



FACULTY OF LAW  
Lund University

Vasileia Naka

The Presumption of Innocence: A Legal Spectroscope for  
Article 101 TFEU

JAEM03 Master Thesis

European Business Law  
30 higher education credits

Supervisor: Xavier Groussot

Term: Spring 2018

# Contents

Preface.....	3
Abbreviations.....	4
Synopsis .....	5
I. Introduction to the Research.....	6
I.1.Purpose and Research Questions.....	7
I.2. Research Method and Material.....	7
I.3.Research Delimitations.....	8
I.4.Research Structure.....	8
II. Criminal or not?.....	10
II.1. Introduction.....	10
II.2. Background.....	11
II.3. Charter and Beyond.....	15
III. The notion of the PI.....	17
III.1. Introduction.....	17
III.2. Burden of proof and standard of proof.....	17
III.3. Analysing the PI.....	20
III.4. Presumptions in the legal discourse.....	20
III.5. The PI as a legal rule of evidence.....	22
III.6. Innocent ‘Until proved guilty’.....	24
IV. The PI in the Charter.....	26
IV.1. The intersection with the ECHR.....	26
IV.2. The allocation of the legal burden of proof.....	27
IV.3. Presumptions within reasonable limits.....	30
V. Article 101 TFEU.....	35
V.1.Introduction.....	35
V.2.Allocation of the burden of proof and the ‘requisite legal standard’.....	36
V.3. Presumptions in article 101.....	42
Concluding Remarks.....	46
Bibliography.....	48
Table of Cases.....	52

## **Preface**

I am extremely thankful to my advisor and supervisor Professor Xavier Grousot for his patience, advice and inspiration which provided both direction and focus to my research. His suggestions and encouragement have been above and beyond. I am also sincerely grateful to the most influential mentor in my career Honorary Lawyer of Larissa Bar Association, Dr Ioannis Diamantis, a doyen of oral advocacy, whose continuing support and immense knowledge are one-of-a-kind.

*'If I have ever seen further it is by standing on the shoulders of giants'*

Isaac Newton

*Στον αγαπημένο μου, Πάυλο  
Στη λατρεμένη μου, Κωνσταντίνα*

## **List of Abbreviations**

AG	Advocate General
EU	European Union
CJEU	Court of Justice of the European Union
Charter	Charter of Fundamental Rights of the European Union
Commission	European Commission
ECJ	European Court of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
PI	Presumption of Innocence
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

## Synopsis

This thesis examines the enforcement of art 101 TFEU by the European Commission through the lens of the Charter, in particular, art 48(1) thereof which provides for ‘Everyone who has been charged shall be presumed innocent until proved guilty according to law’, usually referred to as the presumption of innocence. The fact that the fines imposed by the Commission in competition proceedings are considered to be ‘criminal charges’ by the ECtHR seems to have been settled for quite some time now. Granted, the EU has not acceded yet to the ECHR and, thus, the CJEU is not officially bound by the Strasbourg organs’ jurisprudence. Nonetheless, the Charter which is now binding upon the Commission is modelled upon the ECHR and its rights corresponding to the ones enshrined in the ECHR have, explicitly, the same scope and meaning.<sup>1</sup> Furthermore, the CJEU and the ECtHR have had a long-standing tradition tending to convergence as regards their jurisprudence in human rights. The research demonstrates that the presumption of innocence (hereinafter PI), except for its dimension as a human right which presents much perplexity, is also a legal rule of evidence within the common law understanding. This purpose of the PI does not seem to have attracted much of the ECtHR’s attention throughout the years; however, in the author’s view, there is an overlap between some of the PI’s corollaries as an evidential rule and the procedural corollaries of the PI as a human right which are, in fact, extensively developed in the ECtHR’s jurisprudence. Finally, the research reflects on the compatibility of the enforcement of art 101 TFEU with the PI as a rule of evidence enshrined in the Charter.

---

<sup>1</sup> Art 51(1), (3), (5) Charter

## I. Introduction to the Research

More than half a century of EU competition law<sup>2</sup> and its enforcement seems to still produce controversy and fierce debate amongst scholars and academics as regards its compatibility with fundamental rights, particularly so, after the proclamation of the Charter<sup>3</sup> as a binding document equal to the EU Treaties.<sup>4</sup> In particular, there is vast volume of literature and case-law which reflects on whether the current enforcement of competition rules, especially of art 101 TFEU,<sup>5</sup> is compatible with the due process rights enshrined in the Charter, namely in art 41 and 47 thereof.<sup>6</sup> This research takes a different tack; it is an attempt to shed light on the EU Courts' case law on art 101 TFEU cases, this time, through the notion of the PI.

The PI is enshrined in international human rights' documents,<sup>7</sup> in the American Convention of Human Rights,<sup>8</sup> in the European Convention of Human Rights<sup>9</sup> and, at EU level, in the Charter;<sup>10</sup> however, saying that it is difficult to delineate its nature and scope in a universally accepted way would be an understatement. In truth, there is no lacking in the literature as regards its origins, its purposes and the wide variety of its normative scope across jurisdictions;<sup>11</sup> therefore it is not unreasonable to argue that there is probably not *one* presumption of innocence but several norms that fall under the umbrella-term 'Presumption of Innocence'.<sup>12</sup>

---

<sup>2</sup> In this work 'antitrust law' and 'competition law' are used interchangeably.

<sup>3</sup> Charter of the Fundamental Rights of the European Union (consolidated version) [2016] OJ C202/02.

<sup>4</sup> Art 6, TEU.

<sup>5</sup> Consolidated versions of the Treaty on the European union and the Treaty of the Functioning of the European Union [2016] OJ C202/01.

<sup>6</sup> See, *inter alia*, Arianna Andreangeli, 'EU Competition Enforcement and Human Rights' (London, MPG Books 2008).

<sup>7</sup> International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art.14(2); Universal Declaration on Human Rights, (adopted 10 December 1948), art 11(1); It is also enshrined in the African Charter on Human and People's rights (adopted 27 June 1981, entered into force 21 October 1986), in the New Zealand Bill of Rights Act 1990 and in the Canadian Charter of Rights and Freedoms 1982.

<sup>8</sup> art.8 (2).

<sup>9</sup> art 6 (2).

<sup>10</sup> art 48(1).

<sup>11</sup> See, *inter alia*, Richard Lippke 'Taming the Presumption of Innocence' (NY OUP 2016).

<sup>12</sup> Carl-Friedrich Stuckenberg, 'Who is presumed innocent of What and by Whom?' (2014)8 Criminal Law and Philosophy 301, 303.

The focus of this research lies in public enforcement of art 101 TFEU and its putative incompatibility with the PI as it is enshrined in the Charter,<sup>13</sup> in particular, art 48(1) thereof. Crucially, the PI in the Charter, explicitly, corresponds to the PI as it is prescribed by the ECHR, therefore, its meaning and scope is the same as it is developed in the Strasbourg organs' jurisprudence unless the Charter's provision provides for greater protection.<sup>14</sup>

### **I.1. Purpose and Research Questions**

The overarching purpose of this project is to contribute to the recurrent debate around the application of fundamental rights in EU competition proceedings by examining whether the PI as prescribed by the Charter is at odds with the current enforcement regime of art 101 TFEU.

To achieve the aim of the research three issues are examined:

- i) What is the notion of the PI?
- ii) How is the PI conceived in the Charter's provision?
- iii) What is the current enforcement regime of art 101 TFEU as regards the allocation of the legal burden of proof and its discharge?

### **I.2. Research Method and Materials**

Since the research includes, necessarily, descriptive sections the method used is the legal doctrinal method (legal dogmatics). Broadly speaking, this method includes an inquiry into the law as it is (*de lege lata*) but it also includes the possibility to evaluate the law and express an opinion of what the law should be (*de lege ferenda*).<sup>15</sup>

The materials used in the research are the main available legal sources of EU primary and secondary law, namely, the EU Treaties and the Charter as well as Directives, Commission Notices, Guidelines and Commission Recommendations. In addition, the ECHR<sup>16</sup> is used to the extent that it is necessary for the context. For interpretative reasons, the case-law of the EU Courts<sup>17</sup> and the ECtHR's case law is

---

<sup>13</sup> Charter of the Fundamental Rights of the European Union (consolidated version) [2016] OJ C202/02.

<sup>14</sup> Explanations Relating to the Charter of Fundamental Rights of the European Union, [2007] OJ C303/17, 30; art 52 (3) Charter.

<sup>15</sup> Jerzy Stelmach and Bartosz Brozek '*Methods of legal reasoning*' (Netherlands, Springer 2006).

<sup>16</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

<sup>17</sup> In this work, references to the 'EU Courts' should be understood as reference to the General Court of the European Union ('General Court') and the Court of Justice of the European Union ('ECJ').

also examined as long as it is relevant to the research purpose. Moreover, academic works, books and commentaries are also included in order to provide some context and a better understanding of the research area and the issues examined throughout the research.

### **I.3. Research Delimitations**

The vast volume of literature, lacking consensus amongst scholars and the very nature of the subject matter itself makes it almost impossible to address all the relevant issues in a single comprehensive project. For these reasons, I propose, firstly, that the focus of this research is confined on the public enforcement of art 101 TFEU solely at EU level. Consequently, private enforcement and enforcement of competition rules by the Competition Authorities in national level is not discussed whatsoever.

Secondly, as regards the PI, it is researched only as an evidential rule therefore, only the *allocation* of the *legal* burden of proof and how it is discharged, in 101 TFEU cases, will be discussed leaving outside the scope of this research issues concerning the PI as a human right. Admittedly, these two facets of the PI are not clearly distinct but the focus of this research remains on the PI as a legal rule of evidence. In addition, for the sake of clarity, it must be stressed that the interpretation and enforcement of art 101 TFEU has produced a significant amount of case-law the analysis of which is not possible to be included in this work; therefore, the case-law presented and analysed is contingent on its relevance with the PI and it is limited, predominantly, to cases regarding only horizontal collusive behaviour, that is, cartel cases and not vertical agreements due to the differences in the economic theories regarding consumer welfare and competitive harm.

Finally, although the PI is traditionally considered to be exclusively a criminal-head guarantee, the purpose of the research does not permit an in-depth analysis of the criminal character of competition proceedings in the EU. Nonetheless, it is the view of the author that it is a preliminary issue that should be briefly outlined in order to form a foundation for the research.

### **I.4. Research Structure**

The research is structured, for the purposes of the analysis, in four sections discounting the introduction. Firstly, section II offers a short account of the ECtHR and EU Courts' case-law regarding whether the fines imposed by the Commission in competition

---

proceedings are ‘criminal charges’ or not. Then, section III proceeds to examine the notion of the PI from a common law perspective as an evidential rule. On this basis, section IV provides a critical assessment of the approach adopted by the ECtHR as an interpretative tool for the Charter’s provision, and finally, section V reflects on the current enforcement regime of art 101 TFEU and its compatibility with the PI. Finally, some concluding remarks are incorporated in the conclusion.

## II. Criminal or not?

### II.1. Introduction

Antitrust law aims, primarily, to control anticompetitive co-ordination between companies,<sup>18</sup> monopolisation and often, but not always, mergers. At EU level, competition rules are incorporated in the EU Treaties, in particular, articles 101 and 102 TFEU which prohibit, anticompetitive agreements and concerted practices between undertakings and abuses of dominant positions respectively, and also in secondary law, namely the EU Merger Regulation.<sup>19</sup> Merger control being a different subject matter altogether, the prohibitions included in the Treaty are enforced, mainly, by the Commission and the Member States' Competition Authorities and, subsequently, through private litigation before the Member States' national courts.<sup>20</sup> The public enforcement of the EU competition rules is governed by Regulation 1/2003,<sup>21</sup> a significant amount of Commission Notices and Guidelines and the EU Courts' case-law.

In the field of competition proceedings at EU level, the Commission may impose on the undertaking infringing articles 101 or 102 TFEU, fines up to 10% of its total turnover in the business year preceding the infringement;<sup>22</sup> these fines pursuant to Regulation 1/2003 'shall not be of criminal nature'<sup>23</sup> and their final amount depends on the gravity and the duration of the infringement.<sup>24</sup> The undertaking concerned can bring an application for the annulment of the Commission's decision before the General Court<sup>25</sup> which has unlimited jurisdiction to review the Commission's decision imposing fines and can make alterations on the amount of the fine or even cancel it.<sup>26</sup>

---

<sup>18</sup> The term 'undertaking' is used in EU competition rules.

<sup>19</sup> Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1.

<sup>20</sup> see Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (Text with EEA relevance) [2014] OJ L349/1.

<sup>21</sup> Council Regulation (EC) No 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.

<sup>22</sup> art 23(2), Regulation 1/2003.

<sup>23</sup> art 23 (5), Regulation 1/2003.

