DECLARATORIA SULLA TESI DI DOTTORATO

Il/la sottoscritto/a

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Titolo della Tesi:

Presumptive Reasoning and Right To Be Heard in Public Economic Adjudication: The Case of EU Antitrust Enforcement

Dottorato di ricerca in	Diritto Internazionale dell'Economia
Ciclo	XXIV
Tutor del dottorando	Giorgio Sacerdoti
Anno di discussione	2013

DICHIARA

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Presumptive Reasoning and Right to Be Heard in Public Economic Adjudication: The Case of EU Antitrust Enforcement

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PART ONE: DUE PROCESS IN ECONOMIC ADJUDICATION AND THE CHALLENGE OF PRESUMPTIVE REASONING

I. Due process in economic adjudication: theory and methodology

1. Introduction

The interaction of law and economics has received extensive coverage in both the legal and the economic literature[1]. Various have been the contributions analyzing or advocating for the progressive opening of legal reasoning to the use of economics: take, for example, the introduction of probability theory and of the methods of mathematical theory in evidence[2]; or the reference to the yardsticks of efficiency in economic analysis of law[3], and consumer welfare in competition policy[4]. Similarly, numerous have been the calls for the amendment or a refined interpretation of a particular statute from the perspective of economic analysis of law[5].

Almost invariably, when speaking about law and economics combined, reference is made to what represents a subcategory of the broader universe of intersection between these two disciplines: economic analysis of law. Economic analysis of law, which is defined as the application of microeconomic tools to the analysis of legal rules and institutions[6], is the connotation for a movement originated in America in the late 60s and which increasingly appealed to the minds of legal and economic scholars triggering the proposal of new rules, standards and institutional arrangements. The importance of this scholarship for the advancement of the legal system can hardly be overstated: in all the areas concerned, the insights of economic theory have been to a large extent conveyed through the force of a growing doctrinal debate,

[1] For a comprehensive review of such literature, see Boudewijn Bouckaert and Gerrit De Geest (eds.), ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME I. THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS(Cheltenham, Edward Elgar 2000)

[2] Lawrence Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harvard Law Review 1329(1971)

[3] For a critical view, see Mario J. Rizzo, The Mirage of Efficiency, 8 Hofstra Law Review 641(1980)

[4] Robert Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (New York, Free Press 1978)

[5] For a survey of the foundations of the movement and the wide range of fields of application, see Richard Posner, ECONOMIC ANALYSIS OF LAW (New York, 5th ed., Aspen 1998); Donald A. Wittman, ECONOMIC ANALYSIS OF THE LAW : SELECTED READINGS (Oxford, Blackwell 2002)

[6] The Economic Analysis of Law, Stanford Encyclopedia of Philosophy (available at http://plato.stanford.edu/entries/legal-econanalysis/)

which often found its break-through in the discussions of the members of parliaments, the executive, or the courts.

The predominance of economic analysis of law in the literature concerning law and economics, and the frequent association that is made of the combined use of these terms and the objectives that the law strives to achieve in the different branches of economic law[7], inevitably lead to the trend of confining the "law and economics" debate to the impact of economics on the law. However, it needs to be noted that there are two other important features in the interaction between law and economics. First, their reciprocal influence: as much as structuring the legal system attuned with economic principles enables it to achieve its objectives in the most efficient manner, it has been proved that the existence of an effective legal system has a visible impact on economic progress[8]. Second, their continuous dialogue: the need to convey the relevant information in a way that it can be understood and deployed by their counterparts forces both lawyers and economists to translate their knowledge onto a common language, where the incidence of the specificities of each discipline can be reduced to a minimum.

Accordingly, two further areas of research deserve to be catalogued as part of the "law and economics" movement. On the one hand, we have the attempts to view the results of legal process from an economic perspective: this differs from the traditional "law and economics" approach in that the legal rules and institutions are analyzed looking at the parameter of economic progress, as opposed to the various effects of cosmetic changes on the way by which the legal system achieves its most disparate objectives. Under this approach, economics constitutes not only the methodology used for the assessment of results, but also the ultimate parameter that informs the normative choice over the different and alternatives types of rules and institutional solutions adopted by the legal system. Instead of an "economic analysis of the working of the legal system", as put by Coase[9], this strand of law and economics hinges on the

[7] For the meanng of "economic law", see *infra*, para. 7.a

[8] Tom Ginsburg, Does Law Matter for Economic Development? Evidence From East Asia, 34 Law & Society Review, No. 3 (2000), pp. 829-856 ; Katharina Pistor and Philip. A. Wellons, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT (New York 1999); Thorsten Beck, Legal Institutions and Economic Development (August 31, 2010). CentER Discussion Paper Series No. 2010-94. Available at SSRN: http://ssrn.com/abstract=1669100 or http://dx.doi.org/10.2139/ssrn.1669100

[9] Ronald H. Coase, Law and Economics and A. W. Brian Simpson, 25 Journal of Legal Studies, 103–19 (1996), 103

‘‘study the influence of the legal system on the working of the economic system”[10]. Despite its obvious and inevitable relation with the definition of economic objectives that the law is intended to achieve, the relevant literature is not addressed in this thesis for the simple reason that the focus of this work is on outputs for the legal process, rather than for the economy. The choice of preferring a focus on the legal process rather than on the economic one is dictated by the belief that law is primarily about justice, and that this value should not be sacrificed in the pursuit of secondary objectives. This does not mean that legal certainty implies a mechanical application of rules, leaving no space for equity[11]: recognizing that economic growth or efficiency may be the benchmark towards which a set of norms is geared in the mind of the legislators and policy-makers, this thesis moves from the assumption that the provision of a coherent legal framework, and the corresponding rights and duties for its consociates, can conveniently be relied upon in the strive for that benchmark.

On the other hand, a special mention in the category must be reserved for those studies devoted to understanding how the principles, theories and insights of economics are factored into the legal process, and whether there are better alternatives. This type of research can be pursued by targeting the process of “incorporation” of economics in law as the subject of sectorial studiesor at a more general level, building on the common traits existing across different types of areas where such incorporation occurs. In fact, two streams of scholarship can be traced in this respect operating at opposite extremes of abstraction: one at a very general level, discussing broadly the role of economics in legal theory[12]; the other, at a very peripheral level, confining the discussion to specific areas of law, usually focusing on specific segments or subparts of those areas[13]. By

[10]Ibid., 104; Richard A. Epstein, Gary S. Becker, Ronald H. Coase, Merton H. Miller and Richard A. Posner, The Roundtable Discussion, 64 University of Chicago Law Review 1132, 1138 (1997)

[11] This stance was the object of the Roscoe Pound’s criticism at the beginning of the XX century: see Roscoe Pound, Mechanical Jurisprudence, 8 Columbia Law Review 605 (1908)

[12] See for instance, Richard Posner, Observation, the Economic Approach to Law, 53 Texas Law Review 757(1975); Utilitarianism, Economics and Legal Theory, 8 Journal of Legal Studies, 103–140 (1979); Mitchell Polinsky and Steven Shavell, Legal Error, Litigation, and the Incentive to Obey the Law, 5 (1) Journal of Law, Economics, & Organization, (1989), 99; Christine Jolls, Cass R. Sunstein, Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stanford Law Review 1471(1998)

[13] This is for example the case of most of the famous works of the “Chicago school” in the area of antitrust, Robert Bork, Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception, 22 University of Chicago Law Review 157 (1954); Ward S. Bowman, Tying Arrangements and the Leverage Problem, 67 Yale Law Journal 19 (1957); John S. McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 Journal of Law and Economics 137 (1958); or the famous articles by Judge Calabresi on tort liability and insurance: Guido

contrast, it seems that there is at present only a very thin layer of literature standing as the middle ground between these two, which is able to capture both the general picture and the specificities of different branches of "economic law": little is the scholarly production on the role of economics in law which manages to blend the specifics of these different areas into a unique cross-disciplinary framework, or which starting from an examination of selected issues in one area of law broadens the discourse referring to other areas where economics has a visible impact. Even in those rare cases where the scholarship has engaged in such cross-disciplinary exercise, it has typically done so to focus on general economic theory[14] or other substantive issues[15], thereby neglecting or minimizing its consideration for the nuts and bolts of procedure of each of the areas under analysis[16]. This is not to imply that the above referred cross-disciplinary attempts have necessarily failed to provide cogent and coherent analyses of the subjects of enquiry. However, the risk exists that the delivery of the insights gained from a sound theoretical analysis may be hampered by the application of different procedures on the assessment of the very same facts.

For these reasons, this thesis aims to at least partially bridge the gap by suggesting the need to refer to a common set of procedures addressing the incorporation of economics into law through the process of adjudication. While the project does not deal with two other forms of

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Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale Law Journal, 499–553 (1961); by contrast, for a broader perspective cf. Guido Calabresi and Douglas A. Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harvard Law Review, 1089-1128 (1972); R. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (New York, Free Press 1978); Richard Posner, Utilitarianism, Economics and Legal Theory, 8 Journal of Legal Studies, 103–140 (1979)

[14] Adelheid Puttler, Karl M. Meessen, Marc Bungenberg, ECONOMIC LAW AS AN ECONOMIC GOOD: ITS RULE FUNCTION AND ITS TOOL FUNCTION IN THE COMPETITION SYSTEM (Munich, 2009); J. Trachman, Regulatory Competition and Regulatory Jurisdiction, 2000 Journal of International Economic Law 331

[15] Thus, for example, some contributions have addressed market definition techniques in competition and trade law: see Petros Mavrodis and Thomas Cottier (eds.) REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW: PAST, PRESENT AND FUTURE, (University of Michigan Press, Ann Harbour 2000); Nicolas F. Diebold, Assessing Competition in International Economic Law: A Comparison of 'Market Definition' and 'Comparability', 32 Legal Issues of Economic Integration, (2011), 115. Others have explored the concept of fair prices in antitrust and international taxation Nicolo Zingales and Alessandro Turina, Economic Analysis and Evaluation of Fair Prices: Can Antitrust and International Taxation Learn from Each Other?, 5 (10) Comparative Research In Law And Political Economy (2009). Yet others have analyzed (and proposed for a unitary view of) fairness in competition and contract law; Pinar Akman, THE CONCEPT OF ABUSE IN EU COMPETITION LAW. LAW AND ECONOMIC APPROACHES (Oxford, Oxford University Press 2012)

[16] An exception is the leading contribution by Richard Posner to the definition of an economic approach to evidence rules: see Richard Posner, An economic approach to the law of Evidence, 51 Stanford Law Review 6 (1999). However, this analysis is confined to the law of evidence in the United States, and does not draw on comparative experience. For one such type of comparison, but not so much focused on economic analysis, see Andrew Jurs, Balancing legal process with scientific expertise: expert witness methodology in five nations and suggestions for reform of post-Daubert US reliability determinations, 95 Marquette Law Review 1329 (2012)

incorporation, namely legislation and administrative rule-making, it maintains a broad scope of enquiry being essentially concerned with *any* type of judicial or quasi-judicial determination having as outcome the incorporation of economics into law. For purpose of this work, adjudication is defined as the settlement of disputes and the sound administration of justice[17]. The narrower concept of "economic adjudication" refers, instead, to the settlement of disputes and the administration of justice in those contexts where decisions are taken on the basis of economic arguments. Such arguments need not be exclusive, for the pursuit of legitimate economic goals may well intersect with the protection of other values; however, they must be clearly separable from non-economic arguments and predominant towards the determination of the outcome in order to fall within the scope of the framework that this thesis intends to provide.

The reason why adjudication is chosen, in this particular study, lies in the belief that the function of the judiciary goes beyond that of *applyingthe law* to resolve disputes, encompassing the interpretation, rationalization and development of the law. In fact, it has been argued in the context of public law[18] as well as with regard to international courts and tribunals that such activity can be convincingly qualified as law-making.[19] Furthermore, the choice of adjudication moves from the premise that the judge's position is one of relative advantage compared to the legislator or the administration, as it is more insulated from potential bias and more apt to acquire and deploy bi-(or multi-)partisan input in order to tackle the issues at stake. The other side of the coin of this greater ability to account for and reflect different views and

[17] Endorsing this concept for international adjudication, see C. Forrester, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS; EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY (Cambridge, Cambridge University Press 2011), 253; Chester Brown, A COMMON LAW OF INTERNATIONAL ADJUDICATION, 72-78; Paola Gaeta, Inherent Powers of International Courts and Tribunals, in Lal Chand Vohra, Fausto Pocar, Yvonne Featherstone et. Al. (eds.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE (The Hague, New York, Kluwer Law International 2003), 353

[18] John A. G. Griffith, Judicial Decision-Making in Public Law (1985) Public Law 564; Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harvard Law Review 1281 (1976)

[19] See Tom Ginsburg, International Judicial Lawmaking, 45 Virginia Journal of International Law (2005). Available at SSRN:http://ssrn.com/abstract=693861; Armin Von Bogdandy & Ingo Venzke, On the Democratic Legitimation of International Judicial Lawmaking, 12 German Law Journal 1341-1370 (2011); Daniel Terris, Cesare P.R. Romano, Leigh Swigart, Louis Brandeis THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (London 2007). See more generally, A. Von Bogdandy & I. Venzke (eds.) INTERNATIONAL JUDICIAL LAWMAKING (Springer 2012); Sabino Cassese, WHEN LEGAL ORDERS COLLIDE: THE ROLE OF COURTS (Sevilla 2010); Tom Ginsburg, International Judicial Lawmaking, 45 Virginia Journal of International Law (2005). Available at SSRN:http://ssrn.com/abstract=693861.

methodologies for the incorporation of economics is, however, that the judge's activity is significantly constrained by the existence of a wide array of procedural rights for individuals, thus inevitably making stiffer the process upon which decisions are made. These rights have become known as "due process", referring to the process that a state owes to the members of a legal system which are subject to specific individual determinations[20]. It is important to recognize that, although such rights are labeled as procedural, *de facto* they impose also substantive coherence and consistency, restraining not only the methodology, but also the set of arguments which can be used as the basis for the justification of a given decision.

This two-fold nature of due process reflects the tension between the two values that are attributed to "procedural fairness" in legal scholarship: on the one hand, the adherence to the procedures that are perceived as the most adequate for the ascertainment of truth; on the other hand, the guarantee that individuals will be treated in such a way that their input will be considered towards the final decision, out of respect for their dignity[21]. As it will be argued *infra*,[22] the existence of this dignitarian rationale implies necessarily the idea of a minimum core for the cardinal principle of due process: the right to be heard. That is, the imperative to respect human dignity as a fundamental right of the individual requires the judge to allow the parties to present their case, and this requirement cannot be waived under any possible circumstances. The challenge in the economic context, then, will be to ensure respect for this principle notwithstanding the pervasive complexity of economic disputes, due to the peculiar terminology and the ambivalence of certain economic concepts. Accordingly, the objective of this thesis is to provide a structured framework within which adjudicators can confidently and efficiently settle disputes over the interpretation or application of economics, so as to respect basic procedural rights and ensure that economics-based decisions are taken on objective grounds, thereby

[20] This definition is intentionally broad so as to cover different conceptions of due process: first, it does not distinguish process owed on the basis of positive law and on the basis of principles of natural justice or general principles of law; secondly, it does not account for the distinctions in scope applicable to different jurisdictions, such as the American focus on "deprivation of life, liberty or property" or the European notion of "determination of civil rights and obligations". For an account of the meaning of "due" in the American context, see Andrew T. Hyman, The Little Word "Due", 38 Akron Law Review 1 (2005)

[21] Denis J. Galligan, Ibid., 75-78; Paul Craig, ADMINISTRATIVE LAW AND LEGITIMACY (Calendon Press 1990), p. 160 ff; Jerry Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 Boston University Law Review 885 (1981)

[22] See *infra*, para. III.1

preventing arbitrariness or abuse of power.

To fulfill these objectives, the thesis takes both a descriptive and a normative approach. The former is followed in identifying the existing rules principles in the law that must inform the process of adjudication of economic disputes, and showing how these principles apply in practice. By contrast, the latter suggests what principles could be derived from the adjudication of certain types of disputes, particularly with regard to the tools adopted for the protection of the right to be heard, and considers whether those principles can be extrapolated and applied in the broader context of economic adjudication. In particular, a normative approach is adopted in the definition of the limits of presumptive reasoning, which is described here as a necessary feature of economic adjudication that inevitably brings up challenges for the protection of the right to be heard. The two different stances – positive and normative- are not subject to a strict chronological division throughout the thesis; rather, they permeate the entire work with the intention to provide the reader with both the state of play and the prospects of improvement of the existing principles. A division is instead made between a first part containing a general characterization of the object of inquiry, including an explication of the methodology to be used throughout the work (Chapter I) and an attempted classification of presumptions (Chapter II); and a second part where the methodology is actually applied, extrapolating from the jurisprudence of international courts and tribunals a general principle of law concerning the right to be heard and substantiating what it means to apply that principle in the context of presumptive reasoning which is usually applied in economic adjudication (Chapter III). To facilitate the understanding of the complex issues of conflict between law and economics and of balancing of different public policy objectives, the third part endeavors to apply the principles to the specific context of EU antitrust enforcement, where their relevance can be perceived most vividly. This part includes a chapter describing the normative framework concerning the right to be heard in EU competition law (Chapter IV), and subsequently an illustration of some presumptions adopted by the courts in applying articles 101 and 102 TFEU (Chapter V). Finally, part four (Chapter VI) concludes with a short summary laying out the take-home lessons regarding the use or presumptive reasoning as a facilitator of economic adjudication, and suggesting the contribution of the thesis to the existing literature at the interface of “law and economics” and

"due process".

2. The problem of complexity and expertise in adjudication

In attempting to define the boundaries of presumptive reasoning in the law, one inevitably needs to face the issue of complexity. Complexity is a pervasive feature in a global, multilayered and technologically advanced society: since relationships between individuals present a variety of different features in different degree, often simultaneously, and the humankind attributes significance to such variations from a moral and sociological standpoint, it is increasingly hard to see the world we live in without accounting for an omnipresent layer of complexity. Complexity has given shape to our perceptions of the world, our values and aspirations; and quite logically, it has been incorporated into the legal system. Its most direct consequence is the high and often sophisticated level of detail that the legal norms have reached, either explicitly or by interpretation, to discipline a significant range of behaviors. Yet the great number of combinations between human relationships, behaviors and characterizations of the self is such that, notwithstanding the level of detail of the existing rules, the greatest challenge remains to assess the facts and retrace them under one of the categories identified by the norm. In fact, complexity affects both the intelligence of the relevant facts related to a given action and the applicable law. While the former is essentially an issue of gathering multiple pieces of the same puzzle, the latter refers to the subsequent challenge of verifying the criteria that will determine whether those jigsaw pieces will fit. For example, the decision by a firm to assemble its material for the final consumer in a way that maximizes its efficiency, but exposes the company to risks of liability for defective products, presupposes two sets of considerations: on the one hand, the analysis of the risks and benefits of the alternative scenarios, along with the costs associated; on the other hand, and often simultaneously, the determination of what standard of care will be applied to the facts –an analysis which is complicated by the interplay of different regimes.

In his seminal contribution on legal complexity[23], Professor Schuck lists 4 factors to determine complexity of a legal norm: density, technicality, differentiation and indeterminacy. The first

[23] Peter Schuck, "Legal complexity: Some Causes, Consequences, and Cures" 42 Duke Law Journal 1, 3 (1992)

factor refers to the intricacy of the norm, meaning the scope of the conduct regulated, the subjects involved and the specific formalities that trigger the application of the norm. The second factor refers to the difficult intelligibility of the norm in itself, that is, the amount of expertise that is necessary to understand and apply the law in light of its language or otherwise technical complexity. The third factor refers to the variety of norms that intersect in the regulatory space, and make it difficult to reach a definite conclusion on the ultimate content that will apply to the a given action. Finally, the fourth factor is related to the vagueness of the legal norm, its being open-ended, easily malleable by those who are called to apply it and thus hard to predict for the regulated subjects[24]. For our purposes, it is important to distinguish this last typology, which may be referred to as "vacuum-filling" complexity, from the second type of complexity – hereinafter more conveniently dubbed as "technical" complexity: the essential difference lies in the fact that whereas in one case even the mere understanding of the norm necessarily demands the application of specialized knowledge to solve the "puzzle" of complexity, in the other a layman would be able to grasp its basic meaning but not the exact scope of application, due to the incomplete character of the norm. And while the rule in public law is that there are subjects (usually the executive or specialized agencies) who are in a better position than others to determine how to fill that vacuum[25] , that is simply because the statute -or more broadly the legal system- confers such authority, and not necessarily on the basis of the technical expertise of those subjects. Nevertheless, it is also fair to acknowledge that the line between these two concepts if often blurred: statutes may confer the authority precisely because of the technical expertise of specialized agencies; furthermore, it might be hard to distinguish the "technically complex" aspects of the norm from those that owe their uncertainty to a deliberate abdication of political authority by the legislator in favor of the administration for the determination of the

[24] Richard Epstein would add to these four criteria a quantitative threshold, focusing on whether the norm has a pervasive application across routine social activities, as opposed to targeting only dangerous activities of people who live at the margins of society. See Richard Epstein, SIMPLE RULES FOR A COMPLEX WORLD, London (1995), 29.

[25] See *US v. Chevron*, 67 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 ERC 1049 (1984); in Europe, see the decisions of the European Court of Human Rights in Application No 8793/73, *James and Others v UK* Series A No 98, para 46; Application No. 10522/83, 11011/84, 11070/84, *Mellacher and Others v Austria* Series A No 169, para 45; Application No 20348/92, *Buckley v UK* ECHR 1996-IV, para 74; Application No 66746/01, *Connors v UK* (unreported) 27May 2004, para 82; Application Nos 46720/01, 72203/01, 72552/01, *Jahn and Others v Germany* (unreported) 30 June 2005, para 91; Application No 13378/05, *Burden v UK* (unreported) 29 April 2008, para 60; Application No 11810/03, *Maurice v France* (unreported) 6 October 2005, paras 116–117

actual content. To be clear, most legal norms present a mixed complexity, which is a combination of the four factors mentioned above in different degrees.

The reason why these different types of complexity matter for the present work is that they denote different types of expertise that are needed to overcome the hurdle. In the first and the third scenario, the problem of complexity can be easily overcome by the assistance of a competent lawyer. In the second scenario, a lawyer may not be sufficient, and resort to a specialist of the field would be advisable for a complete understanding of the norm. By contrast, in the fourth scenario there cannot be certainty over the exact application of the norm, since the discretion granted to the decision-maker is unbridled. Of course, these four are the four types of legal complexity taken to the extreme, but the bottom line is that the need for the application of specialized knowledge, i.e. the traditional notion of expertise, is compelling only where and to the extent that truly technical complexity is involved. Bearing this principle in mind, along with the different types of issues underlying legal complexity, will afford us to conduct a much more focused analysis of the role of expertise in legal adjudication.

Having clarified all the above concerning the role of complexity in the law, it is now in order to turn to what solutions have been or ought to be adopted to address it; more specifically, we must pose ourselves the question: what structural arrangements are required for, or conducive to, the proper handling of expertise?

The need for expertise in the law is not a new claim. The idea that complexity of the subject matter is better handled by resorting to experts with thorough knowledge of the issues at stake stems from a fairly logical argument which needs no introduction: suffice to say that it has been the driving force behind the creation of specialized agencies during the New Deal era in the US[26] and the modernization of EU administrative law[27], and both for conferring broad discretion on those agencies and shielding them from the potential second-guessing of the judiciary. Even beyond the domain of administrative law, it is empirically undeniable that the increasing

[26] Reuel E. Schiller, The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law, 106 Michigan Law Review 3 (2007), 399-441;

[27] The establishment of specialized EU administrative agencies began in the 1990: see G. Majone, The New European Agencies: Regulation by Information, Journal of European Public Policy, 4(2), 262-275 (1997); A. Kreher, Agencies in the European Community - A Step Towards Administrative Integration in Europe, 4(2) Journal of European Public Policy, 225-245(1997).

complexity of rules and disputes in a globally interconnected world has led to the proliferation of experts in a variety of areas. A more critical approach is to point to the fact that this "complexification" has originated a trend of legitimizing decision-making through the outsourcing to professionals endowed with the requisite expertise[28].

What is more pertinent in this context is an analysis of the role that expertise plays not so much in the legislative or administrative stage, but rather, in the process of adjudication. What is the relevance of expertise for the settlement of disputes and the pursuit of justice? At the outset, one must acknowledge that complexity in fact-finding was arguably the main reason for the creation of a number of specialized courts[29], which are supposedly better equipped to deal with the

[28] See Louis B. Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harvard Law Review (1954) 436, 472 ("[…] Expertness is not wisdom and . . . the relative ordering of values in a society-the ultimate problem of choosing between alternative courses of action - is something we do after the expert has completed his task of collecting data, describing, and, to a limited extent, predicting"); R. Stewart, The Reformation of US Administrative Law, 88 Harvard Law Review (1975), 1669–1813 ("[…]Once the function of agencies is conceptualized as adjusting competing private interests in light of their configuration in a given factual situation and the policies reflected in relevant statutes, it is not possible to legitimate agency action by either the 'transmission belt' theory of the traditional model, or the 'expertise' model of the New Deal period. The "transmission belt" fails because broad legislative directives will rarely dispose of particular cases once the relevant facts have been accurately ascertained. More frequently, the application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests. The required balancing of policies is an inherently discretionary, ultimately political procedure. Similarly, the 'economic manager' defense of administrative discretion- under which discretion was bound by an ascertainable goal, the state of the world, and an applicable technique – has been eroded by the relatively steady economic growth since World War II, which has allowed attention to be focused on the perplexing distributional questions of how the fruits of affluence are to be shared. Such choices clearly do not turn on technical issues that can safely be left to the experts"); Alyson C. Flournoy, Coping with Complexity, 27 Loyola of Los Angeles Law Review (1994), 809, 823 (" attempts to hide complexity with illusory scientific accuracy and illusory precision tend to obscure the relevant policy choices from public view"). See more generally, David Kennedy, Challenging Expert Rule: The Politics of Global Governance," 27 Sydney Journal of International Law (2005), 5-28.

[29] For example, this is the case of the special criminal tribunals for Rwanda [see UN Resolution 955(1994) of 8 November 1994, at 1: "Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, *having regard in particular to the necessity for those courts to deal with large numbers of suspects"*(emphasis added)] and Lebanon [see Resolution 1595 (2005) adopted by the Security Council on 7 April 2005, at 1: "Noting with concern the fact-finding mission's conclusion that the Lebanese investigation process suffers from serious flaws and has *neither the capacity* nor the commitment to reach a satisfactory and credible conclusion"], and according to authoritative scholars, the International Criminal Tribunal for the former Yugoslavia (see Michael P. Scharf, The Politics of Establishing an International Criminal Court, 6 Duke Journal of Comparative & International Law 167-174 (1995) (listing among the goals for the creation of the tribunal "to establish the historical record of atrocities before the guilty could reinvent the truth")). In the same vein, this spirit of overcoming complexity is contained in the Statute of the International Criminal Court, which emphasizes in its Preamble "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions", and in article 17.1 a) excludes jurisdiction for a case that "is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is* unwilling or *unable* genuinely to carry out the investigation or prosecution (emphasis added). Similarly, and even more to the point, complexity of fact-finding was the explicit driver in the creation of the General Court of the European Union, as evinced by Council Decision of 24 October

challenge. However, it has also been criticized that specialization has merely tempered and not solved the issue, which has remained latent behind the operation of the newly created judicial bodies[30]. What is in fact apparent is that simply invoking the general need to resort to expertise for the purpose of adjudicating disputes in a complex world constitutes a rather superficial comment, which in its generality carries the risk of overlooking the crux of the matter and ultimately running amiss. The problem concerns, admittedly, the handling of expertise; but what is central to the inquiry is to understand not whether, rather how such expertise should be handled in the process of adjudication.

In this respect, it is important to stress that given the different areas of law where expertise plays a pivotal role, it is not entirely clear whether, and to what extent, the actual involvement of experts at the adjudicative stage would be beneficial for specific classes of disputes. Cases where a judge is normally able to assess the merits of each party's submission without engaging experts, such as basic employment disputes, need to be distinguished from those where the mere understanding of the vocabulary begs the intervention of a reliable "translator", such as patent or articulated medical liability cases; similarly, those cases where the very assessment of the facts cannot be performed without the advice of an "insider" in the field or industry under examination, must be separated from those that can easily be handled by translating specialized information into plain language . More importantly, there may be areas where an attempt has been done to incorporate the insights of expertise at the legislative stage, and which do not leave room for expertise to be factored in through the process of adjudication. In other words, generalizations on the hypothetical desirability of expertise are both inaccurate and prejudicial to

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1988 establishing the Court of First Instance, O.J. 1988, no. L 319, p. 1 ["Whereas, *in respect of actions requiring close examination of complex facts, the establishment of a second court will improve the judicial protection of individual interests;* … it is necessary, in order to maintain the quality and effectiveness of judicial review in the Community legal order, to enable the Court to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law… *to transfer to the Court of First Instance jurisdiction to hear and determine at first instance certain classes of action or proceeding which frequently require an examination of complex facts*, that is to say actions or proceedings brought by servants of the Communities and also, in so far as the ECSC Treaty is concerned, by undertakings and associations in matters concerning levies, production, prices, restrictive agreements, decisions or practices and concentrations, and so far as the EEC Treaty is concerned, by natural or legal persons in competition matters;" (emphasis added)]

[30] See Nancy A. Combs, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS, New York (2010); Mario Siragusa, address for the celebration of 20 years of the Court of First Instance of the European Communities, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/siragusa.pdf

the understanding of the ultimate objective that the legal system strives to achieve: modulating the involvement of experts across the types of disputes, thereby maintaining the greatest possible accuracy. The dilemma is indeed that of enabling a timely settlement of disputes which does not abridge the right of the parties involved to make their case heard, not merely at a formalistic level but also with respect to the substance of the matter at issue. Albeit from a different angle, this same dilemma is faced in both private and public litigation: the degree of accuracy required to level a claim against an individual, be it the government or a private plaintiff, is a common problem to both types of litigation. Similarly, the accuracy of fact-finding is a concept which is heavily influenced by the extent to which the defendant will be afforded the opportunity to delve into the merits of the reasons adduced by the other party, even where this requires a certain level of expertise. Often, a complete and conclusive fact-finding will not be possible; therefore, the legal system needs to provide rules that determine how the adjudicator is to decide in favor of whom the balance ought to be tilted in situations of uncertainty. Conventional wisdom has it that this function of pendulum of the scale is essentially satisfied by a general principle according to which the decision in such borderline cases will be taken on the basis of whether the plaintiff provided sufficient evidence to convince the adjudicator, and in civil law systems (where there is no burden of production[31]) on the basis of which party bore the burden of persuasion. Throughout this work, some clarifications will be made on the exact scope of these principles and the way they should inform the handling of expertise, with particular regard for the role of economic expertise.

To a certain extent, tipping the scale in favor of more or less accuracy as a default rule is a "policy" decision that should be left to the legislature: legal systems are relatively free to pursue different objectives to a different degree of intensity, and face different constraints in their pursuit. For instance, a more liberal system which places greater importance on the protection of property rights may be more exacting in requiring the government to justify any interference with private property. Also, much will depend on whether the setting is one of criminal or civil enforcement, traditional public law litigation or an international dispute involving a sovereign State. Accordingly, this thesis will account for variations across these different systems and

[31] On the distinction between burden of persuasion and burden of production, see *infra*, para. II.3

different levels of protection[32]. Nonetheless, as it will be concluded by the end of the classification, some general rules can be spelled out that apply to all these different settings. Ultimately, this will allow us to define a general framework for the treatment of presumptive reasoning, which allows disputes over expertise to be resolved through the use of administrative shortcuts.

3. The difficult marriage of science and law

One of the threads of this thesis is that a specific procedure can and ought to be devised in order to deal with complexity, when the latter concerns the appreciation of economic evidence. To that end, the claim that economics is somehow different from other disciplines that interact with law needs to be explained and substantiated. Before undertaking that challenge, however, one should step back and consider what the meaning of science is.

The most complete definition of science given by the Oxford English dictionary is the following: *"A branch of study which is concerned either with a connected body of demonstrated truths or with observed facts systematically classified and more or less colligated by being brought under general laws, and which includes trustworthy methods for the discovery of new truth within its own domain*". This clarifies that science is not simply a body of knowledge nor simply a method to attain knowledge: both elements concur to give shape to its very concept, in a continuous process of mutual reinforcement. Still, the generality of the definition tells us little about how exactly a court is to distinguish between science and non-science in a dispute.

