. Baudenbacher and Others, eds, *The EEA and the EFTA Court: Decentred Integration; to mark the 20th Anniversary of the EFTA Court*, Hart, 2014, 417, 427).

1.006 Finally, one must bear in mind that debates on the topics of this book are heavily influenced by the scope and degree of protection of certain fundamental rights within the EU. Such protection has acquired more visibility with the full applicability, as primary law, of the Charter of Fundamental Rights, that has prompted calls for a better protection of such rights in EU competition law as well.⁶ Decision-makers carry out their fact-finding tasks in conditions of uncertainty, since they must reconstruct past events not susceptible to direct observation. Therefore, determination of facts always entails risk of error. Laws of evidence are often not concerned about ascertaining the truth as such, but about how to allocate that risk of error. The risk-allocation scheme in EU competition law does not follow an entirely utilitarian rationale (e.g. a simple trade-off between administrative costs and error costs), but is determined by individual rights, such as the presumption of innocence. The presumption of innocence is, however, not incompatible with the application of certain ‘presumptions’ or other mechanisms by virtue of which the authority may have its burden alleviated, and the accused may have to adduce evidence for certain facts, reflecting utilitarian principles. We will examine in certain sections how the presumption of innocence or the right to effective judicial review and to fair proceedings applies in this area. But competition proceedings also engage other fundamental rights, such as the right to privacy, protection of correspondence, or the principles of legality and proportionality of criminal offences and penalties, to mention just a few. One overarching concern is how fundamental rights, especially criminal law type of guarantees, can be applied to enquiries which concern only undertakings, not individuals. The typical evidentiary constellation in a criminal case cannot apply as such here: the measures of enquiry of the Commission are addressed to undertakings, not individuals, and the ‘accused’ is an undertaking too. The ‘trial’ is not carried out before the judge in the same way. Only the disputed issues reach the judge, not the whole case.

B. IS THERE A PROBLEM WITH JUDICIAL REVIEW?

1.007 Criticizing judicial review carried out by EU Courts has become a sort of mantra among practitioners. However, sometimes calls for ‘more’ judicial review are based simply on disagreements as to what facts need to be proven. The stricter standards of review or proof proposed often aim, in reality, at

6 However, the Court of Justice has held that the entry into force of the Lisbon Treaty, incorporating the Charter into EU primary law, cannot be considered a new matter of law which would allow raising a new plea, since the relevant rights were already part of the EU law as applied by the Court of Justice before that Treaty (C-58/12 P, *Groupe Gascogne v Commission*, EU:C:2013:770 para. 32; C-289/11 P, *Legris Industries v Commission*, EU:C:2012:270, para. 36).

introducing the analysis of certain facts in the definition of what should constitute an infringement. Yet, the definition of the prohibited conduct is a legal issue that, even if influenced by economic reasoning, has nothing to do with the standard of proof, although it is very often confused with issues of evidence and proof.⁷ It goes without saying that EU Courts have full jurisdiction over the law.

On issues of evidence, criticisms are often formulated on the basis of abstract standards and overall figures, and very rarely on the basis of a specific analysis of deficiencies of concrete judgments and concrete findings in them. The fact that there are few annulments, i.e., the Commission ‘wins’ many cases, is sometimes seen as problematic in itself,⁸ but this cannot seriously be considered, as such, as a symptom of anything. A low ‘rate’ of annulments may well be due to good priority-setting and a high quality of work or to the procedural framework applied by the competition authority, explanations that many practitioners tend to omit in their opinions. Moreover, competition litigation is not litigation between parties in a civil procedure, where one could expect a balanced win/loss ratio between plaintiffs and defendants. 1.008

7 See H. Schweitzer, n. 3, considering that criticisms of the case law should be read as ‘objections to the substantive interpretation of Article 102 TFEU’ and pointing out that the relative success of the Commission before EU Courts ‘lies not in the weakness of judicial review, but in the structure and relative predictability of the courts’ approach to Article 102 TFEU which does not require a concrete finding of negative welfare effects’ (at 521–3). For Advocate-General Wahl the criticism is often one about ‘outcomes’, the critical voices considering that judges are ‘not capable of, or willing to observe errors in fact or manifest errors of appreciation’ and do not render the ‘right judgments’ (N. Wahl, ‘The Role of the Court of Justice in Ensuring Compliance with Fundamental Rights in Competition Cases since the Lisbon Treaty’ in J. Derenne and M. Merola, *The Role of the Court of Justice of the European Union in Competition Law Cases*, Bruylant, 2012, 272). For him a decision by a judge ensures sounder outcomes provided the reviewing entity is ‘at least as knowledgeable as the decision making authority in the relevant field’ (ibid., at 271). He has no problems in recognizing that this may well not be the case, and what the judge can and should undertake is ‘to verify that the facts invoked by the Commission are ascertained, pertinent, sufficient and capable of substantiating the conclusions drawn by the Commission’. See also M. Jeager, ‘Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?’ in T. Baumé, E. Elfernick and D. Thiaville, eds, *Today’s Multi-layered Legal Order: Current issues and Perspectives*, Paris Publishers, Zutphen, 2011, 115, 136, who finds that the reason is simply that the judges are not convinced by the arguments of the applicants. He adds that ‘full jurisdiction is not a synonym of judicial activism’.

8 See, for example, P-E. Partsch, who considers that the fact that the Court of Appeal of Paris quashes more fines than the General Court is an indication that the General Court does not ensure sufficient judicial review, and refers to ‘the lack of actual control by the General Court’, see final remarks in T. Harles-Walch e.a., *Competition Law within a Framework of Rights: Applying the Charter and the Convention*, Association of European Competition Law Judges, Annual Conference 2013, Lacier, 2015, 110, 112. However, in the French system, the authority is obliged to examine and decide the merits of each case. By contrast, the Commission may decide not to deal with certain cases and focus its limited resources in those which have priority and those where evidence is the strongest. When an authority must examine the merits of each and every case, the risk of error is higher. In the period 1990–2013 the overall amount of fines was reduced to 17.4 billion euros (a reduction of 1.8 billion euros) (taken from G. Vallindas, ‘Sanctions, juges de l’Union, juges nationaux et CEDH: Nouvelles perspectives du contentieux européen de la concurrence’, in S. Mahieu, *Contentieux de l’Union européenne*, Larcier, 2014, 193).

1.009 The Commission should be a responsible institution which obviously learns from past experience.⁹ The weakest cases will be dropped along the way. It is quite common, depending on the strength of the Commission's case, that the final decision will contain differences (sometimes very substantial) as compared to the statement of objections: some objections are dropped (or the whole case, as has happened in certain cases, including cartel cases, in recent years) or periods of participation for some or all of the addressees are shortened. Obviously in all these situations the controversial issues dropped along the way do not reach the EU Courts and thus they are not recorded in judgments. More specifically in the area of cartels the Commission's current 'good record' as regards the substantive findings of infringement is due to the fact that leniency policy has helped to increase the quality of the evidence on which decisions are based. Although mistakes can be made (whatever the amount of internal checks and critique),¹⁰ or the General Court may assess evidence differently as regards certain aspects (more rarely the whole case, but it does happen too), such disagreements should be marginal in a system that works properly.