<sup>24</sup> art 23(3), Regulation 1/2003.

<sup>25</sup> art 263, TFEU.

<sup>26</sup> art 31, Regulation 1/2003.

## II.2. Background

At European level, the question of what is ‘criminal’ had been a vexed one and it seems that there is not a crystal-clear answer; in fact, it rather seems that there is not *one* answer but, at least, two.<sup>27</sup> In the EU, historically, there have been references in the Treaties to ‘criminal matters’<sup>28</sup> for quite some time as well as references to ‘victims of crime’,<sup>29</sup> ‘criminal justice system’ of the Member States<sup>30</sup> and ‘criminal offences and sanctions’<sup>31</sup> after the Lisbon Treaty but it is not an easy task to find a reliable definition of what is considered to be ‘criminal’ within the meaning of EU law in the Treaties or in the EU Courts’ case law.

Conversely, in the ECHR context, the ECtHR has developed with a series of judgements throughout the years, an ‘autonomous meaning’<sup>32</sup> of the notion of criminal within the ambit of article 6 ECHR.<sup>33</sup> First of all, the so-called *Engel* criteria are applied by the Strasbourg Court on a national law provision in order to establish whether the charges imposed for an offence are considered to be ‘criminal charges’ or not: these criteria are the domestic classification of the law, the very nature of the offence and the degree of the severity of the penalty that the accused person risks incurring.<sup>34</sup> Notably,

---

<sup>27</sup> Wouter Wils, ‘Is Criminalisation of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117, 117-122.

<sup>28</sup> art.82-86 TFEU.

<sup>29</sup> art 82(2) (c) TFEU.

<sup>30</sup> art 82 (3) TFEU.

<sup>31</sup> art 83 (2) TFEU.

<sup>32</sup> *Öztürk v. Germany*, (App No 8544/79) (1984) 6 EHRR 409 para 50.

<sup>33</sup> Art 6 ECHR reads as follows: ‘1. 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 within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>34</sup> *Engel and Others v. The Netherlands*, (App No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (1976) 1 EHRR 647 para 82.

the *Engel* criteria are not cumulative but alternative for the ECtHR<sup>35</sup> meaning that the domestic classification of the national law as criminal or not is only a starting point for the ECtHR and ‘has a relative value’.<sup>36</sup> The second and third criterion are alternative but they will be applied cumulatively in cases where their separation does not provide sufficient results for the establishment of a ‘criminal charge’.<sup>37</sup>

Alongside several judgements on a number of national laws of the Contracting States which they were considered to be criminal for the purpose of the ECHR, the issue of the characterization of competition proceedings as criminal was tackled by the now defunct European Commission on Human Rights in *Stenuit v France*<sup>38</sup> where the Commission considered, relying on the ‘combination of concordant factors’<sup>39</sup>, that the enforcement of French competition law, has a ‘criminal aspect[...].for the purpose of the Convention’.<sup>40</sup>

However, the judgement in *Jussila*<sup>41</sup> provoked a new spate of debate on whether all criminal charges that fall under the protective scope of article 6 ECHR are equally ‘criminal’ or there are different categories of criminal charges. The ECtHR in *Jussila*, acknowledging in essence the significant enlargement of the criminal sphere, ruled that

... it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly criminal charges of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a ‘criminal charge’ by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings, customs law, *competition law*, and penalties imposed by a court with jurisdiction in financial matters. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency.<sup>42</sup>(emphasis added)

---

<sup>35</sup> *Jussila v. Finland*, (App No 73053/01) (2007) 45 EHRR 39 para 31.

<sup>36</sup> *Janosevic v. Sweden*, (App No 34619/97) (2004) 38 EHRR 22, para 67; *Öztürk v. Germany*, (App No 8544/79) (1984) 6 EHRR 409, para 52.

<sup>37</sup> *Lauko v Slovakia*, judgement of 2 Sept. 1998, para 57.

<sup>38</sup> *Stenuit v France*, (App No 11598/85) (1992) ECC 401.

<sup>39</sup> *Ibid.*, [66].

<sup>40</sup> *Ibid.*, [61]; the ‘concordant factors’ included the goal of the French provisions to maintain free competition within the French market, see *ibid.*, [62].

<sup>41</sup> *Jussila v. Finland*, (App No 73053/01) (2007) 45 EHRR 39.

<sup>42</sup> *Ibid.*, para 43 (citations omitted); At EU level this approach is adopted for example in Case T-99/04 *AC Treuhand AG v Commission* [2008], ECR II- 1501, para 113 and Case T-138/07 *Schindler Holding Ltd and Others v Commission* [2011] ECLI:EU:T:2011:362, para 52.

This distinction between hard-core criminal charges and cases that do not strictly belong to the ‘traditional categories’<sup>43</sup> of criminal law has formed an argument for the justification of the inference that some of the guarantees that flow from article 6 ECHR may apply with a ‘lighter touch’.<sup>44</sup>

In this regard, AGs Kokott and Sharpston have had the chance to opine that EU competition proceedings must comply with the rights that flow from art 6 ECHR but they do not belong to the hard-core criminal law.<sup>45</sup> By the same token, the General Court in *Schindler*<sup>46</sup> citing *Jussila* held that since competition fines are pecuniary sanctions that belong to the general sphere of criminal law the criminal-head guarantees ‘will not necessarily apply with their full stringency’.<sup>47</sup>

The ECtHR itself has not had the opportunity to rule, explicitly, on whether Commission fines are criminal charges and if so, to what extent. Nonetheless, in *Menarini*<sup>48</sup> a fine imposed by the Italian Competition Authority was examined by the Strasbourg Court and it was established that, in actual facts, it is a criminal charge.<sup>49</sup> Interestingly, the ECtHR did not address the issue whether the fine imposed is a hard-core criminal fine or it belongs to the criminal sphere within the context of *Jussila*.<sup>50</sup> Regardless, since the Italian competition proceedings in national level are modelled after those at EU level<sup>51</sup> it is fair to say that competition proceedings in the EU are, implicitly, considered to be also criminal within the meaning of the ECHR requiring the application of the procedural guarantees described in *Menarini*.<sup>52</sup>

---

<sup>43</sup> ECtHR, *Jussila v. Finland*, judgment of 23 Nov. 2006, para 43.

<sup>44</sup> Wouter Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’, (2010) 33 *World Competition* 5, 14–16.

<sup>45</sup> Case C-109/10 P, *Solvay SA v Commission*, [2011] ECLI:EU:C:2011:686 AG Opinion para 256; Case C-272/09 P, *KME Germany AG and Others v Commission* [2011] ECLI:EU:C:2011:810 AG Opinion paras 65-67.

<sup>46</sup> Case T-138/07, *Schindler Holding Ltd and Others v Commission* (2011) ECLI:EU:C:2011:362.

<sup>47</sup> *Ibid*, para 52.

<sup>48</sup> *Menarini Diagnostics S.R.L v Italy*, (App No 43509/08) ECHR 27 Dec 2011

<sup>49</sup> *Ibid.*, para 40-42.

<sup>50</sup> cf Ian Forrester, ‘From Regulation 17/62 to Article 52 of the Charter of Fundamental Rights’ in Ulf Bernitz and Others (eds), *General Principles of EU Law and European Private Law* (European Monograph Series, Kluwer Law International BV The Netherlands 2013), 366-369

<sup>51</sup> Michele Carpagano, ‘Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04’ (2006) 3 *Competition Law Review* 47, 47.

<sup>52</sup> The Strasbourg Court proceeded, even more, accepting that there had been no breach of the ECHR because the applicant was able to challenge the Italian’s commission decision before the administrative court and, subsequently, appeal its decision before the ‘Consiglio di Stato’ submitting arguments of fact and arguments of law. Furthermore, the Italian courts were able

Admittedly, the EU is not yet member of the ECHR despite its obligation to accede to the Convention,<sup>53</sup> therefore, it is not bound by this jurisprudence. However, the ever so close relationship since the 1970s between the EU Courts' and ECtHR case-law has been rather unique<sup>54</sup> and must not be neglected. In spite of not being officially bound by the ECtHR's case-law, the ECJ has had since 1996 with *P v S and Cornwall Country Council*<sup>55</sup> a long-standing tradition on referring, explicitly, to the Strasbourg Court's jurisprudence, in particular in cases concerning fundamental rights regarding fair trial, family life, personal status and freedom of expression<sup>56</sup> as a means to respect their delicate judicial relationship. Similarly, the ECtHR has demonstrated its firm belief that fundamental rights are sufficiently respected in the EU developing the so called 'Bosphorus doctrine' according to which there is a rebuttable presumption that the protection which fundamental rights enjoy in the EU is equivalent to the one they enjoy the ECHR context.<sup>57</sup>

At this point, it is worth recalling a line of case-law regarding art 50 of the Charter on the *ne bis in idem* principle where the *Engel criteria* are used by the ECJ itself in order to assess whether EU law provisions are considered, indirectly, to be 'criminal' within the ECHR context. Interestingly, in these cases, the ECJ's logic is that once EU law provisions, such as regulations in *Bonda*<sup>58</sup>, enter the domestic legal order, they become an integral part of the Member States' law and, as such, they are considered to be, at the same time, also 'national law' for the purposes of the ECHR and, as such, they are subject to its scrutiny.<sup>59</sup> The same logic was applied reversely by the ECJ in *Åkeberg Fransson*<sup>60</sup> where national provisions this time were considered to

---

to verify whether the Italian Authority had used its discretionary powers properly, check its technical findings and could have altered the penalty imposed had they found that it was inappropriate for the offence (paras 63-66).

<sup>53</sup> art 6(2) TEU; cf Opinion 2/13 of the Court (full Court), 18 December 2014, EU:C:2014:2454

<sup>54</sup> see, *inter alia*, Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 *The Law and Practice of International Courts and Tribunals* 375 available here < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1527358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527358) > accessed in 27 April 2018, page 381, a relationship based 'merely on comity'; also 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, 640-652.

<sup>55</sup> Case C-13/94, *P v S and Cornwall County Council*, EU:C:1996:170, para. 16.

<sup>56</sup> Nina-Louisa Arold Lorenz and Others, *The European Human Rights Culture: A Paradox of Human Rights Protection in Europe?* (Leiden, Martinus Nijhoff 2013) 128-133.

<sup>57</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, (App. No. 45036/98) ECHR 2005-VI.

<sup>58</sup> Case C-489/10 *Lukasz Marcin Bonda* [2012] ECLI:EU:C:2012:319.

<sup>59</sup> *Ibid.*, paras 37-38 where the ECJ cites the ECtHR's case law.

<sup>60</sup> Case C-617/10 *Åkeberg Fransson* [2013] ECLI:EU:C:2013:105.

be, also, EU law because they had a bearing on the EU budget and, subsequently, the ECJ confirmed that as national law they were subject to the Engel criteria.<sup>61</sup> In both cases, national provisions were in a way ‘baptised’ EU law and were available to be scrutinised under the ECHR context. Interestingly, recently in *Menci*<sup>62</sup> a case concerning the *ne bis in idem* principle the ECJ confirmed this case law making reference to the *Engel criteria* citing *Bonda* and *Åkeberg Fransson*.

It is the view of the author that, by analogy, this logic can be applied to interpret *Menarini* as well; the national (Italian) competition proceedings are in fact a duplicate of the EU provisions meaning that since national (Italian) competition fines are criminal charges for the ECHR so are the Commission fines for the purposes of the ECHR.

To conclude, the fact that national competition fines in *Menarini* are considered to be criminal charges within the meaning of the ECHR must not be underestimated. Whether hard-core criminal or not, this conclusion has significant implications in the EU competition proceedings in the sense that principles applicable in criminal proceedings must be respected in competition proceedings as well.

### **II.3. The Charter and beyond**

The Charter, meanwhile, has become a binding document upon the EU institutions and Member States when the Lisbon Treaty entered into force in December 2009 and its legal value is now, explicitly, equal to the Treaties.<sup>63</sup> Its provisions are applicable, *inter alia*, whenever the EU institutions apply EU law,<sup>64</sup> for example competition proceedings at EU level, whilst the rights that correspond to rights enshrined in the ECHR have the same meaning and scope unless the Charter provides for greater protection.<sup>65</sup>

It must be mentioned that the wording in the Charter is not identical with the wording in the ECHR; it lacks the criminal offence reference for its application.<sup>66</sup> Thus, one could indeed argue that the PI in the Charter enjoys a broader scope of application

---

<sup>61</sup> Ibid., paras 32-37.

<sup>62</sup> Case C-524/15 *Luca Menci* ECLI:EU:C:2018:197, para 26.

<sup>63</sup> art 6 (1), TEU.

<sup>64</sup> art 51(1), Charter.

<sup>65</sup> art 52 (3), Charter.