Throughout the history of the humankind, several have been the attempts by philosophers to provide a more illuminating definition. Far from going into the details of their arguments, this thesis cannot neglect to recall the tenets of the most important contributions to this literature. At the outset of this definitional exercise, the scope of the disagreement can be narrowed pointing to the fact that what remained constant across the different views is that science implies systematic

[32] see *infra*, para. II.3

knowledge, gained through the application of a so called "scientific method". The crux of the matter, therefore, is to identify what that scientific method is supposed to mean.

As early as in the early 300 B.C., Aristotle was the first philosopher to conceptualize scientific method (although he did not call it as such)[33], asserting that knowledge is attained through the use of logical inferences derived from first principles; and that these principles, in turn, cannot themselves be inferred through scientific reasoning, but can be grasped only through intuition. Like Plato, who believed that systematic knowledge of reality was to be achieved through divine contemplation of ideas, Aristotle assigned an important role to divine contemplation in the process of explaining the causes of the natural phenomena. However, differently from Plato, Aristotle believed that such process was intertwined with scientific observation. As a result he maintained that, whereas science is organized knowledge which presupposes intuition based on observation, scientific method is simply deductive reasoning based on syllogism.

During the first half of the seventeenth century, Rene Descartes rejected this view, holding that knowledge is created by the human intellect, which is something that goes beyond the mere observation, and distinguishes the natural from speculative philosophy[34]. That implies that scientific method cannot be limited to the application of syllogisms (or as he called it, "philosophical disputation")[35], and must include investigation. But what is exactly the nature of this process of investigation that goes beyond sensational experience? Decartes did not provide an exhaustive answer to this question, simply affirming that an objective inquiry is one based on reliable methods focusing on features that can be quantified[36]. An attempt to provide further content to the idea of "objectiveness" was made instead by his contemporary Francis Bacon, whose definition of scientific method centered on the idea of collection of observation without prejudice. In this context, prejudice referred to the existence of a bias, in the process of observation, towards a particular representation of reality. However, it soon became clear that

[33] In particular, in Book VI of its "Analitica Posteriora", available translated in English at http://classics.mit.edu/Aristotle/posterior.1.i.html
[34] Peter Godfrey-Smith, THEORY AND REALITY (Chicago, University of Chicago Press 2003), 20
[35] For background reading on Descartes, see John Cottingham, Dugald Murdoch, Robert Stoothoff, MEDITATIONS ON FIRST PHILOSOPHY. IN THE PHILOSOPHICAL WRITINGS OF DESCARTES (Cambridge, Cambridge University Press 1986)
[36] Ibid.

asserting that the scientific method is free from any sort of bias is fundamentally idealistic: some bias will always be embedded in the methods, language and the instruments chosen[37]. In fact, later philosophers progressively dismantled this idea: first, David Hume challenged inductive reasoning contesting the assumption that observed events would follow the same pattern as previously manifested[38]. Much later, Thomas Kuhn made explicit the underlying criticism that the interpretation of statistical results (as much as the methods and terminologies deployed) cannot be dissociated from the perception of what society thinks ought to be rejected[39]. Accordingly, objectivity should not be seen as correspondence with reality, but rather as general acceptance to experts in the field of the theory or methods relied upon to evaluate it. Kuhn also argued that science evolves by incremental progress, whereby innovative theories win the conservative resistance of "normal science" and replace conventional wisdom (the so called "scientific revolution")[40].

But perhaps the most cited philosopher on the definition of scientific method is Karl Popper. Popper's claim started from a criticism similar to Kuhn's (whom he preceded) and was equally grounded on the belief of a constant replacement of old paradigms with innovative breakthrough. Popper also believed, like Hume, that inductivism is a myth, as no theory can ever be guaranteed to be true. However, he went further in affirming that it is not the verifiability of a theory that makes it scientific, but rather, its falsifiability through observation: the existence of such criterion differentiates science from dogmatism[41]. Accordingly, scientists should specify in advance a particular occurrence, in the absence of which they would be willing to abandon the theory as unreliable. Practically speaking, Popper suggested that bias could be eliminated (or at least attenuated) by adopting certain principles in the process of observation, such as

[37] David Goodstein, How Science Works, in, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, (Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence ed., Washington 2011) 40
[38] David Hume, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (Harvard Classics Volume 37, 1910)
[39] Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Chicago, University of Chicago Press 1996)
[40] See E.D. Klemke, Robert Hollinger, A. David Kline, INTRODUCTORY READINGS IN THE PHILOSOPHY OF SCIENCE (New York, 1998), 490; I. Bernard Cohen, REVOLUTION IN SCIENCE (Cambridge, Harvard University Press, 1985)
[41] Peter Godfrey-Smith, THEORY AND REALITY (Chicago, University of Chicago Press 2003), 63-67

experimental design, transparency, and a thorough peer review process regarding both the experimental results and the conclusions drawn[42].

As a matter of fact, this latest view of science, which implicitly suggests criteria to define scientific method, has become the paradigm for the incorporation of science under US law: in 1993, in delivering its opinion in the *Daubert* case[43] about the admissibility of scientific expert testimony[44] in a case involving a claim for liability of a drug manufacturer for birth defects, the US Supreme Court cited Karl Popper among others to stress the importance of empirical testing in the validation of a scientific theories, and established a series of factors that would be of guidance for future courts called to evaluate scientific evidence. In particular, the court ruled that features such as testability, the known error rate, having undergone peer review and publication and general acceptance in the field, would control the determination of whether a given theory is reliable in itself, as well as whether it can be properly applied to the facts of the case. In practice, this translated into a two-pronged test, focusing on the acceptability of the theory in the case at hand and on the credibility of the experts[45]. However, it should be noted that the decision was followed by a great deal of variations amongst lower courts as to the scope of application of the factors and the weight to be given to each[46], and a by a general dissatisfaction with the vagueness of the ruling in distinguishing science from other types of expertise[47]. In its opinion in *Kumho Tire*[48] few years later, the Supreme Court confirmed the ambiguity of the distinction by rejecting the establishment of a normative difference between the expert who "relies on the application of

[42] Craig Pease, Deliberate bias: Conflict creates bad science, in SCIENCE FOR BUSINESS, LAW AND JOURNALISM, Vermont Law School (September 6, 2006)
[43]*Daubert v . Merrill Dow Pharmaceuticals*, 509 US 579 (1993), 592-596
[44] A ruling on admissibility of evidence can be requested by a party to a court proceeding in United States under two circumstances: first, as part of the motion to dismiss ex*Rule* 12(b)(6) of the Federal Rules of Civil Procedure (Failure to state a claim upon which relief can be granted); second, as part of a move for summary judgment, ex Rule 12 (c) of the Federal Rules of Civil Procedure (Motion for judgment on the pleading)
[45]*Daubert v . Merrill Dow Pharmaceuticals*, 509 US 579 (1993), 597
[46] Michael C. Polentz, Comment, Post-Daubert Confusion With Expert Testimony, 36 Santa Clara Law Review (1996)1187; Jennifer Laser, Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony, 30 Loyola of Los Angeles Law Review (1997)1379
[47] For an overview of the criticism, see John H Mansfield, Scientific Evidence Under Daubert, 28 Saint Mary's Law Journal 1 (1996) and the literature cited therein.
[48]*Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

scientific principles" and that who "relies on skill- or experience-based observation"[49]. This appeared to reverse the prior holding by the court in *Joiner*, where the Court declined to follow the suggestion to distinguish between validity of the scientific methodology and plausibility of conclusions[50]. But the explanation of this inconsistency may be simply that the judges refrained from delving into the specifics of the case (ie, specific application of generally accepted scientific principles), believing that it was the jury's task; accordingly, the apparent inconsistency would simply be due to a different level of abstraction at which the inquiry operates, meaning that the scrutiny over the soundness of scientific methodology is one that aims to respond the question of whether the proffered testimony is based on sufficiently specialized knowledge of the field, whereas the assessment of the plausibility of conclusions is a credibility check which inevitably requires the jury to more closely look into the facts of the case, and the potential bearing of the witness' expertise for that purpose. In any case, regardless of the reasoning behind this distinction, it is now settled that the *Daubert* criteria apply to any kind of expert testimony, as long as the expert possesses sufficiently specialized knowledge.

What is important to stress in this context is that Popper's key contribution was to provide a valid indicator for scientific character that nicely fits the dynamics of the scientific method, i.e. to work by trial and error. However, such indicator constitutes only a proxy for the scientific nature of the methodology used in order to obtain a particular finding, and suggests little about the actual soundness of the theory proffered: not only would meeting the falsifiability criterion be insufficient to determine whether a theory is ultimately true; it would also be conceivable that a theory be falsified just because of the interference of some exceptional factors, which alter the process of observation and lead one to reject the theory despite its general validity -even where it is grounded on strong empirical observation. In fact, falsifiability merely represents a hallmark for a process that is not dependent on dogmatism, and should not be taken as a criterion of validity or reliability of a theory. Other criteria that have been proposed to distinguish science

[49] In particular, this led to the exclusion from the stand of an expert who testified in a deposition that, in light of his experience and the absence of contrasting indicia, the blowout of a tire which caused an accident was due to a manufacturing defect. Ibid., at 151

[50] *General Electric v Joiner*, 522 US 136, 146 (1997). ("Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.")

from non-science are testability; predictive capacity or accuracy; consistency; simplicity; comprehensiveness; and fruitfulness (i.e., focused promoting the advancement of the field rather than on accommodating known knowledge)[51]. But even these criteria, or a combination of those, may not be dispositive on the merits of a given theory in a particular case: there always is the possibility that something goes differently from what reasonable expectations would appear to indicate, even in the presence of a very promising record. In other words, there is no absolute definition of science; accordingly, what the law can do in order to promote defensible theories is to confine reliance in the scientists' inductive process to reasonable assumptions. For this reason, a line needs to be drawn regardless of the actual merit of a theory, and what the truth is in law and science may eventually differ[52].

The effective metaphor of "marriage" has been evoked by Susan Hack to depict the relationship between two disciplines which start not only from different goals and values, but also from a wide difference in characteristics and attitudes towards closure[53]. Professor Hack very effectively summarizes the significant differences between the two "partners":

" […] there are deep tensions between the goals and values of the scientific enterprise and the culture of the law […] between the investigative character of science and the adversarial culture of our legal system; between the scientific search for general principles and the legal focus on particular cases; between the pervasive fallibilism of the sciences-its openness to revision in the light of new evidence-and the concern of the law for prompt and final resolutions; between the scientific push for innovation and the legal system's concern for precedent; between the informal, problem-oriented pragmatism of scientific investigation and the reliance of the legal system on formal rules and procedures; and between the essentially theoretical aspirations of science and the legal system's inevitable orientation to policy."

To pinpoint the most important clashes, one can refer to four antinomies: first, science seeks general and theoretical, whereas the law brings it to come to terms with the complexity of

[51] For an overview of these criteria, see Robin Feldman, THE ROLE OF SCIENCE IN LAW (New York, OUP 2009), 134-136

[52] The recognition of such divergence was also made by justice Blackmun in Daubert: see Daubert v Merrell Dow Pharms., Inc., 509 US 579, 596-597 (1993) ("important differences between the quest for truth in the courtroom and the quest for truth in the laboratory")

[53] This point is well formulated by Joseph Sanders, Science Law and the Expert Witness, 72 Law and Contemporary Problems (2009) 63, 73

practical reality in specific instances. Second, science has a more skeptical and agnostic approach towards drawing conclusions, which the law demands to be taken. Third, there is a fundamental difference in the tools used by the two communities: experiments in science, rhetoric in law[54]. Fourth, and as a consequence of all the above, there is a different level of detail the empirical basis in defining a proper course of action , as courts necessarily make decisions on the basis of selected sources of evidence, whereas scientists take into account all types of evidence[55]. But it is the second feature of science, in particular, which appears most strikingly in conflict with the social function attributed to adjudication: its tendency to continuously cast doubt on the universal truth of any given scientific conclusion inevitably leads scientists to rejecting rather than accepting (or confirming) a theory, even though as a matter of fact a definite answer cannot be given in either way. Translated in economic terms, this means that theory confirmation in science is naturally oriented towards the prevention of type II errors (i.e., false positives) and away from the prevention of the opposite type I errors (i.e., false negatives).

This "systemic doubting" attitude that is treasured by science for the reach of universal truth may be at odd with the protection of other values that the legal system aims to pursue in particular contexts: there are rules by which the legal system seeks to protect procedural propriety (e.g. rules barring the admission of evidence obtained in violation of human rights, or evidence of prior convictions of the accused), or to endorse community sentiment rather than professional expertise (e.g. requiring the verdict to be taken by juries)[56]. Or, to remain in the balancing of possible false positives and false negatives, there are areas where the procedure is structured in a way that maximizes the scope of potentially regulated conduct (and thereby the number of false positives), usually because a general message of deterrence needs to be sent to the consociates of the legal system. Furthermore, even where the concern for false positives is shared between science and law, that does not imply that the two disciplines are aligned with regard to the degree

[54] See Sander Greenland, The Need for Critical Appraisal of Expert Witnesses in Epidemology and Statistics, 39 Wake Forest Law Review 291, 293-94 (2004). However, it needs to be noted that this does not apply to all the sciences, some of them relying explicitly on rhetoric (philosophy being the most notable example)

[55] See David E. Bernstein, Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution, 93 Iowa Law Rev. 451, 475-476 (2008)

[56] See Michael Freeman, Law and Science: Science and the Law, in Michael Freeman and Helen Reece, SCIENCE IN COURT, at 4, quoting J. Sanders, From Science to Evidence: The Testimony on Causation in the Bendectin Cases, (1993) 46 Stanford Law Review 79

of certitude which is considered sufficient for the validation of a given theory: while in every field of science the criterion is based on a widely accepted concept of standard of error in hypothesis testing, in law the standard oscillates between likelihood, balance of probabilities and beyond reasonable doubt[57]. Similarly, when an expert is asked to testify on his belief, he will be instructed to adopt the view of a "reasonable person" in the industry[58], which in US law has become known as the "same intellectual rigor" standard.[59]

One may advance at this point the hypothesis of addressing the imbalance by requiring the scientist to adjust the rigor of his or her testimony on the basis of the standard of proof required by law in the case at hand, notably raising the bar for scientific inferences when it comes to criminal cases –where theories of culpability have to be proven beyond the reasonable doubt. However, this solution is practically not feasible for two reasons: first, because as it will be shown further down in this thesis[60], there is often no clear, uniform requisite standard of proof, as the objective aspect of proof is complemented by a less predictable subjective part. Second, because in those legal systems where the standard of proof appears to be more clearly and consistently applied, that standard is evaluated by a jury of laymen, whereas the examination of the expert testimony in the first place is under the purview of the judges. As a result, inconsistencies may remain between the standard applied in the first screening and the standard used to reach the final verdict, which means that either some potentially reliable evidence is lost in the process, or that the final decision is reached on the basis of evidence that should not have been admitted. Another hypothesis may be to codify a standard of rigor for expert testimony, and consequently endeavor to shape the law accordingly; however, this seems unpractical not only because of the risk of ossification intrinsic in the dynamic nature of science, but also because such standard would be different across different disciplines or even sub-disciplines[61].

[57] See *infra*, para. III. 5 d

[58] In fact, many industries have specified codes of conduct precisely to address this issue. For more details on this suggestion, see Joseph Sanders, Science, Law and the Expert Witness, 72 Law and Contemporary Problems 63, 81 (2009)

[59] See *Kumho Tire Co. Ltd. V Carmichael*, 526 US 137, 152 (1999)

[60] See *infra*, para. III 5d

[61] This point was made with regard to the double of the risk standard in Finley, Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules, 49 De Paul Law Review 335, 363-73 (1999); Thomas O McGarity, Proposal for Linking Culpability and Causation to Ensure Corporate Accountability for Toxic Torts, 26 William & Mary Environmental Law & Policy Revieew 1, 38

How can this inconsistency be solved or ameliorated? For sure, the law cannot just decline to take a stance, and leave it to the adjudicatory process to come up with the appropriate solutions. On the other hand, it must be recognized that the problem is all the more acute in those systems where an adversarial posture is adopted: besides the risk of selection bias intrinsic in the self-nominated party expert, one needs to take into account that a party's advocate will be naturally incentivized to create systematic doubt about the other party's expert opinion, even where uncontroversial. Further, the situation is aggravated by the potential undue influence over decision-makers through the use of "dirty tricks" of cross-examination[62]. Only one argument appears to be constantly made in favor of adversarialism in the evaluation of expertise, and that is that it makes assumptions explicit to the judges[63]. But then, if this is the only virtue of adversarialims with respect to expertise, wouldn't it be recommendable for a system to require the court to adopt an inquisitorial stance on expert testimony, and arrange for the assumptions to be made explicit through some other mechanism of procedure?

As a matter of fact, this is in line with what is happening in common law on both sides of the Atlantic: on one side, United Kingdom has recently introduced a number of amendments to its civil procedure which enhance the powers and the responsibilities of the Court. Since April 1999, the Court can "control the evidence by giving directions as to (a) the issues on which it requires evidence; (b) the nature of evidence which it requires to be placed before the Court. (c) the way in which evidence is to be placed before the court. Moreover, it can exclude admissible evidence and limit cross-examination[64]. With respect to expert evidence, the new rules empower judges to direct a discussion between experts for the purpose of requiring them to identify matters agreed

(2001), both cited by Andrew Jurs, Judicial Analysis of Complex & Cutting-Edge Science in the Daubert Era: Epidemiologic Risk Assessment as a Test Case for Reform Strategies, 42 Connecticut Law Review 49 (2009)

[62] see Andrew Jurs, Balancing Legal Process, *supra* at 16, 1341; Saul M. Kassin; Lorri N. Williams; Courtney L. Saunders, Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury, 14 Law & Human Behavior 373, 373-374 (1990); Valerie p Hans, Jurors Evaluation of Expert Testimony, Judging the Messenger and the Message, 28 Law & Society inquiry 441, 447-449 (2003)

[63] See David E. Bernstein, Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution, 93 Iowa Law Review 451 (2007)

[64] See Neil Andrews, A New Civil Procedure Code for England: Party-Control "Going, Going, Gone", 19 Civil Justice Quarterly 19 (2000); Access to justice : draft civil proceedings rules. Final Report by the Right Honourable the Lord Woolf, Master of the Rolls to the Lords Chancellor on the Civil Justice in England and Wales, HMSO (London, 1996)

and outstanding areas of difference, direct that evidence is to be given by a single joint expert or to appoint expert assessors to assist them in complex litigation[65]. On the other side, the *Daubert* ruling and its progeny *de facto* introduced an inquisitorial element by requiring the judges to preliminary assess the evidence through the admissibility filter, which has led to a proactive case-management by federal courts[66]. Moreover, it is worth noting that there are instruments available to US judges which afford them the opportunity to channel and cooperate with the parties' adversarial efforts to search for truth[67], such as the powers to hold pre-trial conferences ex Rule 16 of Federal Rules of Civil Procedure in order to narrow the scientific issues in the disputes (including by hearing and examining experts) and to appoint scientifically trained clerk or special masters ex Rule 53[68], or independent experts ex Rule 706. Unfortunately, these options –and especially the last one- are rarely pursued[69]. It has been suggested that the reasons for this lie in the unfamiliarity of the judges with the inquisitorial posture and in the conception of exceptionality of such an approach[70], as well as in the inability to identify the right and the more general opposition to techniques that might slow the process[71].

For these reasons, most forward-looking proposals in the field have been focusing on the streamlining of the appointment process, such as through the creation of rosters, building on the

[65] See Rules 35.12, 35.7 and 35.15. For a detailed description of the use of experts in English civil courts, see Louis Blom-Cooper (ed.), EXPERTS IN THE CIVIL COURTS (Oxford, Oxford University Press 2006)

[66] See Howard M Erichson, Mass Tort Litigation and Inquisitorial Justice, 87 Georgetown Law Journal 1983 (1999); Joseph Sanders, Science, Law and the Expert Witness, 72 Law and Contemporary Problems 63 (2009); Joseph Sanders, Scientifically Complex Cases, Trial by Jury and the Erosion of the Adversarial Process, 48 De Paul Law Review 621, 62-627 (2006).

[67] Pamela Louise Johnston, Comment, Court-Appointed Scientific Expert Witnesses: Unfettering Expertise, 2 High Technology Law Journal 249 (1998)

[68] For an account of a famous antitrust [*United States v. United Shoe Machinery Corp*., 110 F. Supp. 295 (D Mass 1953), aff'd, 347 U. S. 521 (1954)] where the court hired a clerk expert in economics specifically to deal with the economic challenges of the case, see Carl Kaysen, In Memoriam: Charles E. Wyzanski, Jr., 100 Harvard Law Review 713, 713–715 (1987)

[69] This point was made by Justice Breyer in his concurring opinion in *General Electric v Joiner*, 522 US 136 (1997)., at 149

[70] See Joe S. Cecil & Thomas E. Willging, Court- Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706, 83–88 (1993); Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995, 1015-19 (1994) Jack B. Weinstein, Individual Justice in Mass Tort Litigation 107– 110 (1995); Samuel R. Gross, Expert Evidence, 1991 Wis. L. Rev. 1113, 1187-1208

[71] Edward K. Cheng, Independent Judicial Research in the Daubert Age, 56 DUKE L.J. 1263, 1271-72 (2007). Christopher Tarver Robertson, Blind Expertise, 85 New York University Law Review 174, 200 (2010), both cited by Andrew Jurs, Balancing Legal Process, *supra* note 16, at 1355.

pattern of expert identification followed by the National Conference of Lawyers and Science, a joint committee of the American Association for the Advancement of Science and the Science and Technology Section of the American Bar Association[72]. Along that line, Andrew Jurs is arguably the most committed in recommending not only the creation of rosters and suggesting the involvement of professional association, but also the establishment and operation of a central administrative body maintained within the office of the US courts, which would set up the lists where direct appointment from the professional association would not be possible or desirable, and which would also be in charge of ensuring that the experts in all rosters demonstrate skill in their field and dedication to ethical assessment of evidence in assigned cases[73]. In either case, the proposal emphasizes the added value of the professions in validating expertise, which would ensure competence if handled with objectivity and impartiality. In another article, Jurs goes as far as proposing to confer the power for the court to appoint a Complex Litigation Science Panel, following a bi-partisan appointment process, in order to provide recommendations for cases concerning (1) a determination of essential need to the judge (2) high potential for evaluation in the future (3) determination that a single scientific consultant would not be appropriate[74]. Alternatively, he would welcome the resuscitation of the idea (very much in vogue in the 1970s and 1980s)[75] of a specialized court, so called "Court of Scientific Jurisdiction", formed by judges with some form of scientific background[76]. Both proposals are intriguing, and generally speaking should be given serious credit. Once again, however, these appear solutions which aim to temper the adversarial character of the procedure, to allow an expert to provide authoritative advice to the judge and enable the latter to take a sound decision on this basis. But arguably, if that is the

[72] Stephen Breyer, Introduction to FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1, 8 (3rd ed. 2011)
[73] Andrew Jurs, Balancing Legal Process, *supra* note 16, 1408-1409
[74] Andrew Jurs, Judicial Analysis of Complex & Cutting-Edge Science in the Daubert Era: Epidemiologic Risk Assessment as a Test Case for Reform Strategies, 42 Connecticut Law Review 49 (2009)
[75] See David L. Bazelon, Coping with Technology Through the Legal Process, 62 Cornell Law Review 817, 817–18 (1977); Troyen A. Brennan, Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation, 73 Cornell Law Review 469, 470–71 (1988); Arthur Kantrowitz, The Science Court Experiment, 17 Jurimetrics Journal 332, 332 (1977); Arthur Kantrowitz, Proposal for an Institution for Scientific Judgment, 156 SCI. 763, 763 (1967) ; William V. Luneburg & Mark A. Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation, 67 Virginia law Review 887, 888 (1981) (discussing use of "'special' juries and expert nonjury tribunals" for "complex federal civil cases"); James A. Martin, The Proposed 'Science Court,' 75 Michigan Law Review 1058, 1058 (1977); Confronting the New Challenges of Scientific Evidence, 108 Harvard Law Review 1481 (1995), 1603–05
[76] Andrew Jurs, Judicial Analysis of Complex & Cutting-Edge Science in the Daubert Era: Epidemiologic Risk Assessment as a Test Case for Reform Strategies, 42 Connecticut Law Review 49 (2009), 91-97

ultimate objective, and in line with what mentioned above regarding the pros and cons of adversarialism, the best solution which one could aspire to have in the systems of common law is moving towards an entirely inquisitorial system for the handling of expertise, having the independent expert determine the issues conclusively, and then imposing on him the obligation to parse out the assumptions relied upon, to be tested under a "normality" criterion[77]. However, it need also to be recognized that it is unlikely that reforms be approved which do not present at least some aspects of continuity with the tradition of the legal system; for this reason, it appears a stretch, at least in the short to medium term, to advocate for the adoption of a uniform procedure for common and civil law countries on the assessment of expertise. In particular, it is suggested that reforming the typically adversarial posture of common law systems would require some intermediary steps, before switching to a wholesale embracement of a system which attributes a central role to independent court-appointed experts.

The existence of a not readily reconcilable divergence between on the one hand, law and science, and on the other, common law and civil law, does not foreclose the possibility of finding common ground, or at least a way out of the conflict, by devising a uniform methodology for the incorporation of scientific expertise into law. In fact, uniformity does not presuppose identity of procedures, as long as some commonality with regard to general principles can be identified. However, as anticipated above, the focus of this work is narrower: identifying basic principles for the use of presumptive reasoning in the assessment of economic evidence. To that end, the next paragraph will point out some of the peculiarities of the science of economics.

4. The incorporation of economics into law: lost in translation? The peculiarity of economics

As pointed out, the reason why this thesis proposes a special process for the assessment of economic evidence is that there is something that differentiates economics from other disciplines. In the previous paragraph, we have seen that the scientific method is what

[77] "Normality" in such context would depend both on the advancement of expertise in the particular industry (i.e., whether a tradition of rigorous research has been developed within the field) and on the expertise of the decision-maker.

characterizes a discipline as science; however, we have also seen that attempts to specify the content of this method have failed to gain universal recognition. Possibly, the only widely accepted proposition is that science works "by trial and error", and that is should be falsifiable. And admittedly, this tells us little about how the trial and error is done in the different fields of science. In general terms, however, it can be maintained that the process consists of formulating theories and running experiments to verify the robustness of the theory.

In the context of economics[78], there are two types of testing which can be referred to for those purposes: first, the validation of a theory through selected test-cases, otherwise known as quantitative data-sets, which is what is usually required by economic journal for the publication of a theoretical paper[79]. Second, the broader and consequential testing which a theory undergoes when it is published, is exposed to the specialists of the field and becomes a potential target of the often less forgiving criticism of empirical papers. These papers test the theory using econometrics, usually in the form of regression analysis, where one variable (the "dependent" variable) is explained as a function of other variables (the "independent" variables). The object of these observations is usually an economic model, i.e. a mathematical equation that represents a simplified version of the economy or the decision-making process of an economic agent such as a consumer or a firm[80]. The ideal testing occurs through Randomized Control Trials, which is a technique used to verify the robustness of statistical analysis consisting of varying one component in the starting assumptions, and proceeding to identifying the outcomes on the data sets *ceteris paribus*. In this context, it is of utmost importance that the underlying assumptions- both of "knowables" and "unknowables"[81]- be clarified, so that subsequent research can conduct adequate testing.

[78] And similarly, in other fields where experiments can be conducted on a continuous basis; the distinction to be drawn here is *vis a vis* fields which present characteristics such as lack of data, non-linearity and impracticable experimental replication: for this type of delineation and the exceptional role of "science for the environment", see Elisa Vecchione, Science for the Environment: Need for Reconsidering Statistical Methodologies, Cornell Law Faculty Working Papers, Paper 25 (2007), 16 available at http://scholarship.law.cornell.edu/clsops_papers/25/

[79] See Paul Dudenhefer, A Guide To Writing in Economic, 30-31, available at http://econ.duke.edu/undergraduate/undergraduate-research/writing-support

[80] See Paul Dudenhefer, Ibid., 27

[81] This refers to the conceptual controversy between those who see the economist as 'the overeducated in pursuit of the unknowable' and those who, taking a more normative stance, qualify his professional goal as one of 'the appropriately educated in pursuit of the knowable'. See David Colander, The future of economics: the appropriately educated in pursuit of the knowable, 29 Cambridge Journal of Economics (2005), 927–941, citing Robert Solow,

Sometimes, however, the complexity of the model is such that, even if the assumptions are clearly spelled out, it will be difficult for a judge without training in economics to understand what ought to be the proper weight to be assigned to that particular piece of evidence. This is particularly true for statistical evidence. A recent study[82] indicated that as little as 6% of the judges interviewed really understood the concept of statistical error. In fact, one of the most common mistakes is interpreting statistical significance as equal to a real world significance[83], or standard error as scientific error. By statistical significance, economists refer to the deviation of the sampling distribution of a statistic, which is used as a measure of confidence that the null hypothesis (i.e., the hypothesis which defies the theory that is being advanced) can be rejected: if the standard error is high, it is very likely that other factors which were considered endogenous in the theory advanced are responsible for the particular results; accordingly, the variable that is being measured is not statistically significant to explain the results. It is misleading to take statistical significance as a proxy for economic significance because on the one hand, the existence of a statistical error means that there is a potential error in the process of experimentation, and not necessarily in the theory. On the other hand, the low incidence of statistical errors, and high marks on statistical significance, do not imply that the theory is true; in fact, ever since a 5% error has been attributed the conventional value of confidence threshold[84], this will simply mean that the theory holds in at least 95% of the cases. This, in turn,

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How did economics get that way and what way is it?, Daedalus, (Winter 1997). Cf. David Colander, New millennium economics, how did it get this way, and what way is it?, 14 (1) Journal of Economic Perspectives. In essence, this debate is about the proper role of inductive reasoning in economics, which is increasingly challenged by the advancements of mathematics and computational techniques.

[82] Sophia I. Gatowski, Shirley A. Dobbin, James T. Richardson, Gerald P. Ginsburg, Mara L. Merlino, Veronica Dahir, Asking the Gatekeepers: A National Survey of Judges Expert Evidence in a Post-Daubert World, 25 Law and Human Behaviour 433 (2001)

[83] For an elaborate account of how pervasive this error is, see this see Stephen Ziliak, , and Deirdre N. McCloskey, THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICES AND LIVES (Ann Arbor, University of Michigan Press 2008); Stephen Ziliak, , and Deirdre N. McCloskey, Science Is Judgment, Not Only Calculation: A Reply to Aris Spanos's Review of The Cult of Statistical Significance, 1 Erasmus Journal of Philosophy and Economics, 165-170 (2008); Tom Engsted, Statistical vs. economic significance in economics and econometrics: further comments on McCloskey and Ziliak. 16 (4) Journal of Economic Methodology, 393-408; Thomas Mayer, Ziliak and McCloskey's Criticisms of Significance Tests: An Assessment, 9(3) Ecoomic Journal Watch 256-297 (2012); Deirdre N. McCloskey and Stephen T. Ziliak, Statistical Significance in the New Tom and the Old Tom: A Reply to Thomas Mayer, 9(3) Economic Journal Watch (2012), 298-308

[84] Ronald A. Fisher, STATISTICAL METHODS FOR RESEARCH WORKERS (New York, G. E. Stechart and Co. 1941); Statistical methods and scientific induction, 17 Journal of the Royal Statistical Society (1955) 69-78.

does not take into account of the value that one may attribute to the actual precision of the estimation, i.e. of the size of the potential error. For this reason, it is often argued that the use of statistical evidence alone is problematic, particularly when it comes to criminal law, where in light of the value attributed to precision and the risk of imposing criminal sanctions to an innocent, there is a strong "default" rule constituted by the presumption of innocence. The accuracy of this statement will, of course, depend on the level of sophistication of the decision-maker; but if the results of the survey conducted in the United States are to be taken as indicative of the ability of an adjudicator to assess statistical evidence, the argument deserves serious consideration.