1.010 The President of the General Court, speaking extrajudicially, has explicitly acknowledged that the 'call for intensification' of judicial review in competition cases involving complex economic assessments '*cannot be ignored*'.¹¹ At the

9 For example, the judgments of 2002 annulling different merger decisions have certainly helped to refine and improve the system, so that it is only logical that the number of annulments in the merger area has diminished. The allocation in practice of 50/50 win/loss quotas which some appear to consider 'fair' could simply diminish the quality of decisions, since the defendant would be 'allocated' a 'win quota' as well, and could increase the number of cases and decisions, in the understanding that a higher rate would be annulled. That may be good for lawyers, but certainly not for the law. Strangely, one practitioner considers that a more stringent review may lead to 'less effective judicial review' since the decisions will become 'better':

Another puzzling issue lies in the fact that, if judicial review is reinforced without sufficient regard for the applicants' procedural rights, this may lead to less effective judicial review. This results from the fact that, following the *Airtours/Schneider/Tetra Laval* trauma of 2002, the Commission has increased the length and detail of its decisions. Competition law decisions are increasingly well reasoned, which is of course a welcome development, but which also means that to successfully challenge a competition law decision an applicant must often present more detailed arguments than in the past.

(Barbier de la Serre, n. 5, 432).

10 If a 'prosecutorial bias' may exist (W. Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', (2004) 27(2) *World Competition* 202), the internal debate and intellectual critique within the Commission (to the frustration of certain case-teams) cannot normally be disclosed, due to duties of confidentiality.

11 M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2(4) *Oxford Journal of European Competition Law & Practice* 295, 297. Another judge appears critical of the standard of review and states that the standard applied is only 'capable of reaching a standard sufficiently close to a full jurisdiction' required by Article 6 ECHR (E. Buttigieg, 'General Court's Standard of Review in Competition Cases and the ECHR', in Harles-Walch, n. 8, 83, 93). A former head of cabinet of the President of the General Court could confidently claim that 'the armour is cracking', while acknowledging that this is not necessarily the sign of more stringent judicial review, but just a 'methodological clarification' (Barbier de la Serre, n. 5, 418)

same time, several appeals have triggered a degree of clarification of the abstract principles that govern judicial review, and the Court of Justice has become more explicit in the way it formulates its definition of the standard of review.¹² There is a clear trend in writing much lengthier judgments which, however, may not satisfy the critics until the ‘rate’ of annulments is ‘high enough’. Certainly, a well-functioning regime of judicial review is a fundamental part of the EU’s commitment to the rule of law, and the Commission should not be afraid of effective judicial review, but the ‘effectiveness’ of such review has nothing to do with abstract figures of cases won or lost.

C. FACT AND LAW: WHAT NEEDS TO BE PROVEN?

1. The boundaries between fact and law

Before discussing problems of evidence and proof it is important to distinguish such problems from a different debate: the definition of the facts which are relevant, and must be the object of the proof.¹³ There are plenty of examples where the EU Courts do not even examine a certain point of fact as the Commission need not prove it for the conduct to be unlawful. In principle, this book will focus on issues of evidence, and not on how the ‘offences’ are defined. Yet, it is clear that there is some complementarity and interaction between the legal and the evidentiary issues. The definition of the offence may result from choices related to ease or difficulty of proving certain points.¹⁴ The ‘legal’ choice of whether a certain aspect must be examined under Article 101(1) or (3) TFEU, for example, may have a significant impact on the outcome of cases and ultimately on the effectiveness of the enforcement of competition law.¹⁵ Economic reasoning also influences the way the offence is defined.¹⁶ **1.011**

The distinction between law and fact is important as recent literature tends to see whatever definition of the conduct which is forbidden as a simple issue of evidence. The basic theory advanced is that the ultimate goal must be the **1.012**

12 N. Wahl, ‘Enjeu et limites actuelles de la jurisprudence relative à la compétence de pleine juridiction conférée au juge de l’Union en matière de concurrence’, *Liber Amicorum Vassilios Skouris*, Lacier, 2015, 727–40, 729.

13 On this distinction, A-L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, L.G.D.J., 2008, paras 668, 678, 823 (in some cases this leads to a ‘dispense de l’allégation’, see, e.g., paras 717, 876–878).

14 See para. 2.048 below. As Stein explains, ‘a substantive law policy would never be sound if it were to ignore anticipated enforcement expenses that include the costs of both fact-finding errors and their avoidance’ (A. Stein, *Foundations of Evidence Law*, OUP, 2005, 8).

15 A. Kalintiri, ‘The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A “Clear” Rule with not-so-clear Implications’ (2015) 34(1) *Yearbook of European Law* 232–56.

16 Sibony, n. 13, para. 1027.

prevention of consumer harm.¹⁷ Therefore, it is consumer harm that must be ultimately proven and any definition of prohibited conduct one may find in case law just establishes at most a sort of probative presumption: what was really to be demonstrated could be inferred from certain other facts, which were directly the object of the evidence, and such inferences were determined by the circumstances of the case.¹⁸ Even the definition of restrictions ‘by object’ is said to be a simple presumption of effects, and therefore some degree of examination of the context will be necessary to see if it is justified to apply a presumption.

1.013 This is not entirely the approach of the Court of Justice, as regards restriction by object, for example.¹⁹ Admittedly, the examination of whether a practice is a restriction by object needs to take into account the legal and economic context. Therefore, the Commission cannot just dispense itself of any analysis of the factual context. However, examination of legal and economic context in cases which are normally characterized as comprising restrictions by object is primarily designed to see whether or not there is still competition which may be restricted.²⁰ Beyond the ‘easy’ situations of cartel cases or conduct directly restricting parallel trade, to identify but two examples, there can be factual situations where further examination is required, as demonstrated by the

17 On the goal of competition law, as seen in the case law, see C-8/08, *T-Mobile Netherlands*, EU:C:2009:343, para. 38: ‘Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.’ See also C-52/09, *TeliaSonera*, EU:C:2011:83, para. 24.

18 For an example of this approach see E. Nazzini, ‘The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 EC Cases’, (2006) 31(4) *ELRev* 518–39.

19 That was the core of the debate in *T-Mobile Netherlands*, n. 17. The background of the case is the allegedly strict standards imposed by Dutch courts as regards evidence of effects. The Court of Justice not only stood firm in its interpretation of restriction ‘by object’, but firmly rejected any attempt to require from the investigative authority the demonstration of certain effects.

