The presumption of innocence in the EU competition law

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed).....

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ABSTRACT

This Bachelor thesis aims to analyse the application of the presumption of innocence in the EU competition law, more precisely in the anti-cartel proceedings. In addition, this thesis will provide the analysis of the categorisation of the competition law. This, in turn, is a topical debate due to the fact that in competition law the penalties are comparable to criminal charges notwithstanding the administrative procedure. The thesis will try to answer the question "To what extent is the presumption of innocence applied in the EU anti-cartel procedure?". This paper's primary objective is to identify the procedural rights of cartel members, analyse their implementation, and emphasise any potential restrictions of those rights that cartel participants may experience during anti-cartel procedures.

Keywords: Cartel, Competition Law, Anti-Cartel Procedure, ECHR, Charter of Fundamental Rights

SUMMARY

A lot of the European Commission's resources are spent on combating cartels, moreover, the dismantling of cartels is on the top list of priorities and is one of the Commission's most fundamental responsibilities.[1] In the last five years, from 2017 to 2021, the Commission issued sanctions against cartels totalling over $6 billion.[2] This, in turn demonstrates the seriousness of penalties applied to the cartel members and proves the necessity for the accurate implementation of the fundamental rights in anti-cartel proceedings. The research question that this thesis will try to answer throughout the whole work is "To what extent is the presumption of innocence applied in the EU anti-cartel procedure?". This paper's primary objective is to identify the procedural rights of cartel members, analyse their implementation, and emphasise any potential restrictions of those rights that cartel participants may experience during anti-cartel procedures.

One of the topical debates that this thesis is covering is that competition law penalties are more comparable to criminal charges notwithstanding the administrative procedure. However, the EU does not express eagerness towards the transition. Even though it is difficult to reject the similarity between the sanctions imposed on cartel members and those that the ECtHR categorises as criminal under Article 6 ECHR[3] in the ruling of the *Volkswagen AG v. Commission* case the Court stated that the procedure is not criminal.[4]

It is ironic that in cartel cases, there is the "proof paradox", and the irony is that usually the biggest and the most momentous cartels the government wants to find and end because their damage on the market is significant is the hardest to find and establish evidence. Moreover, when a number of enterprises illegally agrees on a price, the industry price as such rises even though some companies might not engage in the machination. Thus, if someone: state or private party brings antitrust lawsuits, the parties who were not a part of the collision confront the issue of proving their innocence since their prices grow in tandem with the

[1] Mickonytė, Aistė, *Presumption of Innocence in EU Anti-Cartel Enforcement*, (BRILL, 2018), p.7.

[2] European Commission. Cartel Statistics. Accessed May 2, 2022. Available on: https://ec.europa.eu/competition-policy/cartels/statistics_en

[3] Mickonytė, *supra* note 1, p.107.

[4] Judgement of the Court (Sixth Chamber) of 18 September 2003, *Volkswagen AG v. Commission., C*-338/00 P, ECLI:EU:C:2003:473, para 97.

colluders.[5]And this is an important issue that has to be solved if we want effective competition law enforcement.

The Commission's main aim is to protect consumers as well as other market players, and for that purpose the leniency program has been created. According to the leniency program, cartel members can settle with the Commission for the reduction of the fine. But it seems that the Commission has to walk on thin ice, because it is difficult to balance between different parties and to follow all the fundamental principles in order not to deprive one of the parties of their rights.

After the analysis of the case law, it can be stated that in general, the presumption of innocence is followed in the anti-cartel proceedings, nevertheless it proved to be a very fragile topic where many of the factors might have an impact. Moreover, it is a difficult task for the Commission to remain impartial and objective when working with both settling and non-settling parties. Since evaluations at all levels are conducted by individuals, the human factor must also be considered, as even when people strive to remain impartial, personal sympathy can still occur.

[5] Blair, Roger D., and Richard E. Romano, "Proof of Nonparticipation in a Price Fixing Conspiracy." *Review of Industrial Organisation* 4, no. 1 (1989): 101–17. Accessed April 18, 2022. Available at: http://www.jstor.org/stable/41798255.

TABLE OF CONTENTS

INTRODUCTION

A lot of the European Commission's resources are spent on combating cartels, moreover, the dismantling of cartels is on the top list of priorities and is one of the Commission's most fundamental responsibilities.[6] An anti-competitive corporate environment is unanimously seen as extremely detrimental to a free-market economy that the European Union is trying to guarantee. One of the Commission's primary responsibilities is to implement the anti-cartel provisions of Article 101 of the TFEU by attempting to penalise cooperating firms and dissuade them from committing future violations.[7] Even though the main purpose of the Competition law is to protect consumers, since the accused persons penalties have already become strict and are still becoming harsher, the rights of the accused persons cannot be ignored. The Commission is imposing severe penalties that are meant to have a significant punishing and preventive impact. In the last five years, from 2017 to 2021, the Commission issued sanctions against cartels totalling over $6 billion.[8] Thus, the accurate implementation of the fundamental rights is critical in the case when such big fines are applied. The presumption of innocence is an important component of the right to a fair trial, which is addressed in Article 6 paragraph two of the European Convention on Human Rights.[9] The presumption is a legal notion that states that all individuals should be presumed innocent unless their guilt is verified.[10] The aforementioned Convention is formally not binding on the European Union as such because the Convention was initiated by the Council of Europe that is another, different international organisation where the European Union is not a part of.[11] Nevertheless, as it is mentioned in the Treaty of the European Union Article 6 paragraph 3, the EU respects common fundamental rights, thus it does not necessarily need to be bound by formal sources of law as, for example, the European Convention on Human Rights.[12]

Even though the Convention is not binding to the EU it still serves as a foundation for many European Union policies that are binding on its member states, for example the European Union's Charter of Fundamental Rights, which has an Article 48 that establishes a

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[6] Mickonytė, *supra* note 1, p.1

[7] Whelan, Peter, "The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*"*. *Oxford: Oxford University Press*, 2014, p.3, accessed February 22, 2022, doi: 10.1093/acprof:oso/9780199670062.001.0001.

[8] European Commission, *supra* note 2.

[9] European Convention on Human Rights. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed February 22, 2022.

[10] ibid.

[11] The Council of Europe. European Union accession to the European Convention on Human Rights, available on: https://www.coe.int/en/web/portal/eu-accession-echr-questions-and-answers. Accessed March 17, 2022.

[12] Treaty on European Union (Consolidated version 2012), *OJ C 326, 26.10.2012.* Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT. Accessed April 25, 2022.

presumption of innocence.[13] While the Convention mentions the presumption of innocence in the context of criminal proceedings, it has been incorporated into the various member nations' laws and a notion of how trials should be conducted and accused individuals should be handled throughout time before the Charter of Fundamental Rights was created and implemented. Additionally, competition law is not an exception to this rule. Nonetheless, such a notion is not absolute, and some uncertainty over the adequacy of the evidence continues in competition issues.[14] The presumption of innocence is closely linked to the concept of the burden of proof and in turn with the standard of proof since the presumption of innocence means that the person has to be treated as innocent until his guilt is proven, thus the evidence is a crucial part for the presumption to be applied. However, there are few misconceptions that have to be addressed and clarified.

Due to the strict level of penalties applied to the cartel participants there has been a long-lasting debate over the need to criminalise anti-cartel proceedings that has not yet been resolved. This Bachelor thesis tends to analyse the presence of the presumption of innocence and the adjacent fundamental rights to it in the competition cases as well as the difficulties that implementation of such rights may raise. Since the competition law sector is wide and contains merger cases as well as the dominant position in the market and the use of the dominant position, this research paper will narrow the focus mainly analysing the implementation of the presumption of innocence and adjacent rights in the anti-cartel proceedings. The research question that this thesis will try to answer throughout the whole work is "To what extent is the presumption of innocence applied in the EU anti-cartel procedure?". This paper's primary objective is to identify the procedural rights of cartel members, analyse their implementation, and emphasise any potential restrictions of those rights that cartel participants may experience during anti-cartel procedures.

As a legal approach, doctrinal research has been employed in this paper, which involves a descriptive and in-depth investigation of legal norms uncovered in primary sources. This research paper systematically presents the inter-related to the presumption of innocence norms and views their theoretical and later practical applicability in the competition law. Since the case law is a leading source of law that provides an interpretation of different norms and demonstrates the way how EU law has to be implemented, the case law issued by the Court of Justice of the European Union (further in text "the Court") will be broadly used. Other primary sources such as TFEU, Charter of the Fundamental Rights, European Convention on Human Rights, and different regulations are going to be used in order to provide the reader with the understanding of the main concepts used in the paper,

[13] Charter of Fundamental Rights of the European Union, *OJ C 202, 7.6.2016,* p. 403–403. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016P048. Accessed February 22, 2022.

[14] Mel Marquis, "Evidence, Proof and Judicial Control in Competition Cases," in *European Competition Law Annual: 2009*, eds. Claus-Dieter Ehlermann, Mel Marquis, (Hart Publishing, 2011), p.xxviii.

categorisation of the discussed proceedings as well as with the framework for law enforcement. Moreover, references will be made to the Opinions of the Advocate Generals and to the Commission Guidelines. Even though it is a "soft law" that has a non-binding character, nevertheless makes Commission actions more transparent and predictable, as well as the analysis of Opinions of the Advocate Generals are going to be used during the research.

This bachelor thesis consists of three main parts, where the first part provides with the categorisation of EU anti-cartel proceedings and explains the ongoing debate regarding the applicability of the competition law in the criminal proceedings as well as evaluates the applicability of the presumption of innocence in the anti-cartel proceedings under Article 6 ECHR. The second section provides the explanation of the presumption of innocence and the rights adjacent to it. The last section is the most practical part, emphasising the enforcement of the competition law, implementation of the restrictive measures and the settlement programs and evaluating the presence of the presumption of innocence and offering the reader to get acquainted with the problems that the cartel members can face in such proceedings.

As to the limitations of this paper, since the scope of this research paper was narrowed only to the cartel cases, the analysis of applicability of the presumption of innocence excludes the merger cases as well as the use of the dominant position in the market. Thus, the conclusions of this work should not be generalised to the whole sphere of the Competition law. Another limitation is that due to the insufficient amount of academic literature on the topic, the academic discussions might not be too diversified.

1. Categorisation of EU Anti-Cartel Proceedings

Before pre presumptions and fundamental rights are stated and evaluated, the categorisation of Competition law must be understood. The first chapter of this research paper aims to demonstrate the historical background of the competition law. This chapter is a crucial step in understanding the principles regulating this sphere of jurisprudence. Till now, the competition law was a part of administrative law, thus anti cartel proceedings were and still are regulated in the administrative manner. However, over the years there has been a lot of controversy around the topic of criminalising anti-cartel proceedings in the EU. Nevertheless, this discussion is scarcely original, because this topic was discussed back into the 1990s in the case *Rhone-Poulenc SA v. Commission* in which the Advocate General noted that nevertheless cartel cases have administrative status the anti-cartel procedure visibly has a "criminal-law character", that in turn means that it is crucial to guarantee a qualitative standard of procedure that respects fundamental rights according to the ECHR.[15] This chapter will provide with the assessment of the administrative system where the anti-cartel proceedings originally occurred as well as analyse the reasons for the hypothesis that anti-cartel proceedings have criminal grounds. This debate is closely linked to the topic of the research paper due to the fact that in the criminal matters proceeding process is stricter and the fundamental rights are clearly stated and followed, nevertheless in administrative matters the finding of evidence and fundamental rights might not be as strictly followed as in the criminal proceedings due to the fact that legal consequences are less damaging.