<sup>66</sup> art 48(1) of the Charter reads as follows: ‘Everyone who has been charged shall be presumed innocent until proved guilty according to law’ while the ECHR provision reads ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.’ Whereas art 6(2) ECHR reads: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.’

than that in the ECHR.<sup>67</sup> In other words, it could be reasonable to argue that the PI at EU level is applicable to competition proceedings regardless of their characterization as criminal proceedings or not because of the open wording of the Charter's provision. Nonetheless, according to the Charter's explanations, art. 48 Charter corresponds to art. 6(2) and (3) ECHR and its scope and meaning is the one determined therein.<sup>68</sup>

In fact, the Court of Justice itself in *Huls*<sup>69</sup> in 1999, pointing out the ECtHR's case-law, held that

...given the nature of the infringements in question and the nature and the degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A)<sup>70</sup>.

Therefore, the application of the PI in competition proceedings has been recognised by the ECJ and it has been given full force;<sup>71</sup> at any rate, for the purpose of this paper, its applicability to competition proceedings will not be challenged.

---

<sup>67</sup> In this regard see Stefan Trechsel, 'Human Rights in Criminal Proceedings' (Oxford, OUP 2005) 155 where Trechsel argues that the restriction of the PI in criminal proceedings in the ECHR is not justified: 'The restriction of the application of the specific fair-trial rights to criminal proceedings, as opposed to civil, administrative, disciplinary, or other proceedings, is legitimate. These rights are intrinsically tied to the criminal context. The presumption of innocence is different. Why should a person who has been charged with an offence be presumed innocent, while another, who is not subject to a charge, be presumed guilty? This would be an absurd proposition.'

<sup>68</sup> Explanations Relating to the Charter of Fundamental rights of the European Union, [2007] OJ C303/17, 30; art 52 (3) Charter.

<sup>69</sup> Case C-199/92 P, *Huls v Commission* [1999] ECR 4287.

<sup>70</sup> *Ibid.*, para 150; see also Case C-265/92P *Montecatini v Commission* [1999] ECR I-4539, paras 175–176; more recently see Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank AG and others v Commission* [2006] para 61.

<sup>71</sup> Macro Bronckers and Anne Valery, 'No longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law' (2011) 34 *World Competition* 535, 545.

### III. The notion of the PI

#### III.1. Introduction

Regarding the nature of the PI, although unanimity amongst scholars and academics does not exist, it is conceived as having two dimensions.<sup>72</sup> The first one is its evidential role in criminal trials mainly in common law traditions where the adversarial system prevails and, as such, the PI mandates that the prosecution bears the burden to prove that the defendant committed the crime beyond reasonable doubt. The second dimension is that the PI is also a broader, much more open principle and, as Trechsel argues, the phrase ‘is presumed’ must be regarded ‘as a guiding principle which exists in order to regulate the treatment of persons who have not been convicted.’<sup>73</sup> More ambitiously, it has been argued that the PI is a substantive human right from which flows a wide range of rules that persons are entitled to.<sup>74</sup> The limited remit of this research does not allow an exhaustive examination of all of these issues. Suffice to say, the PI only as a rule of evidence lies in the heart of the focus of this essay.

#### III.2. Burden of proof and standard of proof

Before even beginning to discuss any kind of presumption (including the PI), one must first be familiar with the concepts of the ‘burden of proof’ and ‘standard of proof’. Put succinctly, the burden of proof dictates *who* will bear the risk of a wrong decision in the event of incomplete proof for the judge.<sup>75</sup> To put it another way, since judges are under the obligation to rule on a matter<sup>76</sup> there must be a mechanism that mandates which of the parties will lose the case in the event that their the allegations have not been proved or in the event of insufficient information; this is the purpose of the legal burden of proof (or the burden of persuasion)<sup>77</sup> which is why it remains stable

---

<sup>72</sup> see, *inter alia*, Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *The International Journal of Evidence and Proof* 241, 243.

<sup>73</sup> Stefan Trechsel, ‘*Human Rights in Criminal Proceedings*’ (Oxford OUP 2005) Chapter 7 p 156.

<sup>74</sup> Stefan Trechsel, ‘*Human Rights to Criminal Proceedings*’ (Oxford OUP 2005) 155; Hock Lai Ho, ‘The Presumption of Innocence as a Human Right’ in P. Roberts and J. Hunter (eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford, Hart Publishing 2012), 259–81; Hamish Stewart, ‘The Right to Be Presumed Innocent’ (2014) 8 *Criminal Law and Philosophy* 407–420.

<sup>75</sup> Alex Stein, *Foundations of Evidence Law* (OUP US 2005) 122.

<sup>76</sup> *Ibid.*, page 34.

<sup>77</sup> For the distinction between legal and evidential burden see James Thayer, ‘The Burden of Proof’ (1890) 4 *Harvard Law Review* 45, 48; for more analysis see also J McNaughton, ‘Burden

throughout the course of the legal proceedings. On the contrary, the evidential burden of proof (or the burden of adducing evidence) can shift back and forth between the parties but, in fact, this does not affect which party bears the risk of non-persuasion.<sup>78</sup>

At any rate, the concept of the burden of proof must be distinguished from the legal issue of its discharge which concerns *how* the party may satisfy it. At first blush, the answer seems rather obvious: each party must provide evidence for its claims.<sup>79</sup> For the common law understanding, though, the question is, one of degree; the party must provide for its allegations evidence to the requisite legal standard. In other words, the term ‘standard of proof’ describes ‘the threshold that must be met before a court can reach a conclusion on the evidence before it’.<sup>80</sup>

Whilst the concept of the burden of proof is present both in common law and civil law jurisdictions, the concept of ‘the standard of proof’ is not familiar in jurisdictions relying on civil law traditions. The main reason is the adoption of the roman principle of the free, unfettered evaluation of the evidence<sup>81</sup>, at times, combined with the medieval formal theory of evidence according to which specific sorts of evidence have a certain, predetermined probative value.<sup>82</sup> In continental systems when courts refer to *onus probationis* they mean the responsibility for the party to introduce evidence, a concept similar to the evidential burden of proof in common law tradition.<sup>83</sup> Notwithstanding, the principle of the free evaluation of the evidence, in essence, means that the judge, while adjudicating, is not particularly subject to evidential rules but her judgement is, generally speaking, a result of her personal conviction on the matter (what is regularly called as *intime conviction*). It goes without saying that this personal opinion of the judge cannot be rational or arbitral but it is constrained by the obligation

---

of Production of Evidence: A Function of a Burden of Persuasion’ (1955) 68 Harvard Law Review 1382.

<sup>78</sup> Christina Volpin, ‘*The ball is in your court: Evidential Burden of Proof and the Proof Proximity Principle in EU Competition Law*’ (2014) 51 Common Market Law Review 1159.

<sup>79</sup> David Bailey, ‘Standard of proof in EC merger proceedings: A common law perspective’ (2003) 40 Common Market Law Review 845, 848.

<sup>80</sup> *Ibid.*

<sup>81</sup> Mirjan Damaska, ‘*Evidence Law Adrift*’ (New York, Yale University Press 1997) 81-84.

<sup>82</sup> This distinction is regularly mentioned in the literature as *la liberte de la preuve* and *la preuve legale*; For a comparative view of the standard of proof between common law and civil law traditions see Kevin Clermont, Emily Sherwin ‘A Comparative View of Standards of Proof’ (2002) 50 American Journal of Comparative Law 243; cf Michelle Taruffo, ‘Rethinking the Standards of Proof’ (2003) 51 The American Journal of Comparative Law 659.

<sup>83</sup> Mirjan Damaska, ‘*Evidence Law Adrift*’ (New York, Yale University Press 1997), 81-84.

to state reasons for her decisions resulting, finally, to a *conviction raisonnee*.<sup>84</sup> Granted, the ‘beyond reasonable doubt’ standard is indeed adopted in criminal proceedings but it is conceived as a procedural corollary of the presumption of innocence (the *in dubio pre reo* principle) and not as a standard of proof within the common law understanding.<sup>85</sup>

As regards the common law jurisdictions, since absolute certainty in a fact-ascertaining process is not possible, evidence law comes to our rescue relying on probability to provide for standards of proof. Probability, though, can be perceived as a continuum which means that at some point of this continuum one could be convinced that there is not reasonable doubt concerning an allegation of a party, at some other point one could believe that an allegation is more likely to be true than not (be true) and at some point of this continuum there is a manifest error in the allegations of the party.<sup>86</sup> Beyond reasonable doubt, the balance of probabilities (or the preponderance of evidence) and the manifest error of assessment are the standards of proof used in a common law system.<sup>87</sup>

All things considered, it is fair to say that, within the common law understanding, the higher the standard of proof required to be met, the more difficult it is, for the party who bears the legal burden of proof, to discharge it. On the contrary, in continental systems the *onus probacionis* is ‘of negligible importance’ because ‘it is highly unlikely that a court would state that the accused’s conviction is based on the fact that he or she failed to prove his or her innocence’.<sup>88</sup> However, it must be born in mind that, depending on the circumstances, the kind of evidence available, what has to be proved, other procedural devices (such as disclosure) and, of course, presumptions on which this section focuses, also have a bearing on how difficult or easy it, finally, is for the burden of persuasion to be discharged.<sup>89</sup>

---

<sup>84</sup> Kevin Clermont, Emily Sherwin ‘A Comparative View of Standards of Proof’ (2002) 50 *American Journal of Comparative Law* 243, 246.

<sup>85</sup> Maria João Melicias, ‘*Did They Do It?*’ The Interplay between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations’ (2012) 35 *World Competition* 471, 475.

<sup>86</sup> David Bailey, ‘Standard of proof in EC merger proceedings: A common law perspective’ (2003) 40 *Common Market Law Review* 845, 850-851

<sup>87</sup> *Ibid.*

<sup>88</sup> Stefan Trechsel, ‘Human Rights in Criminal Proceedings’ (Oxford OUP 2005), 167.

<sup>89</sup> Andriani Kalintiri, ‘The Allocation of the Legal Burden of Proof in 101 Cases’ (2015) 34 *Yearbook of European Law* 232, 236; as regards competition law, in particular, see Julian Kammin, Florian Becker, ‘Cross Border EU Competition Litigation: Qualitative Interviews from Germany’ in Mihail Danov and Others (eds.), *Cross-border EU competition law actions*

### III.3. Analysing the PI

As a preliminary point, the PI's wording is its only unequivocal element and, as usual, the wording must be the starting point for its interpretation.<sup>90</sup> The language used across-the-board in the PI is predominantly as follows: 'everyone charged is presumed innocent until proved guilty according to law' with slight variations.<sup>91</sup> The maxim can, thus, be analysed in the following components: 'everyone', 'charged', 'is presumed', 'innocent' 'until proved guilty, and 'according to law'.

Regarding its scope of application, the meaning of the words 'everyone' and 'charged' is quite ambiguous and, potentially, they can be interpreted rather expansively. Firstly, 'everyone' must be referring to anyone that there is a suspicion to have broken the law.<sup>92</sup> Secondly, the word 'charged' raises even more concerns regarding its notion as a criminal charge, necessarily, or its use as a technical term that is able to be used in a much broader context.<sup>93</sup> For the purposes of this section, the meaning of the word 'charged' in the PI will be conceived in a traditional manner meaning everyone that is charged with a criminal offence.

Furthermore, the terms 'innocent' and 'according to law' are components of the PI that are not the focus of this research since they are pertinent to the PI's dimension as a human right, and their analysis would defeat its main objective. On the other hand, the words 'presumed' and 'until proved guilty' are indeed the focus of this section regarding the PI as a rule of evidence. In other words, the question is: what does 'presumed' and 'what has to be proved' entail?

### III.4. Presumptions in the legal discourse

Presumptions are considered "as the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof'".<sup>94</sup> Generally, presumptions are widely used

---

(Hart Studies in competition Law, Hart Publishing UK 2013), 67–68; for the emergence of the proof proximity principle see Christina Volpin, 'The ball is in your court: Evidential Burden of Proof and the Proof Proximity Principle in EU Competition Law' (2014) 51 Common Market Law Review 1159.

<sup>90</sup> Carl-Friedrich Stuckenberg, 'Who is presumed innocent of What and by Whom?' (2014)8 Criminal Law and Philosophy 301, 303.

<sup>91</sup> Stefan Trechsel, 'Human Rights in Criminal Proceedings' (Oxford OUP 2005) 153.

<sup>92</sup> Carl-Friedrich Stuckenberg, 'Who is presumed innocent of What and by Whom?' (2014)8 Criminal Law and Philosophy 301, 307; cf Directive (EU) 2016/343 of the European Parliament And Of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (2016) OJ L65/1, recitals 11-15.

<sup>93</sup> Stefan Trechsel, 'Human Rights in Criminal Proceedings' (Oxford OUP 2005) 155-156.