20 For example, if the legal framework already restricts competition and leaves no margin for further restriction by undertakings, there cannot be an infringement of Article 101 TFEU (either by object or, indeed, by effect), even if the agreement would contain a prima facie restriction by object. See 40/73–48/73, 50/73, 54/73–56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others v Commission*, EU:C:1975:174, paras 71–73. The examination of the context is limited to that point (C-373/14 P, *Toshiba v Commission*, EU:C:2016:26, paras 31–34). The General Court has rejected attempts to introduce an analysis of effects ‘by the back door’ by denying the relevance of certain hypothetical counterfactual scenarios: ‘The examination of a hypothetical counterfactual scenario – besides being impracticable since it requires the Commission to reconstruct the events that would have occurred in the absence of the agreements at issue, whereas the very purpose of those agreements was to delay the market entry of the generic undertakings – is more an examination of the effects of agreements at issue on the market than an objective examination of whether they are sufficiently harmful to competition. Such an examination of effects is not required in the context of an analysis based on the existence of a restriction of competition by object’ (T-472/13, *Lundbeck v Commission*, EU:T:2016:449, para. 473). For an example where the Commission did not discharge the burden of proof of the existence of potential competition, see T-370/09, *GDF Suez v Commission*, EU:T:2012:333, para. 105 (as regards such potential competition in Germany between 1980 and 1998).

recent cases decided by the Court of Justice concerning this issue.²¹ Yet, the definition of what constitutes a restriction by object is an issue of law and, more importantly, the aim of the evidentiary enquiry in this context will be limited in scope. In the same vein, requiring only ‘potential’ or ‘likely’ effect on competition instead of ‘actual’ effect on competition and the meaning of ‘effect’ are legal questions going to the definition of an infringement and, as such, are not questions of standard of proof.²² Admittedly, the boundaries are sometimes blurred, since in certain cases the establishment of certain factual circumstances is not considered a pre-condition for the existence of an infringement, but may be relevant, where present, in the examination of all the circumstances of the case, and therefore for the outcome of the analysis.²³

The goal of a provision in the law, or the legal interest to be protected, should not necessarily be confused with the conduct which is forbidden by the provision at issue. The relationship between the definition of an offence and **1.014**

21 See, for example, C-382/12 P, *Mastercard v Commission*, EU:C:2014:2201; C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204; C-32/11, *Allianz Hungária Biztosító*, EU:C:2013:160; C-286/13 P, *Dole v Commission*, EU:C:2015:184, paras 113–135.

22 See, for Article 101 TFEU, as regards this issue being one of law, C-7/95 P, *Deere v Commission*, EU:C:1998:256, paras 75–78. The definition of the ‘threshold’ for the effects is seen as an issue of law, governed by EU law, in *Post Danmark II*, for example (C-23/14, *Post Danmark (II)*, EU:C:2015:651). The Court of Justice held that the anticompetitive effect of a particular practice must be ‘probable’, i.e. must not be purely hypothetical, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking (paras 64–67). There is no need to prove that the effect is ‘serious or appreciable’ in nature (paras 70–74). National courts cannot just apply their own ‘thresholds’ as if this was an issue of ‘standard of proof’. The relevance of certain facts is also examined in other contexts. The economic analysis report drawn up at the request of the applicant on the basis of the Statement of Objections concluding that, ‘when the particular features of the market are taken into consideration’, the information that they exchanged ‘was not such as to significantly reduce strategic uncertainty’, was considered irrelevant in *Philips* since there is no legal requirement that the market concerned has some ‘particular features’ (T-762/14, *Philips v Commission*, EU:T:2016:738, para. 72)

23 *Post Danmark II* illustrates this point and the thin boundaries between law and fact. The Court of Justice examined the relevance of whether the rebate scheme applied to a majority of customers or not, and held that there was no need to ascertain this point. At the same time, ‘the fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anticompetitive exclusionary effect’ (*Post Danmark II*), n. 22, paras 43–46). In other words, this verification is not a pre-condition (thus, no legal rule), but the fact that it is complied with is an indication of the existence of abuse (so this fact may be relevant). The same happened a bit later in the judgment, when discussing the ‘as-efficient-competitor’ test: there is no a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based on the as-efficient-competitor test, since in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking. Therefore, the as-efficient-competitor test is, in the words of the Court of Justice, ‘one tool amongst others’ for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme (*ibid.*, paras 56–61).

the justification for the existence of the offence is often a complex one.²⁴ The problems of possibly over-inclusive or under-inclusive laws are not specific to competition law.²⁵ Even if economic reasoning may help to better define the legal criterion in some cases, the choice is, however, a purely legal issue, and to present it as a simple issue of evidence amounts to an attempt to change substantive law by the back door, by creating the illusion that what the judge would be doing is simply to raise the bar of the standard of proof.

1.015 Differences in approach risk having fundamental systemic consequences. The principle of the presumption of innocence, which we will discuss later, is applicable when it comes to the evaluation of the evidence (i.e., whether a fact has been proven), but not in principle as regards the definition of the infringement to be proven (i.e., whether a fact must be proven). In other words, there is no principle requiring that the accused be given the most lenient interpretation of substantive law in case of doubt in the mind of the judge. However, if the fact in question is considered relevant just because something else can be inferred from it, i.e., because it has a logical relationship with another fact, the principle of the presumption of innocence may come into play to contest that relationship.

1.016 We will examine in Chapter 2 certain elements which influence the ‘persuasive effect’ of evidence, and we will see how they may influence the actual definition of what is prohibited. The offence may precisely be defined in a way that avoids endless evidentiary problems,²⁶ and this explains why in EU competition law it is enough to prove ‘potential’ effect on intra-EU trade or on competition (see paras 2.048 and 2.049 below).²⁷ This reflects the principle that the prohibition of certain conduct is more concerned about proving personal conduct than about proving its consequences, and therefore it is more tolerant of uncertainty as regards the latter. The same will apply as regards what we call ‘the risk of getting it wrong’. If there is a risk of a ‘chilling effect’

24 In criminal law, for example, certain legal interests are protected by prohibiting behaviour which creates an objective risk (this type of analysis may also be present in competition rules, see Opinion of Advocate-General in C-8/08, *T-Mobile Netherlands*, EU:C:2009:110, para. 47).

25 One should bear in mind that to some extent Article 101 TFEU does not encompass all possible anticompetitive problems. For example, phenomena which an economist would consider ‘collusion’ (price-signalling which is communicated to the public, tacit collusion) are not necessarily captured by Article 101(1) TFEU, which is concerned with the way the outcome is achieved.

26 On these issues, from a comparative law perspective, see C-F. Stuckenberg, *Untersuchungen zur Unschuldvermutung*, de Gruyter, 1998, 95–6 on German law.

27 In EU competition law, the fact that effects on intra-Community trade need to be only ‘potential’ is justified by the difficulties of proving actual effect ‘to a sufficient legal standard’ (T-25/95, T-26/95, T-30/95–T-32/95, T-34/95–T-39/95, T-42/95–T-46/95, T-48/95, T-50/95–T-65/95, T-68/95–T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* EU:T:2000:77, para. 3376; T-395/94 *Atlantic Container v Commission* EU:T:2002:49, para. 90).

on highly desirable conduct, this may be resolved by the EU Courts with a heightened substantive standard of legality and not necessarily through their assessment of the evidence.

The way the offence is defined renders (or may render) irrelevant the demonstration or the discussion of certain facts. EU Courts have taken an expansive, purposive view of what constitutes cartel behaviour. As early as 1972, the Court of Justice indicated in its *Dyestuffs* judgments that the aim of (now) Article 101 TFEU was to prohibit any form of co-ordination between undertakings ‘by which, without having reached the stage where an agreement properly so-called may have been concluded, they knowingly substitute practical co-operation between them for the risks of competition’.²⁸ Accordingly, abundant case law has widely defined what constitutes a cartel offence.²⁹ Article 101 TFEU seeks to ensure that each economic operator determines its commercial policy in the market-place independently. It thus prohibits any form of contact, either direct or indirect, between competitors, the aim or effect of which is to distort competition.³⁰ The contours of what an agreement is are rather open.³¹ **1.017**

An agreement within the meaning of Article 101(1) TFEU can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the **1.018**

28 *ICI v Commission*, n. 4.