1.1 Administrative backgrounds of the Competition law

Historically, Competition law originated from administrative law. This can be easily proved by the case law, as an example can be *Thyssen Stahl v Commission* where it was indicated that cartels are of the administrative nature.[16] Competition authorities can undertake administrative processes to investigate, ban, and penalise anticompetitive conduct, for instance with a fine.[17] Companies that break the competition rules by restricting or distorting competition receive severe penalties in order to avoid similar situations in future.[18]

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[15] Opinion of AG Vesterdorf delivered on 10 July 1991 in Case T- 1/ 89, *Rhone-Poulenc SA v. Commission*, ECLI:EU:T:1991:38, para 885.

[16] Judgement of the Court (Fifth Chamber) of 2 October 2003, *Thyssen Stahl AG v Commission of the European Communities.*, C-194/99 P, para. 30.; Judgement of the Court (Fifth Chamber) of 7 January 2004, *Aalborg Portland A/S and Others v Commission of the European Communities.*, C-204/00 P, para.200.

[17] Möllers, Thomas M. J., and Andreas Heinemann, *The Enforcement of Competition Law in Europe*, 389–430. The Common Core of European Private Law. Cambridge: Cambridge University Press, 2008. doi:10.1017/CBO9780511495038.007.

[18] OECD Home. Criminalisation of cartels and bid rigging conspiracies, available on: https://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm. Accessed April 15, 2022.

According to the Article 23 paragraph 5 of the Regulation 1/2003 the Commission is authorised to issue exclusively administrative penalties, thus the nature of the anti-cartel proceedings in the EU regulations is clear.[19] Moreover, the Commission does not have any expertise in criminal matters, meaning that the Commission would not be able to participate and solve such matters. And this in turn indicates the historical context that reflects the initial conceptualisation of the anti-cartel legislation being administrative in nature.[20]

Moreover, the Court has highlighted that originally the Commission was not intended to engage in the proceedings touching Article 6 of the ECHR and especially implementing it.[21] The Commission's actions were clearly administrative in character throughout many years of operation. Nevertheless, it also has to be kept in mind that before the 1980s fines and punishment were also quite light in comparison to the ones issued nowadays and there was no heated debate on the nature of penalties for the breach of competition law.[22] Nonetheless, at the moment when the deterrence strategy gained the central position of the policy, it resulted in a substantial increase in the amount of penalties enforced.[23]

Important to mention that prior to enforcing the Regulation, the Parliament did not express reservations about the criminal nature of the used punishments even though it had the power to do so. It was the opposite, it presented a question concerning the suitability of the Article 6 of the ECHR to the competition law as a sphere, since Article 6 ECHR was mainly used as the protection in the criminal proceedings thus the Parliament was not sure whether it is suitable in the administrative procedure such as competition law.[24]

1. 2. Application of Article 6 ECHR in the Anti-Cartel procedure

Before the analysis is conducted, the aim of this paragraph has to be explained. As was already stated in the introduction the ECHR is not binding on the EU as on the organisation, nevertheless it is a crucial document that was taken as a base for the Charter of Fundamental Rights, and since the competition matters occurred before the 2009 when the Charter came into force, in the claims applicants were referring to the Article 6 of the ECHR. Moreover, due to the fact that Article 47 and 48 of the Charter are very similar to the Article 6 of the ECHR it can be concluded that if Article 6 ECHR is applicable to the cartel cases, then

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[19] 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

[20] Mickonytė, *supra* note 1, p.110.

[21] Luiz Ortis Blanco, *European Community competition procedure*, Oxford (2006), p.159.

[22] ibid.

[23] Michelle Cini, Lee McGowan, *Competition Policy in the European Union*, Macmillan International Higher Education (2008), p.82.

[24] Mickonytė, *supra* note 1, p.110.

Article 47 and 48 of the Charter also have to be applied in a similar manner. Thus, this paragraph aims to assess the applicability of Article 6 ECHR in competition cases.

In the *Landewyck v. Commission* case the Court ruled that Article 6 ECHR is inapplicable in cartel cases since the Commission did not have competences for such article.[25] In the judgement the Court highlighted the need for the Commission to follow the procedural rules according to the EU law, thus it is not necessary to assess the matter also from the Convention's perspective.[26] This was not the only case, the following judgements of the Court were of a similar character, identifying the competition proceedings as administrative.[27] Even though the application of Article 6 of the ECHR has not yet been set, the court in the judgement *Thyssen Stahl v Commission* stated that whenever there is a punishment such as fine the right of the defence has to be followed, even in the administrative cases.[28] Over time, the language and the related to the criminal proceedings rights started to appear in the competition case law.[29] Only in 1999 in the *Montecatini SpA v Commission* case the Court for the first time highlighted the importance of Article 6 paragraph 2 of the ECHR.[30] In the *Montecatini SpA v Commission* case the Commission established an agreement between parties and actions corresponding to the cartel. The fine imposed on Montecatini was 11 million EUR for being part of the same cartel as Hüls, which was penalised only for 2.75 million EUR.[31] Both undertakings claimed that the presumption of innocence had been breached, referring to Article 6 of the ECHR. In response to such claims, the Advocate General took a very prudent stance based on administrative law, stating that, due to the nature of the competition procedures, the reference to the ECHR and the presumption of innocence was "highly dubious".[32] Nevertheless, in this case the Court acknowledged the overall applicability of the presumption of innocence stating that considering the nature of the violations and intensity of the penalties, the presumption of innocence should be followed in the competition law matters.[33]

Another case mentioned in this section took place after the Charter of Fundamental Rights was created. This case repeatedly brought up the discussion about the classification of the anti-cartel proceedings. In the *Schindler Holding Ltd and Others v Commission* case the Commission sanctioned powerful corporations such as Schindler, Otis, ThyssenKrupp, and

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[25] Judgment of the Court of 29 October 1980, *Heintz van Landewyck SARL and others v Commission of the European Communities*, Joined cases 209 to 215 and 218/78, CLI:EU:C:1980:248, paras. 79–81.

[26] ibid.

[27] *Thyssen Stahl AG v Commission of the European Communities., supra* note 16, para. 200.

[28] ibid.

[29] Mickonytė, *supra* note 1, p.113.

[30] Judgement of the Court (Sixth Chamber) of 8 July 1999, *Montecatini SpA v Commission of the European Communities*, C-235/92 P, para.175.

[31] Judgement of the Court (Sixth Chamber) of 8 July 1999, *Hüls AG v. Commission of the European Communities*, Case C-199/92 P

[32] Opinion of Advocate General Cosmas delivered on 15 July 1997 in *Montecatini SpA v Commission of the European Communities*.

[33] *Montecatini SpA v Commission of the European Communities*, *supra* note 20, para.176.

Kone for the creation of an elevator cartel that was influencing sales, preservation, upgrades, and installations in the elevator market.[34] In its claim Schindler appealed that the anti-cartel matters had to be viewed as criminal matters instead of administrative, nevertheless this case also did not prove to be a success in this matter. The General Court in its reply pointed out that Article 47 CFR so far provided the applicant with the efficient legal protection, which seemed to make this debate about classification less important.[35] Moreover, if the comparison is made between the Article 6 ECHR and Article 47 of the Charter, the scope of Article 47 is way broader due to the fact that it covers all persons. In the text of Article 47 is written "Everyone is entitled to a fair trial…" , nevertheless Article 6 ECHR covers only rights in the criminal proceedings.[36] However, Article 47 of the Charter does not contain identical rights covered by the Article 6 ECHR due to the fact that Article 47 does not include the presumption of innocence that is covered by the Article 6 paragraph 2. Even though the presumption of innocence is stated in Article 48 of the Charter, meaning that the Charter still covers this right, a separate analysis might be needed to determine conformity with Article 6 paragraph 2 ECHR.[37]

In conclusion, it can be stated that the EU does not express eagerness towards the transition to the criminal proceedings, and the Court categorises the anti-cartel procedure as administrative.[38] The ruling from the *Volkswagen AG v. Commission* case is only proving such a statement, since in the judgement the Court stated that the procedure is not criminal.[39] That seems very pleasant since according to the Article 23 paragraph 5 of the Regulation 1/2003 the Commission is authorised to issue exclusively administrative penalties.[40] From another hand, a transition would require a major reassessment of various procedural safeguards, such as the burden and standard of proof, which unavoidably relates to stricter norms in criminal procedure.[41] However, the Commission's belligerent approach to fight cartels, especially severely large fines exemplifying its preventive and punishing nature, makes the legal categorization of EU anti-cartel matters way more complex. It is difficult to reject the similarity between the sanctions imposed on cartel members and those that the ECtHR categorises as criminal under Article 6 ECHR.[42]

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[34] Judgement of the Court (Fifth Chamber) of 18 July 2013, *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P

[35] ibid, paras.33-38.

[36] Charter of Fundamental Rights of the European Union, *OJ C 202, 7.6.2016*, p. 403–403. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016P048. Accessed February 22, 2022.

[37] Mickonytė, *supra* note 1, p.118.

[38] ibid.,p.7.

[39] *Volkswagen AG v. Commission., supra* note 4, para 97.

[40] 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.

[41] Mickonytė, *supra* note 1, p.109.

[42] ibid., p.107.

2. Presumptions and their general role in the Competition Law

The whole debate in this research paper is centred around the discussion of the presumption of innocence and adjacent to its fundamental rights in the Competition law. This section of the work aims to provide definition for the word presumptions, so there are no uncertainties in the next chapters when the discussion will get more complex, and implementation of restrictive measures are going to be discussed. The whole chapter two serves as a descriptive part of the research, identifying and analysing not only the presumption of innocence but also the burden of proof, standard of proof as well as the right to silence. The analysis of the presumption of innocence as well as adjacent rights will be supported by the case law throughout the work.