Another complication is that related to language: in order to bring the law in line with the economic principles, an adjudicator is often called to "translate" the economic wisdom into legal jargon. This task is challenging for two reasons: first, because the translator faces a choice between leaving the definition open, to take into account of the diversity of the economic discourse, or adopt a unique, hegemonic definition which gives credit to the dominant theory at that particular point time. In this context, it has been emphasized that the translator should avoid "authoritative and close-system definitions of economic transplants in hard legal texts", so as to limit the risk of ossification of the economic discourse.[85] However, it seems hardly possible for the "translator" to circumvent the problem that, for a workable legal definition, some economic data or consideration will be left out in order to identify a unitary and delimited field of inquiry. Second, because the same words or concepts may have a different meaning in the two disciplines –and it is indeed important for the translator to detect those variations and limit the inconsistencies. By contrast, it often occurs that lawyers show overconfidence in approaching concepts of economics which may look like more familiar concepts found in the law, yet An illustrative example made by Anne-Lise Sibony in her recent book on the economic reasoning of the judges in competition law[86] is the famous *Continental Can* case, where the European Court of Justice defined the market as one of "products that are particularly apt to satisfy a constant need and [are] only to a limited extent interchangeable with other products" ("*particulierement*

[85] For a leading contribution on this topic, see Ioannis Lianos, Lost in Translation? Towards a Theory of Economic Transplants, 62 (1)Current Legal Problems (2009) 346, 398

[86]Anne-Lise Sibony, LE JUGE ET LE RAISONMENT ECONOMIQUE EN DROIT DE LA CONCURRENCE, (Paris, L.G.D.J. Montchrestien 2008), 226-247

aptes a satisfaire des besoins constants et [seraient] peu interchangeable avec d'autres produits") [87]. While listing next to each other what appeared two alternative definitions of the same legal concept, the ECJ in fact referred to two different concepts in the economic world: in one case ("particularly apt to satisfy a constant need"), the focus is to the strong link existing between the product at issue and particular classes of consumers, whereas in the latter, the reference is to the position of the good relative to others ("to a limited extent interchangeable"). The addition of the word "constant" to the first sentence, while denoting a certain trust of consumers towards that product across time, does not capture the essence of the economic inquiry in this context, which is to assess the likely reaction of consumers to a raise in price[88]. The result is an economic translation which is dangerously deceiving over what the criteria for the definition of the relevant market are. And while the incidence of this mistranslation in practice is limited, since it was only present in the French version of the judgment and subsequent uncertainty was removed by the adoption of the English version in the European Commission's Directorate General for Competition in its Discussion paper on the Application of Article 82 of the Treaty to Exclusionary Abuses[89], it is a clear indication of how important it is that the adjudicators possess the capability not only to understand, but also to communicate the economic rationale of the decision to the next generations.

In this respect, it should be noted in favor of the European Court of Justice that *Continental Can* was one of the first cases of unilateral conduct which had ever come under the purview of that court. It is often argued, and rightly so, that the repetition of similar types of disputes can make the judge more equipped to deal with this complexity. For example, few practitioners would contend the fact that the EU General Court, having to decide a great majority of cases in competition and state aid matters, shows a more sophisticated level of economic analysis than the European Court of Justice -which is a court of last instance and where the quantitative

[87] ECJ judgment of 21 February 1973, *Continental Can v Commission*, Case 6/72, para. 32.
[88] See Anna Lise Sibony, *supra* note 86, at 228 (pointing to passages 31-35 of the judgment)
[89] Which gave rise to the Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20. Both documents are available at http://ec.europa.eu/competition/antitrust/art82/index.html

importance of the antitrust docket is diluted by cases in a variety of other areas[90]. Yet, it can still be questioned whether the dynamics of litigation can catch up with the pace of evolution in economics, particularly where the focus of the inquiry in deciding whether or not the adjudicator should hear an expert testimony is on the current paradigm, as it is the case under *Daubert*.

Given all the above, one may legitimately think that in cases where the legal assessment depends ultimately on the choice of a particular economic theory, it is necessary to staff the courts with economists, or specifically trained judges, so as to ensure that they will be able to give the appropriate weight to the evidence presented, and decide cases on the basis of an objective economic record. This view, however, does not discount the fact that a great part of economics is inherently subjective, that is, dependant on the views of who describes the economic facts to be analyzed. In fact, there is agreement that "scientific progress in economics […] is achieved mainly through common sense, elegant theories, historical perspective, and long and disciplined conversations among scholars, i.e. how persuasive we are in our discussions".[91]

In the concluding chapter of a book containing a series of critical contributions on the integrity of economics, Albert Eichner questions whether economics can be called a science[92]. He refers to a number of tests that are to be applied in science to a given theory or hypothesis before it can be accepted as true: first of all, the coherence of the conclusions with the assumptions (which was considered in itself sufficient until Hume spurred skepticism on the validity of inductions); second, the correspondence of the theory with empirical results; third, its comprehensiveness; and finally, its simplicity (which he calls "parsimony"). Eichner argues that, since the current paradigm fails all the three "empirical" tests, economics cannot be considered as science yet. Furthermore, he expresses skepticism in the immediate prospects for "scientific revolution" due to the way economists are trained and employed, which are geared towards isolation and

[90] According to the official statistics of judicial activity for the year 2011, competition and state aid accounted for 540 of the 722 cases lodged with the General Court, while the share reaches cases lodged with the European Court of Justice only reaches 158 over 667.
[91] Deirdre N. McCloskey, The Rhetoric of Economics, 21 Journal of Economic Literature (1983), 481–517
[92] Alfred S Eichner, Why Economic is not yet a science, in Alfred S Eichner (ed.),WHY ECONOMIC IS NOT YET A SCIENCE, (M.E Sharpe, New York 1983), 205-240

elimination of non-mainstream views[93]. Other scholars have complemented this view with the observation that economics' lack of strict adherence to empiricism is due to the reliance on fairly abstract, sometimes unverifiable, and largely mathematically derived conclusions about human behavior[94]".

Why does all this matter to our case? Well, the most important reason is that economics is explicitly made the criterion to determine legality; note that this is different from allowing science to be brought to court in order to corroborate the arguments on one side or another at a given time. In many areas of law, the objective is to incorporate specific economic wisdom into the law via a process of norm formation which requires the legal system only seldom to return upon it for reconsideration. In other words, once the determination for the specific case is made, the principle is embedded in the law and enters to make part of the "economic law". The situations which are presented to the courts may be different, but there are patterns which can be identified and which give rise to legitimate expectations in subsequent cases. Differently from other disciplines, the relevance of these patterns is not limited to the cases which contain elements equivalent to those that give rise to the original decision, but inform different areas of reach of the same economic law. For example, the fact that a court views a market with three competitors and high entry barriers as conducive to collusion within the assessment of concerted action, necessarily needs to be consistent with the way the same or a similar market is seen when two competitors intend to merge and bring the market from four to three or three to two. Similarly, the impact on future cases of the theories supported by a court regarding the assessment of consumer behavior, for example through the adherence to specific theories of

[93] To be clear, Eichner's criticism is not only destructive: there is, in fact, a silver lining in his argument. His claim is essentially that economics has the potential to become a science, as long as it purges itself from the assumptions which are endemic to the existing paradigm (which in the area of microeconomics, he identifies as "(1) a set of indifference curves; (2) a set of continuous isoquants based on a postulated production function for each and every good that is produced, which, when taken together, represent all the combinations of labor and other inputs which can be used to produce those goods; (3) a set of positively sloped supply curves for all the different firms and industries which comprise the enterprise sector of the economy; (4) a set of marginal physical product curves for all the inputs used in the production process, not just the labor inputs but also, even more critically, the "capital" inputs". See Eichner, Ibid, 210. He then proceeds to show the empirical evidence available against these four tenets: see Eichner, Ibid, 211-217

[94]Herbert Hovenkamp, Economic Expertise in Antitrust Cases, Chapter 44, in David L. Faigman, Michael J. Saks, Joseph Sanders, David H. Kaye (eds.), MODERN SCIENTIFIC EVIDENCE; THE LAW AND SCIENCE OF EXPERT TESTIMONY (Eagan, MN, West Group 2nd ed.2002),723.

behavioral economics, is such that a clear and convincing explanation of the theories would be necessary if it were to depart from them in a subsequent case.

The ultimate reliance on economics in search for a definite answer stands in stark contrast with the fact that economics operates in a dynamic field, where the object of observation is in continuous movement. If the ultimate criteria were to be based on full, unbiased economic analysis, that would necessarily have a deleterious impact on legal certainty, and the capability of citizens to predict the legality of their actions. In turn, this would generate a loss of credibility of the legal system as an institution, at least with regard to the areas of law directly affected by this fallacy, and a wide-spread disregard for the relevant legal provisions[95]. Entrepreneurs would likely factor the risk of being found guilty into the cost of their actions, thus being deterred in undertaking new course of business conduct or charging more for their product or services to recoup such costs. Overall, society's welfare would end up decreasing. As a result, it is unquestionable that the legal system needs to rely on certain assumptions to channel economic theory in a way that allows the rules to be both intelligible and predictable. The next step is to ask, what types of assumptions are acceptable in this context? Or more specifically, what are the limits to the incorporation into law of economic assumptions? In his "The Economic Approach to Human Behavior"[96], Gary Becker reviews three commonly used definitions of economics: (1) a narrow version, which sees it as the social science which deals with the ways in which men and societies seek to satisfy their material needs and desires"[97]; (2) a market-centric version, which sees it as "that part of social welfare that can be brought directly and indirectly into relation with the measuring rod of money"[98]; and (3) the most general version, as "the study of allocation of scarce means to satisfy competing ends". Making clear his discontent with the three versions, he rejects them and invites to focus, instead of the object of the profession, on what sets the

[95] For an account of the instrumentalist function of procedures and the law more generally, see Jeremy Bentham, PRINCIPLES OF JUDICIAL PROCEDURE (Works 1837, ii); A TREATISE ON JUDICIAL EVIDENCE (M. Dumont ed., London 1825); RATIONALE OF JUDICIAL EVIDENCE (Works, 1827, vi); Tom Tyler, WHY PEOPLE OBEY THE LAW (New Heaven, Yale University Press 1990).

[96] Gary S. Becker, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (Chicago : The University of Chicago Press, 1976), 1

[97] See Albert Rees, Economics, in William Bridgwater and Seymour Kurtz (eds.) THE COLUMBIA ENCYCLOPEDIA (Columbia University Press, NY, 3rd Ed. 1968); for a similar vocabulary, see Lionel Robbins , AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE (London, 3th ed., Macmillan, 1962) and the references to Mashall, Cannan and others.

[98] Arthur C. Pigou, THE ECONOMICS OF WELFARE (New York ,4th ed. , St. Martin's Press, 1962), 11

economic approach apart from other scientific approaches. He finds the answer to this quest in identifying a method which relies at least on three assumptions: utility maximizing behavior, market equilibrium and stable preferences. Strikingly, however, more recent articles have referred with equal conviction but different conclusions as the "holy trinity" assumptions to rationality, greed and equilibrium[99]. Which of these competing stories is more credible and up to date?

This discussion is but a reflection of the fact that there is no such thing as a "unique credo" in economics; rather, there are several schools of thought which differ not only with respect to the normative conclusions on whether the government should take a certain course of action, but also more fundamentally in the way they see the market and the interactions of its participants. True, there are certain conventions which allow the different schools of thought to communicate to one another; however, such conventions constitute only a thin layer of the basis upon which their arguments are developed. The extent and modalities of disagreement have been subject of continuous debate: in their respective essays entitled "Why economists disagree", both Fritz Malchup[100] and Milton Friedman[101] emphasized the importance of a great deal of agreement in the profession, specifically regarding the basic models and theories: they pointed out that what economists tend to differ on is the process of interpretation of empirical data. Some years later, Lester Thurow replicated with its own "Why economists disagree?", going as far as saying that the disagreements are about noneconomic aspects of economic problems[102].

Without getting into the details of this particular debate, the point can be synthesized maintaining that disagreement exists because economics is largely comprised of a set of models[103], which in turn are determined by the problem to be addressed, the variables included and the relationship

[99] David Colander, The future of economics: the appropriately educated in pursuit of the knowable, 29 Cambridge Journal of Economics (2005), 927, 931
[100] Fritz Machlup, 1 Proceedings of the American Philosophical Society Vol. 109 (1965), 1-7
[101] Milton Friedman, Why Economist disagree, in DOLLARS AND DEFICITS: LIVING WITH AMERICA'S ECONOMIC PROBLEMS (Englewood Cliffs, NJ; Prentice Hall, 1968)
[102] Lester Thurow WHY ECONOMIST DISAGREE?, Dissent 29 (Spring 1982), 176, 176
[103] See Warren J. Samuels, The Methodology of Economics and the Case for Policy Diffidence and Restraint, in David L. Prychitko, WHY ECONOMISTS DISAGREE: AN INTRODUCTION TO THE ALTERNATIVE SCHOOLS OF THOUGHT (Albany 1998), 345, 347.

which is assumed to exist among endogenous variables[104]. In other words, models are malleable tools which can be shaped to satisfy different needs, and sometimes, to achieve different results. Even the frequently used concepts of "capital", "unemployment", "market", etc. can mean many different things, and unless clarified at the outset, might lead to misunderstanding. All this stands as an illustration of the fact that economic evidence can be the result of manipulation, and accordingly, the best way to prevent it is to require economists to disclose the assumptions underlying their models and terminology. Similarly, economists should be clear about distinguishing positive statements arising out of mere observation and normative claims which are not supported by empirical analysis, and are thus inherently subjective. Unfortunately, as mentioned above, the rigor characterizing the attempts to falsify one's own theory tends to be less exacting than that applied by peers with the aim to control for counterfactuals or alternative explanations of an observed event. Moreover, precisely because models are created by oneself and because an article gets published in an economic journal only if one demonstrates that he rejects the null hypothesis, or there is strong evidence that the null hypothesis is likely to be false[105], it is natural that models will be structured in such a way that is conducive to that ultimate finding, possibly to the detriment of the search for a more objective truth. Perhaps the clearest example is that an economist may fetch a data-set that suits its purpose by restricting it to a smaller sample, eliminating groups or classes of cases which rendered results that are prejudicial to his case. From this perspective, in order to monitor closely the objectivity of results it would be necessary for a judge, an independent expert or a special advisor to the court to require an economist to share not only the assumptions and the data of the sample, but also the data concerning any other experiment or analysis done that is relevant to the case at hand. Otherwise, the risk of falling victim of the "confirmatory bias" trap is simply too difficult to estimate. Consider also that the risk is augmented by the fact that expert communities, when

[104] Ibid.
[105] Bradford De Long and Kevin Lang, Are All Economic Hypotheses False?, 100 (6) Journal of Political Economy, Centennial Issue (1992), 1257-1272. See also Stephen Ziliak, and Deirdre N. McCloskey. THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICES AND LIVES (Ann Arbor, University of Michigan Press 2008), Tom Siegfried, Odds Are, It's Wrong: Science fails to face the shortcomings of statistics, 177 (7) Science News 26–29 (March 2010).

trying to convey their message to a broader audience, normally prefer erring on the side of "false certainty" rather than that of "false uncertainty"[106].

Note that this corresponds to the tendency of the law to seek and provide closure in its reference to principles of other disciplines: expecting –and indeed, assuming- that one definitive answer can be given to any particular issue that is of concern for that discipline, and installing the principle in the legal system through the interpretation of a norm. This tendency to closure is often not only manifest in the structure of the rule, but is also reflected in the structure of legal process which has been embraced to deal with this type of adjudication. Take for example the case of the US legal system, briefly touched upon *supra*: we have seen that the judge is given the power to evaluate the strength of the scientific evidence, although summarily, at the beginning of the whole process, when the arguments of the actor are presented. This is in contrast with the model of civil law, where the parties are typically given the opportunity to respond to each other before the first comparison in court, with the result that not only their arguments are refined, but also the evidence can be integrated and cumulated on each side, and the judge left with the task of mastering the whole file at a later stage. At this point the judge, not having had the opportunity to screen out unreliable evidence, is usually bound to review a more significant body of material. It is often stated that this kind of system is more prone to the ascertainment of truth, also in light of the considerably greater powers of inquiry that he enjoys. Letting aside the issue of volume of the case-file, which inevitably may affect the length of the proceedings, the question is whether the believers in the superiority of this kind of system can really confidently assert that it performs better in terms of objectivity of results. If, as stated above, economics is often an exercise in rhetoric, what does a greater inquisitorial stance add to the confrontation between two different interpretations of the same facts? Obviously, formulating this question is oversimplifying the values and the mechanics intrinsic in the operation of civil law courts, but it serves the purpose of illustrating the dynamics of incorporation and clarifying the extent to which a legal process can be more or less geared towards objectivization: if , regardless of the procedure that is followed, there is a high risk of missing -or misunderstanding- the truth

[106] See Christine Willmore, Codes of Practice: Communicating Between Science and the Law, in SCIENCE IN COURT, 37, 40

concerning the "proper" application of a given principle, why ever allow it to develop longer? In other words, why not allow the procedure to be shorter and seek closure as soon as possible?

A similar question can be posed along the same lines confining the inquiry to the use of admissibility rules in common law: why would it be better to screen out evidence through the admissibility filter, rather than regulating the use that can be made of it? This question relates to why it should be up to judges, instead of juries, to act as "gate-keepers". Traditionally, it is believed that juries are simply not capable to deal with scientific evidence.[107] Notwithstanding the general commitment of the legal system to having citizen participation in legal decision-making as a tool for democracy, the problem of complexity has spurred discussions regarding the abolition of jury trial in complex cases[108]. It has also been suggested that this choice can be at least partially explained on accountability grounds, but more fundamentally, by the fact that judges are repeat players and therefore would develop expertise through the *Daubert* inquiry[109]. However, the very same *Daubert* opinion seemed to indicate skepticism towards the idea of greater relative capabilities of the judiciary[110], and a recent study suggests that judges perform worse than the college-educated jurors in analyzing scientific evidence[111]. Similarly, Gary Wells suggests that both judges and juries do not perform well with statistical evidence[112], a finding which is backed up by the results of the National Research Council in 1989[113]. In line with these findings, the English system is very weak in its admissibility control on expertise, its benchmark being one of helpfulness in terms of relevance and the balance between prejudicial effect and

[107] Richard Lempert, Experts, Stories and Information, 87 Northwestern University Law Review 1169, 1173 (1993); John W. Osborne, Note, Judicial/Technical Assessment of Novel Scientific Evidence, 1990 University of Illinois Law Review 497, 530-31 (1990).
[108] See James S. Campbell, Current Understanding of the Seventh Amendment: Jury Trials in Modern Complex Litigation, 66 Washington University Law Quarterly 63 (1988); see also Richard Lempert, Civil Juries and Complex Cases: Taking Stock After Twelve Years, in Verdict: Assessing the Civil Jury System 181 (Robert E. Litan ed., 1993);
[109] Erica Beecher-Monas, EVALUATING SCIENTIFIC EVIDENCE. AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS (Cambridge University Press 2006), 15-16
[110] See Ronald J. Allen, Expertise and the Daubert Decision, 84 Journal of Criminal Law & Criminology 1157, 1159-62, 1174-75 (1994)
[111] Valerie P. Hans, Judges, Juries and Scientific Evidence, 16 Journal of Law and Policy 19, 19-20 (2007)
[112] Gary L Wells, Naked Statistical Evidence of Liability: is subjective Probability Enough? 62 J Personality & Social Psychology 739 (1992)
[113]Stephen E. Fienberg (ed.), EVOLVING ROLE OF STATISTICAL ASSESSMENT AS EVIDENCE IN THE COURTS (New York, Springer 1989), 72

probative value[114]; similar is the situation in Australia and New Zealand, the former having no explicit requirement of scrutiny over expertise other than the balancing of probative value against unfair prejudice[115], and the latter simply being focused on an unspecified minimum threshold of reliability[116]. By contrast, Canada is on the other end of the common law, placing importance on other factors as well, such as the verifiability of the data in court and the availability of other experts to evaluate it.[117] The result is that, while the Canadian system in restricting the scope of the legal process on verifiable evidence risks missing important pieces of the puzzle, English rules of procedure do not seem to adequately ensure that courts will refrain from judging cases on the basis of "junk science"[118].

One alternative to this dichotomy is to give judges some guidance from the profession or the field on the type of expertise to be accepted and evaluated: an argument of this type is advanced by Willmore, proposing to adopt codes of practices as a guide to "selective juridification of expertise" obtained through joint effort of the expert communities and the broader society, rather than exclusively imposed top-down[119], which enhances the possibility of voicing less mainstream view. Setting some reasonable presumption in favor of reliable expertise, such codes would

[114] Even in the delicate area of criminal evidence, there is little inquiry into the reliability of the science or techniques chosen by the expert (besides the threshold question of possession of the appropriate qualifications): see Erica Beecher-Monas, EVALUATING SCIENTIFIC EVIDENCE. AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS (Cambridge University Press 2006), 10, citing Mike Redmayne, EXPERT EVIDENCE AND CRIMINAL JUSTICE (Oxford University Press, Oxford 2001), 95. The standard of reliability is admittedly not high also in UK criminal law, where expert evidence is admissible if: (1) it concerns a subject exceeding the ordinary knowledge and experience of whoever must decide the case; and (2) it concerns a subject in a field of knowledge which is sufficiently well organised and recognised to be considered a reliable source of knowledge, a field of which the expert in question has special knowledge that could assist the court in its task. See *R v Bonython* (1984, 38 SASR 45-47). Cf. The Law Commission, The Admissibility of expert evidence in criminal proceedings in England and Wales – a new approach to the determination of evidentiary reliability- a consultation paper (Consultation paper No. 190), 19-22 (criticizing the inadequacy of the safeguards for the purpose of allowing the jury to "separate the [reliable] wheat from the [unreliable] "chaff").

[115] See Sections 135 and 137 of the Evidence Act, Austl.C. Acts. No. 2 (1995).

[116] See R. *v Calder*, No. 154/94, t (N.Z.H.C., April 12, 1995).

[117] See Christine Willmore, Codes of Practice: Communicating Between Science and the Law, in SCIENCE IN COURT, 37, 43-44, citing I. Frekelton, Contemporary Contempt: When Plight Makes Right, The Forensic Abuse Syndrome (1994) 18 Criminal Law Journal 29; *R v Beland* (1987) 36 CCC (3d) 481, 43 DLR (4th) 641; *R V Johnston* (1992) 69 CCC (3d) 395; *R v Mohan* (1994) 89 CCC (3d) 402, 29 CR (4th) 243, (1994) 2 SCR 9

[118] A UK Court of Appeal even went as far as rejecting the idea of having been attributed a "gatekeeper" function: see *R. v. Luttrell* [2004] EWCA Crim 1344. See also Christophe Champod and Joëlle Vuille, Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms, 9 (1) International Commentary on Evidence, Article 1, (2011), 41

[119] Ibid., at 47

allow breaking "the chain of mutual reinforcement between the authority of law and expertise"[120]. Not so much hard and fast criteria that create irrefutable presumptions, otherwise known as "bright line rules", which resolve uncertainty at potential expense of equity. Rather, a set of indicative criteria, developed by professionals with authority in the field, that leaves the possibility for the challenging party to overcome an adverse classification of admissible expertise by producing evidence to a sufficient degree, which will be context-dependent. It is precisely in favor of presumptions of such type that this thesis intends to advocate.

5. The nature and limits of adjudication: towards a unified theory of procedural rights

At this point, we have come to a crucial discovery. As a matter of fact, we have demonstrated that given the complexities that a legal system must face, particularly in the context of economic law, it is necessary for the system to provide "shortcuts" for closure to which an adjudicator can conveniently resort. The consequent challenge is: how to design a framework in a way that allows the system to meet the objective of closure but still retain respect for the parties' right to be heard? Obviously, the answer depends on what we define as right to be heard, which is the subject of the following chapter. But even prior to this definition, important limitations derive from the type of disputes with which the system entrusts adjudicators.

In one of the most cited law review articles of all times[121], Lon Fuller describes adjudication as a form of social ordering concerning decision of claims of rights based on the possibility for the parties involved to present proofs and reasoned arguments[122]. According to Fuller, that distinguishes this form of social ordering from organization by reciprocity, such as contract, in that it involves a third entity, which is expected to be impartial in hearing all the arguments submitted, and to fulfill its promise it must hold to a higher standard of rationality[123]. But most importantly, this characterization of adjudication as a form of social ordering presupposes the recognition of its limits: adjudication will not be appropriate, and alternative forms of social

[120] As depicted by Gunther Teubner, Altera Pars Audiatur: Law in the Collision of Discourses, in Richard Rawlings (ed.), LAW, SOCIETY AND ECONOMY (London, Oxford University Press 1997), 149-156
[121] See Fred R. Shapiro, The Most-Cited Law Review Articles of All Time, 110 Michigan Law Review (2012) 1483
[122] Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harvard. Law Review 353 (1978).
[123] Ibid., at 367

ordering will be preferable, in situations where the "effectiveness of human association would be destroyed if it were to be organized about formally defined 'rights' and 'wrongs'"[124].
The gist of Fuller's detailed account is that there are certain types of situations, where the value of proofs and reasoned argument loses meaning: simply because it is difficult, if not impossible, to check the reliability of the opposing argumentative instruments. For clarification, he points to those activities that are hardly "amenable to science", such as judging whether a painting was made by a certain author simply based on the stroke, or those determination that are simply too complex for the trier of facts to come to grip with, either because of intrinsic complexity (in a broad sense) of the subject matter or because of its sheer technicality.

Now, at first it should be noted that Fuller's reference to the concept of science is, according to Popperian criteria, an implicit suggestion that proof and reasoned arguments must be falsifiable, and are typically subject to testing in adjudication. More fundamentally, however it is hard to miss that Fuller was already talking about the problem of complexity which we introduced above. The problem, which arguably affects adjudication even more forcefully today, is the one of complexity in its various forms: density, technicality, differentiation and indeterminacy. The suggestion, is, in essence, that disputes concerning something complex, where a certain level of *not directly verifiable* expertise is required, should be solved through other types of social ordering. In short, Fuller was claiming that an adjudicator should be presented only with verifiable statements, so as to ensure rationality and rectitude of decision.

While there is no need to immediately take issue with such an extreme normative claim, it is easy to see that in actuality, this ideal situation is rarely met. As stressed above, this is particularly the case in the field of economics, where much of the proffered proof is not verifiable[125] and contestable for the assumptions that it relies upon. If those assumptions are not spelled out in the submission of economic evidence, they will hardly be unraveled by an adjudicator who lacks the expertise to critically assess the models or theories relied upon.

[124] Ibid., at 371
[125] See Herbert Hovenkamp, 'Economic Expertise in Antitrust Cases', Chapter 44, in in David L. Faigman, Michael J. Saks, Joseph Sanders, David H. Kaye (ed.), MODERN SCIENTIFIC EVIDENCE; THE LAW AND SCIENCE OF EXPERT TESTIMONY (2nd ed.,West Group, 2002), at 723.

Should we then leave all economic expertise out of adjudication simply because of this peculiarity of the economic discipline? The right answer is neither a straight yes nor a clear no. Completely relinquishing the idea of solving the dispute through adjudication is the right answer if, and only if, search for truth and rectitude of decision is the sole goal that the legal system intends to pursue through this type of social ordering: in economic terms, only if the legal system sees adjudication as an activity aimed at minimizing error costs. However, as anticipated above in paragraph 1[126], it is clear that this is not the only objective pursued through adjudication, for the law typically includes a number of provisions that are aimed to protect other values.
Additionally, this problem must be efficiently addressable through one of the alternative forms of social ordering alluded to by Fuller (namely, contracts and deliberative democracy), or else the abdication of decision-making in such context would amount to an outright denial of justice. Under this perspective, too, the argument appears weak in that it would hardly seem a recommendable solution to leave to the market the regulation of economic expertise, or to crystallize the rules of the game through deliberative democracy. In the first scenario, the biggest risk would be the skewed notion of expertise derived from the process, due to the prominent role played by more wealthy and powerful corporations; this would reinforce the strength of the current paradigm and make it virtually impossible for the process to validate scientific breakthrough. Under the second scenario, by contrast the biggest risk would be the inability of the system to keep the pace of dynamism of science, due to the bureaucratic and administrative cost to be incurred for the amendment of the relevant rules in light of the new scientific paradigm.

However, Fuller's proposition has inherent merits if not taken literally. Following the underlying argument that adjudication is not the proper form of social ordering and combining it with the suggestions made above that the legal system seeks closure in its intersection with economics, one can make an analogy of "not proper form of social ordering" with "closure" to infer that the legal system ought to provide closure in those circumstances where decision-making is simply too complex. Once again, this confirms the view taken above that commended the use of presumptions as short-cut to provide closure. However, the question of whether and to what

[126] See *supra*, para. 1

extent adjudication is the proper form of ordering remains for those cases where a party is in the condition to produce sufficient evidence to the contrary, so as to challenge the presumption. It is clear that, by providing simply rebuttable presumptions, the system does not solve the issue of complexity in at least certain types of cases. The natural temptation would be to ask "But then, why not creating conclusive presumptions, so as to do away with the complexity concern?

It is at this point that the broader notion of justice comes into play. In paragraph 1 we defined adjudication as "the settlement of disputes and the sound administration of justice", which tells nothing regarding the level of accuracy of the dispute settling. Thus, the objective of adjudication depends on the concrete meaning attributed to "justice", which directly informs how disputes ought to be settled. Although in conventional parlance justice may refer to an ideal which has no second-best alternative, in everyday's practice it is accepted that this ideal takes different shapes in different situations, in consideration of a variety of factors, and its results are to be discounted by the possibility of decision errors on either side. In fact, errors are bound to occur simply because of the human nature of adjudicators. However, one needs to put the error into context to understand the extent to which the system is really striving to achieve accuracy.

Obviously, when we are trying to tackle the problem of complexity, we are concerned with efficiency. It is technically possible to conceive that any complex problem be solved with the greatest possible accuracy, for example providing the adjudicator with an extremely competent and abundant numbers of advisors which master the subject matter; or allowing the appointment of *ad hoc* panels of experts to evaluate the conflicting expert testimonies; or conducting extensive interrogations and using all possible efforts for a complete and robust fact-finding. All these measures are undoubtedly beneficial from an accuracy standpoint; however, they come at a cost –the expenditure of resources and time. In doing this hypothetical trade-off, some choices are intrinsically more efficient than others, in the sense that the gains accrued in terms of accuracy well compensate the additional expenditure. But just how much resources the system is willing to sacrifice to obtain an additional hypothetical unit of accuracy, will depend on three types of considerations: first, the importance of getting it right in the particular case; second, the probability that the additional expenditure will be sufficient to get it right; third, the type of policy the legal system aims to achieve with the resolution of a particular kind of controversy.

Thus, the overall assessment will not depend simply on a trade-off between accuracy and administrability, as it is often put in the law and economics literature[127]: the applicable policy aim is also relevant to the determination, so much that it can in fact override those concerns. This third factor is of particular importance for our framework as it calls for a different type of assessment depending on the dispute at issue. In that regard, we shall refer to the framework suggested in an article authored by Miriam Damaska[128]which distinguishes three types of disputes: (1) adjudication with a strong law-making component (2) traditional civil lawsuits; and (3) criminal process. The article identifies a distinctive policy objective having priority over accuracy in each of these different frameworks, respectively (1) giving parties the opportunity to be heard or otherwise participate in the litigation; (2) ensuring neutrality; and (3) protecting the individual from abuse of power by the public authority.

While these are the values protected in the particular fields examined, the broader claim that can be made is that they all can be related to a particular theory of justice, that is, procedural justice. In fact, the reason for the rigidity of particular safeguards in the legal system that ensure the respect of those principles is not that those principles are (as they were) shorthand for rational decision-making, but rather, that the system treasures the respect of the established procedures. The rationale for adhering to a theory of procedural justice is sound not only from a moral standpoint[129], but also from a purely utilitarian perspective. As Judge Posner stated in one of his early writings[130]:

"[…] when the issue of justice is studied seriously and when the many pseudo-justice issues are eliminated, it will turn out that society is in fact willing to pay a certain price in reduced efficiency for policies (e.g., forbidding racial and religious discrimination) that advance notions of justice, but that society does so to preserve intact the social fabric-to forestall rebellion and other forms of upheaval[…] I am suggesting, in short, that we will eventually develop a utilitarian theory of justice."

[127] See for example to that effect, within the area of EU competition law: Eugène Buttigieg, SAFEGUARDING THE CONSUMER INTEREST: A COMPARATIVE ANALYSIS OF US ANTITRUST AND EC COMPETITION LAW (Kluwer Law International, The Netherlands 2009), p. 40-46; Erik Østerud, pp. 19-20; Andreas Scordamaglia-Tousis, EU CARTEL ENFORCEMENT: RECONCILING EFFECTIVE PUBLIC ENFORCEMENT WITH FUNDAMENTAL RIGHTS, Doctoral Thesis submitted at the European University Institute (Florence, March 2012), on file with the author, pp. 11-15

[128] Mirjan R. Damaska, Truth in Adjudication, 49 Hastings Law Journal 289 (1998)

[129] Tom Tyler, WHY PEOPLE OBEY THE LAW (New Heaven, Yale University Press 1990)

[130] Richard Posner, Observation, the Economic Approach to Law, 53 Texas Law Review 757 (1975), 778

For our purposes, we need not enter the discussion of the motives driving the system to adhere to this particular theory of justice. By contrast, what is important to stress is that the concept of procedural justice is an intrinsic part of adjudication. The implications of procedural justice for the notion of due process, and the limits to the use of presumptions in economic law, are significant: most fundamentally, the priority of procedural justice over substantive justice means that there will be process rights of absolute nature, i.e. that cannot be subordinated or conditioned to any other policy or objective that the state might want to pursue. What remains to be seen, is what exactly those minimum process rights are. This thesis addresses the question with regard to the most fundamental "due process" right, the right to be heard. It is under that perspective that the limits of presumptions will be tested.