<sup>94</sup> Kenneth Broun 'Mc Cormick on Evidence' (6<sup>th</sup> edn US, Thomson West 2006) 572.

in different contexts by all sorts of disciplines<sup>95</sup> but their legal conception has been described in several ways the assessment of which is not the focus of this research. However, a brief presentation of the main conceptions of presumptions in the legal context which have been diachronically developed by scholars is considered prudent by the author, to the extent that they are necessary for the arguments presented in due course.<sup>96</sup>

The traditional conception of presumptions is the one adopted by civil law jurisdictions and it has strongly influenced the common law tradition until relatively recently. For the traditional conception, presumptions are considered to be inferences; they suggest that when a fact (the basic fact) is true, another fact is presumed to be also true. When this inference is the result of the mental process of the judge, it is a 'permissive inference' (or a presumption of fact) and when it is prescribed by law it is a 'legal presumption' (or a presumption of law) which can of course be rebuttable or irrebuttable (conclusive presumption).

The normative conception of presumptions emerged through the impact of Thayer, as an attempt to distinguish between, on the one hand, presumptions as legal rules and, on the other hand, presumptions as mere inferences which are not, according to the normative concept, true presumptions but circumstantial inferences.<sup>97</sup> Only legal presumptions must be considered legal rules and they are always rebuttable whereas irrebuttable presumptions are, in fact, substantive rules of law.<sup>98</sup>

On the other hand, the advocates of the pluralistic conception of presumptions argue, in brief, that it is impossible to classify presumptions because there is not a concept of presumptions but everything depends on the specific circumstances that each presumption applies.<sup>99</sup> Last but certainly not least, the functionalist conception whose main developer is Ronald Allen, rejects the idea that the term 'presumption' has a specific meaning holding that the use of the term 'presumption' is the symptom of

---

<sup>95</sup> James Thayer, 'A Preliminary Treatise on Evidence at the Common Law' (London, Sweet & Maxwell, 1898) 351.

<sup>96</sup> The presentation that follows is a summary of the presentation in Raymundo Gama, 'The Nature and the Place of Presumptions in Law and Legal Argumentation' (2017) 31 Argumentation 555, 564-569 and the citations therein.

<sup>97</sup> Ibid.

<sup>98</sup> James Thayer, 'A Preliminary Treatise on Evidence at the Common Law' (London, Sweet & Maxwell, 1898) 314.

<sup>99</sup> Raymundo Gama, 'The Nature and the Place of Presumptions in Law and Legal Argumentation' (2017) 31 Argumentation 555, 566.

evidentiary issues and discrepancies in the fact-finding process.<sup>100</sup> Ultimately, according to Allen, presumptions are used as evidentiary devices to resolve a procedural deadlock, to allocate the burden of proof (persuasion or production) and to instruct the jury for the relationship between facts.<sup>101</sup>

### III.5. 'Presumed' in the PI

Taking the above theories into consideration, it seems that the PI does not fit in any of those categories perfectly.<sup>102</sup> In spite of being formulated as a presumption, it does not concern an inference for a fact because of another basic fact having been proved neither it takes into account probabilistic considerations.<sup>103</sup> In fact, in this sense, it is an oxymoron: everyone charged, which means that since there is a 'charge' there is a probability to a certain extent that the accused is guilty of an offence, yet the accused is presumed to be innocent until her guilt is proved according to law.<sup>104</sup>

However, it would be, indeed, a stretch to argue that it is not a legal presumption but merely an assumption because of the fact that it does not share the regular structure of presumptions; the difference between a presumption and an assumption is substantial as Hock Lai Ho put it: 'We assume something is the case when we are inclined to believe it to be the case or think that it is likely the case. We presume something is the case when we commit ourselves to act as if something is the case without believing it categorically'.<sup>105</sup> Under this view, however, since law cannot regulate, and it does not really intend to regulate, states of minds, feelings or personal beliefs<sup>106</sup> the PI cannot be considered as a mere assumption prescribed by law but it must be a true legal presumption.

As regards the probabilistic oxymoron, Stuckenberg follows Wroblewski's distinction of presumptions in 'para-empirical' presumptions whose logic is based on

---

<sup>100</sup> Ronald Allen, 'Presumptions in civil actions reconsidered' (1981)66 Iowa Law Review 843.

<sup>101</sup> Raymundo Gama, 'The Nature and the Place of Presumptions in Law and Legal Argumentation' (2017) 31 Argumentation 555, 567.

<sup>102</sup> Raymundo Gama, 'The Nature and the Place of Presumptions in Law and Legal Argumentation' (2017) 31 Argumentation 555, 568 'it is a border line case of presumption'.

<sup>103</sup> Ibid., 568.

<sup>104</sup> In this regard see Stefan Trechsel, '*Human Rights in Criminal Proceedings*' (Oxford OUP 2005) 154 where he describes this oxymoron as a contradiction in terms, a '*contradictio in adjecto*'.

<sup>105</sup> Hock Lai Ho, 'The presumption of innocence as a human right' in Paul Roberts and Jill Hunter(eds), '*Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*' (London, Hart Publishing 2012), 274.

<sup>106</sup> Stefan Trechsel, '*Human Rights in Criminal Proceedings*' (Oxford OUP 2005) Chapter 7 page 156.

factual inferences, ‘non-empirical’ presumptions which may be rebutted empirically and ‘anti-empirical’ presumptions which ‘do not conform with or even contradict empirical knowledge’.<sup>107</sup> For Stuckenberg, the PI can be classified as a non-empirical presumption.<sup>108</sup>

Stuckenberg proceeds to argue, following again Wroblewski’s analysis of legal presumptions as legal norms with ‘an element of *ought*,’<sup>109</sup> that legal presumptions share the same provisional structure with legal norms because they both consist of a positive premise, a negative premise and a legal consequence.<sup>110</sup> However, sometimes, according to Stuckenberg, the factual basis of a presumption is not described in detail and the legal consequence is also missing rendering the presumption an incomplete legal norm; it does not provide for what it is to be done, therefore, its content and scope of application must be determined in a normative way.<sup>111</sup>

Indeed, the PI’s factual basis is the presumption that the accused is innocent but without more detailed description of what this means. The PI also does have a negative premise (‘unless or until is proved guilty according to law’) but it lacks the legal consequence; in other words, it does not dictate what must be done. Thus, if the PI is to be conceived as a legal presumption, this explains nothing; on the contrary, in fact, it needs explanation.<sup>112</sup> Put another way, the PI does not provide the judge answers but it rather produces questions to be answered: Who is presumed innocent of what, by whom and what can defeat the presumption.<sup>113</sup>

To sum up, the PI as a legal rule does not necessarily have the function to allocate the legal burden of proof between the parties or mandate how it is to be discharged. Seen in isolation, it lacks any legal consequence and it rather has a blurring effect on any piece of legislation. It is its combination with the broader legal framework where it belongs that puts flesh on its bones and clarifies its meaning and scope of application.

---

<sup>107</sup> Carl-Friedrich Stuckenberg, ‘Who is presumed innocent of What and by Whom?’ (2014)8 *Criminal Law and Philosophy* 301, 305.

<sup>108</sup> It could also be argued that it is an anti-empirical presumption because it does not follow the empirical knowledge that dictates that most people charged are found to be guilty.

<sup>109</sup> Carl-Friedrich Stuckenberg, ‘Who is presumed innocent of What and by Whom?’ (2014)8 *Criminal Law and Philosophy* 301, 305.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, p.306.

<sup>112</sup> *Ibid.*, p.310.

<sup>113</sup> for the questions that arise from the PI see Antony Duff, ‘Who must presume to be innocent of what?’ (2013) 42 *Netherland Journal of Legal Philosophy* 170.

### III.6. Innocent ‘Until proved Guilty’

This linguistic component of the PI concerns what has to be proved in order for the PI to be rebutted. To put it another way, the notions of ‘innocence’ and ‘guilt’ must be delineated in order to have a clearly established idea of what has to be proved in order to rebut the presumption. Granted, as it has been argued in the abovementioned considerations, this is an issue that is not possible to be analysed in the abstract; however, for the purposes of this research it is crucial to cursory present the main ideas in the three distinct approaches that delineate the PI’s scope of application, namely the substantive approach, the narrow procedural approach and the broad procedural approach.<sup>114</sup>

#### (a) The Substantive Approach

As Stumer put it, ‘The substantive approach extends the scope of the presumption of innocence so that it may be used to adjudicate on the substantive content of the criminal law. If an offence as defined by statute or the common law does not include a sufficient degree of culpability or blameworthiness to justify a criminal conviction and punishment, the presumption is breached.’<sup>115</sup> The substantive approach is usually used to support the argument that strict liability offences, that is offences that at least one element of the offence is not attributed to the defendant’s intent or negligence,<sup>116</sup> are incompatible with the PI because, in their case, it is not required for the prosecution to prove the culpability of the defendant.<sup>117</sup> In other words, the judge following the substantive approach in the application of the PI is able to control substantive rules of criminal law because the broadened PI’s scope can be justify the refusal to apply criminal law rules.

#### (b) The Narrow Procedural Approach

Conversely, according to the narrow procedural approach, the PI mandates that only the core elements of an offence as they appear on the pertinent legal rule must be proved by the prosecution (in order to rebut the PI) before the legal burden of proof shifts upon the defendant to prove peripheral matters. It goes without saying that the distinction

---

<sup>114</sup> Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (London, Hart Publishing 2010) 52.

<sup>115</sup> *Ibid.*, p 53.

<sup>116</sup> Stuart Green ‘Six Senses of Strict Liability: A Plea for Formalism’ in Andrew Simester (ed) *Appraising Strict Liability* (OUP, Oxford 2005) 1, 9–10.

<sup>117</sup> See for example R.A. Duff ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ in Andrew Simester (ed) *Appraising Strict Liability* (Oxford, OUP 2005) 125.

between the core elements of an offence and the peripheral matters, which mandates the allocation of the legal burden of proof is, thus, crucial and shapes this approach into several guises.<sup>118</sup>

(c) The Broad Procedural Approach

Finally, this approach ‘is premised on the notion that statutes and common law rules demarcate an area of criminal prohibition’.<sup>119</sup> Therefore, all the aspects of an offence necessary for the conviction,<sup>120</sup> irrespectively whether they are considered to belong to the ‘core’ or the ‘periphery’ thereof must be proved in order not to take issue with the PI. To put it another way, the accused has either committed the offence as it is conceived by the pertinent legal rules (positively and negatively-using exceptions or defences) or not and this must be proved to its entirety by the prosecution for the PI to be respected. Obviously, this approach extends the PI’s scope to its maximum and additionally it has been argued that it contributes to the respect for the rule of law.<sup>121</sup>

To conclude, answering, partly, Duff’s question about what can defeat the PI, there is not a clear-cut answer; it depends on the approach adopted by the jurisdiction that prescribes it and on the broader context that determines the PI’s scope of application. Therefore, the focus now shifts on the PI as it is conceived in the Charter’s provision in order to examine its meaning and scope through the Strasbourg jurisprudence.

---

<sup>118</sup> For a systematic presentation of the different methods that have been used for the distinction between core and peripheral elements of an offence in English law see Andrew Stumer, ‘*The Presumption of Innocence: Evidential and Human Rights Perspectives*’ (London, Hart Publishing 2010) 68-82.

<sup>119</sup> *Ibid.*, page 82.

<sup>120</sup> *Ibid.*

<sup>121</sup> Donald Dripps, ‘The Constitutional Status of the Beyond Reasonable Doubt Rule’ (1987) 75 *California Law Review* 1665, 1718.

## IV. The PI in the Charter

### IV.1. The intersection with the ECHR

The PI is enshrined at EU level in the Charter and it is also prescribed by the ECHR where all EU Member States are signatories and to which the EU has the obligation to accede.<sup>122</sup> To begin with, as it has been already mentioned, the provisions in the Charter and the ECHR are not completely identical; the provision in the Charter lacks the ‘criminal offence’ reference that the ECHR provision has. Furthermore, context-wise, it is enshrined in art 48(1) whilst art 48 (2) reads: ‘Respect for the rights of the defence of anyone who has been charged shall be guaranteed’. According to the explanations of the Charter, art 48 thereof corresponds to art. 6(2) and (3) ECHR and its scope and meaning is the one determined therein.<sup>123</sup>

Additionally, the PI, seen in its broader context, on the one hand in the ECHR is followed by several rights for the accused person<sup>124</sup> and is preceded by a more general provision for the right to a fair trial and they are all part of the same article. Therefore, it may be remarked that in the ECHR context the PI belongs to the same framework.<sup>125</sup> In the Charter, on the other hand, the right to a fair trial is enshrined in a separate article (the preceding one) whereas the rights that flow from the general due process rights are provided for in secondary law. Nonetheless, the PI as it is enshrined in the Charter, must be interpreted and applied in the same vein as in the ECHR.