Before the examination of the presumption of innocence, the word "presumption" as such has to be discussed. A presumption is a legal assumption regarding the presence or veracity of a fact that is not definitely known, taken from the already known and established fact.[43] As Judge Cruz Vilaça pointed out in *Intel* judgement, presumptions may be a valuable instrument, but their application is a very sensitive matter that should be handled by the courts.[44] Presumption must be rebuttable, meaning that there always need to be the possibility to prove the opposite, for example with the presumption of innocence there has to be space to prove the quilt, otherwise no one ever could be accused.[45] However, the terms under which the presumption may be rebutted have to be proportional.[46] The presumptions are also widely used in Competition law to demonstrate the presence of a violation, however in cartel cases there has been a shift in the discussion in the courts from proving the violation to specifying the liability and time span of the violation.[47]

The presumption of innocence that is the main focus of this paper is internationally recognised as a basic and fundamental principle relevant in all democratic criminal justice systems.[48] According to the presumption the accused person is assumed innocent of the allegations brought against him. This assumption follows the accused person throughout the proceedings unless his guilt is proved beyond a reasonable doubt, thus he is innocent until his

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[43] Cyril Ritter, "Presumptions in EU competition law", *Journal of Antitrust Enforcement* (2018), accessed May 1, 2022, https://doi.org/10.1093/jaenfo/jny008

[44] José Luís da Cruz Vilaça, "The intensity of judicial review in complex economic matters—Recent competition law judgments of the Court of Justice of the EU", *Journal of Antitrust Enforcement* (2018), accessed May 5, 2022, https://doi.org/10.1093/jaenfo/jny003

[45] Cani Fernandez, "Presumptions and Burden of Proof in EU Competition Law: The *Intel* Judgement", *Journal of European Competition Law* (2019), p.3, accessed May 1, 2022. Available on: https://awards.concurrences.com/IMG/pdf/4._presumptions_and_burden_of_proof_in_eu_competition_law_the_intel_judgement.pdf?55798/8cb20dfd9d05dc3dd39a9a085d2a1b8c00aa501a

[46] ibid.

[47] ibid.

[48] Andrew Ashworth, "Four Threats to the presumption of innocence", *International Journal of Evidence and Proof (2006)*, p.243.

guilt is undeniable.[49] This right is protected by all international and regional human rights treaties, as well as several national constitutions. To name a few, Article 6 paragraph 2 ECHR, Article 48 paragraph 1 CFR, and Article 11 paragraph 1 of Universal Declaration of Human Rights all imply a need to observe the guarantee. This presumption is based on the concept that the criminal procedure of an all-powerful state has the potential to significantly infringe upon the autonomy and freedom of the person. Therefore, this authority must be constrained by legislation so as not to violate the basic rights of the person. The presumption of innocence is one of the legal mechanisms used to limit the authority of the state.[50] In the absence of such presumption or if it is not followed or ignored, the conclusion of the proceeding would be foreseeable, rendering the other assurances provided at trial largely irrelevant. In order for the presumption of innocence's full efficacy to be realised, the ECtHR appears to promote a broad, holistic understanding of it.[51]

2.1. Presumption of Innocence for Legal Persons

In the previous paragraph the origins and the main aim of the presumption of innocence has been stated, however it is important to mention that both Charter and Convention were mainly used for the natural persons, nevertheless the legal person distinct from the natural person, thus some difficulties are obvious in implementation of the same legal documents to the legal persons. Hence, it is crucial to assess the difficulties that the legal persons face regarding their rights and assess the effect of the absence of different rights.

In 2016 the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings entered into force, nevertheless only natural persons could benefit from such directive in comparison with directives of the Roadmap for strengthening procedural rights in criminal proceedings that aimed at accused, where legal persons were not technically excluded.[52] In turn, if the legal persons could potentially benefit from the directive of the Roadmap, then it seems like the new directive on the presumption of innocence is not the case. While creating the Directive, the European Parliament tried to expand it, so corporations are also able to use it, nevertheless, such proposal was rejected by the Council and the Commission, due to the fact that the presumption of innocence is not applying to legal and natural persons equally, as well as there is a belief that overall need in presumption of innocence for the legal persons is

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[49] Brandon L. Garrett, "Texas Law Review". Accessed April 28, 2022. Available on: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6537&context=faculty_scholarship

[50] Mickonytė, *supra* note 1, p.24.

[51] ibid.

[52] Stijn Lamberights, "The directive on the Presumption of Innocence", *The European Criminal Law Associations' Forum* (2016), accessed April 30, 2022. Available on: https://eucrim.eu/articles/directive-presumption-innocence/#docx-to-html-fn4

unreasonable.[53] These directives and the criminal law as such are mentioned due to the fact that the debate about the transition to the criminal law is still present and despite the fact that it has been ongoing for the many years as it was mentioned in chapter 1 of this research paper it is not ended. Moreover, it seems like the relevance of companies in criminal prosecutions appears to be underestimated by EU legislators.[54] It seems like the ECHR being the milestone in the sphere of fundamental human rights does not expressly or implicitly exclude the legal persons from its reach, thus the right to bring a claim to the European Court of Human Right potentially is not limited to natural persons.[55] According to the Article 34 of the ECHR any individual, non-governmental organisation, or group of individuals are empowered to file a complaint to the ECtHR if they have been the victim of a breach of a Convention-guaranteed right.[56] The ECtHR case law seems to be supporting the aforementioned statement and proves that whenever a right is applicable to the legal person the Convention is covering them and not excluding legal persons.[57] The phrase "whenever a right is applicable" means that the Convention was mainly designed for the natural persons, thus there are many rights such as the right to life that is protected by the Article 2, the prohibition on torture or degrading treatment that is covered by the Article 3, or the freedom of thought, conscience and religion explained in Article 9 are not relevant and in turn are not applicable for the legal persons.[58] The Convention was made based on the liberal democratic idea that people should be free and able to make their own decisions and the rights described in the Convention are meant to stop the government from interfering with people's freedoms too much, moreover without reasonable justification. After the analysis of such document it is hard to state the reason why freedom-based considerations could not also be applied to the economic realm in which these people act, creating separate legal entities.[59] Hence, the Convention should also be covering legal persons, especially in the light of Article 6 that covers the rule of law, since the concept of the rule of law is broad and many-sided, thus it is not limited only to the natural people and their rights.[60]

Moreover, with the growing tendency towards corporate criminal responsibility or punitive procedures for corporate misbehaviour, which were already mentioned above as well as will be also further stated the exact adherence to the fundamental rights is becoming more crucial than ever. However, legal persons being a subject of criminal law are not always

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[53] ibid.

[54] ibid.

[55] Mickonytė, *supra* note 1, p.71.

[56] European Convention on Human Rights

[57] Judgement of ECtHR of 6 April 2000, *Comingersoll SA v. Portugal* , Application no. 35382/ 97; Judgement of ECtHR of 16 April 2002, *Société Colas Est v. France*, Application no. 37971/ 97; Judgement of ECtHR of 19 October 2010, *Baroul Partner-A v. Moldova*, Application no. 39815/07; Judgement of ECtHR of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia* , Application no. 21638/03.

[58] European Convention on Human Rights.

[59] Mickonytė, *supra* note 1, p.12.

[60] Judgement of ECtHR of 2 November 2010, *Ştefănică and Others v. Romania* , Application no. 38155/02, paras. 31–40.

balanced with a corresponding focus on their procedural rights, moreover national practices vary in Member States.[61] In this subchapter the right to silence is going to be briefly assessed in competition cases, due to the fact that a corporation cannot be presumed innocent if it is forced to testify against itself.

There is a visible challenge, since there is an interaction between the obligation of the companies to assist and work together with the Commission and the right not to self-incriminate.[62] During the inspection period, the suspected company has to cooperate with the Commission and provide with all requested materials, even though these materials could later serve as a base for the claim.[63] As such, this duty is legal, nevertheless the line between providing the information and self-incrimination is quite blurred. In the landmark case *Orkem v Commission* the ruling required the accused party to self-incriminate by acknowledging a violation of competition law.[64] This decision was taken before the ECtHR judgement *Funke v France* that is counted as the landmark case on the right to silence, so it was in the time when the right to silence was not seen as part of the right of free trial.[65] Thus, in the *Orkem* case, the Commission requested information but the corporation tried to refuse such request basing its argument on the fact that it is breaching the right to defence, but since at the time when this case took place the Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty did not include a right to silence, moreover there had been no precedents in ECtHR, as well as ECHR did not cover such topic the Orkem was obliged to self-incriminate by admitting that a violation of competition law took place.[66] Specifying, the request to answer questions is reasonable as was discussed above, but forcing a party to acknowledge a breach of the competition law is not acceptable and is counted as a breach of the fundamental rights. Important to mention that recognition of the right to silence has two sides: one that protects the accused party and the second that produces difficulties, since the line that differentiates between the acceptable and prohibited questions becomes indistinct.[67]

Even though with the right to silence the interrogation becomes more complex, it is an important component of fundamental rights that has to be followed. Despite the fact that some Directives exclude legal persons, there is still a need to follow fundamental rights, since the punishment becomes more severe and in the debate about transition to criminal penalties is actively going on in some states (see Chapter 1).[68] Moreover, as was already mentioned above the competition law is a subdivision of an administrative law, and since the mentioned above

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[61] Lamberights, *supra* note 52.

[62] Mickonytė, *supra* note 1, p.12.

[63] Judgement of the Court of 18 October 1989, *Orkem v Commission*, Case C-374/87, EU:C:1989:387, para.34.

[64] ibid., para.18.

[65] Judgement of ECtHR of 25 February 1993, *Funke v France*, Application no. 10828/84.

[66] Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, *IO 13, 21.2.1962*

[67] Judgement of the Court (Third Chamber) of 10 March 2016, *Buzzi Unicem SpA v European Commission*, Case C-267/14 P, paras. 73-91.

[68] Stephan, Andreas. "An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation." *Legal Studies* 37, no. 4 (2017), accessed April 18, 2022, doi:10.1111/lest.12165.

rights are a part of the administrative law they must be tolerated and respected also in the competition law.

2.2. Paradox of the presumption of innocence

Even though this principle is universal and predominant in the criminal justice systems, as well as there is a large amount of academic literature on the subject, somehow its meaning stays debatable.[69] And for that reason, it is crucial to distinguish the "factual" and "legal" definitions of guilt and innocence. For example, “factual” guilt can be when the investigators have a solid, evidence-based case, thus they know that the accused in fact is responsible for a crime, nevertheless, the presumption necessitates to treat everyone without exception as an innocent. The principle should be seen as a normative idea describing how a person charged with a crime should be handled throughout the prosecution. As such, it is not a *stricto sensu* presumption but a legal assumption demanding certain behaviour on the part of the institutions.[70] Consequently, someone who is "factually" guilty may not automatically be convicted, since legal guilt is not synonymous with factual guilt.[71]

Furthermore, it looks as if the prosecutor's behaviour is critical in this case. In other words, the presumption does not impose on the prosecutor the notion that the defendant is indeed innocent. Rather than that, it suggests an attitude based on the fact that the prisoner has not yet been proven guilty in accordance with the law. Thus, without the presumption of innocence, any effort to exercise rights that the accused person has would obviously be a mirage, since the result of criminal proceedings would be predetermined from the start.[72] And individuals have a fundamental right not to be convicted of crimes for which they are not guilty.[73]

As history demonstrates, some wrongful convictions are unavoidable. The presumption of innocence may help to prevent judicial mistakes by directing them in favour of the defendant, most notably by laying the burden of evidence on the prosecuting authorities. The possibility of judicial mistake is further mitigated by the concept of *in dubio pro reo*, which requires any reasonable doubts in evaluating evidence to favour the accused.