29 The fact that the examination of the agreement may limit itself to the ‘principle’ of the agreement, and that the precise ‘mechanics’ of the cartel matter less shows that the prohibition of Article 101 TFEU is applied to the ‘partnership’ in illegality, including the bargaining process leading up to agreement in terms (J. Joshua, ‘Single Continuous Infringement of Article 81 EC: Has the Commission Stretched the Concept Beyond the limit of its Logic?’ (2009) 5 *European Competition Journal* 451, 457–8).

30 *Suiker Unie and Others v Commission*, n. 20, para. 174. Moreover, in the case of a complex infringement there is no need to qualify each conduct as an agreement or concerted practice. The case law regards cartels as complex or multiform infringements, capturing anti-competitive cartel behaviour irrespective of its precise legal classification. The case law consistently stresses that such an interpretation does not have an unacceptable effect on the question of proof. On the one hand, the Commission must still establish that each form of conduct found falls under the prohibition laid down in Article 101(1) TFEU as an agreement, a concerted practice or a decision by an association of undertakings. On the other hand, the undertakings charged with having participated in the infringement have the opportunity of disputing, for each form of conduct, the characterization or the characterizations applied by the Commission by contending that the Commission has not adduced proof of the constituent elements of the various forms of infringement alleged (T-9/99, *HFB and Others v Commission* EU:T:2002:70, para. 191, with further references).

31 It is settled case law that in order for there to be an agreement within the meaning of Article 101(1) TFEU, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (*HFB and Others v Commission*, n. 30, para. 199; T-61/99, *Adriatica di Navigazione v Commission*, EU:T:2003:335, para. 88; T-49/02 to T-51/02, *Brasserie nationale and Others v Commission*, EU:T:2005:298, para. 118).

restriction envisaged are still under negotiation;³² there is no need to provide a precise date for the agreement or the form it took;³³ there is no need to show intention to restrict competition for an agreement to be restrictive by object;³⁴ there is no need to show effects as regards agreements or concerted practices which have as their object the restriction of competition; the concept of concerted practice does in fact imply the existence of reciprocal contacts, and the condition of reciprocity is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it;³⁵ a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices;³⁶ there is no need, in the case of cartels, to define the market.³⁷ As we will see, there is no need to demonstrate the precise mechanism by which the restrictive object was sought.³⁸ This lack of need to examine certain facts, which may render irrelevant certain factual disputes, also applies in the area of abuses of dominant position.³⁹ The *Intel* judgment is very illustrative on this point. Many documents were considered irrelevant since they referred to the lack of existence of formal exclusivity, but the Commission's case was not based on that.⁴⁰

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- 32 See, to that effect, *HFB and Others v Commission*, n. 30, paras 151–157 and 206; T-186/06, *Solvay v Commission*, EU:T:2011:276, para. 86; T-240/07, *Heineken Nederland v Commission*, EU:T:2011:284, para. 45; T-83/08, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, EU:T:2012:48, para. 186.
- 33 Case T-133/07, *Mitsubishi Electric v Commission*, EU:T:2011:345, para. 231.
- 34 Case C-551/03 P, *General Motors v Commission*, EU:C:2006:229, paras 77–78; even if intention may be relevant, see T-472/13, *Lundbeck v Commission*, EU:T:2016:449, paras 334 and 523, with further references.
- 35 *Cimenteries CBR and Others v Commission*, n. 27, paras 1849, 1887. The exchange does not need to be reciprocal, in the sense of both sides exchanging the information, see T-54/03, *Lafarge v Commission*, EU:T:2008:255, para. 458; T-377/06, *Comap v Commission*, EU:T:2011:108, para. 70.
- 36 *T-Mobile Netherlands*, n. 17, paras 36, 39.
- 37 There is an obligation on the Commission to define the market in a decision applying Article 101(1) TFEU only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect intra-EU trade and has as its object or effect the prevention, restriction or distortion of competition within the common market (T-62/98, *Volkswagen v Commission*, EU:T:2000:180, para. 230; T-359/06, *Heijmans Infrastructuur v Commission*, EU:T:2012:489, paras 43–45, 53–57).
- 38 Case T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, EU:T:2004:221, para. 203; T-566/08, *Total Raffinage Marketing v Commission*, EU:T:2013:423, para. 225.
- 39 See, for a recent example, *Post Danmark (II)*, n. 22, on the relevance of the 'coverage' of a rebate scheme and the 'as-efficient-competitor' test (n. 23 above). These factual debates, which may ultimately turn out to be irrelevant depending on the applicable legal criteria, are as old as competition law. In *Commercial Solvents* the factual debate on the existence of processes of experimental nature was irrelevant, since only substitution 'without difficulty' was relevant (6/73 and 7/73, *Istituto Chimioterapico Italiano and Commercial Solvents v Commission*, EU:C:1974:18, paras 9–16, see also para. 22, rejecting the request for an expert report on market definition).
- 40 Case T-286/09, *Intel v Commission*, EU:T:2014:547, para. 597. Other points did not need to be proven: an exact quantification of the level of the part of those rebates which was provided in consideration for exclusivity (paras 453 and 973); that the parties had expressly agreed, or that Intel had expressly communicated to the customer that the rebates would, at least in part, be withdrawn if it failed to comply with the 95 per cent condition (para. 776); and that the applicant threatened a customer with a disproportionate loss of payments, as that threat is inherent in the existence of an unwritten exclusivity condition, regardless of whether or not it

Some cases show how thin the line between law and fact can be. The ‘causal link’ between ‘concertation’ and ‘practice’ which the concept of concerted practice requires can be presumed: it is to be expected that participants in an information exchange will make use of the information obtained in determining their course of conduct on the market (see para. 2.076 below). The preliminary question in *T-Mobile*⁴¹ raised precisely the issue of whether this presumption is an issue of substance (of the interpretation of Article 101 TFEU) or procedure (to be in principle governed by national law). The Court of Justice followed the first option, which was certainly more in line with previous case law, but also reflected the reality that certain issues of evidence are considered under national law more a question of substance than an issue of procedure. Advocate-General Kokott had a different approach. For her, ‘whether and in what circumstances a relationship of cause and effect between concertation and market conduct may be presumed concerns the issue of proof’.⁴² Yet, she reached in practice a result somewhat similar to that of the judges by referring to the general principles of Union law, and in particular the principle of effectiveness.⁴³

2. The relevance for national courts

The distinction between law and fact is particularly important in the context of the decentralized enforcement of Articles 101 and 102 TFEU. In this respect, recital 5 of Regulation No. 1/2003 provides that 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’. Therefore, even for ‘defences’, rules on the burden of proof do not substantially affect the duty of the authorities to

has been communicated expressly (paras 778 and 999, 1494). See also, making similar points, T-155/06, *Tomra Systems and Others v Commission*, EU:T:2010:370, paras 265–268, 288–290.