First of all, a common conception of the PI in the ECHR context is found in *Minelli v Switzerland*<sup>126</sup> where it was held that

---

<sup>122</sup> art 6(3) TEU.

<sup>123</sup> Explanations Relating to the Charter of Fundamental rights of the European Union, [2007] OJ C303/17, 30; art 52 (5) Charter.

<sup>124</sup> Art 6(3) ECHR reads: Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>125</sup> Stefan Trechsel in this respect argues that the PI has two distinct aspect i.e the ‘outcome-related aspect’ which concerns issues relating to the outcome of the proceedings and is indeed relevant to the general principle of fair trial embodied in article 6 ECHR and the reputation related aspect which aims to protect the image of the innocent, see Stefan Trechsel, *Human Rights to Criminal Proceedings* (Oxford OUP 2005) 163-164.

<sup>126</sup> *Minelli v Switzerland*, (App No 8660/79) (1983) 5 EHRR 554.

*In the Court's judgement, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.*<sup>127</sup>

The *Minelli* judgement thus, concerns the way in which the accused is treated by the court and it is closely related to the circumstances and concordant factors in each specific case. This section, though, discusses the other two formulations which the Strasbourg organs have adopted to delineate the content of the PI in the ECHR and they must act as a methodological tool for the Charter provision's interpretation and application. The first formulation concerns the PI as a rule mandating the allocation of the legal burden of proof and the second formulation is pertinent to other presumptions of fact or law that limit the PI's scope.<sup>128</sup>

#### **IV.2. The allocation of the legal burden of proof**

It is true that the Strasbourg organs' jurisprudence does not set specific rules as regards the allocation of the legal burden of proof *per se* although in *Barbera, Mesegue and Jabardo v Spain*<sup>129</sup> regarding art 6 ECHR it was held that

Paragraph 2 embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.<sup>130</sup>

In this case, though, the final judgement of the ECtHR was reached based *not* on the issue of the allocation of the burden of proof between the prosecution and the defendant but on whether the judge on the case concerned expressed the opinion that accused had committed the offence before the proceedings were concluded according to law.<sup>131</sup>

---

<sup>127</sup> Ibid., [37].

<sup>128</sup> Andrew Stumer, 'The Presumption of Innocence: Evidential and Human Rights Perspectives' (London, Hart Publishing 2010) 89-90.

<sup>129</sup> *Barbera, Mesegue and Jabardo v Spain* (App No 1058890/93) (1988) 11 EHRR 360.

<sup>130</sup> Ibid., [77].

<sup>131</sup> Ibid., [101].

Therefore, the first instance where the PI was, indirectly, discussed in Strasbourg as a guiding rule for the allocation of the legal burden of proof was in 1963 in the *Pfunders case*<sup>132</sup> where the Strasbourg Commission stated that

This text according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgement, they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.<sup>133</sup>

Thus, the Strasbourg Commission considers the placement of the legal burden of proof in criminal cases on the prosecution (and the *in dubio pro reo* principle) and the judge's obligation to abstain from any assumptions that the accused is guilty as two sides of the same coin in the sense that they are both manifestations of the PI. Notably, the Commission proceeded ruling that the accused must nonetheless be able to provide evidence to rebut her guilt and she can be found guilty 'only on the basis of direct evidence or indirect sufficiently strong in the eyes of law'.<sup>134</sup> Thus, the Commission in Strasbourg considers that the fact that the burden to adduce evidence is possible to be placed upon the accused does not take issue with the PI; it is solely the placement of the *legal* burden of proof i.e. the burden of persuasion on the prosecution that flows from the PI and it must be respected.

Two decades later, in *Lingens v. Austria*<sup>135</sup> two journalists were convicted for defamation via press because they had described a politician as a liar. In such cases the Austrian Penal Code provided for a special defence for the accused; if they proved that their allegation was true, they would be acquitted of the offence. The journalists claimed that the PI was violated because they were convicted in spite of the fact that the Austrian court was not convinced beyond reasonable doubt of the falsity of their allegations. The Commission in Strasbourg noted that in the Austrian Penal Code, the offence at issue was conceived as being able to be committed by both a true or a false statement in the sense that it was not the truth in the statement that exculpates but the

---

<sup>132</sup> *Austria v Italy* (1963) 6 Yearbook 740.

<sup>133</sup> *Ibid.*, 782.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Lingens v Austria*, (App No 8803/79) (1982) 4 EHRR 373.

accused's ability to prove that truth meaning that anyone making statements via press bears an additional burden to make sure that she can prove them.<sup>136</sup> Therefore, the Strasbourg Commission decided that the PI was not violated in this case because the prosecutor was, indeed, required to prove the existence of a defamatory statement and thus, the reversal of the legal burden of proof concerned only the special defence issue.<sup>137</sup> Thus, for the Commission in Strasbourg the reversal of the legal burden of proof on special defences is not incompatible with the PI when the substance of the case is proved by the prosecution and a special defence issue must be proved by the accused.

The complementary relationship between the PI and the allocation of the legal burden of proof was tackled again by the ECtHR even more recently in *Telfner v Austria*<sup>138</sup> where the applicant, as the main user of the car, was charged for causing injury in a car accident:

The Court recalls that, as a general rule, it is for the national courts to assess the evidence before them, while it is for the Court to ascertain that the proceedings considered as a whole were fair, which in case of criminal proceedings includes the observance of the presumption of innocence. Article 6 § 2 requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence.<sup>139</sup>

The applicant had refused that he had driven the car at that time but gave no further explanation and the other users of the car, his mother and sister denied, lawfully, to give testimonies. The Strasbourg Commission concluded that in this case the PI was, in fact, violated because the evidence against the applicant in the Austrian legal system 'did not constitute a case against the applicant which would have called for an explanation' and concluded that 'in requiring the applicant to provide an explanation although they had not been able to establish a convincing *prima facie* case against him, the courts shifted the legal burden of proof from the prosecution to the defence.'<sup>140</sup> In other words, the legal burden of proof may shift upon the defendant *only* once the prosecution

---

<sup>136</sup> Ibid., 390-391.

<sup>137</sup> Ibid.

<sup>138</sup> *Telfner v Austria*, (App No 33501/96) (2002) 34 EHRR 7.

<sup>139</sup> Ibid., [15] (citations omitted).

<sup>140</sup> Ibid., [18].

establishes a *prima facie* case against him.

The abovementioned line of cases is instructive and sheds light on the stance adopted by the Strasbourg organs as regards the PI's scope of application; it seems that it does not offer the highest protection for the accused since the prosecution is not required to prove all the aspects of the offence but merely to establish a *prima facie* case and, subsequently, the legal burden of proof may very well shift upon the defendant to prove any special defences. In other words, the reversal of the legal burden of proof upon the defendant after the establishment of a *prima facie* case by the prosecution is not at odds with the PI's scope as it is delineated in Strasbourg; put in the theoretical context analysed previously, the narrow procedural approach is adopted and the bifurcated allocation of the legal burden of proof between the prosecution and the defendant as regards the elements of the offence concerned and the defences recognised is, emphatically, in line with the PI.

#### **IV.3. Presumptions within reasonable limits**

Apart from the allocation of the legal burden of proof, the second and most common formulation which the Strasbourg organs have embraced in order to assess the application of the PI in the Contracting States is found in the influential judgement *Salabiaku v France*.<sup>141</sup> In this case, the applicant was convicted for smuggling prohibited goods based on a legal presumption provided for in the French Customs Code according to which a person in possession of prohibited goods is liable for smuggling. There was a defence of force majeure recognised by the French courts' decisions but it was limited to cases where the force majeure was not attributable to the defendant and it was absolutely unavoidable.<sup>142</sup> The ECtHR as regards legal presumptions ruled that

Presumptions of fact or 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 the criminal law (...) Article 6 (2) does not therefore regard presumptions of fact or law provided for in the criminal law with indifference. 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>143</sup>

---

<sup>141</sup> *Salabiaku v France*, (App No 10589/83) (1991) 13 EHHR 379.

<sup>142</sup> *Ibid.*, [19].

<sup>143</sup> *Ibid.*, [28].

The ECtHR concluded that in this case, the PI was not violated because the French Courts ‘were careful to avoid resorting automatically to the presumption’;<sup>144</sup> they inferred a ‘presumption which was not subsequently rebutted’<sup>145</sup> confirming that since the defendant had the opportunity to rebut the presumption, there is no violation of art 6(2) ECHR.

The ‘within reasonable limits’ confinement of legal presumptions has ever since been the Strasbourg’s mantra when assessing the compatibility of legal presumptions with the PI; in cases following *Salabiaku v France* the ECtHR has ruled that the PI is not violated because the courts ‘enjoyed a genuine freedom of assessment’<sup>146</sup> when deciding whether the defendant proved the defence or not. There is also a series of cases where the Strasbourg organs have repeatedly taken the view that the PI is not violated when the defendant has the opportunity to present his or her case.<sup>147</sup> However, this ratiocination does not seem convincing as to reason why initially a presumption is needed. Perhaps the reference to ‘what is at stake’ is a connotation to legitimate aims but it is not expressed explicitly. Regardless, rendering presumptions compatible with the PI because they are not irrebuttable is as Trechsel argues, ‘tantamount admitting that there is a presumption of guilt, but holding that as it is rebuttable there is no violation of the right to be presumed innocent’.<sup>148</sup>

In this regard, there is also another condition that must be satisfied according to *Salabiaku v France*, for rebuttable presumptions to be consistent with the PI. In particular, it is remarked that the language used in the judgement resembles the language used in the context of the application of the principle of proportionality and this was explicitly confirmed in *Janosevic v Sweden*.<sup>149</sup> In that case, the applicant claimed that the PI was breached because, *inter alia*, the Swedish system of imposing tax surcharges placed a burden of proof on the taxpayer which was ‘almost

---

<sup>144</sup> *Ibid.*, [30].

<sup>145</sup> *Ibid.*, [30].

<sup>146</sup> *AG v Malta*, (App No 16641/90) EComp HR 10 December 1991.

<sup>147</sup> *Bruckner v Austria*, (App No 21442/93) EComHR 18 October 1994; *Muller v Austria*, (App No 12555/03) ECHR 5 October 2006; *TH v Austria* (App No 19116/91) EComHR 13 October 1993.

<sup>148</sup> Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford OUP 2013) 170.

<sup>149</sup> *Janosevic v Sweden*, (App No 34619/97) (2004) 38 EHRR 22.

insurmountable<sup>150</sup> because in reality he was already presumed to be guilty.<sup>151</sup> In this regard, the Strasbourg Court ruled that

Swedish tax surcharges are imposed on objective grounds, that is, without any requirement of intent or negligence on the part of the taxpayer. As the Court has previously held the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. (...) Consequently, the starting-point for the tax authorities and courts must be that inaccuracies found during a tax assessment are due to an inexcusable act attributable to the taxpayer and that it is not manifestly unreasonable to impose a tax surcharge as a penalty for that act. The Swedish tax system thus operates with a presumption, which it is up to the taxpayer to rebut.<sup>152</sup>

Furthermore, the ECtHR proceeded, citing *Salabiaku v France* that

Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.<sup>153</sup>

It is remarkable that in *Janosevic v Sweden* ‘what is at stake’ is interrelated with the aim pursued by means of a presumption and it is subject ‘to a balancing test’ in order to be compatible with the PI. This test has paved the way for some limitations of the PI as recognised in *Salabiaku v France*. For example, in *Västberga Taxi Aktiefbolag and Vulic v Sweden*<sup>154</sup> a reverse burden of proof was justified because of a State’s financial interests in tax matters<sup>155</sup> and in *Maatschap v Netherlands*<sup>156</sup> environmental protection was held to be a legitimate aim that can outweigh the PI.

In this respect, it has been argued that the adoption of permissible limitations of the PI via presumptions is compatible nor with the wording of the PI in the ECHR which is expressed in unqualified terms or with the approach adopted by the Strasbourg jurisprudence about the application of the other art 6 ECHR rights.<sup>157</sup> These arguments are, to a certain extent, reasonable but they are

---

<sup>150</sup> Ibid., [77].

<sup>151</sup> Ibid., [99].

<sup>152</sup> Ibid., [100], (citation omitted).

<sup>153</sup> Ibid., [101].

<sup>154</sup> *Västberga Taxi Aktiefbolag and Vulic v Sweden*, (App No 36985/97) ECHR 23 July 2002

<sup>155</sup> Ibid., [115-116]

<sup>156</sup> *Maatschap v Netherlands*, (App No 31463/96) EComHR 21 May 1997.