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[69] Mickonyte, *supra* note 1, p.15.

[70] ibid., p.17.

[71] Larry Laudan, “Truth,Error, and Criminal Law: An Essay in Legal Epistemology”, Cambridge University Press (2006), p. 12, accessed April 26, 2022, https://doi.org/10.1017/CBO9780511617515

[72] Mickonytė, *supra* note 1, p.19.

[73] Andrew Stumer, “The Presumption of Innocence: Evidential and Human Rights Perspective”, *Singapore Journal of Legal Studies* (2011), p. 32., accessed May 1, 2022, https://www.jstor.org/stable/24870576

The presumption of innocence is playing an important role in maintaining the rule of law in the democratic cultures.[74] Moreover, it has been proven that the presumption of innocence to the big extent represents the rule of law. Such dependency was highlighted in the ECtHR judgement *Salabiaku v. France*.[75]

A system of specific safeguards gives the presumption of innocence the power to keep people and businesses from being treated unfairly by the state. Part of the general principle of the presumption of innocence as it is reflected in the Article 6(2) of the ECHR can be seen in the principle of fault, or the requirement to interpret remaining doubts in favour of those who are charged with a crime, and this is only a small example.[76]

Nevertheless, as was already discussed above, the Convention formally is not binding to the EU, however the EU Charter of Fundamental Rights is binding, and the idea of the Article 48 paragraph 1 sounds quite familiar with the Convention's Article 6(2), since while the Convention does not have force of law, it is still an invaluable instrument for clarifying the Charter's clauses.[77] Article 48 paragraph 1 states that "Everyone who has been charged shall be presumed innocent until proved guilty according to law".[78]

2.3. Burden of proof

As was mentioned above, the burden of proof as well as the standard of proof are very closely linked to the presumption of innocence, due to the fact that the presumption indicates that the accused person has to be treated as innocent until the opposite is proved, thus the part of proving the guilt is highly important, since it has to be done qualitatively and attentively.

The gathering and evaluation of evidence is a critical component of criminal procedures, and since the punishment for breaching the competition law becomes harsher, moreover, since there is already a debate of criminal punishment, the criminal procedure has to be accurately followed. Anyone who carries this responsibility also faces the danger of losing the case due to his inability to persuade the court of his reasoning. Placing this

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[74] Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, (Oxford, OUP, 2013), p.126, accessed April 27, 2022, https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199671199.001.0001/acprof-9780199671199

[75] Judgement of ECtHR of 7 October 1988, *Salabiaku v. France*, Application no. 10519/83, para. 28.

[76] Mickonytė, *supra* note 1, p.38.

[77] European Union Agency for Fundamental rights. Article 48 - Presumption of innocence and right of defence, available on: https://fra.europa.eu/en/eu-charter/article/48-presumption-innocence-and-right-defence#. Accessed April 27, 2022.

[78] Charter of Fundamental Rights of the European Union, *OJ C 202, 7.6.2016*, p. 403–403. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016P048. Accessed February 22, 2022.

obligation on the accused would very certainly be an overwhelming task since a state has considerably superior resources.[79]

However, it is important to notice that the importance of proofs differ from the proceeding type, meaning that criminal and administrative processes have a way stricter burden of evidence than civil law. For example, while civil law typically allows for a shift in the burden of proof between the parties, it is quite unusual in more punitive processes such as criminal law since there is a danger of damaging the accused's rights if such a turnover occurs.[80]

Thus, in criminal cases, as well as in administrative cases the ground for a legal conviction is only when evidence is trustworthy and proves that an accused person has committed a particular crime.[81] The burden of proof emerged from the case-law, where for example in the *Baustahlgewebe* case or in the *Anic Partecipazioni* case was stated that whenever there is a debate whether the infringement took place or not, the Commission has to provide evidence that is able to point on the existence of the breach.[82] According to the Article 5 of the Regulation No 1/2003 it should be the responsibility of the party or authority claiming a violation of at that time Articles 81(1) and 82, now Articles 101 and 102 of the TFEU to demonstrate its presence of the evidence of the beach.[83] Nevertheless, in order to ease for the Commission the evidential part as well as for the purpose of protecting the consumers, the Court in *Consten and Grundig* case clarified that the Article 101(1) TFEU should be interpreted in a way that it is not necessary to take into account the specific consequences of an agreement once it is proved that its purpose is to hinder, limit, or mislead competition.[84]

However, the burden of proof is a complex principle that is not only about the pure evidence, but this concept also includes *nulla poena sine culpa*- the principle of fault as well as exemption from self-incrimination that in turn are closely linked to the presumption of evidence, as was already explained above in the chapter 2.1.[85] In the case *Schenker & Co AG and Others v. Commission* the Advocate General Kokott highlighted the link between the

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[79] Mickonytė, *supra* note 1, p.48.

[80] Ibid.

[81] Stephanos Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (BRILL, 2021), p.222, accessed May 1, 2022, https://brill.com/view/title/9271

[82] Judgement of the Court of 17 December 1998, *Baustahlgewebe GmbH v Commission of the European Communities*, Case C-185/95 P,ECLI:EU:C:1998:608, para 58; Judgement of the Court (Sixth Chamber) of 8 July 1999, *Commission of the European Communities v Anic Partecipazioni SpA*, Case C-49/92 P, ECLI:EU:C:1999:356, para 86

[83] 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.

[84] Judgement of the Court of 13 July 1966, *Établissements Consten and Grundig-Verkaufs v Commission*, C-56/64, EU:C:1966:41.

[85] Opinion of Advocate General Kokott delivered on 28 February 2013. *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others v Commission*, Case C-681/11, ECLI:EU:C:2013:126, para. 41.

presumption of innocence and the principle of fault, stating that even though the principle of fault is not directly addressed in the ECHR or in the Charter of Fundamental Rights it serves as an obligatory condition for the presumption of innocence.[86]

However, it has to be mentioned that there are two types of the burden of proof- legal and evidentiary. The legal part of the burden is placed on the prosecutor, who is required to show the violation. Nonetheless, the second type - evidentiary burden is more complex, since it touches the topic that deals with the real facts. Needless to say, that making the fact unquestionable is a highly complex task, so the evidentiary burden is less restrictive, meaning that the responsibility of demonstrating that a certain fact is accurate and trustful can shift between the parties. However, there is a concept "*ei incumbit probatio qui dicit, non qui negat",* that states that "the burden of proof rests on the one who asserts, not who denies".[87] However, there is no need for an evidentiary burden if the prosecutor can support his claim with the verification. After a claim has been stated, the evidentiary burden moves to the defendant that has to present contradictory proof disproving these specific assertions in order for their trial to succeed. And this is how the trial happens. However, the burden should not be shifted if the claim is based on the theoretical conjecture, but if the prosecutor presents the relevant evidence, then the defendant is forced to provide the counterarguments.[88]

Generally, it is assumed that all admitted proof or evidence is objective in the sense that it cannot be contested. Obviously, this is not true in practice, since both the reliability of evidence and its value and perception shall be debatable in each specific situation. Indeed, in the majority of legal issues, this discussion is critical.[89] Another common misconception is that "evidence" solely refers to facts, and that once these facts are proved beyond question, the law may be applied. Nevertheless, that line between facts and law is not so obvious, and evidence should also connect to the law, thus the legal argument must also persuade and be supported by evidence. The definition of the relevant market is an excellent example of how difficult it is to separate facts from law in the sphere of competition law. Establishing what is the relevant market, which will serve as the base for the competitor strategy in cartel cases, is more than just observing the facts (the market), but also implementing a legal concept of what

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[86] ibid.

[87] Law Dictionary & Black's Law Dictionary 2nd Ed. Ei Incumbit Probatio Qui Dicit, Non Qui Negat, available on: https://dictionary.thelaw.com/ei-incumbit-probatio-qui-dicit-non-qui-negat/

[88] Douglas Walton, "Burden of Proof, Presumption and Argumentation", *Cambridge University Press* (2014), p.105, accessed April 29, 2022, https://doi.org/10.1017/CBO9781107110311.

[89] Laura Parret, "Sense and Nonsense of Rules on Proof in Cartel Cases", *TILEC Discussion Paper No. 2008-004*, 2008, p.3, accessed April 1, 2022. Available on: https://deliverypdf.ssrn.com/delivery.php?ID=751119001100098001084086079012077006034048031046008017077071072006068115100124067022058117006035008099001118103017102092122083106078039042042121114094114007000003008053028120000105075119118005094094117094017003084103012081090065115001008100001071103&EXT=pdf&INDEX=TRUE

a relevant market is, picking certain evidence and discarding others in light of the legal provisions.[90]

As was mentioned previously, the burden of proof is closely linked to the presumption of innocence to the degree that presumption of innocence mentioned in the Article 6(2) of the European Convention of Human Rights and Article 48(1) of the Charter of Fundamental Rights of the European Union clarify the legal foundations of the rules for distributing the burden of proof over time. However, it seems more like a two-way interaction rather than dependency of the burden of proof on the presumption, since if the presumption of innocence is not taken into account, then there is no need for the burden of proof, since it would be only a formality. And the other way around, if the burden of proof is not followed then also the presumption cannot be applied.

2.4. Standard of Proof

Many concepts are closely linked together, and it is almost impossible to fully separate them from each other. As was already demonstrated in the previous chapter of this research the presumption of innocence is related to the right to defence, as well as it is linked to the burden of proof. The burden of proof in turn, has a close connection to the standard of proof and for this reason this principle is included in this research paper and will be analysed.

After getting acquainted with the burden of proof it can be concluded that the psychological involvement takes place since the judge's feelings are involved.[91] And the involvement of some feelings is unavoidable, because judges are humans, thus the human factor is always going to be present- some sympathy or aversion. Whether the judge will accept the claim to the bigger or smaller extent is related to the personal ability to convince the judge, for that sake the standard of proof is needed. Generally speaking, as was covered in the *T-Mobile* case the standard of proof defines how much evidence is required to prove a violation.[92] The standard of proof is centred on determining the level of certainty that should be applied to evidence.[93] It establishes a standard for the value of evidence that must be met in order for a judge to believe it. [94] At this point the distinction must be made. The standard of judicial review, which is the standard that courts use to see if the primary decision-maker has

[90] ibid.

[91] Giovanni Pitruzzella, "Judicial review, Global Dictionary of Competition Law", *Concurrences*, https://www.concurrences.com/en/dictionary/judicial-review

[92] Opinion of Advocate General Kokott delivered on 19 February 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, para. 80.

[93] Pitruzzella, *supra* note 91.

[94] Mickonytė, *supra* note 1, p.50.

met the standard of proof required, is not the same as this concept at all, and this research paper will not discuss the judicial review in any context.