6. Methodology: identifying GPLs concerning procedural rights in the jurisprudence of international courts and tribunals

A few words over the methodology followed to articulate the arguments in this thesis are in order. As described above, the first aim of the thesis is to demonstrate that there is a certain minimum content for the right to be heard, which is absolute in nature and therefore prevails over any other competing consideration. Yet how can this argument be applied with equal force to systems which are in some fundamental aspects different, and accordingly, provide for different process rights? The answer to this question lies in the nature of general principles of law, which will be described below. It is argued that general principles of law constitute in fact the source of obligation for the states to recognize such minimum process rights.

Article 38 (1) of the Statute of the International Court of Justice enlists the following sources of international law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

General principles of law invoked and applied in international law can be divided in five types[131]: 1) the principles of municipal law recognized by civilized nations. 2) General principles of law derived from the specific nature of the international community. 3) Principles intrinsic to the idea of law and basic to all legal systems. 4) Principles valid through all kinds of societies in relationships of hierarchy and coordination. 5) Principles of justice founded on the very nature of man as a rational and social being.

The classification doesn't tell us, however, which of the 5 categories is the best venue for our search of the right to be heard. Obviously, the right to be heard is not a feature that is peculiar to international adjudication, being constantly invoked and applied in multiple contexts at the national level. Accordingly, we can exclude category n. 2; all the other categories, however, seem a good fit for the principle. Through logic, it would also appear possible to reduce these remaining categories further, to the category of general principles found in municipal law, the category of general principles derived from the existence of law as an institution, and the category of principles that are so fundamental to be attached to the very idea of human being: this simply because the existence of relationships of hierarchy and coordination presupposes the existence of law and can therefore be merged with (3).

Some further confusion may be had also by contrasting the specific area of international criminal law, where the International Criminal Tribunal for the former Yugoslavia distinguished between three kinds of general principles:

"Any time the Statute does not regulate a specific matter, and the Report of the Secretary General does not prove to be of any assistant in the interpretation of the Stattye, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftpersons intended

[131] Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE, (M. Nijhoff Publishers, The Hague 1991), 50-55

the statute to be based on international law, with the consequence that any possible lacunae must be filled by having recourse to that body of law[132]."

The reason why the Tribunal retreated from a unitary conception of general principles of law is understandable, in light of the different approaches taken by the ICJ on the subject of general principles. However, one may wonder if the Tribunal in its definition of the third type has meant to open the door to the importation of general principles which are not shared by the international community, albeit compliant with the basic requirements of international justice. If this is the case, would this possibility of experimentation apply only to criminal law, or other disputes as well? And if not, why? Antonio Cassese, who was the Presiding Judge of the Trial Chamber who made the distinction, clarified that general principles of international law include principles specific to criminal law, such as the principles of legality and specificity, the presumption of innocence, the principle of equality of arms[133]. He argued that those principles are derived from the national sphere and embedded into the international legal order.

But to better understand the meaning of "general principles of law recognized by civil nation" referred to by letter c, the best way to start is to look at the history behind the drafting of the provision. In February 1920, the Council of the League of Nations decided to establish a special committee and assign to it the responsibility of making proposals for the organization of the Permanent Court of International Justice. The Committee, which was made up of jurists from different countries and different backgrounds, discussed extensively the opportunity of conferring to the Court the power to interpret not only treaties and customary international law but also "rules of international law as recognized by the legal conscience of civilized nations", which was seen by the Chairman Baron Descamps –who had put the proposal on the table- as a reference to "the conception of justice and injustice, deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations". This open-textured formulation was allegedly a compromise between the continental tradition, who wanted to prevent any possibility of *nonliquet* by the Court and therefore to expand the sources from which it could draw inspiration, and the

[132] *Prosecutor v Kupreskic et al*., Judgment, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, para. 591
[133] Antonio Cassese, INTERNATIONAL LAW (Oxford, Oxford University Press: 2001)., 31

common-law familiarity with a narrow concept of equity –in essence, equivalent to "objective justice"[134][135]. Yet even this compromise was not successful, since three delegates[136]fiercely opposed the idea that the Court could decide on the basis of new rules, which did not reflect the direct will of the States. The breakthrough at that point was obtained by the English delegate, Lord Phillimore, who proposed the inclusion of "recognized by civilized nation" as a limitation to the potential broadness of the concept of general principles, in order to ensure that the Court would not simply impose the application of laws that were not accepted or perceived as such by the international community.

The proposal was unanimously welcomed, and the requirement of recognition has been there ever since. Nonetheless, it should be noted that this particular element has been rarely mentioned by the Permanent Court of International Justice or the International Court of Justice[137]. As a matter of fact, there seems to be a judicial practice according to which recognition of the judges deciding the case will be sufficient, since those judges are representative of the membership of the United Nation, and all UN members are presumed to be civilized nations[138]. However, the relative permissiveness demonstrated by the ICJ concerning the adjective "civilized" cannot be said to apply to the broader aspect of "nations": in fact, plurality of recognition is still a requirement of fundamental importance, and although it does not mean that all nations- even those part of the UN- must agree, there seems to be a need for at least recognition by the great majority of the interested states [139].

[134] Permanent Court of International Justice Advisory Committee of Jurists, Procés-Verbaux of theProceedings of the Committee (1920) 293-297

[135] See Margaret J White, 'Equity - A general principle of law recognised by civilised nations*?* 4(1) Queensland University of Technology Law Journal 103 (2004)

[136] Elihu Root (USA), Lord Walter Phillimore (UK) and Arturo Ricci-Busatti (Italy)

[137] See Fabian Raimondo, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS, (The Hague, Martinus Nijhoff 2008), 51-52, noting however few exceptions: see *Right of Passage of Indian Territory*, Merits Judgment, ICJ Reports 1960, 43-44; *Anglo-Iranian Oil Co. Preliminary Objection*, Merits Judgment, Dissenting Opinion of Judge Levi Carneiro, ICJ Reports 1952, 161; *Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, Separate Opinion of Judge Lauterpacht, ICJ Reports 1955, 104-105

[138] Max Sorensen, MANUAL OF PUBLIC INTERNATIONAL LAW 146 (New York, Macmillan, 1968)

[139] See Judge Lachs' dissenting opinion in *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101
229 (Feb. 20) , citing *Fisheries*, Judgment, I.C.J. Reports 1951, 128; see also Judge Tanaka's dissenting opinion in the *South West Africa Cases* (*Ethiopia v. S. Afr.*; *Liberia v. S. Afr*.), 1966 I.C.J. 4, 299 (July 18) (1966)

What is certain is that the court, in order to identify a general principle of law, needs to engage in significant research. In fact, the judge will either need to resort to the comparative law method, looking at municipal systems, or refer to the existing jurisprudence of International courts and tribunals. While the latter method is quite self-explanatory, there is discussion regarding the scope of the exercise of the former: first, what types of legal systems should be used as a subject of inquiry? Secondly, what type of norms may the court use, in order to extrapolate general principles of law?

On the first question, the answer cannot be found in the jurisprudence of international courts and tribunals. Unfortunately, the International Court of Justice has not been revealing in that respect, since its judgments mostly come out with a judgment which does not give precise details on the process that has been followed to reach that answer. This applies especially to the first stage of the inquiry, i.e. the extrapolation of the principles from one or more municipal systems of reference. For example, the Court has not specifically addressed the complexity of the process of abstraction that it is required to engage in if it is to transpose a principle to the international context -a process that has been described as self-destructive, for it risks depriving a principle of its content[140]. Nor more prolific references can be found in the second part of the inquiry, i.e. the confrontation of different legal systems on the matter which the principle is supposed to regulate. As pointed out above, it is legitimate to think that some extent of comparison occurs simply in light of the diversified composition of the ICJ. But the paucity of references in this area is not simply a sign of the tendency of the court to refrain from binding itself in further judgment on this particularly sensitive and complex dynamic: it is also due to the fact that, on most occasions, the Court has chosen the second avenue: referring to the jurisprudence of international courts and (mostly arbitral) tribunals[141]. This includes self-references, as it is often done by the ICTY[142].

[140] Prosper Weil, ECRITS DE DROIT INTERNATIONAL: THEORIE GENERALE DU DROIT INTERNATIONAL: DU DROIT DES ESPACES: DROIT DES INVESTISSEMENTS PRIVES INTERENATIONAUX(Paris, Presses Universitaires France, 2000), 155

[141] Fabian Raimondo, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS, (The Hague, Martinus Nijhoff 2008), at 57-58

[142] Ibid., 174

This position was defended by judge Cassese in a dissenting opinion, where he insisted on repeating the idea that " legal constructs and terms of art upheld in national law should not be automatically applied at the international level[143]", and gave three reasons to support his view : while two of these are only applicable to international criminal law (essentially distinguishing it from its traditional, national counterpart), the third one is more important for our purposes. In fact, stating that international courts and tribunals, before resorting to national law, should investigate all the means available at the international level, he implicitly suggested that the practice of the ICJ to refer to the jurisprudence of international courts and tribunals instead of engaging in comparative law research is not only sound, but also required.

Since national adjudication can account on higher numbers of disputes and therefore quicker development of general principles and judicial doctrines, the argument may be advanced that using it merely as a secondary source for the identification of general principles does not allow to unlock their full potential. In particular, they would not be able to properly fulfill the function of gap-filling that Bin Cheng has called the third function of general principles[144] and that Bassiouni arguably envisaged in the three tasks of developing new norms of conventional and customary international law, modifying conventional and customary international rules and being an additional source beyond those[145]. However, there seems to be one powerful counterargument to this: given the level of widespread adoption that is required following the comparative law method, it is not to be taken for granted that developments across a variety of municipal system will take place before the adoption of the very same principles in the international sphere. For instance, this is precisely what happened in international human rights protection, which gave rise to a number of treaties and subsequently to a general practice by most States part of the international community- most of which can today be said to have surged to the level of custom[146].

[143] See *Prosecutor v Erdemovic*, Judgment, Separate and Dissenting Opinion of Judge Antonio Cassese, Case No. IT-96-22-A, App. Ch. 7 October 1997, par. 2-3

[144] The other two being to generate more specific rules as expression of the principles, and to guide the judiciary in the interpretation and the application of existing rules of law. See Bin Cheng, Ibid., 390

[145] Mahmoud Cherif Bassiouni, A Functional Approach to "General Principles of Law", 11 Michigan Journal of International Law (1989-1990) 775

[146] See Anthony D'Amato, Human Rights as Part of Customary International Law: A Plea for Change of Paradigms, 25 Georgetown International & Comparative Law Journal 47 (1995/96); Brian D. Lepard, CUSTOMARY

Therefore, the methodology that is followed throughout this thesis to support the assertion of a minimum core of the right to be heard as a general principle of law will be to draw on the international (as opposed to national) practice, in particular, the jurisprudence of international courts and tribunals. Along this line (i.e., favoring an international approach to general principles), reference can be made also to the *obiter dictum* of the Appeals Chamber of the ICTY in the *Blaskic* case, where it was stated:

"[..] international courts do not necessarily possess, *vis a vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion or misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive feature of criminal courts.[147]"

Admittedly, endorsing this position is not only a matter of principle, but also of convenience: the alternative methodology, the comparative law technique, would need to look into systems that are reference for a legal tradition, such as the common or civil law-but arguably also as well as the Chtonic, Talmudic, Islamic law tradition[148]-, or a geographical representation[149]. In practice, whenever judges found themselves in the position of having to resort to it, they have used their legal systems of origin, those whose jurisprudence was accessible to them and especially in criminal law, those of the country where the facts occurred[150]. Only very rarely have they looked however beyond the civil and common law, referring to "other legal systems"[151] or the "Marxist legal systems"[152]. This past trend may be in conflict with the fact that the ICTY has recently

INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS (Cambridge, Cambridge University Press 2010)

[147] *Prosecutor v Blaskic*, Judgment of the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No/ IT 95-14-AR108 bis., App. Ch., 29 October 1997, para. 40

[148] Patrick Glenn, LEGAL TRADITIONS OF THE WORLD (Oxford, Oxford University Press, 2nd ed. 2004)

[149] Fabian Raimondo, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS, (The Hague, Martinus Nijhoff 2008), 55

[150] Ibid., 181

[151] *Prosecutor v Tadić*, Opinion and Judgment, Joint Separate Opinion of Jude Mc Donald and Judge Vohrah,Case No. IT-94-1-T, T. Ch. II, 7 May 1997, para. 538

[152] Lorenzo Gradoni, "REGIME FAILURE" NEL DIRITTO INTERNAZIONALE (Padova, CEDAM *2009),* 17

insisted that it would be necessary to show that "the major legal systems of the world take the same approach"[153].

On the second question raised, concerning the type of norms that can be used within a legal system to derive "general principles of law", the main issue is whether, considering the required abstraction and adaptation, general principles can also be found in private law provisions.
The jurisprudence shows that there has been at least some reliance on private law, for example in the extrapolation of a principle concerning the defense of "unclean hands"[154]. But the greater insights come from the scholarly work of Hersch Lauterpacht, former member of the International Court of Justice. He defined "General Principles" as:

"[T]hose principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character... a comparison, generalization and synthesis of rules of law in its various branches-private and public, constitutional, administrative, and procedural-- common to various systems of national law[155]".

Lauterpacht believed that, in light of the abstract and incomplete character of norms, the interpretation of judges has a key role in protecting the rule of law by ensuring its application in specific cases. He thought that completeness could be achieved by reference to national legal systems, which could be "mined by the international lawyer for arguments by way of analogy"[156]. A field which he saw particularly fertile to analogy was the principles of natural justice developed in domestic courts in disputes between private individuals : according to Lauterpacht, this was a consequence of the coincidence of the notion of natural justice in municipal and international law, due to the fact that the States are made of individual themselves.

[153] *Prosecutor v Tadić*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, para. 225
[154] *Case concerning the Factory at Chorzów* (Germany v Poland) 31; *German Interests in Polish Upper Silesi* (Germany v Poland.); *Gabcčkovo-Nagymaros Case* (Hungary/Slovakia), para. 110
[155] Elihu Lauterpacht (ed. 1970) INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 69, 74 (Cambridge University Press: Cambridge, 1970)
[156] Hugh Thirlway, International and municipal legal reasoning, in HAGUE LECTURES 273, at 274-5 (though neglecting Lauterpacht's mature position); cited in Amanda Perreau-Saussine, Lauterpacht and Vattel on the Sources of International Law: The Place of Private Law Analogies and General Principles, in Vincent Chetail and Peter Haggenmacher, VATTEL'S INTERNATIONAL LAW FROM A XXIST CENTURY PERSPECTIVE/ LE DROIT INTERNATIONALE DE VATTEL VU DU XXIE SIÈCLE (Dordrecht, NL, Martinus Nijholf 2011), 267

It seems hard to believe that Lauterpacht's view has not had at least some influence on the future development of general principles of law; an example can be found in the dissenting opinion of Judge Tanaka in the *South West Africa cases*, where he opined that article 38 (1) (c) is the basis for the recognition of natural law and that such was the case for the principle of protection of human rights, which deserve protection everywhere as they pertain to individuals[157]. A few years later, Schachter brought some clarity to the idea of natural justice in international law by distinguishing two aspects: one refers to the minimal standards of decency and respect for the individual human being, that are largely spelled out in the human rights instruments; the other one refers to the concept of equity, which includes such elements as fairness, reciprocity and consideration of the particular circumstances of a case[158].

This is precisely the interpretation of natural justice, and accordingly of general principles of law, that we will rely upon in the course of this thesis: the main idea being that the right to be heard owes its status of general principle to both the respect for the individual being and the notion of consideration of the particular circumstances of a case, which is embedded in the very idea of justice. This thesis aims to adopt the approach followed by the ICJ in looking at the jurisprudence of international courts and tribunals, and accordingly, will try to demonstrate the existence of such considerations in the existing jurisprudence.

Note, however, that one needs to keep in mind that doing analogies between public and private law requires the jurist to apply a great deal of caution in the importation. In fact, the sensitiveness of this process is likely to be considerably more than in the case of public law, primarily because of the absence of a sovereign subject in the private law context. A vivid illustration of the necessary adaptation that such principles would have to undergo was put forward by Judge Mc Nair in the Advisory Opinion on the International Status of South Africa[159]:

"International law has recruited and continues to recruit many of its rules and institutions from private systems of law... The way in which international law borrows from the source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules… In my opinion the true view

[157] *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 276 (July 18)
[158] Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE, (M. Nijhoff Publishers, The Hague 1991), 50-55
[159] *Advisory Opinion on the on the International Status of South Africa*, 11 July 1950 (Mc Nair concurring)

of the duty of international tribunals in this matter is to regard any features of terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions".

Judge Mc Nair's concluding suggestion points to a crucial issue for our endeavor: private law sources should only be used, at best, as an indication of policy and principle, and cannot be aptly compared with sources of public law nature from which one hopes to derive a common general principle. This does not mean that private law could not be seen as a source of inspiration, for example concerning the type of challenges and directions that should be followed by our quest for principles. However, the added value of such guidance is considerably outweighed by the enormous complexity that a survey of the entire jurisprudence on private litigation would imply.
For this reason, chapter III will confine the analysis of the jurisprudence of international courts and tribunals to three different areas of public law adjudication, namely (1) administrative and civil ("non-criminal") adjudication; (2) inter-state adjudication; and (3) criminal adjudication.

7. Application of the theory to competition law

This conclusive paragraph merely intends to clarify the reason why competition law has been chosen as a particular case-study, what the relevant rules are that will be looked at for the purpose of applying the framework identified, and the extent to which the same dynamics can be observed in other areas of economic law.
By competition law, reference is made to that branch of law that is concerned with the maintenance of the competitive process by prohibiting the prevention, distortion or restriction of competition in the marketplace. Jurisdictions tend to differ on the exact meaning of the concept of "competition", as well as of what amounts to a "restriction". However, the core principle is that the core aim of this branch of law is to prevent the exploitation of private market power to the detriment of the competitive process, and thereby ultimately of consumers.

In our analysis, an attempt will be made to apply the concept of minimum standard of due process, more specifically of the right to be heard, to an area of law which states as sole objective the protection of the market process. It will be shown that the right to be heard must be applicable in this context even in case of absence of specific statutory provisions, because the

right to be heard is the essence of adjudication and is intrinsic to the idea of equal opportunities of market participants. The main challenge in this context is, how to reconcile the fundamental importance of this right with the focus of the competition rules on economic objectives? In fact, the basic model of industrial organization is unconcerned with non-economic goals: the standard benchmark for the assessment of the legality of a certain behavior is identified with consumer welfare, seen from a purely economic perspective. Under this model of competition, non-economic values can enter the analysis only as a supererogatory element, i.e. to the extent that they are deemed to have a specific effect on the competitive process[160]. In most jurisdictions, however, a different model is followed which allows non-economic values to be equally taken into account in the general welfare analysis: for example, one of the factors that according to South African merger control rules would justify an otherwise anti-competitive concentration is whether the proposed operation would lead to the creation of jobs[161]. Similarly, goals of Australian competition policy include achieving a level playing field for small medium enterprises (SMEs) and promoting consumer choice[162]. Presumably, then, in the scenario where such values are relevant the competition authority will have to balance them with the economic effects of the conduct or transaction under scrutiny. Thus, the difficulty to attach a measure to these non-economic values is the first problem with this general idea of balancing, which has been extensively discussed elsewhere[163]. In this context, however, the focus will be on a different kind of balancing, that intrinsic in the strive between the fulfillment of economic objectives and the respect for the right to be heard.

a. The "constitutional" role of competition law in economic law

[160] For example, a famous decision by the European Commission has found that the agreement pursuant to which producers washing machines were committing to stop the production of first-generation machines could be exempted by the prohibition of article 101 TFEU explaining that the second-generation, energy-efficient machines would benefit consumers in the long run. See Commission decision of 24 January 1999 relating to a proceeding under Art. 81 EC and 53 of the EEA Agreement (Case IV.F.1/36.718.CECED), 2000/475/EC, OJ 26.7.2000 L 187/47 CECED.

[161] See Wentzel Bowens, Nkonzo Hlatshwayo & Martin Versfeld, South Africa – Merger Control, International Comparative Legal Guide Series, available at http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=40&chapters_id=1008

[162] See the International Competition Network's Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

[163] Christopher Townley, ARTICLE 81 AND PUBLIC POLICY, (Oxford, Oxford University Press 2009); Christopher Townley, Which goals count in article 101 TFEU? Public policy and its discontents, 9 European Competition Law Review n. 9 (2011) 441, at 446- 447. See also, more generally, Tony Prosser, Competition Law and Public Services: From Single Market to Citizenship Rights?, European Public Law vol. 4 n. 11 (2005) p. 543.

As a preliminary note, it is important to stress that it is not a coincidence that we have turned to this area of law for an analysis of the role of presumptive reasoning, and more generally, to represent the challenges to the right to be heard in economic law. For clarification, economic law is used here to refer to all those laws and regulations that regulate the "oughts" and " "ought nots" in the behavior of market participants; in other words, all those rules that are perceived as a potential restraint to economic freedom.

First of all, it is fair to say that this is the field where the legal rules have come closest to economic theory and principles. This is in part explained by the fact that regulating market behavior is a particularly sensitive policy area, which normally requires a showing of a specific market failure. Differently from sector-specific regulators, which are instituted and empowered precisely to deal with particular markets, and whose mandates are periodically updated to keep up with the new challenges they are forced to face, competition authorities have a broad and continuous mandate to operate across a span of different sectors, subjects and means of enforcement. The rules they have at their disposal, both as to the procedures they must follow and the rules that they seek to enforce are less contingent as they need to be applied in a variety of different contexts. By consequence, it is natural that the substantive goals of the law are drafted in a broader, more open-textured fashion. At the same time, however, the danger of producing a distorted outcome as a result of such a broad mandate warrants the utmost caution in the powers granted to the enforcers of those rules, suggesting the introduction of a set of limits as to how much those abstract and open-ended norms can be stretched. Moving from the idea that the best way to monitor the functioning of an inherently complex and dynamic institution as the market process is to empower a self-reporting mechanism, most competition laws have introduced a private enforcement system, which complements the resource-constrained operations of the competition watchdogs[164]. For this reason, it is clear that a traditional administrative solution -exerting constraints on the discretion enjoyed by the public authority-

[164] For an emphasis on the crucial importance of private actions under an effectiveness perspective, see e.g. Judgment of the ECJ of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR 1 ("*The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*").

will not be sufficient in this context. The only way to prevent a distortion of the rules to obtain skewed results needs to be through guidance to the interpretation of those rules[165]. Not only, that, but it is also important that such guidance allows to interpret the rules in a way that is adherent to, and consistent with, the ideology and the economic rules of the market. Were it not the case, competition rules would become an instrument to legitimize otherwise hardly justifiable governmental intervention, and allow inefficient undertakings to call for such intervention to disrupt the operations of more efficient business competitors, thus defeating the very purpose of this law.

Secondly, it is important to note that the existence of a relatively transparent competition law in line with sound economic principles is not only important for the good of its own: it also has a pivotal role in the enactment and enforcement of other economic laws. In fact, competition and other economic laws form part of a unique of law that is aimed to address market failures. Peter Behrenes suggested that such failures can be captured by the three concepts of informational asymmetries, externalities, and public goods[166]. While it is not necessary in this context to enter the details of the different types of market failures and whether they can all fit under those three categories, the significance of the argument of unification to our discussion is that a commonalty across the different branches of economic law can be said to exist in that they all intend to ensure the proper functioning of the market. In this sense, competition law is not only a complement, but more fundamentally a pre-condition to the effectiveness of other economic laws, for the simple reason that where competition is limited, it might not be sufficient to address the market with one clinical intervention, since firms with market power will be able to exploit their position in other lines of commerce or other parameters of the market. To clarify, it might not be sufficient to regulate the contractual provisions that a consumer may be forced to enter upon in a

[165] The issuance of guidelines and other soft-law instruments has occurred on a continuous and consistent basis in most of the competition law systems around the world; more importantly, it sends a signal of democratization and accountability in the enterprise of market regulation. It is not surprising that the proliferation of soft-law instruments is increasingly a feature in those countries that move from a state-dominated market economy to a society with more distributed powers: see Nicolo Zingales, Antimonopoly Law and Good Governance of Markets: On The Right Track?, in Paolo Farah (ed.), CHINA AND THE GOOD GOVERNANCE OF THE MARKETS IN LIGHT OF ECONOMIC DEVELOPMENT (Forthcoming, Ashgate 2013)

[166]Peter Behrens, Economic Law Between Harmonization and Competition: the Law and Economics Approach,in Karl M. Meessen, Marc Bungenberg & Adelheid Puttler, ECONOMIC LAW AS AN ECONOMIC GOOD: ITS RULE FUNCTION AND ITS TOOL FUNCTION IN THE COMPETITION OF SYSTEM 46-47, (Wissenschaftliche Verlagsgesellscha, Munich 2009).

particular market (for instance, a no-return policy for running shoes), if the seller has the power to raise the price in absence of such provisions and yet attract the same number of customers (in which case, the consumer protection law is depriving consumers of the possibility to pay a lower price); or if it can direct the distributors to adopt the same policy in its place; or finally, if it can turn to complementary products or services which it sells (for example, providing a free entry to a running race the weekend after the purchase) to obtain the same effect.

Clearly, the economic soundness of both competition law and the other block of economic laws will directly impact the efficiency of each other, establishing the basis for the operation of both a virtuous and a vicious circle. Conversely, a competition law that picks winners and losers will inevitably lead to a skewed outcome also in the context of the other economic laws. However, the influence does not necessarily run in the other direction: problems that are not addressed through specific branches of economic law may still be reviewed under competition law. As a result, it is apparent that competition law plays a more prominent role in the approaching of the law towards economics. Competition law is even likely to be more effective to address the same conducts which are the object of regulation if they are carried out by multi-market companies, preventing those undertakings from getting around the specific technicalities of one regulation through private arrangements -the only limitation for competition enforcers being one of capacity. In fact, competition law is typically not interested by formalities and will look at the overall conduct of the undertaking.

To sum up, competition law touches on the most fundamental nerves of the market economy, and its proximity to sound economics is a precondition for the functioning of any other economic law. For these reasons, it is suggested that competition law should be regarded as the "Constitution" within the framework of "economic law"[167].

b. Scope of the analysis: EU antitrust enforcement vs. merger control

[167]For a similar approach (but different conclusions), see Andy C. M. Chen, Market Paradigm for Understanding Economic Law as an Autonomous Discipline, Paper presented at the 2012 SIEL Biannual Conference, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088324

One important limitation applies to our analysis. This limitation is not conceptual -and therefore does not affect the definition of economic law-, but simply a methodological one due to inconsistencies within competition law which would complicate the enterprise, and perhaps weaken the ultimate message of this thesis. For this purpose, it is important to distinguish two different areas of competition law: antitrust enforcement and merger control proceedings.
While the former is an area where competition law is applied *ex-post facto*, i.e. once the conduct by the private business operator has already taken place, the reverse is true for merger control proceedings in most jurisdictions: instead of having the authority monitor the market to detect potential violations of the law, it is required for the business operator to obtain official authorization before undertaking an acquisition of another entity. Quite logically, this mandatory authorization system applies only to entities which have certain significance for the future of the market, typically measured in terms of combined market share threshold. The analysis performed once the threshold is triggered is substantially similar to the analysis conducted in the context of antitrust enforcement, in the sense that it will be necessary for the authorities to define the market in detail and assess any potential competition concern. However, there are also a couple of important differences between the nature of proceeding that originates at this stage and the traditional antitrust enforcement proceedings.

First, the fact that merging parties lay out themselves the basic information which will be used (together with that of any complaints received and from any market inquiry) to reach the decision, and that there is usually a continuous dialogue between them and the authorities even prior to the filing of the notification marking the beginning of the official investigation, suggest that there are different avenues for participation in this context than there are in the case of antitrust enforcement -where the authorities may be investigating for years before the subjects of investigations are made aware of it.

Secondly, and most importantly, the objective of merger proceedings is to determine whether the proposed acquisition will have a potential adverse impact on the competitive process: this means that the authority will carry out a prospective assessment, where the past behavior of the undertakings is only relevant as an *indicium* of the likelihood that such conduct will be repeated.

In this context, where the effects are to materialize yet and can be only estimated, the assessment of the competition authority is necessarily less strictly linked to empirical data, as the predictive part of the assessment will depend on which of the alternative scenarios the authority believes to be most likely to materialize. By contrast, in the context of antitrust enforcement the data concerning the effects of the conduct is already available; in this case, the competition authority will either decide simply on the basis of the identification of a conduct which falls in the box of "object" infringement, or else it will have to weigh pro- and anti-competitive effects of that conduct. It is clear that the right to be heard fulfills a different function in these two contexts: in mergers, where the Commission is essentially making a policy decision, the right to be heard is simply a right to participate in the procedure; in other words, there is no obligation for the Commission to give full credit to the "story" or hypothesis presented by the merging parties, nor is it guaranteed that it will do so[168]. By contrast, in antitrust enforcement proceedings the nature of the discretion is merely technical, because linked to the legal and economic assessment of existing facts; and although the authority is granted a certain leeway in the interpretation of those facts under a "reasonableness" standard, it will have the obligation to provide succinct motivations as to why it believes that a given interpretation is more credible than another.

Ultimately, the main difference as to evidentiary requirements between merger and antitrust proceedings resembles an important distinction in US administrative law between administrative rulemaking[169] and individual adjudication[170]: while the former can be based on a rather succinct notice not necessarily rebutting the arguments put forward by the interested parties, the latter will require a more detailed explanation. For that purpose, only in exceptional cases should a reviewing court be satisfied with that circumstantial evidence which, along with inductions, is a constituent element of presumptive reasoning.

[168] For example, the European Court of Justice held in *Tetra Laval* II that the Community Courts "must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations". See Case C-12/03 P, *Commission v. Tetra Laval* (``*Tetra Laval II*''), judgment of 15 February 2005 [2005] ECR I-987

[169] See U.S. Administrative Procedure Act, Section 553 (speaking about "concise general statement" after consideration of the relevant matter presented in response to a notice)

[170] See U.S. Administrative Procedure Act, Section 554 (speaking about "sound discretion" in the issuance of an order to terminate the controversy or remove the uncertainty)

II. Presumptions, inferences and burden-shifting devices

1. The role of presumptions in law: definition and preliminary remarks

In 1844, William Mawdesley Best published what constituted the first modern and complete treatise on the law of presumptive evidence[171]. The title-page of his treatise had imprinted the words of caution of a past authority in the field:

"*Materia quam aggressuri sumus valde utilis est, et quotidiana in practica; sed confuse, inextricabilis fere.*".
[Alciatus, TRACTATUS DE PRAESUMPTIONIBUS, ParI I, II].

Similarly, Edmund Morgan, a leading evidence scholar in the United States in the former part of the last century, once famously stated:

"[…] every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair"[172].

It would be preposterous to deny that the situation of confusion regarding the proper use and the meaning of the word "presumption" has essentially persisted throughout history, and can be observed today in considerable magnitude not only in the United States[173] but also at the international level[174]. But in order to put forth the argument in response to Morgan and explain why the repetition of the operation so much frowned upon [defining and classifying presumptions] would be warranted at this time, and why it is believed that it can yield positive results, a methodological premise is required. As the attentive reader will have noted, this thesis –with this chapter being no exception- contains several references to US jurisprudence, and even

[171] William M. Best, A TREATISE ON PRESUMPTIONS OF LAW AND FACT, WITH THE THEORY AND RULES OF CIRCUMSTANTIAL PROOF IN CRIMINAL CASES (London,MCDowall 1844)
[172] Edmund M. Morgan, Presumptions, 12 Washington Law Review 255 (1937).
[173] See G. Michael Fenner, Presumptions: 350 Years of Confusion and it has come to this, 25 Creighton Law Review 383 (1991-1992). For a picture of the persisting problems with presumptions in US federal rules of evidence, see Kaitlin Niccum, Ethics and Presumptions: Lying to Burst the Bubble, 25 Georgetown Journal of Legal Ethics 715 (2012)
[174] For an account of the confusion with the notion of presumptions in WTO adjudication, see Michelle Grando, EVIDENCE, PROOF AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford, Oxford University Press, 2010).

more so, to US legal scholarship. The reason for this choice is dictated by the observation that differently from the Roman-Germanic tradition, detailed and rigid rules of evidence abound in the common law. This implies that common law judges enjoy less freedom when it comes to the admissibility and the weighing of evidence, including on the formulation of logical associations between facts, which is precisely what occurs with presumptions. In fact, a presumption in its simplest form is a connection between the establishment of a fact A and the existence of another fact, B, which the fact-finder will consider established upon the establishment of A unless the presumption is rebutted. Given the greater strictures of the common law on the formulation and the weight of presumptions and the pervasiveness of rules of evidence in the American system, including as opposed to the English, and Australian common law systems[175], it is natural that a significant body of scholarship derives from that particular context. In the following chapter, an attempt will be made to dispel the confusion reigning in the world of presumptions, providing suggestions regarding their proper scope and their role in economic law. Eventually, the chapter will conclude with the establishment of a framework according to which presumptions should be evaluated, and potentially set aside, by a reviewing court. To render the framework fully operational, however, it will be necessary to have a more precise definition of the content of the right to be heard, which will be the object of chapter 3.