<sup>157</sup> Andrew Stumer, ‘*The Presumption of Innocence: Evidential and Human Rights Perspectives*’ (London, Hart Publishing 2010) 109-118.

not particularly relevant in this research to the extent that the PI is researched as a rule of evidence and not as a human right which may be justified to be treated differently. However, it is remarked that the ECtHR recently in *Klouvi v France*<sup>158</sup> ruled that ‘the rights enshrined in the ECHR, including the PI, must be interpreted in a way that ensures them being concrete and effective and not theoretical and illusory.’<sup>159</sup>

Taking the abovementioned case-law into consideration, two conclusions are reasonably drawn. Firstly, as already noted, regarding the *allocation* of the legal burden of proof as a consequence from the PI’s scope of application, the Strasbourg organs seem to have adopted the narrow procedural approach of the PI in the sense that the prosecution bears the legal burden to prove that the offence concerned has been committed by the defendant, at least *prima facie*, and the defendant may also bear the legal burden to prove any defences. However, there are not specific rules in the ECHR or the ECtHR jurisprudence pertinent to the standard of proof as a threshold that must be met in order for the burden of proof to be discharged. Granted, in the event of a doubt the principle *in dubio pro reo* stands but only as an inherent feature, a procedural corollary of the PI and not as a specific legal standard (the beyond reasonable doubt threshold) within the common law understanding. Secondly, presumptions of law or fact, whose relationship with the issue of the *discharge* of the legal burden of proof is, admittedly, deeply complementary, are not, in principle, incompatible with the PI but they must be confined within reasonable limits meaning that they are subject to a balancing test between the legitimate aim pursued with the presumption concerned and the rights of the defence. Therefore, within the ECHR context, the standard of proof is not delineated as such but the ECtHR’s case-law touches upon it via its presumptions-related jurisprudence.

Against this backdrop, the notion of the PI has been elaborated at EU level as well, mainly in competition proceedings, namely, in cases concerning the enforcement of art 101 TFEU where the application of the PI has been recognised in *Huls*. A significant amount of case-law has been produced ever since and, on

---

<sup>158</sup> *Klouvi v France*, (App No 30754/03) ECHR 30 Sept 2011.

<sup>159</sup> *Ibid.*, para 40.

this basis, art 101 TFEU is the focal point of the next section in order to assess its enforcement through the lens of the Charter's provision.

## V. The PI in the enforcement of 101 TFEU

### V.1. Introduction

As it has been already demonstrated, there is extensive jurisprudence regarding the PI in the ECHR context, mainly in criminal proceedings. In the EU though, the PI has been predominantly elaborated in case-law around the enforcement of art 101 TFEU, particularly in cartel cases, in spite of the fact that there seems to emerge a tendency towards the expansion of the application of the PI in other fields of law which provides for imposition of sanctions.<sup>160</sup>

In principle, it must be recalled that the scheme of art 101 TFEU is twofold. Paragraph 1 prohibits, as incompatible with the internal market, agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which by object or by effect prevent, restrict or distort competition in the internal market while, at the same time, it provides for a non-exhaustive list of such agreements, decisions and practices. Paragraph 2 stipulates that these agreements are automatically void and, crucially for the purposes of this research, 101 (3) TFEU provides that the prohibition may, however, be declared inapplicable to any agreement that satisfies four cumulative criteria: the improvement of production or distribution of goods or promotion of technical or economic progress, the consumers enjoy a fair share of the resulting benefit, the agreement or decision or concerted practice does not impose restrictions that are not indispensable to the attainment of the objectives and does not afford the undertaking the possibility to eliminate competition in a substantial part of the concerned products.

Furthermore, alongside this primary law provision, there is also Regulation 1/2003 which governs, *inter alia*, the enforcement of art 101 TFEU and there are also the soft-law instruments available in the EU, in particular, Commission Notices and Guidelines which, albeit non-binding, provide useful explanations and suggestions for various stakeholders. Last but certainly not the least, the EU Courts' case-law also has definitely shaped the way that competition rules have been interpreted and enforced in the EU.

---

<sup>160</sup> Case C-344/08 *Rubach* [2009] ECR I-7033, paras 28–33; it has already been stressed that the applicability of the PI in EU competition proceedings was firstly recognised explicitly in *Huls*.

To begin with, the General Court in *Sumitomo Chemical v Commission*<sup>161</sup> has held that

The presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement is a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of the defence in the normal course of proceedings resulting in a decision on the merits of the case.<sup>162</sup>

Thus, as a preliminary point, it is remarked that the PI in competition proceedings at EU level bears a strong resemblance with the language used in the ECtHR's judgement in *Minelli* and also in *Barbera, Mesegue and Jabardo v Spain*; the accused must be treated throughout the legal proceedings in such a way that reflects the starting hypothesis of him not having committed the infringement concerned.

That being so, this section discusses the PI in the enforcement of art 101 TFEU regarding two distinct issues as they have been elaborated in the Strasbourg jurisprudence: the allocation of the burden of proof between the Commission and the defendant undertakings and the presumptions that have been developed in the enforcement of art 101 TFEU. In doing so, reference is unavoidably being made to the applicable standard of proof in 101 TFEU cases (if any) and its connection with the *in dubio pro reo* principle.

## **V.2. Allocation of the burden of proof and the 'requisite legal standard'**

The legal issue of the *allocation* of the burden of proof in 101 TFEU cases has been addressed several times by the EU Courts throughout the years and the explicit application of the PI has certainly contributed to its understanding. Thus, in *Commission v Anic*<sup>163</sup> the ECJ ruled 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 which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. In doing this, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an

---

<sup>161</sup> Joined Cases T-22/02 & T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR II-4065.

<sup>162</sup> *Ibid.*, para 106.

<sup>163</sup> Case C-49/92 P, *Commission v Anic* [1999] ECR I-4125.

undertaking participated in such an infringement and that it was responsible for the various aspects of it.<sup>164</sup>

In other words, the Commission bears both the legal and evidential burden to prove that the infringement concerned has been committed. Respectively, the defendant undertaking which relies on art 101 (3) TFEU bears the burden to prove the elements of the cumulative criteria provided therein. This was explicitly held in 1982 where it was ruled that

... in the event of an exemption's being applied for under Article 85(3) it is in the first place for the undertaking concerned to present to the Commission the evidence intended to establish the economic justification for an exemption, and if the Commission has objections to raise, to submit alternatives to it. [sic]<sup>165</sup>

In addition, more recently in *GlaxoSmithKline Services*<sup>166</sup> it was held that the only available defence for the undertaking in the context of 101 TFEU is to rely on the defence available in art 101 (3) TFEU and prove that the criteria are satisfied 'by means of convincing arguments and evidence'.<sup>167</sup>

It is, thus, fair to say that the EU Courts' understanding of the allocation of the legal burden of proof matches the way in which art 101 TFEU is drafted in literal terms in the sense that art 101 (3) is considered to be a special defence for the undertakings concerned which bear the legal burden to prove the conditions therein. To put it another way, the way that art 101 TFEU is drafted, in essence in two paragraphs, informs the way that EU Courts allocate the burden of proof between the Commission and the undertakings concerned; and this allocation of the burden of proof, ultimately, affects the enforcement of art 101 TFEU. Therefore, the Commission acting as the prosecutor in art 101 TFEU cases must prove the elements of the infringement and, subsequently, if the defendant undertaking wishes to rely on the defence available in art 101 (3) TFEU, it must respectively prove that the conditions of the defence are satisfied. This line of case-law is now also codified in Regulation 1/2003 where it is explicitly

---

<sup>164</sup>Ibid., para 86 (citation omitted); more recently 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 v Commission* [2004] ECR I-123, para. 78.

<sup>165</sup>Joined Cases 43/82 & 63/82 *Verenigtinger Bevorderingvanhet VlaamseBoekwezen(VBVB) and Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v Commission* [1984] ECR 19, para 52.

<sup>166</sup>T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969.

<sup>167</sup>Ibid., para 235.

provided that

... the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled. [sic]<sup>168</sup>

The exact relationship, however, between art 101 (1) and (3) TFEU, in particular, whether para (3) is a special defence or not, has been a thorny issue for several reasons. First of all, although the dichotomy in the overall drafting of art 101 TFEU may favor the formulaic scheme ‘elements-defence’ and the corresponding allocation of the burden of proof between the Commission and the defendant undertakings, yet the objectives pursued therein which also have (or should have) an impact on its enforcement are strongly contested.<sup>169</sup>

Alongside the arguments regarding the objectives pursued by competition rules, it has also been argued that the wording of the provision itself does not dictate, necessarily, the labelling of art 101 (3) TFEU as a defence since it is expressed ‘in terms of *inapplicability* of art 101 (3) TFEU as opposed to *exemption* of the conduct in question.’[sic]<sup>170</sup> The argument runs in the following vein: Both paragraphs (1) and (3) are manifestations of the analytical framework which is adopted by the Commission as a basis to conduct competition effect-based analysis. On this basis, the pivotal question is whether the agreement is pro-competitive or anti-competitive *all in all* meaning that there is no space for ‘so-so’ or ‘partially, yes’ answers.<sup>171</sup> Therefore, since the Commission itself acknowledges that if the agreement’s net effect, after the balancing of its anti-competitive and pro-competitive effects, ‘is on balance procompetitive and compatible with Community competition rules’<sup>172</sup>, this confirms that it is also the Commission’s view that both provisions belong to the same analytical framework and consequently, they must be assessed during a more sophisticated competition analysis.<sup>173</sup> In other words, the argument’s essence is that art 101 TFEU delineates *as a*

---

<sup>168</sup> art 2, Regulation 1/2003.

<sup>169</sup> See, *inter alia*, Okeoghene Odudu, ‘*The Boundaries of EC Competition Law: The Scope of Article 81*’ (Oxford, OUP 2006).

<sup>170</sup> Andriani Kalintiri, ‘The Allocation of the Legal Burden of Proof in 101 Cases’ (2015)34 Yearbook of European Law 232, 244.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*; Commission Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3)] [2004] OJ C 101/97, para 33.

<sup>173</sup> Andriani Kalintiri, ‘The Allocation of the Legal Burden of Proof in 101 Cases’ (2015)34 Yearbook of European Law 232, 244.

*whole*, an area of prohibited anticompetitive conduct expressed both in a appositive and a negative way and, as a result, all these aspects regardless of their characterization as core elements or defence must be proved by the Commission.

In the author's view, this argument reads operational but at the same time it is fraught with dangers. First of all, it is not supported neither by the current judicial practice nor by the wording of Regulation 1/2003 as regards the allocation of the burden of proof. Furthermore, it does not outweigh the advantage of legal certainty that the current scheme provides. The undertakings concerned are fully aware of the behaviors that may raise competition concerns and thus they can avoid committing competition infringements. On top of that, especially in cartel cases, there seems to be strong consensus amongst economists that such horizontal agreements can rarely produce pro-competitive effects which can justify their assessment by the Commission on its own initiative in the context of 101 (3) TFEU. Conversely, in vertical agreements the Commission appreciates this possibility stating cautiously that

it is relevant to examine whether in the individual case the agreement falls within the scope of Article 101(1) and if so whether the conditions of Article 101(3) are satisfied. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions of competition, there is no presumption that vertical agreements falling outside the block exemption because the market share threshold is exceeded fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). Individual assessment of the likely effects of the agreement is required. Companies are encouraged to do their own assessment.<sup>174</sup>

The language used is illustrating. Each word counts and it is implied that in cases of vertical restraints the Commission assesses the effects of the agreement despite of the fact that the burden of proving the conditions of art 101 (3) TFEU rests on the undertaking which 'may substantiate efficiency claims'<sup>175</sup> and explain the satisfaction of the criteria therein. All things considered, it seems ultimately that the method used to make the distinction between core elements and defences in art 101 TFEU is the scheme of the provision itself in light of the effective enforcement of the objectives pursued by EU competition rules.

As regards standards of proof in competition cases at EU level, this issue is not addressed by the EU Courts explicitly enough. One reason for that could be that the EU

---

<sup>174</sup> Guidelines on Vertical Restraints [2010] OJ C 130/1, para 96.

<sup>175</sup> Ibid.

judicial system, in general, is inspired mostly by the civil law tradition and, as such, it is initially based on the principle of free evaluation of evidence.<sup>176</sup> Admittedly, the principle *in dubio pro reo* is applicable in the context of competition proceedings<sup>177</sup> but not necessarily as a standard of proof *per se* but rather as a procedural corollary of the PI.

Notwithstanding the above, the terms ‘requisite legal standard’ and ‘standard of proof’ are not absent in the EU Courts’ case-law.<sup>178</sup> In fact, in Regulation 1/2003 it was stressed that the Regulation does not affect national laws on the applicable standards of proof in national competition proceedings provided that they are compatible with the general principles of EU law.<sup>179</sup> As regards competition proceedings at EU level, though, the provisions in the Regulation leaves us none the wiser.