There is no one universal common standard of proof. In jurisdictions that follow the Continental Law tradition, to which the vast majority of contracting nations and EU member states belong, the quantity of evidence necessary to establish that the party has met its burden of proof is determined by how much is required to persuade a judge in the provided case. That in turn means that the judge must finally decide in line with their own beliefs and the quantity of proof necessary is determined by the judge's own conviction (*intime conviction*).[95] To put it another way, a party who bears the burden of evidence must persuade the court of the existence of a relevant fact.[96]

If we look particularly at the competition law, then in many cases, there might not be a lot of direct evidence that proves that a party has committed a breach of the competition law. Usually, the existence of an anti-competitive practice or agreement must be based on a number of coincidences and signs that, when taken together, may be enough to show that a violation of competition rules took place.[97] However, in the burden of proof as well as in the principle of the standard of proof we can rely only on the belief that a judge is willing to find the truth and deepen in the case details. However, the indifference of the authorities is a completely different topic.

2.4.1 Variation of the standard of proof according to the circumstances

If we are talking about competition cases, the Commission may act in a regulatory manner and in a non-regulatory manner. A question might arise, should the standard of proof change depending on whether the Commission is acting in a regulatory or non-regulatory way.[98] Insofar as one should refer to a standard of proof in competition cases, the question has been raised whether this standard should vary depending on whether the Commission acts in a regulatory or non-regulatory manner, and depending on the relevant applicable provision, for example Article 81, Article 82 or the Merger Regulation.[99] Although it is not entirely clear what the consequences of such a distinction should be. Certain individuals have claimed that

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[95] Hellstrom, "A Uniform Standard of in EU Competition Proceedings", *Hart Publishing* (2012), accessed March 28, 2022. Available on: https://deliverypdf.ssrn.com/delivery.php?ID=889127119117083071068100068123099104036009058007026037005123120009020081073088028087018123040104049123008015104031004080081109001008088038013094107067030095126010088017064027109093109095108005000003028124014001007115104018029080117122025072000114022&EXT=pdf&INDEX=TRUE

[96] ibid.

[97] ibid.

[98] ibid.

[99] ibid.

the bar should be higher in Article 81 and 82 cases, particularly in light of the harsh penalties applied in these instances.[100]

From the first look, there seems to be no legal basis for using separate standards, however, there may be one significant variation in the legal foundation used. Under Articles 81 and 82, the presumption of innocence applies as principle *in dubio pro reo*, and the burden of proof is on the Commission, whereas, under the Merger Regulation, there is a symmetrical substantive test, where the Commission must prove either that the merger does not result in a significant impediment to effective competition, or that it does.[101] Thus, the next question is does this indicate that the Commission must establish its case "beyond a reasonable doubt" in Articles 81 and 82 cases? Analysing case law, there have been cases where the court mentioned the expression “reasonable doubt”, however “balance of probability” test is used way more frequently in the case law, hence, it does not reach the level “beyond reasonable doubt”.

It is highly important to assess the level of attention that judges pay to the standard of proof. There are very little EU cases on the standard of proof separately, mostly the Court does not get too deep in this topic, but rather requests the Commission to have something “to the requisite legal standard” as it for example can be seen in the case *Dresdner Bank and others v Commission* in the paragraph 59.[102] However, if we want to see how much proof the Commission needs before drawing its conclusion about the particular case, the case law is not able to give the precise answer. In one case, for example in the *CRAM and Rheinzink v Commission* case the Court has decided that the Commission must provide "sufficiently detailed and consistent evidence to substantiate the opinion" that an infringement occurred.[103] However, at the same time the case law highlights that not all of the evidence that the Commission submits to the Court has to be exact and consistent in every aspect, and that it is enough if the summation of evidence reaches the requirements.[104] The severity of the Courts' control in analysing and revising the standard of evidence may vary depending on whether the Court is considering the application of facts or law, or the Commission's comprehension of complicated economic considerations.[105]

The Commission has a wide discretion in economic and technical matters, meaning that the “Commission enjoys wide discretion, the exercise of which involves complex and

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[100] ibid.

[101] ibid, p.6

[102] Judgement of the Court of First Instance (Fourth Chamber) of 27 September 2006, *Dresdner Bank AG and Others v Commission of the European Communities*, Joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, para. 59

[103] Judgement of the Court (Fourth Chamber) of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities*, Joined cases 29/83 and 30/83, EU:C:1984:130, para. 20.

[104] Hellstrom, *supra* note 95, p.5.

[105] ibid., p.7.

social assessments", nevertheless it does not mean that the Court cannot look at the Commission's interpretations of such matters.[106] Just the opposite, the Court has to make sure that the evidence is precise, credible, and consistent. They also need to make sure that the evidence includes all the data necessary to look at a complicated issue and that it can support the findings that are drawn from it.[107]

If before there was a question should the standard of proof differ between the Merger cases and the Article 81 and 82, then now it seems that the distinction here is not so much whether the Commission is investigating a merger or an antitrust action, but rather whether it is conducting a retrospective analysis or investigation of future actions.[108] For example, in cases that touch Article 82, the analysis of future actions is used, it tries to foresee implications of a given behaviour. There is a very interesting quote that "there is certainly a sort of paradox in requiring the Commission to be (more) convincing in proving future than past events."[109]

Even though the presumption of innocence is not the same as burden of proof and the standard of proof, all these concepts are very closely linked to the presumption, because if the evidence is vague and the authorities are not interested in the case, *de facto* the person would not be treated as innocence, even though *de jure* the presumption would be followed.

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[106] ibid.

[107] Judgement of the Court (Grand Chamber) of 15 February 2005, *Commission of the European Communities v Tetra Laval BV.*, Case C- 12/03 P, EU:C:2005:87, para. 39.

[108] Hellstrom, *supra* note 95, p.5.

[109] Matteo Bay, Javier Ruiz Calzado, "Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions", *Kluwer Law International* (2005), accessed April 25, 2022. Available on: https://www.lw.com/upload/pubcontent/_pdf/pub1460_1.pdf.

3. Framework for EU Anti-Cartel Enforcement

In the previous parts of this research paper the reader got acquainted with the concepts of the presumption of innocence and with the related to its rights as well as got the understanding that the completion law has an administrative character. Nevertheless, the previous parts were theoretical and the image of how the competition law is regulated is still absent. For this purpose, the framework for EU anti-cartel enforcement will be discussed and the practical aspect of this law sphere will be demonstrated highlighting complexities that the enforcement might face.

According to the Article 3 paragraph one subparagraph (b) of the TFEU the EU has exclusive competence in creation of the competition regulations.[110] Mainly, in this research paper Article 101 paragraph one was used as the main rule regulating the competition law that is used as a tool to fight cartels. It proscribes all types of settlements between companies that might limit the competition on the territory of the EU, besides the ones allowed by Article 101 paragraph three.[111] At this point, it is crucial to clearly comprehend what are the competition types, and which of the types are prohibited. The competition can be divided into four categories- perfect competition, monopolistic, oligopoly, and the last one is monopoly.[112] All of them are going to be very briefly explained in order to exclude any potential misunderstandings in the future. Perfect competition is when all sellers in the market are relatively small and equal, thus no one has enough power to influence the price.[113] Monopolistic competition is pretty similar to the previous type, nevertheless products are a bit different, however the purpose is still the same or very similar.[114] A good example can be Coca-Cola and Pepsi, where the products are undeniably similar, nevertheless they are not the same, however the price on the market is also similar, thus the consumer may choose between them.

However, restrictive agreements and cartels are most often formed in a monopoly and oligopoly markets. Oligopoly means that each market participant- vendor provides a significant part of all items offered in the market. Thus, since the cost of joining such a sector is often high, the number of enterprises entering it is limited.[115] An example can be the airline sector or stores supplying electronic devices. So, for example when one powerful seller creates discounts, others must do the same in order to stay competitive. And the monopoly in

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[110] Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012. Accessed February 22, 2022. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.

[111] ibid.

[112] Karen Collins, "An introduction to business", *Kluwer Law International* (2005), p.29, accessed April 12, 2022. Available on: https://my.uopeople.edu/pluginfile.php/57436/mod_book/chapter/115971/BUS5110AnIntroductionToBusiness.pdf

[113] ibid.

[114] Ibid, p.35

[115] Ibid.

the legal sense occurs, when a firm obtains a patent that grants it exclusive use of a created product for a specific period in order to recoup the high expenditures that were spent in order to invent such a product.[116]

The information above provided a summary of legal competition types, nevertheless many companies have tendencies to avoid fair competition by reaching an agreement with rivals to gain considerable advantages, either financially or by taking control of a major portion of the market. And even if such commercial activities are prohibited, such agreements happen secretly, making it difficult for the authorities not only to detect but also to establish their presence. [117]

Nevertheless, specifically for these reasons Article 101 of TFEU was created. In order to accomplish the goal of free competition in the market, Article 101 of TFEU comprises a non- comprehensive list of illegal agreements, including those relevant to price-fixing, market- sharing, restricting production, and enforcing discriminatory trade conditions. Article 101 paragraph two deems invalid any term of a contract that is inconsistent to Article 101 paragraph one.[118] The third paragraph of the same article sets out the circumstances that a contract has to meet in order to be excluded from the ban in Article 101 paragraph one.[119]

The second regulation that has been already mentioned above for few times during the first parts of this research and will be used afterwards is the Council Regulation 1/2003, which was established on the context of Article 103 TFEU, acts as the Commission's key vehicle for implementing EU law and policy regarding illegal industrial activities.[120] For now, it is the main weapon that the Commission has as a regulator of the Competition law.[121] According to the Regulation the competition law can be divided into three elements. Where the first is a “self-evaluation” regime, meaning that a company has to individually analyse the legality of their own contracts or activities that they are conducting, risking fines or penalties if the evaluation is incorrect.[122] This, in turn, greatly unloads the work of the Commission, because with this regulation the agreements that meet all necessary requirements and are not going against the law can be implemented without alerting the Commission.[123] Another adjustment is decentralisation of implementation of Competition law, meaning that now the Commission is not the only one who can apply Article 101 and 102 but the national

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[116] Idib, p.36.
[117] Ibid.
[118] Mickonytė, *supra* note 1, p.77.
[119] Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012. Accessed February 22, 2022. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.
[120] 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.
[121] Mickonytė, *supra* note 1, p.77.
[122] ibid., p.78
[123] ibid.

authorities and courts are also competent to do so.[124] However, here it is highly important to refer to the fact that during the application of the EU competition law, the national courts are obliged to notify the Commission.[125] As well as it has to be kept in mind that international law prevails over national, thus courts of the MS must practice Article 101 and 102 on almost all contracts of a greater economic importance.[126] And the third change is widening the Commission's opportunities to the extent that now the Commission is able to perform unexpected inspections, including the private property of the individuals who are directly related to the examined company.[127]

Moreover, the importance of a variety of Commission publications in developing and explaining the application of EU anti-cartel regulations must not be ignored, especially the tools like Guidelines and Notices such as the Guidelines on the method of setting fines imposed pursuant to Article 23 paragraph two subparagraph (a) of Regulation 1/2003.[128] Even though such soft law tools are not binding, they help to understand the motives the Commission is following while applying the competition law and increase the transparency and predictability of the implementation procedure.[129]

The implementation of the competition law as any other sphere should be founded on a strong legal framework that contains understandable rules and where the procedure is protected. But those rules have to be achievable in practice, otherwise the dispute about the exact criteria and acceptable degrees of evidence and judicial scrutiny may quickly turn theoretical and analytical.[130] While TFEU provides the ground for competition law explaining the main principles of how such a sphere has to be regulated, the Regulation 1/ 2003 provides the Commission with expansive investigative authorities in terms of its commitment to establish an efficient policy framework for the implementation of competition law.[131] Nevertheless, the mix of such capabilities necessitates adequately powerful procedural protections. These protections especially have to include Articles 47 that covers the right to a fair trial and 48 that covers the presumption of innocence and the right to defence of the Charter of Fundamental Rights.[132]

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[124] ibid.