41 *T-Mobile Netherlands*, n. 17.

42 Advocate-General Opinion in *T-Mobile Netherlands*, n. 24, para. 77.

43 According to the principle of effectiveness, she concluded that:

criteria for proof of an infringement of Article 81 EC may not be imposed if they are so onerous as to render such proof impossible in practice or excessively difficult. In particular, national courts may not ignore the typical characteristics of evidence adduced in determining infringements of the competition rules and must permit reference to be made to common experience when evaluating typical events (*ibid.*, para. 94).

The principle of effectiveness did not imply for her a requirement on Member States to align in every detail the existing standard of proof applicable under national law with the standard of proof usually required by EU Courts, as the union legislature consciously accepted the existence of certain variations in Member State practice (*ibid.*, para. 86). For her, ‘[t]he presumption of a causal link between concertation and market conduct which the Court recognises in relation to concerted practices constitutes nothing other than a legitimate conclusion drawn on the basis of common experience’ (*ibid.*, para. 90).

investigate the facts, even if they may affect, depending on the context, the intensity of such duty. Each legal system keeps a large degree of autonomy as regards standards of proof and in general how evidence is gathered and assessed (principle of procedural autonomy).⁴⁴ The EU legal order has its own rules on these issues, and the evaluation of evidence is governed by its 'own' principle of autonomy, meaning that only Union law governs the submission of evidence in procedures before the Commission and EU Courts.⁴⁵ These rules are the focus of this book.

1.021 We saw before how, in *T-Mobile*,⁴⁶ the presumption of use of information in a concerted practice was considered part of the substantive law, and therefore national law did not apply. In *SLA 'VM Remonts' and Others* the Court of Justice arrived at the same conclusion as regards the question whether an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services.⁴⁷ Even when left to the national law, two main limits exist in the application of the laws on evidence by Member States. One is the very definition of the burden of proof, which is set out in Article 2 of Regulation 1/2003, and is therefore not at the disposal of Member States. The second is that evidence rules and obligations must be compatible with general principles of Union law. These general principles are those of equivalence and effectiveness,⁴⁸ but also fundamental

44 See, as regards EU law in general, M. Fartunova, *La preuve dans le droit de l'Union européenne*, Bruylant, 2013.

45 K. Lenaerts, 'Some Thoughts on Evidence and Procedure in European Community Competition Law' (2006) 30(5) *Fordham International Law Journal* 1463–95, 1465.

46 *T-Mobile Netherlands*, n. 17.

47 C-542/14, *SLA 'VM Remonts' and Others*, EU:C:2016:578. The Court held that the issue did not concern the rules relating to the assessment of evidence and the requisite standard of proof which, in the absence of EU rules on the matter, are covered, in principle, by the procedural autonomy of the Member States, but the constituent elements of the infringement that must be present if an undertaking is to be found liable for a concerted practice (para. 21). The judgment later defined the issues which were left for the rules of the domestic law (para. 32) (see also para. 2.078 below).

48 The principle that national law must guarantee the full effectiveness of EU competition law also influences national law on remedies in general. In *VEBIC*, the Court of Justice was called upon to examine a particular characteristic of Belgian competition law, namely the fact that the Belgian competition authority *could not* act as a defendant in judicial proceedings brought against its own decisions. The Court of Justice ruled that such characteristic created a risk that the court before which the proceedings have been brought might be wholly 'captive' to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field of activity which involves complex legal and economic assessments, this risk is liable to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of EU competition rules (C-439/08, *VEBIC*, EU:C:2010:739, paras 57–59). In *Pfleiderer* the Court of Justice also limited somehow the procedural autonomy of Member States, as regards access to leniency statements (C-360/09, *Pfleiderer*, EU:C:2011:389). *Schenker* also ensures some degree of uniformity in the enforcement of competition rules, based partly on the need to ensure effective enforcement. The Court of Justice found that if, in the general interest of uniform application of Articles 101 TFEU and 102 TFEU, the Member States establish conditions relating to intention or negligence in the context of application of Article 5 of Regulation No 1/2003, those conditions should be at least as stringent as the condition laid down

rights.⁴⁹ The respect of fundamental rights will influence at national level the burden and the standard of proof, in the same way, as will be seen below, as they have influenced the burden and standard of proof at Union level. Fundamental rights will tend to ensure that differences in evidentiary standards are kept to a minimum and are not prejudicial to the defendant. The principle of effectiveness may also play in the opposite direction, as it will tend to ensure that standards are not so stringent that enforcement of competition rules is undermined.⁵⁰

These issues were discussed in *Eturas*. The referring court raised the issue whether the dispatch of a message, such as that at issue in the main proceedings, could constitute sufficient evidence to establish that the operators using the system were aware, or ought to have been aware, of the content of that message, and if so, what a travel agency (the addressee of the message) could do to rebut the presumption that it participated in a concerted practice. The Court of Justice stated that: **1.022**

although Article 2 of Regulation No 1/2003 expressly governs the allocation of the burden of proof, that regulation does not contain any provisions on more specific procedural aspects. Thus, in particular, that regulation does not contain any provision in relation to the principles governing the assessment of evidence and the standard of proof in national proceedings for the application of Article 101 TFEU.

That conclusion was ‘confirmed by recital 5 of Regulation No 1/2003, which expressly states that the regulation does not affect national rules on the standard of proof’.⁵¹

The Court of Justice refused in *Eturas* to consider, in contrast to the presumption in *T-Mobile*, the answer to the question as something that followed from the concept of a ‘concerted practice’, since it ‘is not intrinsically linked to that concept’. That question ‘must be regarded as relating to the assessment of evidence and to the standard of proof, with the result that it is **1.023**

in Article 23 of Regulation No 1/2003 so as not to jeopardize the effectiveness of EU law (C-681/11, *Schenker & Co and Others*, EU:C:2013:404).

49 W. 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(2) *World Competition* 189.

50 See, in general, W.-H. Roth, ‘Effet utile im europäischen Kartellrecht’, *WRP* 2013, 257ff. For Gärditz, the limited review of evaluative assessments is linked to a definition of competence between the administration and the judge, and also constitutes a substantive rule, and therefore influences as well the scope of judicial review by national courts (K.F. Gärditz, ‘Die gerichtliche Kontrolle behördlicher Tatsachenermittlung im europäischen Wettbewerbsrecht zwischen Untersuchungsmaxime und Effektivitätsgebot’, *Archiv des öffentlichen Rechts*, 139 (2014), 329–83, 356–8, 374–5).