In this respect, in principle, it has been held that in the context of art 101 TFEU cases the Commission must produce ‘a sufficiently firm, precise and consistent body of evidence’<sup>180</sup> to prove its allegations. This language seems to vary in the way it is expressed literary and several adjectives have been used to describe the evidence needed such as ‘convergent and convincing’, ‘convincing’, ‘cogent’, or ‘relevant reliable and credible’.<sup>181</sup> Despite the plethora in the adjectives used, it does not seem to shed light on the specific ‘standard of proof’ that must be met by the Commission in order to satisfy the burden to prove its allegations; whether it is a mere preponderance of evidence or it is the beyond reasonable doubt (within the common law understanding) threshold. Interestingly, in *Dresner Bank*<sup>182</sup> the General Court rejected the Commission’s allegation that ‘a more likely than not’ test is applicable in competition proceedings and stressed the fact that on the point of the concurrence of wills, which is one of the elements of an agreement in EU antitrust law, no reasonable

---

<sup>176</sup> Case T-1/89, *Rhône-Poulenc SA v. Commission* [1991] ECR II-867, 954.

<sup>177</sup> *Ibid.*; Joined Cases T-67/00, T-68/00, T-71/00, and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para. 177.

<sup>178</sup> See, *inter alia*, Eric Jippini-Fournier, ‘The Elusive Standard of Proof in EU Competition Cases’ (2010) *World Competition* 187.

<sup>179</sup> recital 5, Regulation 1/2003.

<sup>180</sup> Joined Cases 29 & 30/83, *CRAM & Rhein zinc v Commission* [1984] ECR 1679, para. 20; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 & C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, para. 127; Case T-62/98, *Volkswagen v Commission* [2000] ECR II-2707, para. 43.

<sup>181</sup> Eric Jippini-Fournier, ‘The Elusive Standard of Proof in EU Competition Cases’ (2010) 33 *World Competition* 187, 192 and footnotes therein.

<sup>182</sup> Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP & T-61/02 OP, *Dresdner Bank and Others v Commission* [2006] ECR II-3567.

doubt must remain on part of the Commission for the requisite legal standard to be satisfied.<sup>183</sup> However, it is not clear whether this passage of the judgement corresponds to the pre-established standard of proof or it is a manifestation of the *in dubio pro reo* principle.

As regards the applicable standard of proof that must be satisfied on behalf of the defendant undertakings when they rely on the defence available in art 101 (3) TFEU, the case-law is even more ambiguous. As already mentioned in passing, in *GSK Services* it was articulated that the conditions included in art 101 (3) must be proved ‘by means of convincing arguments and evidence’.<sup>184</sup> This wording, though, is far from illuminating and the judgements in *Mastercard (I and II)*<sup>185</sup> fall short of providing guidance to this issue.

In *Mastercard I*, the defendant undertakings argued that relying on the art 101 (3) TFEU means that the requisite legal standard must be the ‘balance of probabilities’ threshold and, consequently, the defendants must be given the benefit of the doubt.<sup>186</sup> Regrettably, the General Court did not tackle this issue and merely reiterated the language used in *GSK Services*. This approach was also adopted although on a different reasoning by the AG Mengozzi on appeal; AG Mengozzi contemplated on the appellants’ argument stressing that the circumstances in *GSK Services* were not the same because of the system of prior notification which meant that the Commission had to decide for the future effects of an agreement, a factor that justified ‘the more likely than not’ applicable test in the defence of art 101 (3) TFEU whereas the system in the specific case had already changed justifying a higher degree of probative value of the evidence adduced by the defendant undertakings.<sup>187</sup> Furthermore, AG Mengozzi also opined that the *in dubio pro reo* principle is applicable ‘in the analysis which the Commission carries out under article 81 (1) TFEU when it must prove the existence of an infringement of that provision by the undertaking concerned.’[sic]<sup>188</sup> and proceeded

---

<sup>183</sup> Ibid., para 144-148.

<sup>184</sup> Case T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969, para 235.

<sup>185</sup> Case T-111/08 *MasterCard and Others v Commission* (MasterCard I), [2012] ECLI:EU:T:2012:260 ; C-382/12 P, *MasterCard and Others v Commission* (Mastercard II) [2014] ECLI:EU:C:2014:2201.

<sup>186</sup> Case T-111/08 *MasterCard and Others v Commission* (MasterCard I), [2012] ECLI:EU:T:2012:260, para 195.

<sup>187</sup> Case C-382/12 P, *MasterCard and Others v Commission* (Mastercard II) [2014] ECLI:EU:C:2014:2201 AG Opinion, para 141.

<sup>188</sup> Ibid., para 146.

stating that it must not be invoked ‘in an attempt to reduce the standard of proof required’ when the defendant undertakings wish to rely on art 101 (3) TFEU.<sup>189</sup> On appeal, the ECJ rejected this plea as inadmissible considering it was a repetition of the arguments put forward before the General Court.<sup>190</sup>

Put in the context of the PI as it is elaborated in the Strasbourg jurisprudence which is the considered the interpretative benchmark for the application of the corresponding Charter provisions, it is reasonable to argue that the bifurcated apportionment of the legal burden of proof between the Commission, acting as the prosecutor, and the defendant undertakings as the accused of committing competition law infringements is in line with the PI as conceived by the Strasbourg organs. The Commission must prove the infringement concerned and then the defendant undertakings bear the legal burden to prove the elements of the defence envisaged in art 101 (3) TFEU. In addition, the *in dubio pro reo* principle is explicitly recognised in the case-law but standards of proof are not recognised *per se*.

### **V.3.Presumptions in 101 TFEU**

As a preliminary point, it is evident that the prohibition of art 101(1) TFEU is drafted using itself a legal presumption, namely, ‘an agreement, concerted practice or a decision of an association between undertakings that may affect trade between Member States and which *by object* prevents, restricts, or distorts competition in the internal market is prohibited as incompatible with the internal market.’ (emphasis added).<sup>191</sup> ‘By object’ restrictions of competition are considered to be a legal presumption which has been analysed in depth and it is certainly a highly debated concept in the EU competition analysis.<sup>192</sup>

In addition to that, there are also presumptions which have been acknowledged by the Commission and elaborated by the EU Courts’ case law in the context of art 101 TFEU and they serve various purposes. It is recalled that the PI as it has been conceived in the ECHR does not, in principle, prohibit presumptions in the national laws of the Contracting States but this does not mean that they do not raise compatibility concerns in certain circumstances. According to *Salabiaku v France* presumptions must be kept

---

<sup>189</sup> Ibid., para 147.

<sup>190</sup> Case C-382/12 P, *MasterCard and Others v Commission* (Mastercard II) [2014] ECLI:EU:C:2014:2201, paras 215-219.

<sup>191</sup> art 101 (1), TFEU.

<sup>192</sup> See, *inter alia*, David Bailey, ‘Restrictions of Competition by Object Under Article 101 TFEU’ (2012) 49 Common Market Law Review 559.

within reasonable limits taking into consideration what is at stake and the rights of the defence.<sup>193</sup> In the EU competition law context there is a significant amount of presumptions, such as the presumption that undertakings participating in concerted practices and remaining active on the market, determine their conduct on the market based on information exchanged between competitors<sup>194</sup> or the presumption that an undertaking agrees to a anticompetitive collusive behaviour when it takes part in a cartel meeting unless it distances itself publicly.<sup>195</sup> Due to space restraints, this research does not address the impact of the PI on all the presumptions that are recognised in EU competition law. However, two distinct issues will be presented as they have been illustrated in cases concerning another evidential presumption; the presumption of parental liability.

To begin with, in *Akzo Nobel*<sup>196</sup> it was held that the presumption of parental liability in the context of EU competition law entails that in the event when a parent company holds 100% of a subsidiary's shares and this subsidiary has been proved to have infringed competition rules, the parent company can be held to be jointly and severally liable for the fine imposed by the Commission since it is presumed *prima facie* that the parent company has exercised decisive influence on the subsidiary's conduct.<sup>197</sup> In this case, AG Kokott opined that the presumption of parental liability is not at odds with the PI because it is irrelevant with the burden of proof which still remains on the Commission. AG Kokkot took the view that it is only the standard of proof which is determined by the presumption of parental liability which may be rebutted by the parent company adducing cogent evidence to the contrary.<sup>198</sup> To put it simply, AG Kokott took the view that the PI is relevant only to the allocation of the burden of proof and does not mandate standards of proof. Therefore, presumptions such as parental liability which is pertinent to standards of proof do not take issue with the PI.

---

<sup>193</sup> *Salabiaku v France*, (App No 10589/83) (1991) 13 EHHR 379, para [28]

<sup>194</sup> Case C-8/08 *T-Mobile Netherlands and Others v Commission* [2009] ECR I-4529, paras 51-52.

<sup>195</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 v Commission* [2004] ECR I-123, paras 81-85.

<sup>196</sup> Case C-97/08 P, *Akzo Nobel NV and Others v Commission* [2009] ECLI:EU:C:2009:536.

<sup>197</sup> *Ibid.*, paras 60-61; Case C-216/09 P, *Arcelor Mittal Luxembourg SA v Commission* [2011] ECLI:EU:C:2009: 547, paras 96-98.

<sup>198</sup> Case C-97/08 P, *Akzo Nobel NV and Others v Commission* [2009] ECLI:EU:C:2009:536, AG Opinion para 74 and footnotes 63 and 64 therein.

In this respect, AG Bot in *Archelormittal*<sup>199</sup> interestingly, took note of the Strasbourg jurisprudence, in particular *Salabiaku v France* and *Janosevic v Sweden* which were explicitly cited, and he provided useful guidance on the way that the presumption of parental liability must be applied in competition proceedings. First of all, AG Bot stressed that ‘the presumption of liability is essentially an exception to the principle of the PI’<sup>200</sup> because it considerably reverses the burden of proof from the prosecuting authorities to the accused and as such, it must be confined within reasonable limits to be consistent with the judgement in *Salabiaku v France*.<sup>201</sup>

Furthermore, AG Bot analyzing *Janosevic v Sweden* stated that in order for a presumption to be confined within reasonable limits, it must be rebuttable<sup>202</sup> and withstand a proportionality test analogous to the one that the ECtHR applied to the Swedish tax system.<sup>203</sup> To be consistent with this case-law, AG Bot appreciated the possible argument that the effective implementation of competition rules may be able to justify the fact that the presumption of parental liability is permissible but he also underscored that its current application has sometimes gone beyond of what can be justified.<sup>204</sup> Finally, AG Bot reminded that the Commission in every case where it relies on the presumption of parental liability must support it with other elements of fact which reinforce the argument about the exercise of decisive influence on behalf of the parent company.<sup>205</sup> Notably, according to the AG’s Opinion, this obligation does not become extinct even in the case of a “100 % ownership” case.<sup>206</sup>

Nonetheless, this approach does not seem to have been adopted consistently by the EU Courts although there seems to be a tendency for a more rigorous review of the Commission’s decisions when it rejects the defendant undertakings’ arguments for the rebuttal of the presumption. In this regard, in *Elf Aquitaine*<sup>207</sup> the General Court’s decision<sup>204</sup> was annulled on the basis of the insufficient reasoning in the Commission’s

---

<sup>199</sup> Case C-216/09 P, *Arcelor Mittal Luxembourg SA v Commission* [2011] ECLI:EU:C:2009:547.

<sup>200</sup> *Ibid.*, AG Opinion para 206.

<sup>201</sup> *Ibid.*

<sup>202</sup> In this respect see Case C-521/09 P, *Elf Aquitaine SA v Commission* [2011] ECLI:EU:C:2011:620, para 168.

<sup>203</sup> Case C-216/09 P, *Arcelor Mittal Luxembourg SA v Commission* [2011] ECLI:EU:C:2009 AG Opinion, paras 208-209.

<sup>204</sup> *Ibid.*, para 210.

<sup>205</sup> *Ibid.*, para 213.

<sup>206</sup> *Ibid.*

<sup>207</sup> Case C-521/09 P, *Elf Aquitaine SA v Commission* [2011] ECLI:EU:C:2011:620.

decision as regards the rejection of the indicia submitted by Elf Aquitaine.<sup>208</sup> As a result, the General Court failed to conduct sufficient judicial review of the Commission decision.<sup>209</sup> However, the ECJ stressed that the argument that the presumption of parental liability is irrebuttable because of the fact that it is a difficult task for the undertakings to collect evidence to rebut the presumption is not convincing.<sup>210</sup>

To summarize, this EU case-law analysis shows that the presumption of parental liability as an evidential presumption is considered to be in line with the PI because it is rebuttable and the fact that the defendant undertakings must take much effort in order to rebut it is not relevant to the PI. The Commission as the fact-finder, however, must be careful in the assessment of the evidence adduced and not gloss over such evidence.

---

<sup>208</sup> Ibid., para 168.

<sup>209</sup> Ibid., para 169.