The general definition of presumption provided above in terms of "fact A" and "fact B" can be used as a starting point, but for a full-rounded understanding of the concept, it is appropriate to look into its historical roots. Essential to its rise has been the more general idea of "presumptive proof", which was defined simply as the proof used in all cases of *probable reasoning*.
In Part I of its treatise, Best cited John Locke to refer to his distinction of two faculties "conversant about truth and falsehood": knowledge -characterized by certainty; and judgment – characterized by intuition and demonstration. According to Locke:

"[…] knowledge is limited to the perception of relations between ideas, and the perception of actual real existences without the mind, corresponding to ideas within it. Under the former are comprised all mathematical and other

[175] See *supra*, para. I.4

similar truths; while to the second belong our perceptions of the existence of the universe or any of the creatures that it contains."[176]

This second type of perception - intuitive knowledge- constitutes the first step in the process of forming "judgment", and is exercised "when the agreement or disagreement of any two ideas results from an immediate comparison of the ideas themselves"; while the further step in this process, the demonstration, occurs when the mind:

"[…] unable to bring two ideas together so as to ascertain their agreement or disagreement, attains that object by comparing each with one or more intervening ideas, from the agreement or disagreement of which the original ones […] establishes their agreement or disagreement with each other. The intervening ideas thus employed are called *proofs*, and the process employed in their application, *reasoning*".[177]

Locke observed also that, in the great majority of cases, humans are not able to attain demonstrative knowledge, and as a result, need to resort to probability, deducted from conformity or repugnancy of a given fact or proposition to our (or someone else's) general knowledge, observation and experience[178]. Best concludes from Locke's reasoning that men need to be able to rely on presumptive proof, which therefore can be defined to be "*where, in the absence of or until actual certainty of the truth or falsehood of any proposition or fact can be obtained, an inference affirmative or disaffirmative of that truth or falsehood is drawn by a process of probable reasoning*"[179].

This probabilistic notion of presumptions can indeed be found in the history of the legal culture where they seem to have been originated, i.e. Roman law:

"In obscuris inspici solet quot verisimilius est, aut quot plerumque fieri solet"[180]

"Presumptio est argumentum, quod ex eo quot plerumque fit colligitur rem ita se habere"[181]

[176] John Locke, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Oxford, Oxford University Press , 1979), Book 4, chapter 1, section 7
[177] Ibid., Book 4, Chapter 2, section 2
[178] Ibid.
[179] William M. Best, , A TREATISE ON PRESUMPTIONS OF LAW AND FACT, WITH THE THEORY AND RULES OF CIRCUMSTANTIAL PROOF IN CRIMINAL CASES (London, MCDowall 1844) , 4.
[180] CORPUS IURIS IUSTINIANEI, I, 114, D. De Reg Jur. L. XVII, III

"Ex eo quo plerumque fit ducuntur praesumptione […]Praesumimus ea quae vera esse arbitramur ducti probabilibus argumentis"[182]

However, the picture is more nuanced. While that was undoubtedly the original conception of presumptions, several scholars started recognizing that increasingly, presumptions were resorted to not simply to spare to the decision-maker the need to prove relatively uncontroversial facts, but rather to facilitate the pursuit of certain policies: this is apparent, for example, from the existence of a presumption of death after 7 years of absence[183] or of legitimate filiation during marriage[184]. Best identified the existence of such category as early as in 1844, followed by Thayer in 1898[185] who was arguably the first commentator voicing the concern of a "dilution" of the term "presumption" stressing that "*the numberless propositions figuring in our cases under the name of presumptions, are quite too heterogeneous and non-comparable in kind, and quite too loosely conceived of and expressed, to be used or reasoned about without much circumspection*"[186].

Geny took on that challenge and formally separated presumptions "*sensu strictu*" and presumption "*sensu largo*" to contrast the policy-oriented presumptions from the rationale contained in those old Latin rules[187]. Similarly, Dabin differentiated between "presumption-evidence" and "presumption-concept"[188] following the same line of reasoning; and Laughlin more recently demonstrated the generalization of the term by meticulously analyzing the uses of the term presumptions by jurisprudence and doctrine and identifying 8 different connotations: 1) As indicating a general disposition of courts; 2) As an authoritative reasoning principle; 3) As a

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[181] Robert J.Pothier, PANDECTAE JUSTINIANAE IN NOVUM ORDINEM DIGESTAE, (Paris 1818), ad tit. *De Prob. Et Praes*, Book II, sect. IV, "*de verbis significatione, v. praesumption*"

[182] Iacobus Cuiacius, OPERA. RECITATIONES SOLEMNES (Venice, 1758) ad. Tit. "*De probationibus et praesumptionibus*"

[183] John D. Lawson, THE LAW OF PRESUMPTIVE EVIDENCE, INCLUDING PRESUMPTIONS BOTH OF LAW AND OF FACT, AND THE BURDEN OF PROOF IN BOTH CIVIL AND CRIMINAL CASES, REDUCED TO RULES (San Francisco, Bancroft-Whitney co., 1886)

[184] Ibid., at 108

[185] James B. Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (Boston, Little Brown & C. 1898)

[186] Ibid., at 351

[187] François Geny, SCIENCE ET TECNIQUE EN DROIT PRIVE' POSITIF, (Société du Recueil Sirey, Paris 1913), t. III, p. 61

[188] Jean Dabin, LA TECNIQUE ET L'ELABORATION DU DROIT POSITIF SPECIALMENTE EN DROIT PRIVE', (Bruxelles-Paris,Bruylant; Recueil Sirey, 1935)

rule of substantive law; 4) As a rule fixing the burden of persuasion; 5), As a permissible inference; 6) As a statutory prima facie case; 7) As a proposition of judicial notice, and 8) As a rule shifting the burden of producing evidence[189].

Perhaps the most striking disagreement pertains to the situation of presumptions within the distinction of "adjective" and "substantive" law originated by Bentham[190]: contrary to what may expect at first blush, presumptions would normally fall into the latter category, at least to the extent that they are an aid to rules or principles of substantive law -as opposed to mere procedural strictures. In fact, according to Bentham, "procedural" or "adjective" law is simply the course taken for the execution of the law, whereas substantive law is that part of the law which (a) creates and defines primary rights or regulates them; or (b) which by rules of evidence or of procedure or otherwise, creates or defines secondary rights, incidental but essential to primary rights[191]. This would be in line with the dominant conception of private international law, which sees the rules concerning applicable law and the *lex fori* as procedural, whereas all the other rules of evidence as substantive. However, the solution would appear to be different under the American conception of private international law, which is to consider everything as procedural, with the exception of the substantive rules laid down through irrebuttable presumptions.[192] Fisk suggested that the answer depends on whether the presumption is based on a piece of evidence, as opposed to the pleadings or judicial notice, or admissions in court [193]; and that to the extent that it consists in deeming something proved, i.e. proving a relationship instead of forming a relationship, it forms part of the law of proof which is to be considered as adjective[194]. Another suggestion is that the "substantization" of presumptions is simply a consequence of the fact that the dividing line (between substantive and adjective law) is "dim, wavering and uncertain because no longer anchored the fundamental principles which served as

[189] Charles V. Laughlin, In Support of the Thayer Theory of Presumptions, 52 Michigan Law Review 195 (1953-1954), 196-209
[190] See Albert Kocourek, Substance and Procedure, 10 Fordham Law Review 157 (1941), 157; citing Bentham, WORKS (Bowring's ed. 1843), 5-8
[191] Mark Shain, RES IPSA LOQUITUR PRESUMPTIONS AND BURDEN OF PROOF, (1945) , 15-16
[192] See Jaques Michel Grossen, LES PRÉSUMPTIONS EN DROIT INTERNATIONAL PUBLIC(Neuchatel and Paris, Deleachaut & Niestle', 1954), 32 citing EXPOSE' DU DROIT INTERNATIONAL PRIVE' AMÉRICAIN (traduit sous la direction de J. P. Niboyet P. Wigny et W.J. Borckelbank, Paris 1937), art. 584 ss.
[193] Otis H. Fisk, PRESUMPTIONS IN THE LAW: A SUGGESTION (William S. Hein & Co, 1997), 11
[194] Ibid., at 17-18

guidance for the courts"[195]. This statement can be echoed with respect to most aspects of presumptions, following the different definitions and classifications provided by both jurisprudence and academia. It is precisely for this reason, that it is necessary to revisit this navigated field; accordingly, the objective of the present chapter is to account for the various interpretations and conceptions of presumptions, to provide an orderly perspective of the topic and to test its robustness in facing the challenges of the context of economic adjudication.

Before moving on to a more elaborate view of the definition of presumptions, however, it is also important to mark the distinction between two concepts that are often pictured together as part of a same category, but which are very different for the purpose of our analysis: a generic understanding of presumptions ("*praesumptiones hominis*") and the more specific notion of legal presumptions ("*praesumptiones iuris*")[196]. While the former usually implies the reasoning process that has been defined above, and refers to a posture which an adjudicator may want to follow to reach a decision, the latter is a step which the legal system imposes upon a decision-maker and that cannot be dispensed with; on the contrary, the adjudicator feels compelled to clearly state the fact that is in upon reliance on a presumption that a certain decision has been reached. As the legal obligation to use the presumption can derive from a variety of sources, including the law, the Constitution, a general administrative act or a prior court ruling, the key difference between those two categories is not so much on the source of the presumption but rather on its binding status; this also differentiates legal presumptions from presumptions which the law allows -either explicitly or implicitly- but that remain optional. However, one may wonder if in the absence of these particular presumptions (*rectius*, rules allowing presumptions) the court would really be prevented from resorting to presumptive reasoning in the first place. In fact, it has been argued with these particular rules in mind that the terminology "presumptions of fact" ought to be abandoned altogether, due to the inevitable confusion that it generates[197]. As it

[195] Mark Shain, RES IPSA LOQUITUR PRESUMPTIONS AND BURDEN OF PROOF, (1945), 19; Roscoe Pound, Mechanical Jurisprudence, 8 Columbia Law Review (1908) 605

[196] A distinct and less frequent use of the term "presumption" , which is irrelevant for our purposes, is the one referred to the attitude or behavior of an individual, whereby one takes upon himself more than is warranted by one's ability, position, right, etc.; and is often equated with arrogance, effrontery, pride. See the entry "Presumption" in OXFORD ENGLISH DICTIONARY (3rd ed., 2007)

[197] John H Wigmore, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2nd Ed., Boston Little Brown 1923), sec. 2491

will be argued below, we don't espouse this use of the term "presumptions of fact": to make the concept clear, we will refer to these "simple presumptions" as "inferences" or "permissible inferences". These can be distinguished from legal presumptions also for the potentially broader object of the latter, which may concern not only the assessment of facts but also the interpretation of the law. The latter category is thus to be contrasted with that of "simple presumptions", that concern facts only. For this reason, in the case of simple presumption it is not strictly necessary to have a specific *Grundnorm* attributing a specific role to presumptive reasoning– as drawing inferences is simply part of the normal reasoning process of an adjudicator. However, it should be noted that basing permissible inferences of fact on specific rules of law may give an adjudicator greater the confidence to take in its reasoning process the leap of faith that a particular inference requires.

Finally, another important differentiation for a clear understanding of the topic is that between presumptions and assumptions, the latter representing simply a fact whose existence is taken for granted in the thought process that is conducted to reach a certain conclusion. In other words, if presumptions are a one-step process where given a starting point A, the fact-finder takes a leap of faith to infer the existence of B, the assumptions are a "no-step" process, in the sense that the fact-finder simply takes the existence of B for granted, without the need for an inquiry as to the existence of A. In technical terms, as it will be described in the following paragraph, this means imposing the burden of persuasion on the party against which the assumption is made or invoked. These assumptions have also been referred to as "presumptions without basic facts"[198]. It must be conceded, however, that the use of A as starting point is often implied in the mind of the fact-finder, although it may not always be made apparent in the legal reasoning that is made public. So for example, an assumption about the rationality of the behavior on the market by a given firm may be done in light of the observation of its past conduct, which the adjudicator found to be consistent with the hypothesis of using that assumption. However, only to the extent that the law requires the adjudicator to use past behavior to inform its judgment in a particular dispute, will he be using a presumption.

[198] See Michelle Grando, EVIDENCE, PROOF AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford University Press, 2010), 94; Worku Y. Wodage, Operation and Effect of the Presumptions in Civil Proceedings: An Inquiry Into the Interpretation of Art. 2024 of the Ethiopian Civil Code, 4 (2) Mizan Law Review 259 (2010)

Despite the noted differences between assumptions, legal presumptions and inferences, all these concepts belong to a unique category when used as part of a legal reasoning: that of presumptive reasoning. This concept, and not merely the narrow notion of "legal presumption", is a subject which generates an interesting and multi-faceted tension with an essential feature of adjudication, namely the fact that the decision should be based on the parties' participation through "proof and reasoned arguments". It is thus the interaction between this concept and the fundamental right to be heard that will be at issue in the present work.

2. (Re-)Classification of presumptions

As anticipated in the previous paragraphs, the use of the word presumption is so widespread today in legal reasoning that in absence of a specific connotation, it may be hard or impossible to determine its actual meaning. This is simply an observation of the current status of presumptions; however, it is submitted here that this need not necessarily be the case, as specific arrangements can be thought of to restore a clear significance to the use of this term. In this paragraph, it will be shown how presumptions can be classified following two criteria: object and rationale.

The most frequent definition of presumptions focuses **on their object**, distinguishing those that concern the assessment of facts from those targeting the interpretation or identification of the law: accordingly, one can distinguish in this sense **"presumptions of fact" and "presumptions of law"**. It is of fundamental importance not to confuse this distinction with the ancient classification of "*presumptiones hominis*" and "*presumptiones iuris*", for the latter refers to the *source* of presumptive reasoning, and indicates merely the distinction between the legal notion and the generic notion of presumption. Despite the high incidence of this terminological confusion[199] and the sometime fuzzy line between law and facts, both of which will be addressed below, it is believed that the acceptance of this distinction should be preferred. Not only because it is the most plausible logical and syntactical meaning for the function ascribed to the word "of" in "of law" and "of fact" (were it different, it could have been more properly substituted by

[199] Virtually all authors adopt a conception of "presumption of law" which refers to the source of the presumptive force, as opposed to its object.

"from"); but also because an object-based definition is most important when it is considered the relevance which is assigned to presumptions in the choice of the applicable law.

As a matter of fact, the division is relatively straightforward and uncontroversial: in the case of presumptions of fact, the adjudicator looks into facts to find A (for example, the absence for more than 7 years) and, by consequence of the presumption, conclude that B (for example, death of the absent) has occurred. By contrast, in the case of presumptions of law, although the adjudicator equally needs to look into the facts for A (for example, the absence of specific contractual provision on the applicable law), he will then take A as a trigger for the application of a certain norm B (for example, the law of the forum) – which has no direct effect on the substance of proof. And while it is possible to argue that presumptions of law, too, are often too created out of probability based on the general experience with particular norms, the link in the chain of probability appears more remote than in the case of presumptions of fact; the reason may be that it is easier to ascertain the existence of a general experience in the humankind with respect to a basic fact than to find it amongst the participants to a variety of heterogeneous transactions with respect to the identification of the applicable law.

The literature also refers to another type of presumptions peculiar to jury trials, the so called "presumptions of mixed law and fact" or "presumptions of fact recognized by law". These consist of permissible inferences which have been so often recommended by judges, and acted upon by juries, that they have come to occupy an important place in the administration of justice[200]. Being permissible inferences, they admit proof to the contrary; however, they cannot be applied by the court without the aid of a jury[201]. It is submitted here that the identification of this category offers no particular value, especially so for analysis that transcend the jury-dependent context of the American trial; accordingly, it will be subsumed within the category of presumptions of fact. However, this category attracts our attention to the special role of inferences, or presumptions of fact, which are used by judges in the conduct of their activity. In principle, it would seem that presumptions of fact become legal presumptions whenever a court formalizes them establishing a rule that has binding or authoritative effect on future

[200] Best subdivides these presumptions in 3 classes: those driven purely by common sense; those where an artificial weight is attached to the evidentiary facts beyond their mere natural tendency to produce belief; and those which are purely artificial and dictated by policy reasons.

[201] Thomas Starkie, EVIDENCE (3rd ed. 1830), 404

interpretation[202]. The fact that the judge represents "*la bouche de la loi*"[203] not only in the common law but more generally in the legal system of every modern democracy, implies that his process of reasoning will be accepted and possibly repeated, up to the point that it may become binding law of the country. Another view may be that these presumptions become "of law" when social science used by a court to formulate or interpret a rule: this derives from the long-advanced idea that social science should be considered "law" instead of "fact" and accorded the status of legal precedent. This approach can be contrasted with the rule in Canada, where a judge's opinion over the interpretation of facts, even generally accepted facts or probability, has no precedential value[204]. *Quid iuris*, then, for those inferences which are destined to rise to the level of legal presumptions (*rectius*, judicial presumptions)? This particular aspect of the process of formation of presumptions will be considered in discussing their limits.

What is more intricate and debated is the second key classification of presumptions, one based on the **rationale for their existence**. Several different proposals have been advanced in this area, due to the mix of cultural and systemic differences and divergent views of the ultimate function of presumptions. In the present paragraph, we will limit ourselves to a concise *exposé* of the most significant and innovative classifications, bearing in mind that the truth may lie somewhere in between. Professor Thayer and Morgan are arguably the leading scholars in the field. The former had a less elaborate and "traditionalist" view of presumptions, and grounded their existence on the two categories of "general experience or probability of any kind" and "policy or convenience"[205]. Writing a few years later, Morgan identified 5 different types of presumptions, stressing that a classification based on their rationale was the most sound and reasonable[206]:

- Those expressing a mere balance of probability
- Those founded upon considerations of comparative convenience in producing evidence and involving some countervailing considerations of policy

[202] See John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating and Establishing Social Science in Law, 134 University of Pennsylvania Law Review 477 (1986), 477-517

[203] The term, evoked by Montesquieu in the "De l'Esprit des Lois" (1758) is used here simply to refer to the authority of judge-made law, and not to the broader concept of why the judiciary is entrusted with such authority (which was central to Montesquieu's work).

[204] Thomas M. Franck and Peter Prows, The Role of Presumptions in International Tribunals, 4 (2) The Law & Practice of International Courts and Tribunals 197 (2005), 209

[205] J. Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898), 314.

[206] Morgan, Some observations concerning presumptions, 44 Harvard Law Review 906, 931 (1931)

- Those founded upon considerations of comparative convenience in producing evidence and involving no countervailing considerations of policy
- Those created to further a result judicially deemed socially desirable
- Those supported by two or more of the above.

Amongst the Francophones, it is worth mentioning Grossen, who followed a classification similar to Morgan's by substituting the category of probability with one of "difficulty of production of adequate evidence", and providing further content to the category "socially desirable" (n. 3 in Morgan's classification) by dividing it in 3 subtypes: 1) in favor of certain juridical institutions, such as the continued possession or the *res iudicata*; 2) in favor of weaker parties; 3) against the production of certain types of evidence (however, the resumptions belonging to this category are strictly irrebuttable)[207].

More recently, Louisell read in the US case-law 4 different categories: 1) Presumptions based primarily on procedural fairness (for example, the presumption that the last carrier of a good caused the damage that occurred in transit)[208]. 2) Presumptions based on procedural economy or convenience (for example, the presumption of death after 7 years of absence)[209]. 3) Presumptions based on probability (for example, the presumption against suicide in case of death)[210]. 4) Presumptions based on public policy (for example, the presumption of the implementation of policies aimed at racial segregation in a public school given the ascertainment of segregative school board actions in one aspect of the school system).[211]

However, the divergence of views is not limited to the grounds of justification. This point will be immediately captured by reading Reaugh's 1942 article on presumptions. Like Morgan – whoclaimed that the rebuttal of presumptions based on probability requires the production of evidence sufficient to avoid a directed verdict- Reaugh assigned a different (in particular, lower)

[207] Grossen, LES PRÉSUMPTIONS EN DROIT INTERNATIONAL PUBLIC(Neuchatel and Paris, Deleachaut & Niestle', 1954)
[208] *Chicago & N.WRy v. C.C. Whitnack Produce Co*., 258 US 369 (1922)
[209] *Davie v Briggs*, 97 US 628, 633 (1878); *Tobin v US R.R. Retirement Bd.*, 286 F.2d 480 (6th Cir. 1961)
[210] *Travellers Ins. Co. v McConkey*, 127 US 661, 664-665 (1888)
[211] *Keyes v School Dist. No. 1*, 413 US 189, 208-14 (1973)

weight to the presumptions based on probability, attributing the burden-shifting effect only to the remaining presumptions in his tripartite order:[212]

- Those for probative reasons
- Those for trial expediency
- Those for general social policy reasons.

The fact that these are not merely classifications, but rather proper rankings, suggest that the strength of the presumption depends on the reason underlying its creation: following this principle, it is logical to require that a court formulating a presumption be required to explain in its reasoning the rationale for the presumption, and how this has been weighed in the overall assessment. Yet for the time being, the issue of strength of presumption will be let aside and resumed in the following paragraph, in order to allow the reader to gather a clear and structured classification of presumptions.

In the author's view, the logic behind the use of presumptions in law flows from two general ideals. The first, which is embodied in the great majority of presumptive rules, **is one of operational efficiency**: that is, the need for the administration of justice to deliver results quickly and efficiently. This may be seen as a modernization of Thayer's two categories, or a combination of Reaugh's categories of trial expediency and probative reasons, or the categories of probability and procedural economy in Louisell's view. All the types of presumptions in these categories can be seen as furthering the basic purpose that society attributes to the law, i.e. to provide a systematic, orderly, and predictable mechanism for dispute settlement[213]. In fact, if the determinations to be made for the application of the legal rules were too complex, resulted in too long of a process, or led to unpredictable outcomes, that would seriously jeopardize the trust of the community for the institution of law. For this reason, a fundamental principle informing both law-making and adjudication[214] is that of administrability: the law must be such as to enable

[212] Daniel M Reaugh, Presumptions and the Burden of Proof, 36 Illinois Law Review, 703 & 843(1942). It is worth noting also that, in doing so, he criticizes the Model Code of Evidence of the American law Institute for embracing the opposite approach.

[213] Henry M. Hart Jr. & Albert M. Sacks, THE LEGAL PROCESS (ed. William N. Eskridge Jr.,m Philip P. Frickey, Westbury, New York, The Foundations Press Inc. 1994), p. Ixxxiii-Ixxxiv; Roderick T. Long, The Nature of Law, in FORMULATIONS (Libertarian Nation Foundation, Spring 1994).

[214] Which can be perceived, in a way, as another form of law-making: see *supra*, note 18. See also Scalia, The Rule of Law as Law of Rules, 56 University of Chicago Law Review 1175-81 (1989) ("...when, in writing for the

judges to apply it in a clear, consistent and predictable fashion. **Accordingly, courts and legislators may resort to rules of reasoning, which can be called "presumptions driven by administrability concerns"**, identifying proxies to be used as tests for legality in each particular circumstance. Undoubtedly, the principle of administrability justifies the existence of shortcuts; however, the paradigm of rationality which underlies the concept of adjudication requires that such shortcuts be consistent with rational thinking. As a result, such rules need to be grounded on the experience of the judges, the legal community or more generally all individuals. Note that this does not capture all instances of shortcuts as it is only a subcategorization of a broader notion of legal presumption, which can be defined as a deduction which the law expressly *directs* to be made from particular facts[215]. In fact, this narrower notion can be distinguished for having at object mandatory conclusions, as opposed to the permissible factual inferences, to be drawn from the proof of a specified group of unopposed facts. Accordingly, we will hitherto refer to the broader notion of presumption as "legal presumption". Other legal presumptions may simply codify widely accepted presumptions of fact, which are inferences about the occurrence of certain facts that can legitimately be drawn from the demonstration of another set of facts.

A second function of law, particularly apparent in the domain of criminal law, is to ascertain the truth, and render justice for a perceived misfeasance. This may require the legal system to follow an "**expediency principle**"[216], providing means for the aggrieved party to have access to justice. Accordingly, for those situations where a party is at substantial disadvantage in litigation (for example, due to insurmountable lack of access to evidence), legal systems typically include rules allowing inferences to be made in order for the disadvantaged party to overcome the obstacles to an effective judicial protection. Courts and legislators may sometimes do that simply by resorting to the aforementioned concept of presumptions of fact (for example, establishing that a

majority of the Court, I adopt a general rule, and say "This is the basis of our decision", I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have, committed myself to the governing principle")

[215] See *Egger v. Northwestern Mut. Life Ins. Co*, 203 Wis. 329, 333, 234 N.W. 328 (1931). Note also that the term 'law' can be interpreted to refer not only to the relevant statutes, but also to judicial precedents in those systems which apply the principle of stare decisis

[216] The "principle of expediency" is specific to the criminal procedure of some jurisdictions, where it refers to the discretion for a prosecutor not to bring a case even where it would meet the requisite evidentiary threshold. This terminology is borrowed here to refer to the adaptiveness of the rules of evidence to peculiar circumstances, as explained hereinafter.

plaintiff only needs to prove certain facts which are normally indicative of the existence of certain others); yet in other occasions, proximity to proof is not at issue and the logic followed is simply one of procedural propriety[217] or public policy more generally[218]. **Such logic brings into existence** presumptions which belong to the category of "legal presumptions" but form a subcategory that could be called "**presumptions driven by public policy concerns**". More specific examples of the public policy reasons underlying such presumptions can be found in the literature, and need not be addressed in detail in this context. However, the ascertainment of those reasons and a verification of those principles will be at the core of our analysis of presumptions in antitrust enforcement in chapter V.

So much for the rationale-based classification of presumptions: two general grounds, with a very different focus. True, they will sometimes overlap; but keeping them separated in these two categories enables the interpreter to refer to a simple dichotomy to control for the use and abuse of presumptive reasoning. As anticipated, the general suggestions made here is one of requiring an explanation of the policy justifying the presumption. This requirement will have an important bearing in the context of judicial review, where the dichotomy will come into play by assigning a different weight to the presumption, and prompting a different kind of analysis by the reviewing court. But before detailing the framework for the conduct of such analysis, it is necessary to have a clear understanding of the concept of "strength of presumptions".

3. Strength of presumptions and burden of proof

Strength is the criterion for another oft-cited categorization of presumptions, with particular relevance as to whether a presumption is confined within certain (reasonable) limits.

One of the first measure of distinction amongst presumptions was simply how far a stretch they required the adjudicator to make in order to infer the presumed fact: they could be "*violenta seu vehemens*" (strong), *probabilis seu discreta* (of average probability) or "*levis or temeraria*"

[217] For example, this is the case for the rule according to which a person accused of a crime is innocent

[218] An example is the incontestability of the facts declared by a public official about facts occurred in her presence, contained in a public document, absent a criminal action directed to charge her for falsity in public act. See *infra* note 326

(light)[219]. Reminiscent of this distinction, Lord Coke [220]spoke in 1628 to their existence in English law as presumptions "strong or exceedingly probable", "probable", and "light" or "rash". More recently, Best recommended disregarding this scheme and instead simply calling "slight presumptions" those amounting to circumstantial evidence, and strong presumptions those shifting the burden of proof (for example, stolen property found in possession shortly after theft). This classification, however, said little about what exactly a party against which the presumption militates was supposed to do in order to overcome it. Perhaps for this reason, this classification gradually vanished from the literature as it became obfuscated by the truly unavoidable and uncontroversial classification of the strength of presumptions: that between presumptions that admit and presumptions that do not admit rebuttal. Since the early Roman tradition, there had been a net separation between *presumptiones iuris tantum*, i.e. rebuttable, and *iuris et de iure*, i.e. conclusive. Menochius[221]cricized Curtius and others for holding that irrebuttable presumptions were not real presumptions. Curtius' position seems to be paralleled by the majority of modern commentators, who see them as "disguised" rules of law[222].

Thayer was among the most vocal supporters of this idea[223], arguing that irrebuttable presumptions would be merely a "legal fiction"[224] and furthermore, considering them as the only case in which the burden of proof effectively shifts from the plaintiff to the defendant[225]. His theory was based on the widely accepted proposition that the burden of proof lies with the party

[219] For an account of this division, see Mark Shain, Presumptions Under the Common Law and The Civil Law, 18 Southern California Law Review 91 (1944), 94

[220] In his INSTITUTES OF THE LAWS OF ENGLAND or A COMMENTARY UPON LITTLETON published in1628, also known as "COKE ON LITTLETON" (1853) 6b

[221] Jacobus Menochius, DE PRAESUMPTIONIBUS, CONJECTURIS, SIGNIS & INDICIIS COMMENTARIA (Geneve 1688, vol. 1, p. 2 and 3).

[222] See Edmund M. Morgan, Presumptions, 12 Washington Law Review 255 (1937); Kazazi , BURDEN OF PROOF AND RELATED ISSUES (Alphen aan den Rijn and London, Kluwer Law International, 1996), at 257; Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions, 110 (1) Ethics 5 (1999)

[223] A similar position is taken more recently by M. Grando, EVIDENCE, PROOF AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford, Oxford University Press 2010), 94.

[224] Contrary to Thayer's assertions, the conventional wisdom is that there is an essential difference between irrebuttable presumptions and legal fictions: while the former are arbitrary inferences, which may or may not be true –but is assumed by the law to be true- the falsehood of the fact assumed in legal fictions is well understood and avowed: see Best, , A TREATISE ON PRESUMPTIONS OF LAW AND FACT, WITH THE THEORY AND RULES OF CIRCUMSTANTIAL PROOF IN CRIMINAL CASES (MCDowall, London 1844), at 24.

[225] Thayler, A PRELIMINARY TREATISE ON EVIDENCE; Wigmore, THE PRINCIPLES OF JUDICIAL PROOF: A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (Vol. 10, Boston: Little, Brown, 1904–1905; 3rd ed. 1940).

who alleges a certain fact, as opposed to that which negates its existence (*onus probandi incumbit ei qui dicit, non ei qui negat*), and on the conviction that a court always makes its findings looking at the record of the available evidence –including that acquired via judicial notice–, which in itself defeats the idea of irrebuttability. However, it seems that adherence to this idea on one hand, de-formalizes the operational process of presumptions in a way that makes it unsatisfactory and unpredictable[226]; on the other hand, it tends to overestimate the judicial notice capacity of the courts called to apply the presumptions, particularly where they would need to instruct a jury for the fact-finding[227]. Judicial notice cannot be seen as a panacea for the failure by a party to provide sufficient evidence: in fact, the main difference with a presumption is that the fact assumed by the adjudicator must be universally known as true and not contestable[228], for otherwise it would represent an additional tool the advantage of one of the parties, thereby affecting the independence and impartiality of the court. Morgan vividly expressed his caution about the danger of misuse and abuse of judicial notice as follows:

> A judge may ignorantly consider a generalization drawn from the segment of human experience known to him to be so notoriously true as to admit of no reasonable question. He may erroneously regard a source of information as of indisputable accuracy. He may treat a half-truth as if it were a whole truth. These inaccuracies may not appear in the record so as to be subject to correction or review. The judges of the court of last resort may be guilty of the same faults. Indeed, it would not be difficult to find decisions by the Supreme Court of the United States striking down forward-looking social legislation largely because the prevailing judges considered incontrovertible truth what many people believed demonstrably false[229]

Moreover, Thayer's theory that irrebuttable presumptions are only burden-shifting devices postulates the existence of a distinction between evidential burden and legal burden which is not applicable in the civil law context, where the burden of proof determines (1) which party must put forward the facts and, where necessary, adduce the related evidence (also called "burden of production", or "evidential burden"), and (2) which party bears the risk of fact remaining

[226] Edmund Morgan, Instructing the Jury Upon Presumptions and Burden of Proof , 47 Harvard Law Review 59 (1933)
[227] Edmund Morgan, Some Observations Concerning Presumptions, 44 Harvard Law Review 906, 922 (1931); Edmund Morgan, Further Observations on Presumptions, 16 South California Law Review 245, 250 (1943)
[228] Otis H. Fisk, PRESUMPTIONS IN THE LAW: A SUGGESTION (Buffalo, NY, William S. Hein & Co, 1997), 10
[229] Edmund Morgan, Judicial Notice, 57 Harvard Law Review 269 (1944), 292-293

unresolved or allegations unproven (also called "burden of persuasion")[230]. Instead, a more pertinent concept to understand the burden-shifting nature of presumptions is that of "tactical burden", which refers to the burden by a party to prove disputed facts that are strategically important to its case, although technically speaking not pertaining to the concept of burden of proof of the overall case. In other words, a party bears a tactical burden where it falls upon it to adduce evidence as a matter of tactics and prudence[231], for example to meet the requirements for a defense.