[125] 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.

[126] Mickonytė, *supra* note 1, p.79.

[127] ibid, p.79

[128] European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003

[129] Mickonytė, *supra* note 1, p.79.

[130] Hellstrom, *supra* note 95, p.9

[131] ibid.

[132] Charter of Fundamental Rights of the European Union, *OJ C 202, 7.6.2016*, p. 403–403. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016P048. Accessed February 22, 2022.

3.1. Restrictive ground in Competition law

The procedures differ depending on whether it is a cartel or for example merger or abuse of dominant position cases. The sort of legal analysis that has to be done by the Commission and courts in cartel cases distinct from the analysis required in merger cases.[133] To begin with, the aspect of the study is vastly different, for example the investigation of cartels is centred on the past. It is unusual to find cartel cases in which the accused cartel is still active at the time of the investigation as it will be proved by the *Pometon SpA v. Commission* case in which the participation in the cartel took place from 2003-2007 but the investigation began in 2010 and the proceedings ended in 2019.[134] This is often not the case in situations of abuse of the dominant position. When a complainant is left out without supplies because a dominant company is unwilling to provide with supplies, and it is a continuing condition the judge's decision is supposed to solve this issue and the judge can classify a particular behaviour as abusive.[135]While this research paper established differences between the different types of procedures, the focus will stay on the cartel cases throughout the whole paper.

In order to prevent cartel existence, Article TFEU Article 101 first paragraph prohibits "practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition".[136] However, the exemptions to such prohibitions are also present and described in the same article paragraph three. In order to clarify such complicated matters, the Commission created specific guidelines on application of Article 101 of the TFEU that provides instructions on how Article 101 paragraph three has to be applied in individual cases.[137] Even though this guideline is not binding since it has an instructive purpose, it helps both the Court and the Member States to act homogeneously.

First of all, the guideline breaks ex. Article 81 (Article 101 of the TFEU) into two parts. The first step is to figure out if an agreement between businesses that could affect trade between Member States has an anti-competitive object or has real or possible anti-competitive effects. When an agreement is found to be anti-competitive, the next step is to figure out what benefits the agreement brings to the market and see if these benefits outweigh the negative effects.[138] Theoretically, this paragraph offers successful steps on how to try to follow the presumption of innocence. This presumption slightly gleams between the lines meaning that

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[133] Parret, *supra* note 89, p.10.

[134] Judgement of the Court (Fourth Chamber) of 18 March 2021, *Pometon SpA v. European Commission*, C-440/19 P, EU:C:2021:214.

[135] Parret, *supra* note 89, p.10.

[136] Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012. Accessed February 22, 2022. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.

[137] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004. Accessed April 5, 2022. Available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52004XC0427%2807%29

[138] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, para. 11. Accessed April 5, 2022. Available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52004XC0427%2807%29

after proving that the agreement has been anti-competitive, the prosecutor has to evaluate also the benefits that a particular agreement brought and later assess the situation, nevertheless it might not be as optimistic as it seems. Needless to argue, that the main goal of Article 101 is the protection of consumers and their well-being by protecting the competition, nevertheless, the presumption of innocence should not be forgotten while proving the guilt.

However, the guideline in the paragraph 15 highlights that the type of coordination of behaviour or collusion that is covered by Article 101 paragraph one is when at least one company agrees to act in a certain way on the market, or when it is more predictable what the other company will do on the market because of their contacts.[139] So, coordination can be in the form of obligations that make one party act a certain way in the market. In order to work together, it doesn't have to be in everyone's best interest for them to do so. Coordination must also not always be made public. It can also be hidden. To be able to say that an agreement was made by passive acceptance, there must be an invitation from a venture to another venture, either explicitly or implicitly, to work together to achieve a goal.[140] If viewed from the perspective of the accused person this paragraph almost states that it might be highly convoluted to prove someone's guilt since for some parties the visible interest might be absent, the proof of consent to participate as well as the coordination might be hidden. Meaning that the guilt might not be so obvious and easily proven. In order to make the burden of proof easier, when determining whether an agreement is unfair to competition, it should be done as a part of how competition would have worked without the deal and its alleged restrictions.[141] Moreover, to make the process of proof easier an important role plays the difference whether the restriction is based on the object or on the effect, because when it becomes clear that the agreement is meant to stop competition, the concrete effects are not taken into account.[142] So to clarify, in Article 101 paragraph one the main focus is on the existence of the restriction of competition, thus there is no need to demonstrate the anti-competitive effect, but for Article 101 paragraph three to be applicable, all four conditions mentioned there have to be followed.[143] As a result it seems that to prove that a company is guilty seems easier because only the anti-competitive agreement has to be proved, but in order to fall under Article 101 paragraph three and state that the first paragraph of the article was inapplicable, the agreement has to "contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit".[144]

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[139] ibid.

[140] Ibid, para.15

[141] Ibid, para 17.

[142] Ibid, para 20.

[143] ibid.

[144] Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012. Accessed February 22, 2022. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.

Nevertheless, the Commission believes that these restrictions of competition have such a high risk of harming competition that there is no need to show that they have had an impact on the market in order for the Article 101 paragraph one to be applicable.[145] The lack of the need to prove the impact is most likely due to the seriousness of potential outcomes that the authorities are trying to prevent, because it would activate a chain of consequences, such as the fixation of price lead to the cut in production, thus the consumers do not get what they wanted, and their wellbeing decreases, because at the end of the day they will be forced to pay mere in order to get the needed product.[146]

As was mentioned before in the chapter 2.3- "Burden of proof", after a claim has been stated, the evidentiary burden moves to the defendant that has to present contradictory proof disproving these specific assertions in order for their trial to succeed. And in these cases, the same logic applies, meaning that the prosecutor has to prove Article 101 paragraph one, however paragraph three of the same article can be used as defence. As was already analysed before, it is easier to prove the existence of the anti-competitive agreement rather than declare the Article 101 paragraph one inadmissible, because all the conditions have to be met. As a result, the burden of proof under ex Article 81 paragraph three lies on the side that tries to use the exception rule, thus on the defendant.[147] Pursuant to the established case law for the Article 81 paragraph three to be applicable all the four already mentioned conditions have to be met. If one of the conditions is absent, the application has to be withheld.[148]

Ironically, in cartel cases, there is the "proof paradox", and the irony is that usually the biggest and the most momentous cartels the government wants to find and end because their damage on the market is significant is the hardest to find and establish evidence. And this is an important issue that has to be solved if we want effective competition law enforcement.[149] Nevertheless, the ongoing debates on the criminalisation of anti-cartel proceedings will not facilitate the work of the Commission and will not expedite cartel matters.

3.2. Implementation of the restrictive measures

In order for EU competition law to be implemented in the member states, it has to be used in a way that is consistent with the principle of procedural autonomy for each member state. Procedural autonomy means that the Member States are free to create their own procedural norms to control the application of EU legislation.[150] For the first time the procedural autonomy was clarified in the *Rewe-Zentralfinanz eG and Rewe-Zentral AG v*

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[145] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, para.21. Accessed April 5, 2022. Available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52004XC0427%2807%29

[146] Ibid.

[147] Ibid, para 41.

[148] Ibid, para 42.

[149] Parret, *supra* note 89, p.10.

[150] Luca Prete, Nicolaj Kuplewatzky, "Procedural autonomy", *Global Dictionary of Competition Law*, accessed April 28, 2022. Available on: https://www.concurrences.com/en/dictionary/procedural-autonomy

Landwirtschaftskammer für das Saarland case in 1976.[151] In the case, the Court emphasised that when the EU law provisions are absent, the Member States themselves control the application of EU law at the national level.[152] Usually, there are no specific procedural rules mentioned in the treaties, meaning that the European law is not highlighting specific rules about proof and evidence. Member States have various traditions of procedural law and obviously diverse norms on evidence.[153] Since competition law kept evolving and corporations were sanctioned more severely and the EU legislation was absent on the issues of proof, European courts began to establish jurisprudence on process creating its own procedural rules, taking a lot from different sources of law, moreover each judge had a distinct background, and the European Convention on Human Rights also played an important source of inspiration.[154] Thus, Courts rely on general rules of law that apply to everyone in the European Union, as a good example is the presumption of innocence. However, in cases when national laws vary significantly, the Courts must generate a unique set of standards based on the characteristics of competition law. There is also a lot of case law from the Court about equivalence and effectiveness that has had a big impact on procedural law. General rules played an important role in the development of a single system of rules for competition cases.[155]

The *Degussa AG v Commission* case can demonstrate on what values the Court was basing the argumentation and it can support it.[156] For example, when imposing penalties, the Commission is expected to adhere to broad legal standards, most notably the principles of equal treatment and proportionality. Among other things, the presumption of innocence is one of the basic rights recognised in Community law, according to case law from the European Court of Justice. The presumption of innocence, which comes in part from Article 6 paragraph two of the European Convention on Human Rights, has been reaffirmed in both the preamble to the Single European Act and in Article 6 paragraph two and Article 48 of the European Union's Charter of Fundamental Rights. Because of the nature of the infringements and the penalties that may follow, the principle of the presumption of innocence applies to procedures for enforcing the competition rules that apply to businesses, such as fines or penalties that are paid over time.[157] As was already mentioned above there is no need to demonstrate a formal agreement of one competitor to follow a certain course of action , or for example act in a specific way on the market. In order for the competitor's statement of intent to be enough, it simply has to reduce the uncertainty a bit about how it will act in the market,

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[151] Judgement of the Court of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* C 33/76, EU:C:1976:188.

[152] Luca Prete, Nicolaj Kuplewatzky, "Procedural autonomy", *Global Dictionary of Competition Law*, accessed April 28, 2022. Available on: https://www.concurrences.com/en/dictionary/procedural-autonomy

[153] Parret, *supra* note 89, p.7.

[154] Ibid.