<sup>210</sup> Ibid., para 70.

## Conclusion

Returning to the questions posed at the introductory part of this research, the answers rest on the analysis of the case-law of the ECtHR and the EU Courts and the conclusions which are drawn from it. In particular, first of all, the notion of the PI is not possible to be conceived in the abstract and although one is intuitively tempted to assert that it is universally accepted as a common standard in criminal law, in practice it does not operate so mechanically or in an automatic way. It has been demonstrated that its role, at least as an incomplete rule of evidence, is identifiable only when it is seen in the analogous legal context. Its scope of application is not pre-set but it depends on the approach adopted by the judge. In the EU, its applicability in competition cases has been recognised way before the proclamation of the Charter and its application therein is not, necessarily, contingent on the criminal character of competition proceedings.

Nonetheless, nowadays the PI is explicitly enshrined in the Charter and its scope and meaning is prescribed to be commensurate with the ECHR provision. In this respect, the research demonstrates that the PI's scope is envisaged, *inter alia*, as having the repercussions of a rule of evidence, albeit not explicitly, via the narrow procedural approach; the prosecution bears the legal burden to prove the elements of the offence concerned, at least, *prima facie* and once this is established, the legal burden shifts upon the defendant to prove any defences. Standards of proof, as such, are not explicitly recognised in the Strasbourg organs' jurisprudence but the principle *in dubio pro reo* is respected as an inherent feature of the PI. Permissible reverse of the burden of proof is, indirectly, also permitted through the acknowledgement of presumptions of law or fact which are not, in principle, at odds with the PI as long as they are confined within reasonable limits.

As regards the enforcement regime of art 101 TFEU at EU level and its compatibility with the PI as it is enshrined in the Charter and in the ECtHR's jurisprudence, the research yields the conclusion that the dichotomized apportionment of the legal burden of proof between the Commission and the defendant undertakings does not take issue with the PI as an evidential rule. Since art 101 (3) TFEU is conceived in the EU context as a defence for the undertakings concerned, they bear the legal burden to prove the conditions therein. As regards standards of proof, on the one hand, they are not recognised in the EU Courts' case-law as such but the principle *in dubio pro reo* stands when the Commission conducts the competition analysis in order to

prove the elements of the infringement concerned. On the other hand, the analytical framework as it has been elaborated throughout the years is fraught with presumptions which, in essence, operate as reversal of the burden of proof and must be evaluated in the light of the Strasbourg jurisprudence. The research after the assessment of the presumption of parental liability as an example of presumption of fact, draws the conclusion that although it is not incompatible with the PI because it is considered to be rebuttable and subject to a sort of proportionality test.

One issue that has not been discussed whatsoever in this research is the fact that the PI is not only an evidential rule but it is also considered to be a human right and, as such, it is closely intertwined with other fundamental human rights protected both in the ECHR and the Charter. Admittedly, this dual feature of the PI may have an impact on the way that the PI must be interpreted and applied as a whole. In particular, the ‘presumptions within reasonable limits’ jurisprudence may raise concerns which must be further researched as regards the extent to which these permissible presumptions confine the ‘human-right’ feature of the PI which is pertinent to the fair trial principle and the rights of the defence and whether in this event and in conjunction with other factors restricts the “very essence” of the human right ‘for everyone charged to be presumed innocent until proved guilty according to law.’ Yet another research.

## Bibliography

### Literature

#### **Books**

Andreangeli, A, '*EU Competition Enforcement and Human Rights*' (London, MPG Books 2008).

Broun, K, '*Mc Cormick on Evidence*' (6<sup>th</sup> edn US, Thomson West 2006)

Nina-Louisa Arold Lorenz and Others, '*The European Human Rights Culture: A Paradox of Human Rights Protection in Europe?*' (Leiden, Martinus Nijhoff 2013)

Damaska, M, '*Evidence Law Adrift*' (New York, Yale University Press 1997)

Danov, M and Others (eds.), '*Cross-border EU competition law actions*' (Hart Studies in competition Law, UK Hart Publishing 2013)

Forrester, I, 'From Regulation 17/62 to Article 52 of the Charter of Fundamental Rights' in Ulf Bernitz and Others (eds), '*General Principles of EU Law and European Private Law*' (European Monograph Series, Kluwer Law International BV The Netherlands 2013)

Ho, H-L, 'The presumption of innocence as a human right' in Paul Roberts and Jill Hunter(eds), '*Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*' (London, Hart Publishing 2012)

Kammin, J, Becker, F, 'Cross Border EU Competition Litigation: Qualitative Interviews from Germany' in Mihail Danov and Others (eds.), '*Cross-border EU competition law actions*' (Hart Studies in competition Law, Hart Publishing, UK 2013)

Lippke, R, '*Taming the Presumption of Innocence*' (NY OUP 2016)

Green, S, 'Six Senses of Strict Liability: A Plea for Formalism' in Andrew Simester (ed) '*Appraising Strict Liability*' (Oxford, OUP 2005)

Odudu, O, *'The Boundaries of EC Competition Law: The Scope of Article 81'* (Oxford, OUP 2006)

Roberts, P and Hunter, J (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (London, Hart Publishing 2012)

Stein, A, *'Foundations of Evidence Law'* (US, OUP 2005)

Stumer, A, *'The Presumption of Innocence: Evidential and Human Rights Perspectives'* (London, Hart Publishing 2012)

Stelmach, J, and Brozek, B, *'Methods of legal reasoning'* (Netherlands, Springer 2006).

Thayer, J, *'A Preliminary Treatise on Evidence at the Common Law'* (London, Sweet & Maxwell, 1898)

Trechsel, S, *'Human Rights in Criminal Proceedings'* (Oxford OUP 2005)

## **Articles**

Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *The International Journal of Evidence and Proof* 241

Andriani Kalintiri, 'The Allocation of the Legal Burden of Proof in 101 Cases' (2015) 34 *Yearbook of European Law* 232

Antony Duff, 'Who must presume to be innocent of what?' (2013) 42 *Netherland Journal of Legal Philosophy* 170

Carl-Friedrich Stuckenberg, 'Who is presumed innocent of What and by Whom?' (2014) 8 *Criminal Law and Philosophy* 301

Christina Volpin, *'The ball is in your court: Evidential Burden of Proof and the Proof Proximity Principle in EU Competition Law'* (2014) 51 Common Market Law Review 1159

David Bailey, 'Standard of proof in EC merger proceedings: A common law perspective' (2003) 40 Common Market Law Review 845

David Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49 Common Market Law Review 559

Donald Dripps, 'The Constitutional Status of the Beyond Reasonable Doubt Rule' (1987) 75 California Law Review 1665

Hamish Stewart, 'The Right to Be Presumed Innocent' (2014) 8 Criminal Law and Philosophy 407

Eric Jippini-Fournier, 'The elusive Standard of Proof in EU Competition Cases' (2010) 33 World Competition 187

James Thayer, 'The Burden of Proof' (1890) 4 Harvard Law Review 45

J McNaughton, 'Burden of Production of Evidence: A Function of a Burden of Persuasion' (1955) 68 Harvard Law Review 1382

Kevin Clermont, Emily Sherwin 'A Comparative View of Standards of Proof' (2002) 50 American Journal of Comparative Law 243

Macro Bronckers and Anne Valery, 'No longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law' (2011) 34 World Competition 535

Maria João Melicias, ‘*Did They Do It?*’ The Interplay between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations’ (2012) 35 *World Competition* 471

Michele Carpagano, ‘Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04’ (2006) 3 *Competition Law Review* 47

Michelle Taruffo, ‘Rethinking the Standards of Proof’ (2003) 51 *The American Journal of Comparative Law* 659

Raymundo Gama, ‘The Nature and the Place of Presumptions in Law and Legal Argumentation’ (2017) 31 *Argumentation* 555

Ronald Allen, ‘Presumptions in civil actions reconsidered’ (1981) 66 *Iowa Law Review* 843

Douglas Scott, S, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ (2006) 43 *Common Market Law Review* 629

Wouter Wils, ‘Is Criminalisation of EU Competition Law the Answer?’ (2005) 28 *World Competition* 117

Wouter Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’, (2010) 33 *World Competition* 5

## **Legislation**

Consolidated versions of the Treaty on the European union and the Treaty of the Functioning of the European Union [2016] OJ C202/01

Charter of the Fundamental Rights of the European Union (consolidated version) [2016] OJ C202/02

Convention for the Protection of Human Rights and Fundamental Freedoms  
(European Convention on Human Rights, as amended)

Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1

Council Regulation (EC) No 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

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (Text with EEA relevance) [2014] OJ L349/1

Explanations Relating to the Charter of Fundamental rights of the European Union, [2007] OJ C303/17, 30

International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Commission Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3)] [2004] OJ C 101/97

## **Table of cases**

### **ECHR cases**

*Öztürk v. Germany*, (App No 8544/79) (1984) 6 EHRR 409

*Engel and Others v. The Netherlands*, (App No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (1976) 1 EHRR 647

*Jussila v. Finland*, (App No 73053/01) (2007) 45 EHRR 39

*Janosevic v. Sweden*, (App No 34619/97) (2004) 38 EHRR 22

*Lauko v Slovakia*, judgement of 2 Sept. 1998

*Stenuit v France*, (App No 11598/85) (1992) ECC 401

*Menarini Diagnostics S.R.L v Italy*, (App No 43509/08) (2011)

*Minelli v Switzerland*, (App No 8660/79) (1983) 5 EHRR 554

*Barbera, Mesegue and Jabardo v Spain* (App No 1058890/93) (1988) 11 EHRR 360.

*Austria v Italy* (1963) 6 Yearbook 740

*Lingens v Austria*, (App No 8803/79) (1982) 4 EHRR 373

*Telfner v Austria*, (App No 33501/96) (2002) 34 EHRR 7

*AG v Malta*, (App No 16641/90) EComp HR 10 December 1991.

*Bruckner v Austria*, (App No 21442/93) EComHR 18 October 1994  
*Muller v Austria*, (App No 12555/03) ECHR 5 October 2006  
*TH v Austria* (App No 19116/91) EComHR 13 October 1993.  
*Salabiaku v France*, (App No 10589/83) (1991) 13 EHHR 379.  
*Västberga Taxi Aktiebolag and Vulic v Sweden*, (App No 36985/97) ECHR 23 July 2002  
*Maatschap v Netherlands*, (App No 31463/96) EComHR 21 May 1997  
*Klouvi v France*, (App No 3754/03)

## **EU Cases**

### **ECJ**

C-109/10 P, *Solvay SA v Commission*, (2011) ECLI:EU:C:2011:686 AG Opinion para 256  
C-272/09 P, *KME Germany AG and Others v Commission* (2011) ECLI:EU:C:2011:810 AG Opinion  
C-13/94, *P v S and Cornwall County Council*, EU:C:1996:170  
C-489/10 *Lukasz Marcin Bonda* [2012] ECLI:EU:C:2012:319  
C-617/10 *Åkeberg Fransson* [2013] ECLI:EU:C:2013:105.  
C-524/15 *Luca Menci* ECLI:EU:C:2018:197, para 26  
C-199/92 P, *Huls v Commission* [1999] ECR 4287.  
C-265/92P, *Montecatini v Commission* [1999] ECR I-4539  
C-344/08 *Rubach* [2009] ECR I-7033  
C-49/92 P, *Commission v Anic* [1999] ECR I-4125.  
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 v Commission* [2004] ECR I-123  
Joined Cases 43/82 & 63/82 *Verenigingter Bevorderingvanhet VlaamseBoekwezen(VBVB) and Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v Commission* [1984] ECR 19  
C-382/12 P, *MasterCard and Others v Commission* (Mastercard II) [2014] ECLI:EU:C:2014:2201  
C-97/08 P, *Akzo Nobel NV and Others v Commission* [2009] ECLI:EU:C:2009:536  
C-216/09P, *Arcelor Mittal Luxembourg SA v Commission* [2011] ECLI:EU:C:2009:547

C-521/09 P, *Elf Aquitaine SA v Commission* [2011] ECLI:EU:C:2011:620

## **General Court**

T-99/04 *AC Treuhand AG v Commission* [2008], ECR II- 1501

T-138/07 *Schindler Holding Ltd and Others v Commission* [2011] ECLI:EU:T:2011:362

Joined Cases T-22/02 & T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR II-4065

Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank AG and others v Commission* [2006]

T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969

T-1/89, *Rhône-Poulenc SA v. Commission* [1991] ECR II-867, 954

Joined Cases T-67/00, T-68/00, T-71/00, and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501

T-111/08 *MasterCard and Others v Commission* (MasterCard I), [2012] ECLI:EU:T:2012:260

## **Internet Sources**

Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 *The Law and Practice of International Courts and Tribunals* 375 available here < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1527358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527358) > accessed in 27 April 2018