If seen in combination with the tactical burden of proof, it is clear that presumptions simply serve the function of allocating on one party or another the burden for one of the strategic elements of the case. Yet by focusing on the burden of persuasion, Thayer -and subsequently his pupil Wigmore, who continued his proselytism- believed in a theory that had profound implications for the general understanding of presumptions: moving from the assumption that rebuttable presumptions do not have the effect of shifting the burden of persuasion but simply of facilitating the decision-making process in absence of countervailing evidence, he reasoned that once such evidence was introduced that is sufficient to convince the judge that a jury could reasonably find in favor of the party against which the presumption operates, the jury should be instructed not to consider the presumption. An evocative metaphor used to describe this theory was used by a Wisconsin court, referring to presumptions as "*the bats of the law, flying in the twilight, but disappearing in the sunshine of actual facts*[232]". This theory formulated by Thayer and Wigmore, also known as the "traditionalist", the "when-dissipated" or the "bursting bubble" theory of rebuttable presumptions, is opposed to a "reformist theory", advanced mainly by Morgan,[233]which holds that presumptions remain operative until the trier of fact is persuaded of the nonexistence of the presumed fact. Morgan favors an interpretation that assigns both the

[230] Advocate General Kokott in her opinion in Case C-8/08, *T-Mobile Nethelands v Commission*, at footnote 60, refers to the German tradition to define the two "sides" of burden of proof as "subjecktive or *formelle Beweislast*" and "objective or *materielle Beweislast*".

[231] See Michelle Grando, EVIDENCE, PROOF AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford University Press, 2010), 84; John Sopinka, Sidney N Lederman & Alan W Bryant, THE LAW OF EVIDENCE IN CIVIL CASES (Toronto, Butterworths 1999), at 74; Colin Tapper , CROSS & TAPPER ON EVIDENCE (8th ed. London Butteworths 1995), at 126

[232]*Machowik v Kansas City*, St. J &C.B.R.Co., 196 Mo. 550, 94 S.W. 256, 262 (1906)

[233] Its defining features are described by Edmund Morgan, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION (New York: Columbia University Press, 1956)

burden of evidence (or of going forward) *and* the burden of persuasion[234]. His disenchanted view of presumptions posits that US courts have made extensive use of presumptions not only to control the jury in its function of fact-finding, but also to change accepted rules of the common law without the appearance of judicial legislation. Thus, moving from the idea that presumptions serve the purpose of allocating the burden for reasons of policy and fairness, he advanced skepticism as to whether such delicate function can be intelligently exercised at the beginning of the trial. Provokingly, he suggests that the same results could be accomplished by methods more direct, more intellectually honest, and accompanied by fewer possibilities of harm for the defendants.[235]

The choice for one of the two theories has an important practical significance in jury trials, for if the "reformist" approach is taken, the jury needs to be told simply that the burden of proof is upon the party against which it operates. However, the question which was not addressed in detail by at least the basic version of these alternative theories is "what is the standard of proof" that justifies the disbelief in the presumed fact? Would a mere utterance suffice? The ensuing doctrinal debate, protracted for entire decades, led to an inconsistent approach to presumptions in US Courts for a number of years. Morgan pictured the situation in 1949 summarizing 7 different views[236]: 1) the mainstream view, recommended by Thayer and Wigmore, followed with some substantiation in Wisconsin[237] ,and most importantly, endorsed by the US Supreme Court and adopted by the American Law Institute Model Code of Evidence[238], where *some evidence* to the contrary would be enough to destroy the presumption. 2) the rule adopted in Connecticut, Michigan and Minnesota according to which the rebutting evidence should have some *persuasive effect* upon the mind of the trier of facts. 3) the rule applied in New York according to which a presumption remains "only as long as there is no *substantial evidence* to the contrary"[239]. 4) the

[234] Edmund Morgan, Some observations concerning presumptions, 44 Harvard Law Review 906, 909, 912, 924,& 932 (1931)
[235] Edmund Morgan, PRESUMPTIONS: THEIR NATURE, PURPOSE AND REASON (1949), 13
[236] Ibid.
[237] "[…]some uncontradicted and unimpeached, and not inherently incredible, evidence to the contrary [would suffice to rebut the presumption]: see *State ex rel. Northwestern Development Corp. v. Gehrz*, 230 Wis. 412, 283, N.W. 827 (1939); *ex. Rel. Common Council of the City of West Allis*, 177 Wis. 537, 188 N.W. 601 (1922), both cited by David Kaiser, Presumptions of Law and of Fact, 38 (4) Marquette Law Review 253 (1955), 257
[238] American Law Institute Model Code of Evidence (1945), rules 703 and 704
[239] See *Chaika v. Tandelberg*, 252 NY 101 (1929)

rule followed in some Ohio and California cases, which would require the evidence to be *such that the trier's mind is in equilibrium* as to the existence or non-existence of [the presumed fact] B"[240]. 5) the rule suggested by Frank Bohlen[241] and attributed judicial sanction in Connecticut[242], according to which the presumption simply alleviates the burden of going forward, but *the jury should be persuaded* as to every single element of a claim in case of contestation. 6) the "Pennsylvania rule", which would make the presumption simply fix the burden of persuasion[243]. 7) the view by a number of courts that judges should instruct juries that the presumption is evidence, to be weighed as such amidst the remaining probative material.

At first sight, it would seem that this debate is to a large extent settled, since the adoption of the Federal Rules of Evidence in 1975 preferred the Thayeran interpretation of presumptions[244] in the drafting of Federal Rule301, which recites:

"In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast".

However, from the rule it is not clear what standard is applied to overcome the presumption. Moreover, it needs to be acknowledged that the distinction between the two views has started to blur in federal practice, which have tended to adopt a "hybrid"[245]. What is concededly settled under Rule 301 is simply that presumptions affect burden of production, not persuasion; that they are not evidence; and that the underlying reasoning may still be used after they have been countered to create an inference. The problem remains as to whether, and if so how, a jury should be instructed regarding any permissible inference following the demise of a presumption:

[240] E.g. *Speck v Sarver*, 20 Cal. 2d 585 (1942); Wyckoff v Mutual Se Ins. Co., 173 Ore. 592 (1944).
[241] Frank Bohen, The Effect of Rebuttable Presumptions of Law upon the Burden of Proof. 68 University of Pennsylvanya Law Review 307 (1920).
[242] *O' Dea v Amodeo*, 118 Conn. 58 (1934)
[243] *Rustad v Great Northern Railway Co*., 122 Minn. 453, 456 (1913)
[244] Or at least, this interpretation has been read into the rule by the majority of courts: see Ronald J. Allen, Presumptions, Inferences and Burden of Proof in Federal Civil Action—An Anatomy of Unnecessary Ambiguity And A Proposal For Reform, 76 Northwestern University Law Review 892, 893 (1981-1982).
[245] David W. Louisell, Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings, 63 Virginia Law review 281(1977), 302

the situation is complex because in American law, a party can move for a directed verdict (Judgment As a Matter Of Law, or JAMOL[246]) if the opponent has insufficient evidence to reasonably support its case. The implication for rebutted presumptions is that whenever a JAMOL is warranted in favor of the opponent of the party invoking the presumption, instructing the jury about the possibility of drawing an inference from the facts would be unfair, since the court would be with its authority over the jury potentially exerting pressure to push forward a case which cannot reasonably be made.

Moreover, there is another aspect of reasonableness that limits the instructions that can be imparted to a jury, and that is not to directly or indirectly coerce the jury in its reasoning[247]; and the only way to ensure respect for such principle without lessening the power of presumptive reasoning is to account in the instructions for the limits that are intrinsic to the very idea of presumptions, by referring explicitly to their underlying policy objective. As explained above, presumptions are either driven by operational efficiency or by public policy reasons; and while in the former case they are grounded on rationality, in the latter their existence is linked to a different value that is intrinsic in attributing force to the presumption. In line with this idea, Mc Baine is contrary to the "when-dissipated" approach, except for those presumptions that are grounded on probability[248], because the force of presumptions should further their intrinsic value. Similarly, Louisell concludes that a judicial instruction suggesting a permissible inference after the dislodgement of the presumption is appropriate if it is grounded on one of these two foundations, or more generally, if it explains the reason why the presumption had been created[249].

Transposing the principle to the civil law context, where the issue of jury instruction is non-existent, does not legitimate doing away with the "reason requirement" at least in the first instance, when a presumption is violated: providing reasons for the adoption of a decision is in fact intrinsic to the nature of adjudication, and should not be abandoned in the context of the

[246] See rule 50 of Federal Rules of Civil Procedure

[247] See Robert Allen, Structuring Decision-making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harvard Law Reviewe 321 (1980)

[248] James P. McBaine, Presumptions: are they Evidence? 26 California Law Review 519, 534 (1938)

[249] Louisell, Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings, 63 Virginia Law review 281(1977), 308-321

formulation or reliance on presumptive reasoning. Nonetheless, the absence of jury instruction will afford the adjudicator more leeway in the determination of the force of the presumption. Differently from the common law context, judges will not need to be particularly careful and precise in expressing a distinction between a presumption that has been entirely rebutted and one merely overcome –meaning that in the former case, the party opposing the presumption will be ultimately considered to have prevailed[250], whereas in the latter it will be possible for the jury to rely on factual inferences justifying persisting belief in the existence of the presumed fact. In fact, in both cases will the civil law judge be able to see the countervailing evidence proffered as a legitimate ground of belief of either the existence or the non-existence of the presumed fact. The only exception to that is when statute or a prior judicial ruling binds the judge with regard to the finding of rebuttal evidence: this is the case, for example, of statutes identifying a pre-determined defense; or statutes requiring a "*prima facie*" case to be made. While the former simply requires the shifting of burden of persuasion to the plaintiff once the constituent elements of defense are met, the latter implies that a party will automatically lose in the absence of sufficient evidence, much like in the case of directed verdict in the common law. "*Prima facie* case" is a concept that that has been relied upon by international tribunals in cases where the respondent had not submitted evidence in rebuttal [251] and which constitutes in all respects a legal presumption of law: the irrebuttable presumption according to which, absent a *prima facie* case, the judge will rule in favor of the opposing party. The key difference between this presumption and the legal presumptions of fact is simply that it affects the burden of persuasion, instead of the burden of production.

Two points should be made clearregarding the standard of proof to be met for the rebuttal of presumptions. First of all, the standard for rebuttal is a function of the strength of the presumption; which differently from the Roman times[252], does not necessarily refer simply to its proximity with rationality. Rather, this will depend on the strength that the law attributes to that

[250] Ibid., 26

[251] Kazazi, BURDEN OF PROOF AND RELATED ISSUES (Alphen aan den Rijn and London, Kluwer Law. International, 1996) 333, 336-337. See also Grando EVIDENCE, PROOF AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford University Press, 2010), 142, referring to a case of the United States- Mexico General Claims Commission: *William A Parker (USA) v. United Mexican States*, 31 March 1926, 4 Reports of International Arbitration Award 35 (Milwood, Kraus Reprint, 1974) at 39 or para 6 of the award.

[252] See *supra*, beginning of this paragraph (notions of *praesumptio violenta*, *probabilis* or *lievis*)

particular presumption in that particular context. One may wonder, at this point: what is the simplification role (if any) of a presumption when for the ascertainment of the scope of its operation a contextualization is required in each individual case? In fact, this process of contextualization will be precisely where the party opposing the presumption should be able to make its case by following one of the following strategies: (1) prove it wrong in the particular case by producing evidence against the presumed fact, if the presumption is a rebuttable one. (2) have it declared inapplicable to the particular case by distinguishing the latter from the class of cases that the presumption is meant to cover. The latter opportunity is crucial not only to ensure the respect for the rights of defense of the opposing party, but also and not less importantly, to enable the judge to "give shape" to the existing law by bringing it in compliance with common sense or adapting it to circumstances that were not envisaged when the presumption was originally crafted.

A second point, which inevitably affects the significance of the terminology "standard of proof" in a comparative perspective, is the wide divergence between common and civil law on the topic. Notoriously, the civil law systems are centered on the notion of "*intime conviction*" of the judge[253]. This is opposed to a predetermined, objectivized understanding of standard of proof in common law, which however significantly differs across criminal and civil proceedings : in the US for example, while criminal decisions must meet the well-known standard of "beyond a reasonable doubt", different and more lenient standard is applied to civil cases. Such standard will as a general rule be "preponderance of the evidence", but has been maintained higher for particular classes of cases where courts have referred to "clear and convincing evidence" or "clear, cogent and convincing evidence"[254].

It has been argued that the continental tradition is more subjective and therefore less scientific, but is closer to a quest for truth[255]. On one hand, it needs to be observed that winning a case in

[253] See for example the French Code de Procédure Pénale, Art. 3531; German Zivilprozessordnung, § 286 I 1; German Strafprozessordnung, § 261.; the Italian Codice di Procedura Civile, art. 116; and the Codice di Procedura Penale, art. 192.1 .

[254] See *Nowak v United States*, 356 US 660, 663 (1958); *Addington v Texas*, 441 US 418 (1979). See also Kokott, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW (Kluwer, The Hague, London/Boston 1998), 19 ("American Courts apply a higher standard of proof when an individual interest is involved that is comparable to the stigmatization caused by a conviction in criminal litigation")

[255] Christoph Engel, Preponderance of the Evidence versus Intime Conviction A Behavioural Perspective on a Conflict between American and Continental European Law, Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2008/33, available at http://ssrn.com/abstract=1283503

civil litigation will often be considerably more difficult than in the American context, since the applicable standard will be virtually the same of the one applied in criminal prosecutions. On the other hand, the uniformation of civil and criminal may lead to a degrading of the concept of reasonable doubt, at least in common judicial parlance. However, this idea is buttressed by those who have suggested that in actual practice, the criminal standard is higher than the civil one notwithstanding the verbal equivalence. [256]

Without entering into the nitty-gritty of procedures in civil and common law, what can be maintained from the above is that the latter approach is more prone to an open and introspective development of the law of evidence[257]. In fact, the implication of the continental approach to evidence for our analysis of presumption is that a fundamental uncertainty reigns as to the assessment of presumptions, concerning the requisite threshold for their rebuttal, and consequently, their strength. That is notwithstanding the fact that civil law countries usually dedicate a specific article in their codes to the use of presumptions[258], which only encompasses one of the meanings that have been explained above: that of slight presumption, or circumstantial evidence. This situation is unfortunate from the perspective of developing a uniform common understanding of presumption; however, such divergence on the conduct of civil proceedings does not prevent the possibility of ascertaining (1) a minimum evidential standard for criminal proceedings; and (2) a general type of reasoning which should be followed in the context of presumptions in both the civil and the common law. We will turn to each of these points in the following paragraphs.

4. A special presumption: the presumption of innocence and its implication for presumptive reasoning

[256] Kaplan, Von Mehren and Schaefer, Phases of German Civil Procedure, 71 Harvard Law Review 1193, 1245 (1958)

[257] Kevin M. Clermont & Emily Sherwin, A Comparative View of Standards of Proof, 50 American Journal of Comparative Law 243(2002), 271

[258] This provision derives from the Napoleonic code of 1804, reading as follows: “1353. Les presomptions qui ne sont point etablies par la loi sont abandonnees aux lumieres et a la prudence du magistrat, qui ne doit admettre que des presomptions graves, precises et concordantes, et dans les cas seulement ou la loi admet les preuves testimoniales, a moins que l'acte ne soit attaque pour cause de fraude ou de dol."
(Translation: “ Presumptions which are not established by law are left to the learning and discretion of the Judge, who shall only admit presumptions which are serious, precise and corroborative, and only in cases in which the law admits oral proofs, unless the instrument is attacked on account of fraud or deceit”).

The presumption of innocence is not only a fundamental principle recognized in national laws, Constitution and regional human rights instruments; it is also part of the Universal Declaration of Human Rights[259]. More generally, the presumption constitutes a fundamental part of the right to be heard, the minimum core of which will be detailed in chapter 3. In this context, however, it is important to emphasize some important features of the presumption that are directly implicated in the general definition of the limits of presumptions in law.

First, the presumption of innocence is improperly called "presumption"; more appropriate would be to refer to it, according to the definitions provided in paragraph 1, as the "assumption of innocence": in fact, there is no established fact from which the decision-maker infers the innocence of the accused; rather, it is a rule of law which establishes that in criminal cases, the burden of proof is upon the prosecution, and any doubt must be interpreted in favor of the accused (*in dubio pro reo*)[260]. However, it is well settled that in order to identify the scope of this principle the concept of burden of proof is not to be intended in a technical way: a wide range of safeguards intended to ensure fairness of criminal proceedings are considered embedded in the system as a consequence of the presumption of innocence[261].
Secondly, it needs to be understood that the respect for the presumption of innocence may be directly called into question by an expansive use of presumptive reasoning in both the drafting and the enforcement of criminal law. Two are the potential issues: objective liability and reverse burdens. The former refers to the use of presumptive reasoning in the *abstractidentification* of the conduct which is held to be criminal; the latter refers to the use of presumptive reasoning in the *concrete ascertainment* of the conduct which gives rise to liability.

While both are serious concerns from the perspective of due process as it was defined in chapter I (i.e., including both a procedural and a substantive aspect), the argument may be advanced that only the latter activity falls under the competence of adjudication, the former being reserved to the legislative and executive branches. However, embracing such a formalistic approach would

[259] Article 11 (1): "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".
[260] See e.g. *Barberà and others v Spain*, Judgment of the ECtHR 6 December 1988 (Application no. 10590/83), A 146, para 77
[261] William S. Laufer, the Rhetoric of Innocence, 70 Washington Law Review 329, 333-334 (1995)

imply neglecting the transformative character of law, which is particularly acute in complex adjudication and requires the judge not only to interpret the norms but also, in doing that, to provide a public good by clarifying it, giving shape to it, and in doing so formulating rules, sub-rules and presumptions which enable its adaptation to the socio-economic context. Bearing in mind that the objective of the present work is to identify the limits to the use of presumptions -and more generally, presumptive reasoning- in the context of adjudication, it is recognized that the focus of the enquiry should not be on the traditional "legislative" law-making –nor on its relative "administrative rulemaking". However, there is to the author's knowledge no case or commentary disputing the validity of a judicial presumption under due process grounds. The reasons for that may be several, including the lack of awareness over the extension of due process rights to such circumstances, the unquestioned authority of the courts over citizens, the failure to perceive the presumptions it establishes as binding rules of law, and its resistance to the revisiting of precedents. Now, conceded that the analysis of a hypothetical reviewing court would be essentially the same regardless of the state entity responsible for the formulation of a presumption, the case-law of two courts regarding statutory presumptions will be used hereinafter as a source of reference and inspiration for the analysis of judicial presumptions in modern legal systems.

a. US Supreme Court

The 14th Amendmentof the United States Constitution forbids any deprivation of liberty or property without due process of law[262]. As explained in chapter 1, this clause has been used as a basis for the definition of a constitutional right to both procedural and substantive due process. Although the majority of the elements of the analysis that concern us for the purposes of this work refer to the notion of procedural due process, it is important to recognize that the substantive element is a constituent part of due process, and is the only aspect which enables the Supreme Court to scrutinize the reasonableness of legislation when it identifies individuals to be subjected to a deprivation of life, liberty, property.

[262] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law"

Although there had been some prior cases that were hinting towards the formation of a substantive due process doctrine[263], its rise of the doctrine of substantive due process is often attributed to the Supreme Court's decision in *Lochner*[264], where a New York statute forbidding employment in bakeries for more than 60 hours a week or 10 hours a day was stricken down by the Court on due process grounds simply because it found "no reasonable ground for interfering with the liberty of person or the right of free contract". In doing so, the Court interpreted the notion of "liberty" protected by the Due Process Clause as including "liberty of contract", and therefore significantly narrowed the scope for further economic regulation.

Partially in reaction to the ensuing criticism, however, the Court retreated from such an intrusive stance in *Nebbia v. New York*[265], where it cautioned that " The guaranty of due process [demands] only that the law shall not be unreasonable, arbitrary or capricious […]" . Similar cautioning was emphasized in *Olsen v Nebraska*[266], where it was made clear that "[The Court is] not concerned […] with the wisdom, need or appropriateness of the legislation. Differences of opinion on that score suggest a choice that 'should be left where [it] was left by the Constitution- to the states and Congress".

The trajectory of retrenchment in substantive scrutiny came to its peak in *US v Carolene Products*[267], where upholding the constitutionality of a statute that prohibited the shipment in interstate commerce of "filled milk" considered by the government as *potentially* dangerous to the public, the Court went so far as to argue that the economic regulatory legislation was entitled to a *presumption of constitutionality* and should be upheld if supported by *any* rational basis. Probably in the light of the loose test controlling in the aftermath of *Carolene Products*, it is since then unheard of that a statute gets invalidated on substantive due process grounds. [268] Nonetheless, however informative, the narrative of the rise and the fall of the substantive due process doctrine tends to obfuscate the peculiarity, for the purpose of finding the reasonableness of the limitations imposed by the statute, of the enquiry conducted by the Court with respect to

[263]*Munn v Illinois*, 94 US 113 (1877); *The Railroad Commission Cases*, 116 US 307 (1866); in *Mugler v Kansas*, 123 US 623 (1887); *Santa Clara County v Southern Pacific Railroad* , 118 US 394 (1886); *Allgeyer v Lousiana*, 165 US 578 (1897).
[264]*Lochner v New York*, 198 US 25 S.Ct 539, 49 L.Ed. 937 (1905)
[265]*Nebbia v New York* 291 US 502, 54 S.Ct 505, 78 L. Ed. 940 (1934)
[266]*Olsen v Nebraska ex rel. Western Ref. & Bond Ass.n*, 313 US 236(1941)
[267]*US v Carolene Products Co.*, 304 US 144 (1938)
[268] Jesse H. Choper, Richard H. Fallon, Jr., Yale Kamisar, Steven H. Shiffrin, CONSTITUTIONAL LAW: CASES, COMMENTS AND QUESTION, (West Group 9th. Ed. 2011) , 211

criminal statutes. Due to the fact that the intrusion into an individual's liberty is all the more serious in this context, the common law generally required proof *mens rea* as a fundamental element of the case. However, the situation drastically changed with the rise of the industrial revolution, which created a significantly more complex society[269].

Thus, in reviewing the constitutionality of a criminal strict liability statute, the Court in *Balint* succinctly summarized the evolution of the notion of criminal offense as follows[270]:

"While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it[271], there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin-Carpenter Co. v. Minnesota* […][272], in which it was held that in the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance'.

From the endorsement of this shift, the Court moved on to recall a number of cases that had confirmed the approach:

"Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se[273]. So, too, in the collection of taxes, the importance to the public

[269] An illustrative account of the reason of the Supreme Court in *Morissette v. United States* , 342 U.S. 246 (1952), at 254: "The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare".

[270] *U.S. v. Balint*, 258 U.S. 250 (1922)

[271] Citing *Rex v. Sleep*, 8 Cox, 472

[272] 218 U.S. 57 (1910), 69 , 70 S., 30 Sup. Ct. 663, 666 (54 L. Ed. 930)

[273] Citing: *Commonwealth v. Mixer*, 207 Mass. 141, 93 N. E. 249, 31 L. R. A . (N. S.) 467, 20 Ann. Cas. 1152; *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503; *Commonwealth v. Hallett*, 103 Mass. 452; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855; *McCutcheon v. People*, 69 Ill. 601; *State*

of their collection leads the Legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends and meeting it at the peril of punishment[…][274]. Again where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells[275][…]

In the particular case under examination, this led the Court to conclude the following:

"Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.[276]"

Following *Balint*, any doubt has been settled that the mere imposition of strict liability does not *per se* violate the principle of due process- and therefore, the presumption of innocence which the latter includes. However, it is important to bear in mind that strict liability represents the exception, and not the general rule for the identification of intent in criminal statutes. As an exception is to be narrowly construed, the Supreme Court has held that there is a presumption against strict liability absent a contrary legislative purpose[277]- meaning that a "*mens rea*" element will be read into the statutes in absence of a clearly indicated legislative justification. (Incidentally, it should be noted that this presumption provides us an example of judicial presumption of law).

Still, the acceptance of strict liability statutes in the criminal context provides a powerful argument for both the enactment of such statutes and the use of irrebuttable presumptions in non-criminal context. In fact, the idea that "the greater includes the lesser" and therefore irrebuttable presumptions should be authorized to reach the same objective that the legislature could have

v. Thompson, 74 Iowa, 119, 37 N. W. 104; *United States v. Leathers*, 6 Sawy. 17, Fed. Cas. No. 15581; *UnitedStates v. Thompson*, 12 Fed. 245; *United States v. Mayfield*, 177 Fed. 765; *United States v. 36 Bottles of Gin*, 210 Fed. 271, 127 C. C. A. 119; Feeley v. United States, 236 Fed. 903, 150 C. C. A. 165; *Voves v. United States*, 249 Fed. 191, 161 C. C. A. 227

[274] Citing: *Regina v. Woodrow*, 15 M. & W. 404; *Bruhn v. Rex*, [258 U.S. 250, 1909] A. C. 317

[275] Citing: *Hobbs v. Winchester Corporation* (1910) 2 K. B. Div. 471, 483

[276] *S. v. Balint*, 258 U.S. 250 (1922), 253

[277] *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co* [438 U.S. 422 (1978)

achieved by doing away with the intent requirement was advanced by Justice Holmes in *Ferry v Ramsey*, a case concerning the constitutionality of a provision which imposed liability on company directors who assented to the reception of deposits while knowing the corporation's insolvency status, and presumed the existence of such knowledge in case of proven insolvency.

"It is said that the liability is founded by the statute upon the directors' assent to the deposit and that when this is the ground the assent cannot be proved by artificial presumptions that have no warrant from the experience. But the short answer is that the statute might have made the directors personally liable to the depositors in every case, if it had been so minded, and that if it had purported to do so, whoever accepted the office would assume the risk. The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartful or clumsy way of reaching it.[278]"

This language would seem, in itself, to pave the way for the use of irrebuttable presumptions in the civil context. However, it needs to be recognized that this was an early case, and that the use of a similar test to evaluate all irrebuttable presumption cases would reveal extremely complex, due to the uneasiness in identifying with clarity what the boundaries for the proper definition of a crime would be.[279]

In fact, the Supreme Court followed a different route, developing as early as in the 1930s a so called "irrebuttable presumption doctrine", which served to struck down a number of statutes for conflict with the Due process Clause of the US Constitution[280]. Under this doctrine, a statute may violate the clause if (1) it relies on a presumption that is not necessarily or universally true in fact, or (2) the State has reasonable alternative means of making the crucial determination[281].

The first cases where the doctrine made its appearance, although not yet under the complete form described above, concerned the Food Stamp Act of 1964, a social welfare statute which defined

[278] 277 US 88 (1928), 98
[279] See Note, The Constitutionality of Rebuttable Statutory Presumptions, 55 Columbia Law Review 527, 544-545 (1955)
[280] For a complete and critical summary, see John M Philips, Note: Irrebuttable presumptions: An Illusory Analysis, 7 (2) Stanford Law Review (1975) 449-473
[281] This is the latest formulation of the doctrine, as defined in *Vlandis v Kline*, 412 US 441 (1973)

certain categories of citizens entitled to get food stamps. In *Moreno*[282] the Court struck down section 3(e) of the Act, which denied participation in the food stamp program to households containing unrelated members (unless they were over sixty). In response to the government's contention that this exclusion was necessary to prevent fraud in the program and that fraud tended to be more difficult to detect in unrelated households, the Court suggested that this objective could have been pursued through other means, particularly by dividing large households into several smaller ones.

Few years later, in *Murry*[283], the Court faced a challenge to another provision of the same Act, section 5 (b), which excluded from the food stamp program any household containing an individual, over the age of eighteen, who had been claimed as a tax dependent for the previous year by an individual not himself belonging to a household eligible for food stamps. Rather than question the general rationality of this provision, i.e. to exclude non-needy households from the program, the Court criticized on several grounds the arbitrariness of the exclusion, suggesting that the objective could have been accomplished by other means: not all individuals claimed as dependents are in reality dependents; dependency in one year does not necessarily indicate dependency in a later year; tax dependency of one individual in a household does not necessarily speak to the neediness of the whole household. Once again, the Court noted that the classification did not necessarily correspond to truth, and therefore was unconstitutional. As a matter of fact, the message that it was sending was that, at least in the conferral or revocation of social benefits, a statute cannot presume the existence in an individual of the decisive characteristic upon a given set of facts unless it can be shown that those characteristics belong to all and only to those individuals which the legislature intended to target.

In *Bell v. Burson*[284], the Court expanded the reach of the doctrine outside the social welfare context by striking down a Georgia statute which, aiming to compensate for the absence of mandatory driving insurance in the state, imposed in case of accident involving an uninsured motorist the suspension of his license until determination of liability in case. In doing so, the

[282] *United States Department of Agriculture v Moreno*, 413 U.S. 528 (1973
[283] *United States Department of Agriculture v Murry*, 413 U.S. 508 (1973).
[284] *Bell v. Burson* 37 37402 U.S. 535 (I97I)

Court recognized that it was not simply a problem of absence of procedural due process, but one of inaccurate legislative means to accomplish the end pursued by the statute. Even more explicit was *Stanley v. Illinois*[285], a decision where the Court invalidated a statute that for not granting a father of an illegitimate child the status of "parent" (which by contrast, was attributed to mothers of illegitimate childs) for purposes of the declaration of such childs as ward of the state. Once again, the court looked into the means used by the statute for the accomplishment of its stated objective, and considered that the classification was arbitrary and not justified on that basis.
Another important case was *Vlandis v. Kline*[286], where the Court declared unconstitutional a Connecticut statute which in classifying individuals as permanent nonresidents, for the purpose of determining tuition at a state university even those who had been out of state for more than a year, it was arguably excluding a good number of people who would have been able to demonstrate that they were bona fide residents. An important passage of the opinion by Justice Stewart reads that

"[…] efficiency cannot outweigh individual rights to a judicial determination of entitlement".

Finally, in *Cleveland Board of Education v. LaFleur*[287], the Court invalidated an administrative regulation which required teachers to take leaves of absence in the fifth or sixth month of pregnancy. This case is also noteworthy for the prominent role that the Court attributes to scientific research: citing at length the findings of medical reports and other evidence to the effect that women are rarely disabled at that stage of pregnancy. It stresses that to legitimately impose mandatory leave, the statute would need to be supported by a "consensus" of medical testimony, or a showing of administrative necessity[288].
But *La Fleur* was the last appearance of the irrebuttable presumption doctrine: just a year later, the Court upheld in *Weinberger v. Salfi*[289] a Social Security provision requiring that the spouse of a covered wage earner be married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse. In assessing the rationality of the rule, the Court remarked

[285] *Stanley v. Illinois* 48 405 U.S. 645 (I972)
[286] *Vlandis v. Kline* 4I2 US. 44I (I973)
[287] *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)
[288] Id. at 799-800
[289] *Weinberger v. Salfi*, 422 U.S. 749 (1975)

that the problems of government (and arguably, those due to a reality characterized by an increasing complexity) “are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific”. It reminded that if a classification has some “reasonable basis”, it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because, in practice, it results in some inequality”. Moreover, in the area of economics and social welfare (again, probably in light of the complexity of regulation in this sphere) “a State does not [..] offend the Constitution simply because the classification 'is not made with mathematical nicety or because, in practice, it results in some inequality”. As previously held in *Geduldig v. Aiello*[290]*:*

"[…]a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has."

In its conclusion, Justice Renquist’s opinion made clear that :

“[W]henGovernment chooses to follow this tradition in its own social insurance programs, it does not come up against a constitutional stone wall. Rather, it may rely on such rules so long as they comport with the standards of legislative reasonableness […]”.