[155] Ibid, p. 7

[156] Judgement of the Court of First Instance (Third Chamber) of 5 April 2006, *Degussa AG v. Commission of the European Union*, T-279/02, EU:T:2006:103

[157] ibid., para.15.

becoming a bit more predictable.[158] Fines for breaking competition law must be based on more than just the severity of the infringement and the specific circumstances of each case. In this particular case the General Court decreased the fine amount because the Commission used the incorrect turnover number when assessing the appropriate degree of increase for deterrence.[159] The Commission must also take into account the context in which the infringement was committed and make sure its actions have the necessary practical impact, especially when it comes to types of infringement that are particularly bad for the Community's goals. Another, nowadays, pretty simple Commission's duty is to keep the accused companies a secret from the press, otherwise the presumption of innocence can be easily broken. If the Commission does not follow this rule it means that it is breaching the presumption by disclosing information that has not yet been confirmed.[160]

Also now, a lot of attention has been paid to proof and evidence in competition law in the last few years, thus now the Court mandates the Commission to back up its conclusions of a violation of competition law by showing how it hurts the market place. National courts have the same rules when it comes to rationalising the penalties that are given by national competition authorities. The harsher approach can be easily explained since the penalties that the companies face also became stricter.[161] Thus, heightened attention is paid to the rights of defence and on the rules of proof that are closely linked to the presumption of innocence. However, usually there is a system of free proof in the competition sphere, meaning that the Commission is able to use all kinds of evidence to show that a particular company has broken the law. The word "all" evidence in the previous sentence is meant as proof obtained in a legal way as follows from the general rule.[162]

As it was already mentioned in the previous sections of this paper, the evidence plays an important role in the presumption of innocence and in the whole preceding as such. When a number of enterprises illegally agrees on a price, the industry price as such rises even though some companies might not engage in the machination. Thus, if someone: state or private party brings antitrust lawsuits, the parties who were not a part of the collision confront the issue of proving their innocence since their prices grow in tandem with the colluders.[163]

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[158] Ibid.

[159] ibid.

[160] Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003.

[161] Ibid, p.1

[162] Ibid.

[163] Blair, Roger D., and Richard E. Romano, "Proof of Nonparticipation in a Price Fixing Conspiracy." *Review of Industrial Organisation* (1989): 101–17, accessed April 18, 2022, available on: http://www.jstor.org/stable/41798255.

3.3. Cartel settlement- leniency program

In this section of the research paper the evolution of the leniency program will be covered, moreover, the settlement program is mainly going to be analysed through the angle of the hybrid cases. To discover, monitor, and punish hard-core cartels, several competition authorities prefer to use leniency programmes. Many administrations have implemented amnesty systems to encourage leniency candidates to come as soon as possible.[164] Settlement systems enable a potential applicant to come to the authority with some preliminary information regarding their involvement in a cartel in return for the indulgence from the authority's side.[165] If someone refuses to participate in the settlement process or withdraw from it, the Commission is still able to settle with the parties who agreed while proceeding with the 'regular' procedure for the ones who withdraw.[166]

One of the recent case law examples where the settlement was created and the hybrid case occurred is the *Pometon SpA v Commission* case.[167] This case will be briefly explained in order to enable the reader to understand the essence of the matter. The inquiry began in 2010 when Ervin informed the Commission of the operation of the cartel. The five suspected steel abrasive cartel members signalled an early readiness to join in settlement negotiations.[168] Thus, a so-called hybrid scenario occurred, meaning that some suspected cartel members participated in negotiations with the Commission and others withdrew from such procedure, thus the Commission made a deal with the cooperating parties and applied the regular process to those who refused to settle.[169] In this particular case, in 2014, four parties reached an agreement with the Commission in return for lower penalties, however Pometon, being one of the accused cartel participants withdrew from the settlement process and was eventually punished two years later in accordance with the usual pricing coordination procedure. The Commission found that Pometon was a cartel member for almost four years from 2003 till 2007. Moreover, the Commission highlighted that Pometon together with other members agreed to cooperate to raise the prices for their products as well as decided to synchronise their prices with each client.[170] Firstly, the Commission calculated a fine that was 16 percent of an income earned in 2006. Nevertheless, later it reduced the fine by 10 percent since the

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[164] OECD.Competition and the use of markers in leniency programmes, available on: https://www.oecd.org/competition/markers-in-leniency-programmes.htm

[165] ibid.

[166] Marieke Datema, Andrew Leitch, Edward Coulson, "Cartel Settlements: Facilitating Damages Claims But Hybrid Cases Remain Unsettling", *Competition Policy International* (2021), accessed May 3, 2022, available on: https://www.competitionpolicyinternational.com/cartel-settlements-facilitating-damages-claims-but-hybrid-cases-remain-unsettling/#_edn27

[167] *Pometon SpA v. European Commission*, *supra* note 134.

[168] ibid.

[169] The General Court on procedural rights in "hybrid" settlement cases, Linklaters, 2019. Accessed April 18, 2022. Available on: https://www.linklaters.com/en/insights/publications/2019/april/the-general-court-on-procedural-rights-in-hybrid-settlement-cases

[170] *Pometon SpA v. European Commission*, *supra* note 134, para.18,

Pometon involvement was smaller than other members, however after the fine was repeatedly reduced by 60 percent, and the total fine imposed by the Commission was EUR 6 197 000.[171] The appeal to the General Court consisted of five points; there was a violation of a fair trial and other important principles, since the Commission attributed particular behaviour to the claimant when it made its settlement decision, which then influenced claims later made against it in the contested decision, highlighted that he was accused without proof that he de facto was a member of the cartel, and by such actions violated the presumption of innocence; pointed out that there is a probability that the organisation did not have an aim to limit competition; debates what if the time limit was also precise incorrectly, and the last but not least is the breach of equal treatment, thus asked to reduce a fine by 60 percent.[172] The General court rejected all the arguments besides the last one and agreed to reduce a fine by 60 percent, however later the 75 percent reduction took place. Pometon submitted a similar appeal to the CJEU, however some parts of the previous appeal have been deleted. The court stated that the issue of whether the Commission ignored the presumption of innocence is dependent on the settlement judgments relevant to each case, including their rationale, and the precise circumstances under which those decisions were taken. In this instance, it may be claimed that the settlement decision's references to Pometon's actions were essential to establish the facts of the case as a whole but did not represent an admission of guilt. The Court emphasised that, although the turnover of an enterprise is important because it estimates the size and economic strength of the activity, it must not be given undue prominence in comparison to other relevant elements, such as the volume of trade, market share, or unlawful gain. At the end of the day CJEU reduced the punishment by 83 percent, resulting in a fine of EUR 2 633 895 for Pometon.[173]

This was a pivotal case not only because the presumption of innocence was applied in the hybrid settlements but because it also demonstrated how hard it is to prove involvement and to what extent a particular company is guilty. Since in the Pometon case Courts kept decreasing the fine, even though Pometon refused to participate in the settlement meant that this organisation had to be fined with the use of a regular procedure but at the end of the day their fine kept decreasing. However, knowing that it is so complex to establish the quilt and to follow the presumption of innocence many Member States are still moving towards cartel criminalisation. And from one perspective it might seem reasonable, since it is an important problem which requires a serious approach to the solution and criminalisation might seem the most serious, nevertheless all of the actions have consequences, meaning that all of the proof procedure will need to be way more disciplined and stricter. Even though cartels bring significant economic damage, the question whether cartel activity is a sufficient ground for a criminal liability has to be assessed.[174] A group of critics claim that this would concentrate too

[171] ibid, paras. 22-25.
[172] Ibid.
[173] ibid, para. 166.
[174] Stephan, Andreas. "An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation." *Legal Studies* (2017): 621–46, accessed April 18, 2022, doi:10.1111/lest.12165.

much focus on criminal conduct, neglecting alternative viable punishments that would not have such an effect on business.[175] From another perspective, public expectations for a competitive industry are also highlighted, and cartels are considered undesirable by the public. Moreover, considering that the struggle with cartels is not a new issue and we have been fighting with it since 1964 the results are quite disappointing.[176] Overall, cartel activity did not decrease and the problem stays topical, thus the potential necessity for criminal responsibility is hard to criticise. And if leniency programs did not bring the intended outcome as it can be seen from the *Pometon SpA v Commission* case, criminal prosecution may be a more effective type of remedy.[177] However, as was already evaluated above, the criminal charge entails careful application of the principles such as presumption of innocence and the burden of proof. Moreover, there is a risk that as long as the "proof paradox" mentioned in 2.2. is present, the criminalisation of cartels will not be too effective.

Scania was accused of engaging in price fixing and gross price hikes for medium and heavy trucks in the EEA in violation of Articles 101 of the Treaty and 53 of the EEA Agreement between January 1997 and January 2011 with their rivals (DAF Trucks N.V, Daimler, Iveco, MAN, Renault).[178] Scania first got into settlement talks with the Commission but then resigned. The Commission's settlement agreement with the aforementioned rivals ended the investigation in this area, but did not end the investigation into Scania (undertaking of non-settlement).[179] In 2017, the European Commission penalised Scania for 880.5 million EUR, and the company in turn appealed to the General Court, arguing that the Commission did not act unbiasedly or without permanently impairing Scania's right to be heard and assumption of innocence.[180] Nevertheless, the appeal was totally rejected, the court stated that there were no violations from the Commission's side and that the presumption of innocence was not breached, especially taking into account that there has been a continuous breach of Article 101 of the TFEU from Scania's side. When the settlement decisions were made, they did not refer to Scania's liability, said the judge. The Court then looked at each reference to Scania and said that this did not mean that Scania was found to be responsible for the accident. Then also the court looked at the *Pometon SpA v Commission* case that was already discussed above. For the infringement to be classified as one and continuous, three factors have to be met. First of all, an overall plan to achieve a common goal. Second of all, the intentional contribution of the undertaking to that plan, and its knowledge of the offending behaviour of the other participants. There was a lot of attention paid to the exchanges, and the

[175] ibid.
[176] ibid.
[177] ibid.
[178] Judgement of the General Court (Tenth Chamber, Extended Composition) of 2 February 2022, *Scania AB and Others v. the European Commission*, Case T-799/17, EU:T:2022:48.
[179] ibid.
[180] ibid.

Court found that there was a lot of overlap between the employees at the three levels below.[181] The General Court believed that the Commission was correct when it said that a single and continuous infringement covered all of the countries in the European Economic Area, not just Germany, as Scania had said. The Court went into great detail about the communication between Scania distributors and the company's headquarters. This was done to show how truck manufacturers and their distributors were working together. It came to the conclusion that the exchanges that took place at the German level went beyond the German market because the information came from European competitors about how they set prices for their goods. Moreover, the court made references to the *Ziegler SA v. Commission*, since in that case highlights two parts to the principle of equality that Scania mentioned in the appeal: no different treatment for one party, and if there is a difference in treatment there are reasonable grounds for such actions.[182] The court found that the Commission met all the requirements, since no differential treatment was established. The parties from the beginning were on different levels, due to the fact that the other parties were previously addressed in the settlement judgement, which established their responsibility for their roles in the cartel.[183]

This case proved that there has been no violation of fundamental rights. However, due to the risk of violating basic rights, such complicated instances must be handled with caution. In this scenario, the applicant had the option of filing an appeal before the Court of Justice, but only on legal grounds. However, the change in the result, on the other hand, is quite improbable.[184]

3.4 Issues with the settlement in hybrid cases

This chapter will investigate some topical challenges that hybrid cases are facing, more specifically this part of the research paper is going to focus on arguments that are brought up by non-settling parties about the Commission's unbiasedness and violation of the presumption of innocence by not only implementing the settlement but also making it publicly available, where nonparticipating in the settlement parties are also mentioned.