51 C-74/14, *Eturas and Others*, EU:C:2016:42, paras 30–31.

governed – in accordance with the principle of procedural autonomy and subject to the principles of equivalence and effectiveness – by national law'.⁵² The principle of effectiveness still had an effect. It 'requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent'.⁵³ At the same time, the presumption of innocence precludes the referring court from inferring from the mere dispatch of the message that the travel agencies concerned ought to have been aware of the content of that message.⁵⁴ However, the presumption of innocence does not preclude a decision based on 'other objective and consistent indicia', provided that the travel agencies in question still have the opportunity to rebut it. In that regard, the referring court cannot require that those agencies take excessive or unrealistic steps in order to rebut that presumption.⁵⁵

D. THE INTERACTION BETWEEN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

1. Standard of proof v standard of judicial review

1.024 The relationship between the administrative and the judicial stages can be complex, as the role of the Commission and the EU Courts are different. The difficulty lies in whether evidentiary standards apply to both and if that is the case, if they are the same and what is the role of the reviewer.⁵⁶ Some authors trained in common law differentiate clearly between the 'standard of review' and the 'standard of proof'.⁵⁷ It is theoretically possible to imagine that a particular statute obliges an administrative body to decide on a given case according to a high standard but then impose a judicial review based on

52 Ibid., para. 34

53 Ibid., para. 37

54 Ibid., paras 38–39.

55 Ibid., paras 40–41.

56 Joshua is of the view that if the expression 'burden of proof' may be appropriate when it comes to deciding a case before the court, in the context of an adversarial procedure, it may not be so apt when it comes to defining the task of the Commission during the administrative procedure (J. Joshua, 'Proof in Contested EEC Competition Cases: a Comparison with the Rules of Evidence in Common Law', (1987) 12 E.L.Rev. 315, 319).

57 See, underlining this difference, P. Craig, *EU Administrative Law*, OUP, 2006, 464–70. He distinguishes between the judge and the primary decision-maker:

the standard of proof tells us the degree of likelihood that must be established in relation to factual findings in order for the primary decision-maker to make its initial decision. It does not tell us the standard of judicial review applied by the court in deciding whether the primary decision-maker has met the standard of proof required of it.

manifest error only.⁵⁸ EU Courts have never drawn a clear line. The main clue as to what this standard may be is to a large extent determined by what the judge requires the Commission to show when the decision is contested. As one author has pointed out, it can be said the standards of proof and standards of review are not two separate notions but two aspects of a single control system. Whatever the Commission has to prove is what the General Court is empowered to verify: '[i]mposing a burden of demonstration on the Commission only makes sense if the failure to discharge this obligation is apt to cause judicial annulment'.⁵⁹

Having said this, the scope of one and the other are still conceptually different. **1.025** First, the Commission's burden covers all findings of the decision, whereas the scope of judicial review is primarily determined by the issues which are contested by the applicant. It is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas. This is a procedural requirement which is not incompatible with the rule that, in regard to infringements of the competition rules, it is for 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: 'What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.'⁶⁰ This means that while an undertaking can remain fairly passive during the administrative procedure (without prejudice to its duty to comply with its legal obligations during the enquiry), since it has no 'burden' during the enquiry, this changes when proceedings are brought before the EU Courts, where the undertaking is expected to be more pro-active.

Secondly, equating the two standards is not necessarily possible when it comes to issues as regards which judicial review may not be considered as 'comprehensive', i.e., complex economic assessments. In such cases EU Courts will often exercise more limited (but, as we will see, still intense) review, but case law does not determine the standard which must be used by the Commission. **1.026** Whenever some evaluative judgement is necessary, is the Commission obliged to make the 'only' correct one? Is it entitled to make a choice amongst equally valid inferences or assessments? Or is the Commission just required to reach

58 Fartunova, n. 44, 599; B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (March 2005) 1(1) *European Competition Journal* 7.

59 H. Legal, 'Standards of Proof and Standards of Judicial Review in EU Competition Law' (2006) 32 *Annual Proceedings of the Fordham Corporate Law Institute* 2005 107–16, 113.

60 C-272/09 P, *KME Germany and Others v Commission*, EU:C:2011:810, paras 104–105.

findings which are not ‘manifestly wrong’? We will come back to these issues at several stages.

1.027 The *inter partes* nature of judicial review may convey the impression that judges decide between two ‘competing’ stories. To some extent, this is correct. For many findings of fact the EU Court will carry out its own assessment of the evidence. It will examine typically if it entertains doubts or if it is convinced by such evidence. If it is not convinced, the Court may annul the decision, if the finding is material for the outcome. The Court may express this disagreement with the Commission as an ‘error’ of the Commission when examining the evidence, in order to try to maintain the idea that the review is one of legality first. But in reality, as regards these aspects for which the review is more ‘comprehensive’, the judge is not examining if the Commission should have had doubts; it examines if it has doubts ‘itself’. So it is sometimes substituting its assessment for that of the Commission.⁶¹

1.028 However, the fact that the EU Courts will exercise, for the findings relating to the constituent elements of the infringement, a review of legality (deep, but nevertheless of that nature), means that judges will insist on basing their judgment on evidence which is mentioned in the decision. This will be the case not only for aspects where the burden falls less controversially on the Commission (such as proving the existence of the conduct itself), but may also be the case in cases where the undertaking is relying on defences, or in general is trying to rebut a factual presumption relied upon by the Commission. There are elements of flexibility. This limitation does not apply to the applicant, who, as will be seen, is not always prevented from adducing new evidence, even if the fact that such evidence is raised at a late stage may be taken into account in the overall examination of the evidence. The Commission may provide counter-evidence undermining the probative value of the (new) evidence provided by the applicant. However, the principle is accepted that the decision may be annulled on the basis of pieces of evidence which were completely unknown to the Commission. All in all, the burden of proof of the Commission needs to be discharged with elements gathered at the administrative stage, on which the undertaking has been heard during the administrative procedure, and relied upon in the decision. The Commission can only ‘catch up’ to a very limited extent at the judicial stage. This introduces a certain ‘asymmetry’ in the system.

⁶¹ See, very explicitly, T-422/10, *Trafilerie Meridionali v Commission*, EU:T:2015:512, para. 117, where the General Court makes it clear that it reaches its own conclusions and verifies if they coincide with those of the decision.

2. On the legality of a system where decisions are adopted by the Commission first

The Commission does not need to respect the guarantees of independence that a court must have under case law relating to Article 6 ECHR because the case law of EU Courts has reiterated that the Commission is not a court.⁶² **1.029**

More recently, the debate has focused on whether it is compatible with Article 6(1) ECHR (and Article 47 of the Charter of Fundamental Rights)⁶³ to have a system where competition penalties are imposed, in the first instance, by an administrative or non-judicial body, and then reviewed by courts.⁶⁴ This has been accepted in the case law of the ECtHR, provided the decision is subject to subsequent review by a ‘judicial body that has full jurisdiction’.⁶⁵ In order to be classified as a ‘judicial body that has full jurisdiction’, a judicial body must, inter alia, have jurisdiction to examine all questions of fact and law relevant to the dispute before it.⁶⁶ We will examine in Chapter 6 what this ‘full jurisdiction’ means in practice. At this stage suffice it to say that it was submitted for a number of years that such a possibility was open in the case law of the ECtHR only for cases of minor and frequent offences. However, several cases **1.030**

62 See, for example, 209–215 and 218/78, *Van Landewyck v Commission*, EU:C:1980:248; 100–103/80, *Musique Diffusion Française v Commission*, EU:C:1983:158, para. 7; T-54/03, *Lafarge v Commission*, EU:T:2008:255, paras 36–47 and case law cited therein. See also T-156/94, *Aristrain v Commission*, EU:T:1999:53, where the General Court recalled previous case law to the effect that:

the fact that the Commission combines the functions of prosecutor and judge is not contrary to the procedural safeguards provided for by Community law. [...] these procedural guarantees do not require the Commission to adopt an internal organisation precluding the same official from acting as investigator and rapporteur in the same case (para. 102).