In short, *Weinberger v. Salfi* recognized priority to administrative efficiency over the right to an individual determination. However, despite the contention by most commentators that this case represents the death of the irrebuttable presumption doctrine, it this may be not necessarily true. One reason for this is that the acceptance for the international notion of due process has expanded so significantly in recent years, that this might inform the extent of recognition of its basic principles in national settings. Accordingly, it is not to be excluded that the standard for reasonableness of governmental regulation which was controlling in 1975 has evolved to a more demanding level, for the character of mutability it is intrinsic in the concept of standard.

[290]*Geduldig v. Aiello*, 417 U. S. 484

Moreover, the dissenting opinion by Justice Brennan, joined by Justice Marshall, contributes to fueling the debate on the efficiency/due process rivalry:

"[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

This is not to say, nor has the Court ever held, that all statutory provisions based on assumptions about underlying facts are *per se* unconstitutional unless individual hearings are provided. But in this case, as in the others in which we have stricken down conclusive presumptions, it is possible to specify those factors which, if proved in a hearing, would disprove a rebuttable presumption.

[…]in this case, as in *Stanley* and *LaFleur*, the presumption, insofar as it precludes people as to whom the presumed fact is untrue from so proving, runs counter to the general legislative policy -- here, providing true widows and children with survivors' benefits."[291].

It the author's view, this is precisely the type of reasoning that a matured concept of due process would demand: individual determination is to be provided to any extent possible under the circumstances. This should be read to include that, if the presumption does not perform well in making a classification that furthers the goals that it was intended to achieve, then the affected individual should be entitled to show this deficiency in legal proceedings.

Before moving to a conclusion for this part, it is important to note that the irrebuttable presumption doctrine does not rest on the principle of presumption of innocence, which is directly relevant only in criminal cases: the doctrine simply originated from the recognition of a right to be heard which encompasses all procedures which might lead to a deprivation of liberty or property. In *Murry*, Justice Marshall in writing his concurring opinion elucidated with clarity the factors to be assessed for the concrete operation of the doctrine, explaining that the doctrine's focal point was a balancing test between the private interests affected and the governmental interest sought to be advanced by the statute. He further clarified that:

[291] 422 U. S. 804 (citations omitted)

"We must assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution […] where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing process, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices[292]".

In other words, Justice Marshall implied that there are governmental interests whose pursuit warrants a more serious restriction of the private interests at stake. In such cases, the government may legitimately abridge the right to a hearing of specific classes of individuals in the name of the public interest.

Once again, it cannot be overstated that such reasoning would not be transposable to statutes imposing criminal liability. First of all, this is due to the fact that the US Constitution guarantees a right to jury trial in criminal cases[293], which requires an accused the right to be free from a directed verdict of guilt, i.e. from determinations of guilt made prior to the intervention of the jury. Accordingly, the US Supreme Court found such right infringed upon by the use in criminal statutes of either an irrebuttable or a mandatory presumption[294]. Just few years after this principle was laid down clearly, commentators noted that only permissive (and rebuttable) presumptions are found today in criminal statutes[295].

Moreover, there is another peculiarity in statutory criminal presumptions: given the greater weight of the private interest in the case of criminal prosecution, it is well settled that the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged[296]. This is because

[292] *United States Department of Agriculture v Murry*, 413 US 508 (1973), at 517-519

[293] See the 6th Amendment of the US Constitution, which reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence".

[294] See *Sparf and Hansen v US*, 156 U.S. 51 (1895) ;*United Bhd. Of Carpenter and Joiners of American v US*, 330 US 395 (1947); *US v Gainey*, 380 U.S. 63, 70 (1965); *Turner v US*, 396 US 398, 406-407 (1970)

[295] See N. Huntley Holland and Harvey H. Chamberlin, Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?, 7 (2) Valparaiso University law Review 148 (1973), 153, citing Mc Cormick, EVIDENCE (2nd Ed. 1972), 806

[296] *In re Whirship*, 297 U.S. 358 (1970)

of the function of the standard of proof, which in the words of the Supreme Court: "[…] *as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication*[297]".

As a result, the Court developed a parallel doctrine to evaluate the constitutionality of statutes adopting a rebuttable criminal presumption. In the early cases the Court seemed to endorse two different tests for constitutionality: namely, one based on a rational connection between basic and presumed fact which makes the existence of the latter more likely than not[298]; and another based on "comparative convenience", whereby the presumption would be valid if upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression[299] . By 1943, however, the Court rejected the sufficiency of the latter test, allegedly because the defendant always has easier access to the relevant facts[300]: in *Tot*[301], it ruled that that comparative convenience would be a consideration only where the inference meets the rational connection test. However, due to the fact that the standard for "rationality" was not addressed in detail in this ruling, there remained uncertainty as to the degree of convincingness that a jury should entertain in order to approve the use of the presumptions refined in subsequent cases. The fix to this situation came with a series of cases concerning the inferred knowledge of importation of drugs sold in the United States, which was automatically attributed by a number of statutes on drug-dealers: thus, the standard was refined firstly in *Leary v United States*[302], where the possession and transportation of marijuana was considered insufficient to infer knowledge of its illegal importation. The Court reasoned that although the majority of scholarly studies showed that most domestically consumed marijuana had such origins, this did not imply that the users of

[297] *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Justice Harlan concurring)).
[298] E.g., *Luria v. United States*, 231 U.S. 9 (1913); *Casey v. United States*, 276 U.S. 413 (1928); *Yee Hem v. United States*, 268 U.S. 178 (1925)
[299] *Morrison v California*, 291 US 83 (1934), at 89.This was, however, the only case in which the Court used such test.
[300] 319 US, 469. See David N. Brown, Note, The Constitutionality of Statutory Presumptions, 34 University of Chicago Law Review 141 (1966), 145,citing Mc Cormick, EVIDENCE (2nd Ed. 1972), 661-662
[301] *Tot v United States*, 319 US 463, 469-470 (1943)
[302] 395 U.S. 6 (1969)

marijuana such as the defendant had read the literature which would have made them aware of such truth; by contrast, the Court declared to be prepared to uphold the presumption only if a very small amount of marijuana was domestically grown (presumably, because in such circumstances knowledge would be more easily assumed from the market). A second refinement of the test came in *Turner v United States*[303], where the Court expressed the *Leary* standard as a "more likely than not" test[304]to invalidate a permissive presumption of knowledge of illegal importation of cocaine, given the considerable amount of it produced legally within the country. Finally, a further readjustment came about in *Sussman v United States*[305], where the presumption of knowledge of illegal importation of opium clashed with the fact that opium could have been imported for medical reasons and subsequently stolen. By invalidating the presumption despite the recognition that theft of lawfully imported opium occurs in less than 0.01% of cases, the Court seemed to endorse a rationality standard which requires in effect the dissipation of any reasonable doubt[306].

b. European Court of Human Rights

The due process rights under the European Convention of Human Rights are significantly different from those arising under US law: first, because as mentioned in chapter 1, they are not dependent on the deprivation of life, liberty or property. Rather, the notion of due process is at the same time, broader and more context-dependent: it is broader because it encompasses a plethora of rights and even expectations, not necessarily being concerned (at least directly) with life, liberty or property; on the other hand, it is more contextual because it is limited to a procedural aspect, and therefore cannot be invoked in defence of the sanctity of the individual rights in areas that are considered "off limits" for governmental action[307].

[303] 396 U.S. 398 (1970)
[304] Ibid., at 419
[305] 397 U.S. 43(1970)
[306] For a commentary of these cases, see N. Huntley Holland and Harvey H. Chamberlin, Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?, 7 (2) Valparaiso University law Review 148 (1973), 159-161
[307] On the interaction of procedural and substantive notions of due process, see *infra*, para. III.1

The guarantees of article 6 (1) find equally application in the case of civil proceedings, although with some important variations[308]. But it is in criminal proceedings that the additional guarantee of article 6 (2)[309] attaches, demanding that "*everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*". For our purposes in the present paragraph, we will focus on the interaction of presumption with the criminal head of the article. The leading case in this respect is *Salabiaku*[310], where the court addressed both concerns of substantive and the procedural due process.

Unfortunately, with regard to substantive due process the decision contains merely a rather general *obiter dictum* on the possibility, in principle, for states to impose strict liability:

> In principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention, and accordingly, to define the constituent elements in the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence[311].

The decision did not specify which those conditions were, and what the limits of the principle would be. However, today this stands the controlling precedent on the extent to which states enjoy discretion in the definition of criminal offenses. The more specific challenge brought by the plaintiff, however, was that of compatibility of presumptions in criminal law with article 6 (2). This aspect was discussed in much more detail in *Salabiaku*, and requires a more complete analysis of the case.

Mr. Salabiaku was a Zanese citizen living in Paris who had gone to the airport to collect a package that he was supposed to receive, and which after a custom inspection was revealed to

[308] See Christos Rozakis, The Right to a Fair Trial in Civil Cases, 4 (2) Judicial Studies Institute Journal 96 (2004); Arnfinn Bårdsen, Reflections on "Fair Trial" in Civil Proceedings According to Article 6 § 1 of the European Convention on Human. Rights. 51 Scandinavian Studies in Law 99-130 (2007); Dovydas Vitkauskas & Grigoriy Dikov, Protecting The Right to a Fair Trial Under the European Convention on Human Rights (Council of Europe Human Rights Handbooks, Strasburg 2012), available at http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb12_fairtrial_en.pdf

[309] And 6 (3), but that is not relevant for our purposes

[310] ECtHR Judgment 7 October 1988 in *Salabiaku v France* (Application no. 10519/83) A 141-A, 13 EHRR 379

[311] Ibid., at 27

contain illegal goods, namely 10 kilograms of herbal and seed cannabis. Mr. Salabiaku had then been taken to jail, charged with the criminal offences of illegally importing narcotics and the customs offence of smuggling prohibited goods. Only two days later, Air Zaire telephoned to Mr. Salabiaku's landlord informing him that a parcel bearing his name had arrived by mistake in Brussels. On trial, the Tribunal of Grande Instance acquitted him conceding that he was entitled to the benefit of doubt, but nonetheless found him guilty on both counts on the basis of the whole record of the evidence. Such evidence was on the one hand, that the accused collected the item despite the fact that it had no name on it, that the accused did not have the keys to open the lock, and that he passed through the "green channel" of customs meaning that he had nothing to declare; on the other hand, that a package that was specifically addressed to him had mistakenly arrived in Brussels. The key passage of the ruling was that in which the Court reasoned that

"The latter package arrived in Brussels in circumstances which it has not been possible to determine and its existence cannot rebut presumptions which are sufficiently serious, precise and concordant to justify a conviction"

On appeal, the Paris court of appeal set aside the judgment with regard to the criminal offence of illegal importation of narcotics, holding that

... in those circumstances, it is not impossible that Mr Amosi Salabiaku might have believed, on taking the trunk, that it was really intended for him; ... there is at least a doubt the benefit of which should be granted to him, resulting in his acquittal ..."

Nonetheless, the Court upheld the judgment concerning the customs offence, which is also a criminal offence under French law, on the following grounds:

"[...] any person in possession (détention) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him; such force majeure may arise only as a result of an event beyond human control which could be neither foreseen nor averted […] Mr Amosi Salabiaku went through customs with the trunk and declared to the customs officials that it was his property; [...]he was therefore in possession of the trunk containing drugs; […] he cannot plead unavoidable error because he was warned by an official of Air Zaïre [...] not to take possession of the trunk unless he was sure that it belonged to him, particularly as he would have to open it at customs. Thus, before declaring himself to be the owner of it and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods;

The accused appealed on points of law to the Cour de Cassation, claiming that such "almost irrebuttable presumption of guilt" was incompatible with the right to a fair trial and the right to be presumed innocent accorded by article 6.1 and 6.2 of the ECHR. However, the Cour de Cassation dismissed the appeal finding that the relevant article of the customs code was not to be considered repealed by implication by France's adhesion to the convention, and the Court of Appeal "reached the decision on the basis of the evidence adduced by the parties"[312]. Mr. Salabiaku then submitted an application to the ECtHR, claiming a violation of the two Convention articles mention above. The case became famous for being the first time in which the Court expressed itself on the relationship between the Convention and the use of presumptions, particularly with regard to the area of criminal law:

"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require that contracting States remain within certain limits in this respect as regards criminal law.

The ECtHR then reasoned on the scope of the principle of presumption of innocence enshrined in article 6 (2) of the convention, maintaining that the right to be found guilty only "according to law" could not be merely a reference to domestic law, but had to be concerned with the more general concept of "rule of law"[313]. Accordingly, the Court concluded that:

While the Convention does not regard such presumptions with indifference, they are not prohibited in principle, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence[314].

It then went on to assess whether the presumption at issue was consistent with the principles identified:

Even though the "person in possession" is "deemed liable for the offence" this does not mean that he is left entirely without a means of defence. The competent court may accord him the benefit of extenuating circumstances (Article 369 para. 1), and it must acquit him if he succeeds in establishing a case of force majeure.

[312] *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, para. 15
[313] In support of this interpretation, the Court cites by way of example the *Sunday Times* judgment of 26 April 1979, Series A. No. 30 p. 34, para. 55, which remands to the more extensive explanatiion contained in the *Golder v UK* judgment of 21 February 1975, Series A. no. 18, p. 17, para. 34
[314] *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, para. 28

This last possibility is not to be found in the express wording of the Customs Code, but has evolved from the case-law of the courts in a way which moderates the irrebuttable nature previously attributed by some academic writers to the presumption laid down in Article 392 para. 1.[…] The Court for its part would cite a judgment of 25 January 1982, also concerning Article 392 para. 1. Reference is made therein to the absence of "a case of force majeure" resulting from "an event responsibility for which is not attributable to the perpetrator of the offence and which it was absolutely impossible for him to avoid", such as "the absolute impossibility ... of knowing the contents of [a] package" (Court of Cassation, Criminal Chamber, Massamba Mikissi and Dzekissa, Gazette du Palais, 1982, jurisprudence, pp. 404-405).

More recently, it has held that "the specific character of [customs] offences does not deprive ... the offender of every possibility of defence since ... the person in possession may exculpate himself by establishing a case of force majeure" and, with regard to third parties with an interest in the offence, such "interest ... cannot be imputed to a person who has acted out of necessity or as a result of unavoidable error" (10 March 1986, Chen Man Ming and Others, Gazette du Palais, 1986, jurisprudence, pp. 442-444).

It is clear from the judgment of 27 March 1981 and that of 9 February 1982, that the courts in question *were careful to avoid resorting automatically to the presumption* laid down in Article 392 para. 1 of the Customs Code (emphasis added). As the Court of Cassation observed in its judgment of 21 February 1983, *they exercised their power of assessment "on the basis of the evidenceadduced by the parties* before [them]" (emphasis added). They inferred from the "fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid"

The most important take-away of the ruling was that in order to be “within reasonable limits”, presumptions (1) must not deprive the alleged offenders of every possibility of defence; and (2) should not be applied mechanically, but rather, be the result of an assessment based on the evidence adduced by the parties. This suggests that the ECtHR does not adhere to the “bursting bubble” theory of presumption, and follows the “reformist” approach.

Clearly, this was a landmark judgment to be taken into account by legislators in formulating further presumptions, which would be inevitably bound by the need to respect the rights of defence in the sense explained by the Court. But the judgment is also to be coupled with a previous decision of the European Commission of Human Rights, which established that provisions that place on the defendant the burden of proving certain exculpatory facts are not in

breach of article 6 (2) of the Convention only if they may be regarded as appropriate in relation to the objective they pursue[315].

In fact, some years later the Court illustrated in the *Janosevic* case[316] the importance of combining the principles laid down in those two different decisions, holding that

"[…] in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; *in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved* (emphasis added)."[317]

In particular, this judgment was concerned with the semi-automatic imposition of a duty to pay tax surcharges as a penalty for the supply of incorrect information to the tax authority according to a summary investigation of the latter. Given the importance of the function carried out by the tax authority, the Court readily accepted the qualification of the State interest as legitimate, and engaged in some form proportionality assessment of the measure implemented:

The Court also has regard to the financial interests of the State in tax matters, taxes being the State's main source of income. A system of taxation principally based on information supplied by the taxpayer would not function properly without some form of sanction against the provision of incorrect or incomplete information, and the large number of tax returns that are processed annually coupled with the interest in ensuring a foreseeable and uniform application of such sanctions undoubtedly require that they be imposed according to standardized rules[318].

Regardless of the depth of the proportionality analysis, which appears quite rudimentary, what is most important for our purposes is that the Court for the first time considered the rights of defence *in relation to* the aim pursued.

In a later judgment, however, the Court seems to step back from this approach, and considered that it was not its task to second-guess whether the presumption was in itself a reasonable one:

The Court's task, in a case involving the procedure for the imposition of a confiscation order under the 1994 Act, is to determine whether the way in which the statutory assumptions were applied in the particular proceedings

[315] *Lingens and Letigens v Austria*, (1982) 4 E.H.R.R. 373, Eur Comm. HR, at 390-391
[316] *Janosevic v Sweden*, judgment of 23 July 2002 , no. 34619/97, § 71, ECHR *2002*-VII
[317] Ibid., para. 101
[318] Ibid., at 103

offended the basic principles of a fair procedure inherent in Article 6 § 1 (*Phillips*, § 41). It is not, however, within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (*Edwards v. the United Kingdom*, judgment of 6 December 1992, Series A no. 247-B, § 34)[319].

Rather than the previously adopted sliding scale approach to due process, the Court conceived the "fairness of the trial" as an objective element, without any reference to the specific aim pursued through the introduction of the presumption. Reference was made to certain elements which apparently the Court considered determinant component of the right to be heard:

Throughout these proceedings, the rights of the defence were protected by the safeguards built into the system. Thus, in each case the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. Each applicant was represented by counsel of his choice. The burden was on the prosecution to establish that the applicant had held the assets in question during the relevant period. Although the court was required by law to assume that the assets derived from drug trafficking, this assumption could have been rebutted if the applicant had shown that he had acquired the property through legitimate means. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice[320].

At this point, one may question what role is to be played by the principle of proportionality, if such principle does not apply to restrictions of fundamental rights such as the one examined. In the author's view, the only plausible explanation is to favor an interpretation which grants the Court a double role in the review of potential restrictions of the right to be heard; more precisely, in balancing the compelling justification for the investigative or enforcement measure adopted and the potential restriction of the rights affected[321]

[319] *Grayson and Barnham v UK*, judgment of 23 September 2008, Appl. no. 19955/05, 15085/06, para 42

[320] Ibid., at 45 (citations omitted)

[321] Two scholars that have recently attempted to classify systematically the framework used for "proportionality analysis" in global constitutionalism enumerate the four following steps: 1) legitimacy, where the judge is called to verify whether the government is constitutionally authorized to take the measure which is being analyzed. 2) suitability, where the inquiry shifts to whether the means adopted by the government are rationally related to stated policy objectives. 3) necessity, which involves an assessment of whether the same goal could not have been achieved with a less restrictive means. 4) balancing in a strict sense, which is the actual weighing of the benefits of the measure against the costs incurred by infringement of the right, in order to determine which "constitutional value" shall prevail, in light of the respective importance of the values in tension, given the facts. See Alec Sweet Stone and Jud Matthews, Proportionality Balancing and Global Constitutionalism, 47 Columbia Journal of Transnational Law 72, at 75-76

The principle is not recognized as such by the ECHR as it is, but rather only as a limit to acts of interference with some particular fundamental rights[322]. Nonetheless, it has been recognized that "in practice, the European Court engages in balancing in the context of almost every Convention right[323]". Moreover, proportionality analysis tends to be a constant feature in all legal systems for the review of administrative action[324]; indeed, it is not by coincidence that the doctrinal movement of global administrative law includes such principle as part of the general principles of law on which the movement declares to be based[325].

In the author's view, the only plausible explanation of the Court's failure to apply the principle is the adoption of an interpretation of the right to a fair trial that favors a conception of mandatory respect for the core elements of such right. Following this interpretation, the Court is attributed a double-edged role in the review of potential restrictions of the right to fair trial: on one hand, it will ensure respect for a certain minimum standard, independently from the public interest involved. On the other hand, once the Court ascertains that such minimum standard has been respected, it will engage in proportionality balancing to ensure that states impose restriction on the right to fair trial only to the extent necessary for the attainment of legitimate aims. Accordingly, it is submitted that any assessment of the conformity of presumptions with the right to be heard, be it conducted within the ECHR or the EU or any national system, should adopt this double-sided type of approach.

5. **Judicial oversight on presumptions: proportionality balancing**

[322] Namely, articles 8, 11, 13 and 14

[323] Julian Rivers, Proportionality and Variable Intensity of Review, 65 Cambridge Law Journal 174, 182 (2006)

[324] In the words of Sweet and Matthews: "By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of [Proportionality Analysis]. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered "constitutional" in some meaningful sense: the European Union (EU), the European Convention on Human Rights (ECHR), and the World Trade Organization (WTO). In our view, proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all". Alec Stone Sweet and Jud Matthews, Proportionality Balancing and Global Constitutionalism, 47 Columbia Journal of Transnational Law (2008) 72, at 74

[325] Benedict Kingsbury, The Concept of "Law" in Global Administrative Law, (2009) European Journal of International Law20 (1): 23-57;Benedict Kingsbury and Stephan Schill, Investor-State Arbitration, Fair and Equitable Treatment, Proportionality, and the Emerging Administrative Law of Global Governance (ICCA, 2009).

As pointed out in the first paragraph, legal systems *need* legal presumptions in order to work efficiently. For this reason, both legislators in drafting the laws and courts in interpreting them engage continuously in the establishment of rules of this type. In fact, presumptions are so pervasive in our laws that we may sometimes even neglect to mention that in making certain claims, we are either invoking one or trying to defeat one. For instance, usually parties producing documents released by public authorities do not expressly remind the judge that declarations of a public official contained in a public document about facts occurred in his presence are taken as truthful, unless a criminal action is simultaneously initiated to charge him for falsity in public act[326]. This is also -or perhaps even more so- the case for simple presumptions of fact. Such presumptions are just part of our logical reasoning, and a cornerstone in our dialectical argumentation. Accordingly, this combination cannot fail to have a substantial impact on their use in judicial reasoning[327]: judges will continue to resort to presumption because they constitute an integral part of their (and our) reasoning. The concept of *alibi* in criminal procedure is a good example of this idea, which can illustrate well also how a conclusive presumption operates in relation to the degree of acceptance of its underlying justification. Being based on the infallible norm of experience that one cannot be simultaneously in two different places -something which a judge surely needs not be reminded of-, the rejection of the hypothesis that the person who has a proven *alibi* has committed the incriminated acts does not admit rebuttal. The fact that such presumption is *de facto* irrebuttable is but a consequence of the first and foremost rule governing the creation of simple presumptions: that they must be "reasonable". This suggests that the strength of its assumption, will depend on the measure of the corresponding "leap of faith", and by consequence, on the solidity of its foundation: therefore, an unsubstantiated or insufficiently motivated presumption would fail the test of reasonableness, and according to what has been showed in the previous paragraph, would be considered in violation of due process.

Now, it should be noted that this hypothetical is only applicable to a presumption that is developed from general experience and probability, such as the case of criminal *alibi*. By contrast, this logic cannot be used to control for the use of the remaining presumptions,

[326] See, by way of example, article 2700 of the Italian Civil Code: "L'atto pubblico fa piena prova, fino a querela di falso, della provenienza del documento dal pubblico ufficiale che lo ha formato, nonché delle dichiarazioni delle parti e degli altri fatti che il pubblico ufficiale attesta avvenuti in sua presenza o da lui compiuti".

[327] Courts are even expressly legitimated to do so, being directed to apply open-ended standards such as "reasonableness" or the "*id quod plerumque accidit*"

especially with regard to those driven by public policy concerns: in reviewing the reasonableness of those rules, imposing the adherence to strict rationality criteria would defeat the purpose that setting up such presumptions were intended to achieve. However, allowing policy considerations to depart completely from rationality would incur in serious risks of abuse, as the instinctive reaction would be for the entity (be it judge or legislator) that intends to create or rely on the presumption simply to refer to a more or less defined general interest which it intends to pursue. Therefore, it is necessary to develop a strategy that, although allowing a deviation from the exacting standard of rationality described above, enables to control the abuse of this type of presumptions as well. The only way to deal with both situations in a uniform manner is to find common ground. Specifically, this can be accomplished by defining "public policy" broadly to include administrative efficiency, and then devising a general framework for the verification of the functionality of the presumption at issue with the policy objective it intends to achieve.

In this respect, it is suggested that the experience of the two courts analyzed above is to be taken for guidance in the definition of criteria of assessment. **Based on the foregoing analysis, there appear to be three conditions for judicial presumptions to be consistent with due process.First, the presumption has to be based on a legitimate public policy objective,** i.e. for the furtherance of the public interest. One of these objectives would by definition be administrative efficiency, but the objectives could be further specified or identified on the basis of the definition of the interests protected by the relevant statute or area of law.. *De iure condendo*, a list of valid public policy objective could be provided through guidelines or a general clause in the law.

Secondly, the presumption must be implemented with reference to the experience of the court, the agency or the general public in dealing with a particular matter. Thus, a presumption cannot be introduced simply at will of a particular judge, or in plain contrast with the spirit of the existing law or the insights of social science. On the contrary, it needs to be in line with the principles followed by the law and the social and economic context in which it operates, and every departure from such principles should be justified. Accordingly, judges should explicitly mention what the reason is not only for the creation of a presumption, but also for the choice of a particular structure or mode of implementation of the presumption in light of the ultimate objective that they think the law aims to achieve. Courts and legislators may not

need to make reference to specific instances where the presumed outcome arises as a consequence of the verification of certain facts; however, they will need to point out the compellingness of the reasoning underlying the presumption according to some standard of common experience (and presumably, the wider the spectrum of reference for this common experience, the more respected and relied upon that presumption will be).

Third, throughout this process the affected parties should enjoy the right to be heard to the fullest extent possible. This does not mean that the court is obliged, in all circumstances in which it decides to create, modify or simply rely on a presumption, to conduct a hearing or give some sort of participation aimed to verify that the application of the presumption in the specific case does not offend the principles of fairness and justice. In fact, requiring the court to delve into the specific of the case would clearly defeat the role of the presumption in the first place. On the other hand, as clarified by the ECtHR in *Salabiaku*, presumptions are unreasonable when they deprive defendants of every possibility to defend themselves and when they are applied meccanically, i.e. not taking into account the whole record of evidence. This determines an outer boundary for reasonableness, which appears to prevent the operation of presumptions that are unreasonable either procedurally (being overly restrictive) or substantively (leading to disregard plausible evidence to the contrary). With regard to the second inquiry, in particular, it should be noted that the focus is not on the rationality of the presumption with regard to the particular situation of the defendant, but rather, its rationality with regard to the class of cases that are covered by the presumptive reasoning. Accordingly, the individual should be entitled to question the legitimacy of the presumption, bringing to the attention of the adjudicator not so much the details of his case, but rather quantitative and authoritative data that cast doubt on the rationality of the presumption as applied to that particular class of cases.

In short, these principles suggest that the restrictions to the right to be heard should be maintained to a minimum, i.e. to those strictly necessary for the attainment of the policy objective, and that a defendant should always be entitled at least to challenge the presumption in general terms. **The resulting type of judicial control applicable to presumptive reasoning is one based on a *sui generis* proportionality**, an evolution of the analysis described in paragraph 4. Often the objective to be balanced against the deprivation of the right to be heard will be one

of administrative efficiency, but following these principles, *any* policy will be judged from the perspective of its efficiency as far as its impact on the right to be heard is concerned.

The practical problem with this type of analysis is one of commensurability: how to attach a value to the protection of individual interests which compares to that of community interests? This is a well-known problem in proportionality analysis, or more generally in the balancing of conflicting objectives[328]. We will not attempt to provide a solution to this particular problem in this context; however, for our purposes it is important to stress that one of the main arguments in this thesis is that there is a core minimum of the right to be heard that cannot be infringed upon, regardless of the policy or regulatory objectives. This is in line with the idea of minimum rights which is advanced not only by the courts as seen in the previous paragraph, but also by a number of scholars in the field of legal theory, constitutional and human rights[329]. As a result, the prospected proportionality analysis will be confined to those cases where a presumption restricts only a non-essential element of the right to be heard. The more specific limits to this analysis will be defined in the following chapter.

Moving beyond the general framework and principles proposed here, the suggestion can be made that the different nature of the two rationale-based categories of presumptions may be relied upon to devise additional criteria serving as benchmark for a more particularized notion of "expected" rationality. Defining such criteria for the presumptions based on probability and general common sense, for example, would constitute an important step forward for proportionality analysis given that such presumptions are by far the most frequently created and relied upon. While the exact amount of empirical evidence required for a reliable basis can be debated, it seems at least theoretically possible to imagine the identification of a minimum threshold of reliability to be met for the creation of this type ofpresumption. The threshold would restrain the circumstances in which a judge may consider such presumptions acceptable, in a

[328] See for example, Christopher Townley, Which goals count in article 101 TFEU? Public policy and its discontents, 9 European Competition Law Review n. 9 (2011) 441, at 446- 447; ARTICLE 101 AND PUBLIC POLICY (Oxford, Oxford University Press 2009). More generally, Paul-Erik N. Veel, Incommensurability, Proportionality and Rational Legal Decision-Making, 4 Law and Ethics of Human Rights 177 (2010)

[329] See Ronald Dworkin, TAKING RIGHTS SERIOUSLY (Cambridge, Harvard University Press 1978) ; Rawls, A THEORY OF JUSTICE (Oxford University Press, Oxford 1971); Jurgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (translation of Wiliam Rehg) (2nd. Ed., MIT Press, Camridge 1996) ; Katharine G. Young, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (Oxford University Press, 2012)

much similar way to the rules for admissibility of scientific evidence that were developed and introduced in US law in the wake of the *Daubert* case[330]. Obviously, the formulation of such threshold would face a challenge analogous to that of comparability of alternative courses of action, in the sense that a metric should be established to define the array of possibilities from which the probability calculus should be drawn. Moreover, the probability threshold should account for the different standard of conviction in civil and criminal cases, which as we have seen in paragraph 3, is not at all evident in civil law system. These complications, together with the technical challenges of defining uniform rules for appropriate categories of cases, render the endeavor extremely complex, such that it would deserve to be treated in a separate contribution.

[330]*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). As mentioned *supra* in para. I.3, this case owes its fame to its identification of a set of criteria as standard for the admissibility of expert testimony in court, based on an interpretation of the law which superseded the federal standard in the US (the "Frye standard", derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) governing prior to the enactment of Rule 702. The discussions regarding the test for admissibility were focused on the need to address the concern of excluding "junk science" while not depriving litigants of the opportunity to rely on innovative scientific techniques. For this reason, the Supreme Court laid down the following principles: 1) The testimony must be scientific in nature and must be grounded in knowledge, meaning that it has to be reached through a scientific method. 2) The scientific knowledge must assist the trier of fact in understanding the evidence or determining a fact in issue in the case, that is, there must be a "*valid scientific connection to the pertinent inquiry as a prerequisite to admissibility*". 509 U.S. at 591-92. 3) The Rules expressly provided that the judge would make the threshold determination regarding whether certain scientific knowledge would indeed assist the trier of fact in the manner contemplated by Rule 702, based on criteria such as whether something has been tested, whether an idea has been subjected to scientific peer review or published in scientific journals, the rate of error involved in the technique, and even general acceptance, among other things. As the Court recognized, "*It focuses on methodology and principles, not the ultimate conclusions generated*". 509 U.S. at 595

PART TWO: THE RIGHT TO BE HEARD IN INTERNATIONAL LAW AND ITS IMPLICATION FOR PRESUMPTIVE REASONING

III. The right to be heard in international law and its implication for presumptive reasoning

1. Concept and philosophical underpinning

The notion of due process is often rooted in the idea of natural justice which developed in the English case-law, particularly after King John of England was forced to proclaim in the Magna Carta of 1215 certain liberties and guarantees of citizens against the arbitrary exercise of power by the king[331]. In its clause 39, the Magna Carta stipulated that:

> No free man shall be taken or imprisoned or deprived of his freehold of liberties or free customs or outlawed or exiled or in any manner destroyed, nor shall we come upon him or send against him, except by legal judgment of his peers and by the law of the land

Although the spirit of this provision i.e. one of identifying restraints to the government, is essentially the same which underlies the more modern notion of due process, both the language and the contours of this notion have significantly changed over the years. To a great extent, the merit of replacing "law of the land" with "due process" belongs to Sir Edward Coke, a judge in the early XVII century who with the assistance of the Parliament in 1628 authored and presented to King Charles a Petition of Rights where he pleaded the declaration of unconstitutionality of certain actions of the king[332]. Referring to a statute passed by King Edward III in 1354, which used for the first time the term "due process of law", he claimed:

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[331] See Denis James Galligan, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES (Oxford, Oxford University Press 1996), Chap. 5 ("Procedural Fairness in the English Common Law")

[332] Actions such as levying taxes without the consent of Parliament, housing soldiers in homes, setting up martial law (military government), and imprisoning citizens illegally. For a transcript of the original version of the Petition of Rights of 1628, see http://www.constitution.org/eng/petright.htm

That no man of what estate or condition that he be, should be put out of his land or tenements, nor taken nor imprisoned, nor disinherited, nor put to death without being brought to answer by due process of law.