As was already mentioned beforehand in the *Pometon SpA v Commission* case the Court ruled that there has been no violation of the presumption of innocence, that needless to say comes as a relief for the Commission, nevertheless in another recent case everything has been not that promising. In contrast, in the *Icap v. Commission* case the Court ruled that the

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[181] Priyanka Jain, "Manifestation of Trucks' Manufacturer's Collusion in their Conduct – The Scania Decision (Case T-799/17)", *Wolters Kluwer* (2022), accessed April 21, 2022. Available on: http://competitionlawblog.kluwercompetitionlaw.com/2022/02/07/manifestation-of-trucks-manufacturers-collusion-in-their-conduct-the-scania-decision-case-t%E2%80%91799-17/

[182] Judgement of the Court (Third Chamber), 11 July 2013, *Ziegler SA v. the European Commission*, C-439/11 P, EU:C:2013:513.

[183] Priyanka, *supra* note 181.

[184] ibid.

violation of the presumption of innocence took place.[185] Thus, the question that can logically occur from this situation is whether the Commission should make settlement and non-settlement determinations in hybrid cartel settlement cases concurrently in order to avoid the violation of the presumption of innocence for non-settling parties?[186] Icap repeatedly brought up this discussion when the General Court offered the adoption of both decisions at the same time in order to protect everyone's right to innocence.[187] Such an offer was proposed because the Commission could not surely measure the level of involvement for settling parties without taking into account the non-settling parties.[188]

This chapter offers to repeatedly look at the same beforehand discussed cases such as *Scania v Commission* case and *Pometon SpA v Commission* case, but from a different perspective. In the *Scania v Commission* case, the Commission managed the inspections in the truck industry in 2011. In 2016, the settlement decision was made in that case, and in 2017 it offered to the public a non-confidential edition of the settlement. The infringement procedure against Scania was brought up in 2017, nevertheless, the publicly available non-confidential version of the decision took place only in 2020.[189] The idea behind this information is to highlight how many years had passed from the original violation, and if the Commission would have published their judgement at one time, it most likely would be damaging for the companies and people who lost their money because of the cartel and who would use the settlement to request compensation. From the competition law breach till the last decision nine years had passed, and it is a very long period, where many of the affected parties could have lost the evidence that the cartel has affected them and some of them could even lose their businesses. For damages claims to move forward, it is crucial for the Commission to make decisions publicly accessible, since the decisions give applicants information about the cartel, so they can claim for damages.[190] It seems that if the Commission will not in the future come up with the ideas how to speed up the whole process, the leniency program can cause more problems than it solves.

Moreover, if all information has already been publicly available for a long time before the final decision was made, cartel members might fight that claims against them are time-

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[185] Judgement of the General Court (Second Chamber, Extended Composition) of 10 November 2017, *Icap plc and Others v. Commission*, Case T180/15, EU:T:2017:795.

[186] Cleary Gottlieb, "Pometon v. Commission: The Court of Justice Sheds Light on the Principle of Equal Treatment and the Presumption of Innocence in Hybrid Cartels Settlements", *Clearly Antitrust Watch* (2021), accessed May 4, 2022. Available on: https://www.clearyantitrustwatch.com/2021/03/pometon-v-commission-the-court-of-justice-sheds-light-on-the-principle-of-equal-treatment-and-the-presumption-of-innocence-in-hybrid-cartels-settlements/#_ftnref16

[187] *Icap plc and Others v. Commission, supra* note 185., para. 268.

[188] ibid.

[189] Marieke Datema, Andrew Leitch, Edward Coulson, "Cartel Settlements: Facilitating Damages Claims But Hybrid Cases Remain Unsettling", *Competition Policy International* (2021), accessed May 3, 2022. Available on: https://www.competitionpolicyinternational.com/cartel-settlements-facilitating-damages-claims-but-hybrid-cases-remain-unsettling/#_edn27

[190] ibid.

barred.[191] Needless to mention, that such scenario is highly unbeneficial for the Commission because they are trying to assist affected parties to obtain the compensation through damages proceedings, nevertheless, this might have some challenges.[192]

Hybrid cases as such are highly complicated, in the aforementioned *Pometon SpA v Commission* case, the Commission is walking on thin ice, because it has to keep that balance between creating a settlement from one side, and staying unprejudiced and providing procedural protection from the other side for the non-settling parties.[193] The *Pometon SpA v Commission* was a valuable case, due to the fact that during the proceedings the Court has made many powerful statements that serve to explain fundamental principles such as the presumption of innocence. Whenever an endeavour chooses the hybrid technique instead of the agreement to settle with the Commission, it cannot assert, based on the presumption of innocence, that the Commission will completely ignore certain facts that other enterprises who are participating in the settlement have already admitted.[194]

Another thought-provoking fact is that originally the settlement decisions are supposed to have way less details about the prohibited agreements, which is seen as beneficial for the settling parties. Everything mentioned above is true if all parties that have participated in the cartel are settling, nevertheless, whenever at least one party does not give a consent to participate or withdraw from the settlement, it becomes way more complicated for all parties including the Commission. Since the Commission writes both the leniency and the violation decisions the Commission might consult with the settling parties on the facts that have to be changed in the infringement decision.[195] Nevertheless, none of the cases are identical, and since all of them are distinct to some extent, the individual assessment has to be made by the Courts to prove whether the Commission has respected the presumption of innocence.[196]

This chapter demonstrated that there is a slight dissonance in the Commission's objectives. From one side, the Commission tries to protect people who might have financial losses because of the cartel, from another side it has to promote a leniency program in order to make it beneficial for the cartel members to participate in it, and lastly it has to follow and protect the non-settling parties. This is the reason why at the beginning of this chapter there has been a statement that the Commission has to walk on thin ice, because it is difficult to balance between different parties and to follow all the fundamental principles in order not to deprive one of the parties of their rights.

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[191] ibid.

[192] European Commission. Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions, available on: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1580. Accessed May 3, 2022.

[193] *Pometon SpA v. European Commission*, *supra* note 134, para.72.

[194] ibid., para.93.

[195] Marieke Datema, Andrew Leitch, Edward Coulson, "Cartel Settlements: Facilitating Damages Claims But Hybrid Cases Remain Unsettling", *Competition Policy International* (2021), accessed May 3, 2022, available on: https://www.competitionpolicyinternational.com/cartel-settlements-facilitating-damages-claims-but-hybrid-cases-remain-unsettling/#_edn27

[196] *Pometon SpA v. European Commission*, *supra* note 134, para.86.

CONCLUSION

This research has demonstrated that the presumption of innocence is a significant component of both criminal as well as administrative law. Nevertheless, it would be inaccurate to assume that in both areas of law fundamental rights including the presumption of innocence are equally applied. All fundamental rights mentioned in this research paper derive from the criminal law since, historically, it has been the most serious of all disciplines of law, with the most severe and harmful punishments for the accused. Thus, for the purpose of excluding the execution of innocent, in this sphere the rights of accused are broadened by different regulations and strictly followed, however, in other areas of law, this is not as relevant because the punishments are trivial. However, since cartel activity is not reducing as expected, the Commission continues to increase fines, which has resulted in the sanctions becoming more consistent with criminal law than administrative law over time. Despite the fact that penalties are changing, the whole system is not. Competition law has roots in administrative law, thus the whole procedure of tackling the competition matters as administrative, and after assessing all precedents and after the analysis of the legislation, the possibility of a shift towards the criminal law is highly miserable. This shift would require too much effort, that no one from the authorities is ready to make. The Commission is exclusively an administrative branch; thus, they will not be able to resume working as before, and major changes would be needed. Moreover, even though the rights of the accused are important, the main focus stays on the consumers. The entire regulatory process was established for the purpose of protecting consumers and other market participants, and since it is nearly impossible to balance and satisfy all parties, the choice has to be made, and for now it seems like this choice is not made in favour of the protection of the rights of cartel members.

The Leniency program also proved to raise a lot of questions to both the non-settling parties as well as for the consumers. First, the leniency program had the objective of preventing the cartels, reducing the numbers of the cartels, nevertheless, such a program could not be considered a success. Cartel activity does not seem decreasing as well as the topicality of this problem. On the one hand, this programme appears advantageous for the settling parties, while on the other hand, the same may be said about the non-settling parties. The settling parties do receive a reduction of a fine from the Commission's side, nevertheless all affected parties may bring the claim to the national court and claim damages, however for a non-settling party the proceedings will last for many years, for the Pometon it was 16 years since the first breach till the final decision, and even though the fine will be bigger, there is a high probability that the claims for damages will be absent, due to the fact that the time period was too long, and most likely the affected parties have already lost their documentary evidence. In addition, it is more difficult to adhere to the presumption of innocence in hybrid cases because the Commission must maintain a balance between the participants of a leniency programme, and remain impartial, and follow and preserve the procedure for non-settling parties.

In most of the cases, the presumption of innocence is applied in the anti-cartel proceedings, that in turn is an answer to the main research question, nevertheless it proved to be a very fragile topic where many of the factors might have an impact. As *Icap v. Commission* case proved, whenever there are doubts about the level of involvement for settling parties without taking into account the non-settling parties it is better not to make any announcements before the court proceedings, otherwise the presumption of innocence is going to be violated. Nonetheless, if public announcements are not made prior to a non-settling party's decision, the entire leniency programme loses its purpose. Moreover, it is a difficult task for the Commission to remain impartial and objective when working with both settling and non-settling parties. Since evaluations at all levels are conducted by individuals, the human factor must also be considered, as even when people strive to remain impartial, personal sympathy can still occur.

The results of this research cannot be generalised to the entire field of competition law since they are rather specialised and only applicable to anti-cartel actions. After conducting this research some additional comments can be made. This research paper can be prolonged, and the more credible conclusions can be made if the further research would cover other parts of the Competition law such as merger cases and the use of dominant position. Moreover, some suggestions could be made to improve the existing situation. Many of the competition law breaches might happen due to the lack of proper knowledge, especially if the company is new in that sphere. Thus, the entrepreneur can get into prohibited agreements without any prior intent, if he does not get any important information and explanations about his actions. First of all, his accidental actions might damage the market, second of all his business, moreover, after receiving a fine, that as was concluded above is high, his willingness to engage in business activities might vanish. That in turn affects not only competition and businesses but also consumer product options in the market. Seminars and conferences organised so far by the Competition Council might not be a sufficient tool for educating the public, consequently, the Competition Council should be reluctant to advise undertakings on possible infringements of competition. Moreover, during the COVID-19 many entrepreneurs moved from face-to-face work to work online, and the Competition Council could adapt to the new conditions and offer remote consultations, webinars, online courses for companies, as well as establish cooperation with universities where future entrepreneurs' study, offering online courses. This could be very beneficial and improve the general knowledge in the topic in future.

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