See also, making an identical point on the lack of applicability of Article 6 ECHR as regards the Boards of Appeal of OHIM, T-295/11, *Duscholux Ibérica v OHIM*, EU:T:2012:420, para. 21 and T-405/13, *Comptoir d'Épicerie v OHIM*, EU:T:2014:1072, para. 71.

63 Article 6 ECHR: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.’

64 For early recognition that the system is compatible with Article 6 ECHR, see K. Lenaerts, ‘Sanktionen der Gemeinschaftsorgane gegenüber natürlichen und juristischen Personen’, *EuR* 1/1997, 17–46, 36–40. This debate has, to some extent, been reflected in another area, that of customs duties, see, on this point, the interesting judgment in C-62/06, *Zefeser*, EU:C:2007:811, where there was an issue as to whether or not the administration could make certain determinations. The Court of Justice did not go as far as Advocate-General Trstenjak, who considered that such determination could only be made by a judge (Opinion of Advocate-General of 3 May 2007, EU:C:2007:264, paras 42–68). See also, for disciplinary proceedings in staff cases, F-54/11, *BG v Ombudsman*, EU:F:2012:114, paras 116–118.

65 See, ECtHR, *Albert and Le Compte v Belgium*, 10 February 1983, para. 29; *Schmautzer, Umlauf, Gradinger, Pramstaller, Palaoro and Pfarrmeier v Austria*, 23 October 1995, paras 34, 37, 42, 39, 41 and 38; and *Mérigaud v. France*, no. 32976/04, para. 68, 24 September 2009.

66 See, ECtHR, *Chevroil v France*, no. 49636/99, para. 77, and the case law cited, and *Silvester's Horeca Service v Belgium*, no. 47650/99, para. 27, 4 March 2004.

have applied it also to not so minor offences.⁶⁷ More importantly, in the *Jussila* case,⁶⁸ decided by the Grand Chamber of the ECtHR, it was held that there are clearly ‘criminal charges’ of different weight. Cases that do not belong to the traditional categories of the criminal law, for instance, competition law ‘differ from the hard core of criminal law; consequently the criminal-head guarantees will not necessarily apply with their full stringency’.

1.031 The *Menarini Diagnostics* judgment of the ECtHR⁶⁹ has probably put an end to the debate.⁷⁰ It concerned a decision by the Italian NCA, the *Autorità Garante della Concorrenza e del Mercato* (AGCM) which follows the same system as the Commission, with the authority investigating and determining the matter, subject to review by a court. The ECtHR found that, in view of the amount of the fine (€6 million) the matter was to be classified as ‘criminal’ for the purposes of Article 6 ECHR. The ECtHR held that entrusting the prosecution and punishment of breaches of the competition rules to administrative authorities is not inconsistent with the ECHR insofar as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 ECHR. Decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) ECHR must be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it. However, the ECtHR rejected the applicant’s argument that the judicial review of legality exercised by the competent court over the AGCM’s decision was insufficient. Although the competent court’s powers of review were classified under domestic law as limited to a review of legality, the

67 In *Västberga Taxi Aktiebolag and Vulic v Sweden*, no. 36985/97, 23 July 2002, para. 93, the ECtHR considered that such system was compatible with Article 6 even when the tax surcharges ‘come to large amounts’. See also *Bendenoun v France*, 24 February 1994, para. 46. In *Valico* the ECtHR considered that such a system was also acceptable as regards a fine imposed by the administrative authority for a breach of planning laws. Since the fine was of more than one million euros, the offence can hardly be seen as frequent or minor (*Valico S.r.l. v Italy* (decision), no. 70074/01, 21 March 2006). See also *Mamidakis v Greece*, no. 35533/04, 11 January 2007: no violation of Article 6 ECHR in a situation where an administrative fine, amounting to some 4 million euros, was imposed by a customs investigation service on an individual; the ECtHR did not find any violation of Article 1 of Protocol 1 (deprivation of property) due to the impact on the applicant’s financial situation.

68 ECtHR, *Jussila v Finland* [GC], no. 73053/01, para. 43, ECHR 2006-XIV.

69 ECtHR, *Menarini Diagnostics v Italy*, no. 43509/08, 27 September 2011.

70 See also W. Wils, ‘The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which the European Commission acts both as Investigator and as First-instance Decision Maker’ (2014) 37(1) *World Competition* 5; P. Mahoney, ‘Flogging a dead horse: the appropriate human rights policy for judicial treatment of competition fines’ in D. Edward, J. MacLennan and A. Komninos, *A Scot without Borders – Liber Amicorum Ian S. Forrester*, vol. I, Concurrences, 2015, 225 (the author was at the time judge at the ECtHR).

ECtHR found that in fact the competent court's powers went further and enabled it to exercise full review over the AGCM's decision. The exact extent of the review carried out by the competent court is not very clear from the judgment, but appears similar to, if not more limited than, the review exercised by EU Courts (see paras 6.060–6.062 below).

The Court of Justice has followed the same approach, quite logically, in later judgments. In *Schindler*, an appeal, the Court of Justice repeated similar considerations, and explicitly referred this time to the *Menarini* judgment of the ECtHR. The Court of Justice held that 'the fact that decisions imposing fines in competition matters are adopted by the Commission is not in itself contrary to Article 6 of the ECHR as interpreted by the [ECtHR]'.⁷¹ The issue is then one of how intense judicial review must be in order to comply with Article 6 ECHR and Article 47 of the Charter of Fundamental Rights. This issue will be examined in the Chapter 6. **1.032**

E. THE ADMINISTRATIVE FACT-FINDING

Fact-finding can take place at the administrative and at the judicial stage, when the decision is contested. In both stages fact-finding depends partly on the initiative of the parties, but also on the adoption by the Commission or the Court of measures which, in different ways, may compel the parties to provide evidence. The applicable rules are different, although in both stages there is a wide degree of latitude which is left to the decision-maker. We will see in Chapter 5 the role of the judge in collecting evidence. We will briefly recall at this juncture the different evidentiary means at the disposal of the Commission. It is the evidence gathered during the administrative procedure that will be the basis for the decision. It is also such evidence that will be the primary evidentiary material at the judicial stage. The EU Courts cannot carry out a new enquiry. Moreover, the legal framework which surrounds the obtention of the evidence may determine the value of the evidence as well (see paras 4.05–4.060 below), so a brief recollection of such framework is appropriate. **1.033**

The evidence gathered in any given case, at the administrative stage, will generally be a combination of contemporaneous documentary evidence of the conduct of the parties under investigation and *ex post facto* statements made in the course of the investigation. It may be produced voluntarily by the undertaking concerned, but very often at the request of the Commission, in **1.034**

⁷¹ C-501/11 P, *Schindler Holding and Others v Commission*, EU:C:2013:522, paras 33–38; C-510/11 P, *Kone v Commission*, EU:C:2013:696, paras 20–32; T-286/09, *Intel v Commission*, EU:T:2014:547, paras 1608–1612.

the exercise of its investigative powers. Regardless of the type or form of the investigation, undertakings are expected to co-operate to the extent consistent with their fundamental rights.⁷² Of course, the Commission can obtain information informally, and often does so.⁷³

1.035 The Commission's investigative powers are set out in Regulation 1/2003 and comprise two main types of measure: (i) requests for information;⁷⁴ and (ii) inspections.⁷⁵ Either type of measure may take one of two forms: (i) where information is sought by request (or written authorization in case of inspections); and (ii) where information is required by formal decision.⁷⁶ Article 21 governs inspections of 'other' premises, land and means of transport. The most important additional safeguard provided by Article 21 is the requirement in Article 21(3) that an inspection cannot be executed without prior judicial authorization.

1.036 Article 19 provides an express power to take statements by interview.⁷⁷ The term 'statement' understates the nature of what is actually contemplated, as the reference to 'interviews' also implies that questions may be asked by the Commission.⁷⁸ No fine or penalty under Article 23 or 24 of Regulation 1/2003 can be imposed by reference to a statement made in, or a fact omitted from, an interview made under Article 19. In cartel cases, corporate statements made spontaneously by leniency applicants have become also an important

72 374/87, *Orkem v Commission*, EU:C:1989:387; 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 and Others v Commission*, EU:C:2004:6, paras 62–65.

73 Sometimes public sources, including internet or press articles, T-217/03 and T-245/03, *FNCBV and Others v Commission*, EU:T:2006:391, paras 176–177, 285.

74 There must be a relationship between the information requested and the infringement being investigated (T-39/90, *SEP v Commission*, EU:T:1991:71, para. 29). The Commission has a substantial measure of discretion in this context (*Orkem v Commission*, n. 72, para. 15; C-94/00 *Roquette Frères*, EU:C:2002:603, para. 78; and T-340/04, *France Télécom v Commission*, EU:T:2007:81, para. 148).

75 As with requests for information, investigations under Article 20 can only be made in respect of undertakings and associations of undertakings. As in the case of Article 18, there does not seem to be any restriction as to which undertakings can be investigated. Third-party undertakings may therefore be investigated under Article 20, or inspections may be used as a tool in conducting sector inquiries under Article 17.

76 The inspectors' powers in such case are: (a) to enter any premises, land and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (c) to take or obtain in any form copies of or extracts from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; and (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

77 However, notwithstanding the absence of such a power in Regulation 17, it had not in practice inhibited the Commission from using statements given outside the framework of inspections (in particular in application of its leniency policy) as evidence of infringements. Interviews had been used, for example, in the case leading to C-167/04 P, *JCB v Commission*, EU:C:2006:594, para. 96.

78 Article 19 is silent about a person's right to be accompanied by a lawyer during the interview, but in practice this is accepted; indeed, it is likely to enhance the value of the statement as evidence (see para. 4.062 below).

source of information, although the details of the leniency policy will not be examined here. Regulation 1/2003 has also introduced a potentially important new dimension to the Commission's sources of evidence in Article 12, which provides for the exchange of detailed information between the Commission and NCAs.

In interpreting the Commission's powers of investigation, particular regard must be had to certain fundamental rights. It is necessary to prevent the rights of defence from being irremediably impaired during the Commission's fact-finding.⁷⁹ Other rights, such as legal professional privilege and the privilege against self-incrimination, are as potentially relevant to inspections as they are to requests for information. Some of those issues will be examined in the section on admissibility of evidence (see paras 4.011–4.020 below). The Commission's powers of inspection under Article 20 also raise questions about the right to respect for private life and correspondence under Articles 6 and 8 ECHR and Articles 47 and 7 of the Charter. It has been debated whether the ECtHR's requirements with respect to the immediacy of judicial review are satisfied by the remedies available to the addressee of a decision ordering an inspection. In earlier cases, the Court was dismissive of reliance on Article 8 ECHR as a ground of objection to an inspection.⁸⁰ Several ECtHR cases later rejected that position,⁸¹ and the Court of Justice accordingly revised its

79 Case 46/87 and 227/88, *Hoechst v Commission*, EU:C:1989:337, paras 14–15. The Commission will allow an undertaking a reasonable time for lawyers to arrive to assist during the inspection but in *Dutch Bitumen*, the General Court, having reviewed the criminal law protections afforded by Article 6 ECHR, nevertheless held that the presence of a lawyer was not indispensable to the lawfulness of an inspection, although it appeared to accept that the Commission was required to postpone its inspection pending the arrival of a lawyer, but that such postponement had to be limited to the 'strict minimum' (T-357/06, *KWS v Commission*, EU:T:2012:488, para. 231).

80 *Hoechst v Commission*, *ibid.*, para. 18.

81 *Colas Est* concerned a suspected widespread cartel in the French construction industry, which was the subject of a very large-scale inspection, comprising simultaneous 'dawn raids' on 56 companies. The inspections were ordered by the French authorities pursuant to a law that did not (at that time) require any judicial authorization for the inspectors to exercise their powers of entry and seizure of evidence. The documents seized were used as the basis for a decision which fined the Colas Est group. The ECtHR held that: '... the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises' (*Société Colas Est v France*, no 37971/97, para. 41). Although it found that the inspections were 'in accordance with the law', the ECtHR nevertheless also held that the law under which such large-scale inspections were authorized should have afforded 'adequate and effective safeguards against abuse', which were absent where:

the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present ... That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned ... the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued (paras 48–49).

position in *Roquette Frères*.⁸² Recent cases show that the ECtHR requires that there be effective possibilities for contesting the inspection once the inspectors arrive at the premises. Relying on that case law, the Court of Justice has ruled in *Deutsche Bahn* that EU law offers enough guarantees, and does not require a prior intervention by a judge.⁸³ The obligation to state the subject matter and purpose of the inspection is a fundamental requirement,⁸⁴ safeguarding the rights of defence, whose object not only shows that the investigation is justified but also enables the undertaking to assess the scope of its duty to co-operate.⁸⁵

82 *Roquette Frères*, n. 74.

83 C-583/13 P *Deutsche Bahn and Others v Commission*, EU:C:2015:404, paras 18–37.

84 On these requirements see, for example, *France Télécom v Commission*, n. 74, paras 49–53; T-23/09, *Conseil national de l'Ordre des pharmaciens (CNOF) v Commission*, EU:T:2010:452.

85 *Hoechst v Commission*, n. 79, paras 29, 41; and as regards requests for information, C-247/14 P, *Heidelberg-Cement v Commission*, EU:C:2016:149, paras 19–24: the obligation to state the 'purpose of the request' relates to the Commission's obligation to indicate the subject of its investigation in its request, and therefore to identify the alleged infringement of competition rules. The Commission is not required to communicate to the addressee of a decision requesting all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, provided it clearly indicates the suspicions which it intends to investigate. The Commission is entitled to require the disclosure only of information which may enable it to investigate presumed infringements which justify the conduct of the investigation and are set out in the request for information. Since the necessity of the information must be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision, otherwise it will be impossible to determine whether the information is necessary and the Court will be prevented from exercising judicial review.