Further, in his "Institute of the Laws of England"[333], he asserted that the Magna Carta should be seen as the basis for the protection of all liberties in English law.

Finally, the idea of due process, which had been floating around for about two centuries, was picked up and refined further by Albert Venn Dicey focusing on the centrality of "rule of law", or more generally, supremacy of the law[334]. First, by laying out the fundamental tenet that no one should be punished except for a breach of law, Dicey was inevitably bringing into the notion of due process a substantive aspect –by reference to the categories of conduct which were deemed illegal. Second, another important implication was that no one was above the law, including government officials. Dicey's conception, which stressed the importance of there being a mechanism of judicial review to prevent arbitrary exercise of power, belied an inherent trust for the authoritativeness of the institutions and procedures in place. That is to say, what mattered in his conception of "due process" was the existence of prescribed procedures and of a mechanism of judicial review, and not so much the details of those procedures or the grounds or thoroughness of the review. It is submitted here that these two important aspects of due process are and ought to be an integral part of the current due process analysis. The argument can be divided in two subsections.

a. The interplay of procedural and substantive due process

It is crucial to define the exact bearing today of this double-sided origin of due process, i.e. its combination of a procedural and substantive notion, for the important implications that this has in the context of adjudication. Clearly, there may be situations where the interests protected by these two notions clash: thus, if no priority is decided between the two, the risk is that decisions will be taken on the basis of arbitrariness and abridging the legitimate normative expectations of an individual.

[333] Sir Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND (London, E. and R. Brooke 1628)
[334] Galligan, Ibid., p.178

First, the meaning of "procedural" and "substantive" should be clarified. In that respect, it is reminded that in chapter II, reference was made to the work of Bentham to emphasize the primacy of a "substantive" notion of justice, and a meaning of "fairness" relying on "rectitude of decisions". That is, according to Bentham, the ultimate objective of justice, and thus all procedures used to achieve that end are merely "adjectival law". This conception did not allow notions of substantive justice to be used as part of due process, since any provision which attributed rights was to be considered substantive.

Thus, the substantive element of due process will have to be seeked out through another method, and that is, identifying whether the application of procedural due process promotes some aspect of substantive justice. Reminding Bentham's position allows us to point out that in that context[335], it was also mentioned that the classification of norms according to the procedural/substantive dichotomy is far from being uncontested, as they are not necessarily reflecting a clear-cut, black and white distinction. This does not mean that procedural elements can never be distinguished from substantive ones; however, there will be cases (a prominent example being some presumptions analyzed in chapter II) where the elements of the two are so intertwined that it will be hard or impossible for the interpreter to determine the "true nature" of the norm without favoring a particular underlying theory or conception of the norm. In other words, these border-line cases demonstrate that what matters is the value(s) that a particular norm is meant to protect. This is indeed the reason why it was suggested that in devising presumptions, legislators and most importantly adjudicators should clarify the reasoning or rationale which has led to crafting that particular presumption, or to do so with that particular formulation.

Accordingly, it seems appropriate, for the purpose of ascertaining the existence of a substantive element in the procedural notion of due process, to require the identification of the values underlying the norms that are invoked by the words of "due process"[336]. Although it is undisputed that this terminology implies the obligatory character of the norms that are said to fall

[335] Chapter II.1

[336] Richard B. Saphire, Specifying Due Process Values: towards a More Responsible Approach to Procedural Protection, 127 University of Pennsylvania Law Review 111 (1978)

under the definition of due process, it doesn't follow that the rationale behind all of them is univocal or homogeneous.
That is, there will be procedures which are provided for the pursuit of a particular value (for instance, achieving a quick and efficient justice or ensuring legitimacy of an arrest) whereas others will be devised in the name of a different set of values (for example, promoting rectitude of decisions or safeguarding the dignity of a suspect). Even the same provisions may, in different context, be used for different purposes, as it is the case for the right to be heard in the context of adjudication and rule-making.

It is therefore imperative to identify which provisions serve which values, and to devise a possible strategy to manage any conflict between different ends. In this thesis, the focus is on a specific and fundamental aspect of due process, that is, the right to be heard, in the context of adjudication. Accordingly, considerations relating to other elements of due process will not be addressed here. However, it is worth noting that the values served through the right to be heard are broadly speaking the same that the notion of due process in adjudication aims to protect: this is because the right to be heard is the central part of due process. The fact that the right to be heard constitutes the core of due process implies that if there is any element of inderogability in the notion of due process, for sure some is to be found in the right to be heard.

Having set the basis, we shall now resume our quest for principles in the doctrine of due process by identifying the main components of the rationale for the very existence of "process rights".
The first principle, that has been repeatedly mentioned, is that the adherence to a certain procedural framework will lead to results which will be substantively just. This conception (which can be defined as that of "instrumental compliance"), of which Bentham is a leading exponent, is arguably the strongest root for the creation and development of the primitive notion of due process, up until the times when the principle of separation of powers was conceived by Montesquieu and the first Constitutions were adopted. There is one problems with this theory though, and is that although it sees sacrifice of process in the name of substantive justice as perfectly legitimate (substantive justice being the ultimate objective) it offers no mechanism for individuals subjected to the law to verify whether substantive justice is actually achieved through

the particular outcome reached. Also, if this conception were to be followed, it would be controversial to speak about process *rights* or "*due* process", and more appropriate to simply refer to procedures, perhaps even "guidelines" for government action. Unfortunately, as it will be demonstrated throughout this chapter, this understanding of due process still percolates through the majority of decisions of international courts and tribunals, with only some limitations.

A second principle is that of enforcement of the law in accordance with normative expectations. This theory (which can be called "normative expectation of compliance") refers to the idea that an individual has an expectation that the public authority will use a particular methodological framework to achieve the final outcome, and trusts the authority precisely because he or she knows that this methodology will be complied with. Under this conception, the undertaking of certain actions by the state in violation of the prescribed procedures is a breach of trust, which in turn might lead the individual to be less respectful of the procedures prescribed for his conducts. As a result, this theory treasures the value of proceduralism in and of itself to preserve the sanctity of the social contract. The problem with this theory is, inevitably, one of extreme rigidity, which does not fit the (complex) features of the modern administrative State.

Then there are two intermediate views: a third conception is that following a certain set of procedures allows the community to predict the way a particular law is interpreted or applied. Under this paradigm (which I call discretion-fettering compliance), the value of procedural fairness is one that plays out in the context of discretionary enforcement, and is traditionally coadiuvated by the use of guidelines[337]. This theory allows flexibility in matters that are non-controversial in nature, but requires greater caution in the application of discretionary concepts, and the giving of reasons by the authorities to the enhancement of predictability.

Fourth, and finally, there is a view according to which the procedures are set out to ensure the participation of the individual in order to allow the authorities to take into account his particular situation, out of respect for him or her as a person and for the high value that the legal system places on individuals. Lawrence Tribe describes this theory (which can be referred to as one of

[337] See Kenneth Culp Davis, DISCRETIONARY JUSTICE (Louisiana State University Press, Baton Rouge, Louisiana, 1969)

"dignitary compliance") as follows: "*those rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted for what is to be done*"[338]. This conception of due process warrants the mandatory consideration of the individuals in a variety of procedures, and relies on the duty to give reasons as one of its strong components[339].

With these principles in mind[340], we can direct the analysis of the jurisprudence of international courts and tribunals to the specific question of which of these four values seems to be most prominently served by the rules of procedure, and more generally, by the right to be heard. The answer is likely to be found not only in the context of those provisions, but also and more importantly on the consequences that are attached to procedural violations: was procedural fairness valued *per se*, or was it seen as instrumental to the pursuit of another value? Eventually, only those aspects of the right to be heard which are consistently upheld even in the face of conflicting objectives, can be characterized as "core minimum" of such right.

The notion of "core minimum", "minimum core" or "essence" of rights is inspired by the practice of the European Court of Human Rights (as well as the German Constitution, which will not be considered here[341]) and the United Nations.

The European Court of Human Rights (ECHR) has referred to the concept of "very essence" of right not only in the context of the right to a fair trial (Article 6) but also in that of the right to remain silent, the right of appeal in criminal matters (Protocol No. 7 Article 2) ,the right to vote (Protocol No. 1, Article 3), the right to marry (Article 12) the right to education (Protocol No. 1 Article 2), the right to individual application (article 34), and the protection of *ne bis in idem* (Protocol No. 7 Article 4)[342]. It has explicitly ruled on the right to fair trial only in one particular

[338] Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW (2nd Ed. West, New York, 1988)

[339] Jerry Mashaw, DUE PROCESS IN THE ADMINISTRATIVE STATE (2nd. Ed., West, New York 1988);

[340] There would be even a fifth principle that has been invoked in the context of criminal law, according to which the criminal trial simply lays out the rules of the game for a process which calls a defendant to answer to his or her immoral actions. Anthony R. Duff, TRIALS AND PUNISHMENTS (Cambridge, Cambridge University Press 1986), chapter II. However, it will not be discussed here as it can be subsumed within the dignitary strand. See also Galligan, p. 80

[341] Article 19 (2) (F.R.G.) of the Grundgesetz says "[i]n no case may the essential content of a basic right be encroached upon"

[342] For an account of these cases, see Jonas Christoffersen, FAIR BANALANCE; PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS (Martinus Nijhoff, Leiden, Boston 2009),p. 145-163

area, the right to access to court, where it has declined to affirm the priority of this absolute right either on the basis of sovereignty considerations[343], or due to the existence of alternative means of legal process available to the applicants.[344] Thus, although this suggests that it is doubtful that an absolute or "essential" right to court under Article 6 will ever be found, at least it shows that the Court has indeed applied the concept of "very essence" with respect to a variety of rights.

The United Nation Committee on Economic and Social Rights ("the Committee") has since 1991 promoted the idea of minimum core of economic and social rights first as a presumptive legal entitlement[345], and subsequently as a non-derogable obligation and a cause of strict liability[346]. Admittedly, the right promoted by the Committee is of different nature, and refers to another type of issues; however, the very existence of the concept in this cognate area of law suggests support for the genera idea that rights have a core minimum, and can provide important insights as to the methodology followed to identify the content of such minimum. In fact, a recent article on the subject identified three methodologies that are used for that purpose[347]: the first is to look at the essential minimum related to a moral standard, such as "how the liberal values of human dignity, equality and freedom, or how the more technical measure of basic needs are minimally sustained within core formulations of rights". This would appear a valid and aptly transposable method, but the author recognizes its problematic vagueness "when it acts to close off, rather than open, a conversation of rights". The second approach focuses on the minimum consensus, "reached within the communities constituting each field". This approach may provide more details, but implies the recognition of a number of variegated concepts of "minimum core", which appears to defeat both the purpose of the term and the ultimate objective of asserting it as a general principle of law. Finally, the third approach "locates the minimum core in the content of the obligations raised by the right, rather than the right itself". This approach, which is the one

[343] *Fogarty v the United Kingdon* (GC), 21 November 2001, ECHR 2001-XI, paras 35-39; McElhinney v Rieland (GC), 21 November 2001, ECHR 2001-XI, paras 37-40; *Al Adsani v United Kingdom* (GC) 21 November 2001, ECHR 2001-XI, paras 55-67; and *Maniolescu and Dobreascu v Romania and Russia*, 3 March 2005, ECHR 2005-VI, para. 66-82

[344] See *Waite and Kennedy v Germany* (GC), 18 February 1999, ECHR 1999-I, para 73; *Beer v Regan v Germany* (GC) 18 February 1999, Appl. No. 28934/95, para 63.

[345] UN Economic and Social Council [ECOSOC], Comm.on Econo. Soci. & Cultural Rights, Report on the Fifth Session, Supp. No. 3, Annex III, para. 10, UN Doc. E/1991/23 (1991)

[346] UN Economic and Social Council [ECOSOC], Comm.on Econo. Soci. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standards of Health (art. 12), para. 47, UN Doc E/C.12/2004 (11 August 2000)

[347] Katharine Young, The Minimum Core of Economic and Social Rights, 33 The Yale Journal of International Law 113 (2009), 116-117

used most recently by the Committee, is more attentive to the institutional aspect, and more particularly on the enforceability of the rights invoked. Thus, this last method suggests placing prominent importance on the respect of such right in litigation, although it is not clear whether it would be open to consider rights that are not consistently upheld in the balancing with other rights or with the public interest.

My intuition is that the best solution would be combining this latter perspective, from which we will start, with a more normative idea of minimum core linked to the values of dignity, equality and freedom. In this sense, the project of this chapter is both descriptive and normative, as we shall see in the concluding paragraph.

b. The imperfection of procedures

The other important element for understanding due process is that procedures should be observed despite their imperfection. Procedures typically identify a uniform methodology for the application of the law in a variety of contexts, such as in the presence of different factual elements, but also and more importantly different normative features that come into play. Therefore, procedures can hardly be suited to take into account the particular situation of all individuals in all circumstances. In this sense, procedures are an imperfect instrument for the pursuit of substantive justice. At best, they constitute a compromise between substantive justice and effective enforcement. For this reason, it is believed that what the law strives to achieve is to determine the most effective way by which classes of individuals are treated alike[348]. In this struggle between equity and justice, rights are constituted by "a core certainty and a penumbra of doubt": it is the struggle between the principle and its application to particular situations[349].

This judgment is usually made *a priori*, irrespective of the traits of a particular disputes and having in mind a more general framework, that is, a group of cases or individuals which due to some commonalties will be treated alike. However, there will be circumstances where the legislator will use open-ended concepts, leaving the discretion for the administrative authorities to define those classes of cases or individuals in the application of the law –and the final word to

[348] See Herbert Lionel Hart, THE CONCEPT OF LAW (Oxford, Calendon Press, 1961), p. 163
[349] Ibid., p. 123

the judicature to verify the pertinent use of discretion. The tools that authorities can rely upon to modulate their discretion in order to suit different contexts appropriately are of two types: on the one hand, the powers of enquiry, which they can decide to activate (or not) in a particular case; on the other hand, the rules of proof, using which they can decide to relax or strengthen the rigidity of proceduralism to take into account the specifics of the case. In such cases, therefore, procedures are not (or not entirely) defined "by design": rather, it will be on the authorities to define the boundaries of distinction, fetching the best procedural rules for a determinate class of cases. As it will probably be clear by now, this is precisely the mechanism that operates in the case of presumptions, which create shortcuts to full proof to reflect the typical considerations of a particular class of cases: presumptions are simply a way to balance the quest for substantive justice with the need to account for procedural justice. As it has been briefly mentioned in chapter II and will be illustrated in chapter V, they often conflate the two elements with the result of either changing substantive law significantly, or failing to uphold procedural justice.

One of the arguments of this thesis is that when this operation occurs in the context of adjudication, the role of procedural fairness should not be diminished. In other words, when setting or endorsing a presumption to identify a particular class, an authority or a court should give the parties core due process elements, such as the right to be heard, in order to ensure that the presumption is attuned with the goal(s) of procedural and substantive justice.
However, to make that argument we need to have a grasp of the values underlying certain procedures. For this reason, paragraph 2, 3 and 4 will review the norms and case-law concerning the right to be heard. Paragraph 5 will then conclude trying to extrapolate a common core for such right and translate what its implications are in the context of presumptive reasoning in economic adjudication.

2. Procedural rights in "non-criminal" public law adjudication

A methodological note is in order. Given the commonalities of the notions of the right to be heard in administrative law, public international law and criminal law, the following two paragraphs will inevitably address recurring issues. In the benefit of space, the discussion of the

points made in one context will not be repeated in the others unless it presents some peculiar and significantly distinguishing features. Thus, it is in the author's intention to provide in this paragraph the foundations which will enable a smoother discussion of the peculiarities of the right to be heard in the contexts illustrated below. The aim of the enquiry is to define the content of the right to be heard from its confrontational aspect; that is, to examine the aspects of due process that impact the concrete possibility of having one's voice heard by the adjudicator to influence the outcome of the case. Accordingly, these paragraphs will not address due process issues that are only tangentially related to the *contradictoire*, such as the privilege against self-incrimination, the right to legal aid, the right to be physically present at trial or the right to the execution of the judgment.

Upon that premise, we can proceed to set out the scene for the definition of "non-criminal" public due process. The terminology "non-criminal" is used here to allude to proceedings which may be formally of either "administrative" or "civil" carachter, but are of public law nature with the potential to affect individual rights in the pursuit of a superior public interest. Attention may be brought to the definition of "administrative" advanced by Peter Lindseth, which referred to the two discerning elements of functional autonomy from the historically "constituted" bodies of the state (legislative, executive, or judicial) and normative dependence on those same bodies for legitimation of functionally autonomous regulatory power in democratic and constitutional terms[350]. But ultimately, advanced technical distinction of the administrative process carry the risk of shifting the attention away from the central focus of the inquiry: the fact that the trigger for the right to be heard is a public law measure with potentially adverse effect on individuals.

As the aim of this chapter is to assert the existence of a general principle of law which relates to a particular conception of the right to be heard, this paragraph will contain an overview of the *dicta* by international courts and tribunals on administrative due process which can be read in support of this view. The international courts and tribunals considered here are of three types: first, those called to scrutinize public law from a human right perspective, where the issue of due process is most prominent. Second, those called to review public law from within, and in particular, within the growing body of global administrative law for civil service. Third, and

[350] Peter L. Lindseth, POWER AND LEGITIMACY, (Oxford, Oxford University Publishing, 2010) 21–23

finally, those called to scrutinize public law from an international investment law perspective, in particular under the concept of "of fair and equitable treatment of foreign investors in investment law. While several bodies could be comprised within the category of international administrative tribunals (including among others the EU Civil Service Tribunal, the Administrative Tribunal of the International Monetary Fund, the Administrative Tribunal of the Inter-American Development Bank, the Appeals Board of the Council of Europe, the Appeals Board of NATO, the Appeals Board of the European Space Agency, the Appeal Board of the Intergovernmental Committee for European Migration, the Appeals Board of the OECD), the focus will be on the Administrative Tribunals of the United nations, the International Labour Organization and the World Bank. This choice is dictated not only by convenience, intrinsic in limiting the scope of an otherwise exceedingly burdensome inquiry, but also by the recognition of these tribunals as a prolific source and a representative image of a conscious attempt to lay out a consistent and systematic body of rules and principles for a an entire area of law: that of international civil service. For this reason, the approach chosen is to treat those tribunals in block, rather than individually. Although there are differences in both the constitutive instruments and the rules of procedures applicable to the disputes they adjudicate, it has been recognized by the World Bank Administrative Tribunal in *Louis De Merode et al.* that given the similarity of treatment and subject matter, they can be said to give rise to general principles of international service law[351].

[351] *Louis de Merode,Frank Lamson-Scribner, Jr., David Gene Reese, Judith Reisman-Toof, Franco Ruberl, Nina Shapiro*, WBAT Reports [1981], Decision No. 1, para. 27-28: "Do there exist rules common to all international organizations, and which must, therefore, ipso facto apply in the legal relations between the Bank and its employees, in such a way as to determine the rights and duties of the two parties in the present case? Is there a common *corpus juris* shared by all international officials? […] The Tribunal, which is an international tribunal, considers that its task is to decide internal disputes between the Bank and its staff within the organized legal system of the World Bank and that it must apply the internal law of the Bank as the law governing the conditions of employment. The Tribunal does not overlook the fact that each international organization has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality; its own personnel policy; and that the difference between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. *Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service.* Whether these similar features amount to a true *corpus juris* is not a matter on which it is necessary for the Tribunal to express a view. The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the United Nations family. In this way

For the sake of precision, a further detail should be added to this general picture acknowledging that since December 2009, the UNAT has ceased operating and has been effectively replaced by the UN Dispute Tribunal. For simplicity, however, we will refer here to the more voluminous and long-standing case-law of UNAT.

a. Applicability

(i) International Human Rights Law

To set the outer boundaries to the notion of right to be heard, one must first of all have a close look at the instruments considered. First, it should be noted that all human rights instruments emanate from adherence to the UN Declaration of Human Rights and the subsequent International Covenant on Civil and Political Rights (ICCPR), by which the principles contained in the declaration were made binding between signatories States. Article 14 of the ICCPR reads as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

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the Tribunal may take account both of the diversity of international organizations and the special character of the Bank without neglecting the tendency towards a certain rapprochement" (Emphasis added).

(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

Following those treaties, regional treaties for the protection of human rights were signed in Europe (the European Convention of Human Rights (ECHR)), Africa (the African Charter for Human and People's Rights (AfCHPR)) and America (Inter-American Convention of Human Rights (IACHR)) providing specific protection for the right to be heard.

For example, Article 6 ECHR, in its non-criminal head, states:

In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Similarly, article 7 of the AfCHPR states:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

Notably, there is no "right to a fair trial" as such for non-criminal cases under the IACHR. What the Convention provides, instead, is a strong notion of the right to an effective judicial remedy, laid out in article 25 (1),which asserts that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the Constitution or laws of the State or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Despite the similarity of the formulation of the article with that which establishes the right to an effective remedy in the ECHR (article 13[352]), it has assumed a greater importance in the jurisprudence, due to its inclusion in article 27 of the Convention amongst the articles that cannot be subject to derogation in periods of emergency. Thus, the result is that "the judicial guarantees essential for the protection of rights" (as article 27 calls them) contained in article 25 represent the core of due process, which applies both in criminal and in non-criminal cases. In fact, commentators have noted that the incidence of this bi-partite structure in the interpretation of due process rights does not have practical relevance in the Court's jurisprudence[353]. However, what one can gather from a comparison of the articles of the 3 regional human rights conventions is that the IACHR appears to protect, in non-criminal cases, only against violation of fundamental rights (which need be, moreover, recognized by the law or Constitution of the State) –and this

[352] "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".
[353] See Laurence Burgougue-Larsen and Amaya Ubeda de Torres, LES GRANDES DECISIONS DE LA COURT INTERAMERICAINE DES DROITS DE L'HOMME (Bruxelles, Bruylant, 2008), 673, and references therein.

might well have a limiting effect on the scope of application of the right to be heard in that context.

Under article 6 ECHR, one is protected not only against violations of rights, but rather against any determination of civil rights and obligations: thus, the scope of the trigger for this provision is much wider. Theoretically, the differences could be reconciled if the interpretation of the concept of civil rights and obligations were restrictive; however, the case-law of the ECHR has clearly shown that this is not the case. In fact, with the benchmark of disputes that are "decisive for private rights and obligations", the Strasbourg organs declared that the Article applies to several categories of what would often be considered as public law disputes[354], some examples being proceedings concerning internal administrative proceedings of the European Patent Office[355], action for damages following refusal to grant asylum[356] and investigations into business takeover with little consequence on the applicant's reputation[357]. The criteria were parsed out by the Court in *Benthem v Netherlands*, a case concerning the revocation of a license for the delivery of liquid petroleum gas to motor vehicles. The Court, to determine whether article 6 applied to the appeal by the Regional Health Inspector over the granting of the license, summarized the case-law in respect of civil rights and obligations as follows"

(a) Conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning".

(b) The "contestation" (dispute) may relate not only to "the actual existence of a ... right" but also to its scope or the manner in which it may be exercised. It may concern both "questions of fact" and "questions of law".

(c) The "contestation" (dispute) must be genuine and of a serious nature.

(d) […] the ... expression *'contestations sur (des) droits et obligations de caractère civil*' [disputes over civil rights and obligations] covers all proceedings the result of which is decisive for private rights and obligations". However,

[354] David John Harris, Michael O'Boyle, Colin Warbrick, LAW OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS (London, Butterworth, 1995), pp. 189 et seq., cited by Judge Christos Rozakis in The right to A Fair trial in Civil Cases, 4 (2) Judicial Studies Institute Journal, 96 (2004), at 104
[355] *Rambus Inc v Germany* , Appl. no. 40382/04, 16 June 2009.
[356] *Panjeheighalehei v. Denmark*, application no. 1 1 230/07, decision of 1 3 October 2009
[357] *Fayed v. United Kingdom* (1994) 18 EHRR 393

"a tenuous connection or remote consequences do not suffice for Article 6 para. 1 (art. 6-1) ...: civil rights and obligations must be the object - or one of the objects - of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right"[358].

The Court went on to clarify the first criteria, i.e. the word "dispute", by providing two further details on the notion of "civil" for purposes of the application of this article:

the concept of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State.

Furthermore, Article 6 (art. 6) does not cover only private-law disputes in the traditional sense, that is "disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law", and not "in its sovereign capacity" . Accordingly, "the character of the legislation which governs how the matter is to be determined [...] and that of the authority which is invested with jurisdiction in the matter [...] are [...] of little consequence": the latter may be an "ordinary court, [an] administrative body, etc. Only the character of the right at issue is relevant"[359].

Thus, the Court decided for the applicability of article 6, considering determinant the fact that the license was closely associated with the right to use one's possessions in conformity with the law's requirements, and moreover, had a proprietary character (since it could be assigned to third parties). In short, the determination was reliant upon the existence of a "civil right" (although determined in its autonomous, Convention meaning) in domestic law. Later cases then identified the limits to the concept of "civil right" by declaring the applicability of Article 6 in cases where the law imposes merely a procedural bar to the claim -rather than a substantive one-[360], which would *necessarily* be the case where domestic law removed from the jurisdiction of the courts a whole range of civil claims, or conferred immunity from civil liability to large categories of persons[361]. Although the meaning of "right" in the convention sense is autonomous from the definition in domestic law, the Court noted that it would be deferential to the findings of the

[358] See *Benthem v Netherlands*, (8848/80) [1985] ECHR 11 (23 October 1985) , para. 32 (citations omitted)
[359] Ibid., at 34 (citations omitted and cardinal numbers added)
[360] *Roche v UK*, (Application no. 32555/96). Grand Chamber, 19 October 2005 , paras 116-126 (focusing on the fact that the immunity in question was conferred within the context of the law that had created the right in the first place, and thus was to be considered as defining the very content of that right- a substantive provision)
[361] *Osman v UK*, [1998] EHRR 101 , paras 136-140

domestic courts as to the "substantiveness" of the domestic bar to the claim for purposes of the Convention:

> Where […] the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law[362]

As far as the specific notion of "civil" is concerned, the Court has not identified precise criteria to define the autonomous Convention meaning; rather, it has applied a test that compares the private-law elements and the public-law elements, and determines which category is predominant[363]. Thus, at least in theory, the administrative actions which have no serious consequences for civil rights and obligations or overriding public interest considerations would seem to remain within the State's discretion (in *Benthem*'s term, sovereignty) and thus escape the scrutiny of Article 6 ECHR. One should specify that this is "at least in theory" because, in line with well-established convention law, the overriding public interest considerations would have to pass a proportionality test[364]. However, it is to be noted that, in the special area of civil service, the Court has identified an additional hurdle for the State to exclude a dispute from the application of Article 6. In *Vilho Eskeliken v Finland* , the Court specified that the State is required to (1) have expressly excluded in its national law access to a court for the post or category of staff in question; (2) justify the exclusion on objective grounds in the State's interest -for example showing that the servant in question participates in the exercise of public power (such as, in the words of the Court, a "special bond of trust and loyalty" is created between the civil servant and the State) or that the subject matter of the dispute in issue relates to the exercise of State power, or has called into question that special bond.[365] In the author's view, there would seem to be no reason in principle for limiting the application of the first requirement (i.e., access to court) to the area of civil service, and it would not be a stretch to require its fulfillment for any proceedings that the State intends to immunize from Article 6-scrutiny. As a result, it can be

[362] *Roche v Uk*, (Application no. 32555/96). Grand Chamber, 19 October 2005 , para. 120 (citing *Z. and Others v. the UK*, 10.5.2001, ECHR 2001-V, 103, para. 101)
[363] *Deumeland v Germany*, (1986) 8 EHRR 448 para. 74
[364] See *infra*, para. V.2
[365] *Vilho Eskeliken v Finland*, [GC] No 63235/00, 19 April 2007

submitted that Article 6 ECHR applies to the extent that there is a dispute concerning *any* right that can be adjudicated in the domestic context. Thus, it is the very notion of adjudication that calls into play the right to be heard in the Convention sense.

Article 7(1) of the AfCHPR is perhaps the best illustration of how central the role of the right to be heard is to the concept of fair trial: the article starts with reference to this fundamental right, and then goes on to say that this comprises the above mentioned requirements . The interpretation of this article is closely aligned to the jurisprudence of the Human Rights Committee, and is inspired by both the Resolution on the Right to Recourse and Fair Trial issued in 1992 and the Guidelines on the right to Fair trial and Legal Aid in Africa adopted in 2003 by the Commission. However, it has been noted that most of the cases brought to the Commission were decided before the adoption of the Guidelines and on relatively egregious violation, and thus most of the details of the content of the right to a fair trial constitute uncharted territory[366].

(ii) International Administrative Law

The jurisprudence of international administrative tribunals has been most sensitive to the idea of international due process. As recognized by a former UNAT and WBAT judge and leading authority in the field, "*the trend in the jurisprudence of tribunals is to assume that there is a general principle of law that staff members are entitled to a fair procedure whether it is explicit in the written law or not*"[367]. Notably, this implies developing a set of "due process" principles that apply to administrative –as opposed to judicial- adjudication. Being the amalgamation of generally recognized rules of law, which do not directly flow from the letter of the statutes, such principles tend to escape precise boundaries. Therefore, the actual scope of the right to be heard cannot be limited to the observance of the procedures provided by the relevant statutes. Indeed, an ILOAT judgment recently affirmed that a claimant's rights against an international organization such as the UN are those derived from the Staff Regulations and Staff Rules and

[366] Brownen Manby, Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1-7, in Malcom Evans and Rachel Murray (eds.) THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS. THE SYSTEM IN PRACTICE, 1986-2006 (Cambridge, Cambridge University Press, 2008)
[367] Chittharanjan F. Amerasinghe, THE LAW OF INTERNATIONAL CIVIL SERVICE (2nd. Ed., 1993)

from the general principles of law applicable to such organizations[368]. International administrative tribunals have on occasions recognized international law, such as "general principles of law and basic human rights"[369]; in this respect, the UNAT stipulated that:

> International agreements regarding civil rights, such as article 26 of the International Covenant on Civil and Political Rights, which concerns equality before and equal protection of the law[…]form part of the identifying principles of the United Nations, must influence the […] interpretation [of the staff rule in question][370]

Generally speaking, however, the jurisprudence of international administrative tribunals on the applicability seems to develop around the idea of legitimate expectations. Some cases which undeniably trigger due process rights are the termination of employment for unsatisfactory service[371], transfers to which a staff member objects[372], termination of secondment[373], disciplinary matters[374] and probation[375].

(iii) International Investment Law

In the investment law context, legitimate expectations have come to assume an even greater importance. To set the scene, one should consider the development of the concept of "fair and equitable treatment" for foreign investors, a standard that is nowadays incorporated in virtually every bilateral investment treaty[376]. The origin of the modern notion fair and equitable treatment can be traced back to the beginning of the last century, when the expansion of trade and investment abroad brought to the attention the legal status of foreign nationals abroad and the

[368] *Spina* ILOAT Judgment 2662, [2007] (UNIDO)
[369] See discussion by Laurence Boisson de Chazournes, Judge E. Evatt and Chittharanjan F. Amerasinghe in N.Ziadé, PROBLEMS OF INTERNATIONAL ADMINISTRATIVE LAW (Leiden, Martinus Nijhoff, 2008), pp. 62, 67-68
[370] *Berghuys*, UNAT Judgment No. 1063 [2002]
[371] *Coll*, UNAT Judgment No. 69 [1964] (WHO); *Keeney*, UNAT Judgment No. 6 [1951] JUNAT Nos. 1-70 p. 24; *Gale*, ILOAT Judgment No. 85 [1965] (UNESCO); *Kassab*, WBAT Reports [1990], Decision No. 97
[372] *Go*, ILOAT Judgment No. 631 [1984] (WHO)
[373] *Higgins*, ILOAT Judgment No. 92 [1064] (IMCO), JUNAT Nos. 87-113 p. 41 p. 41
[374] See *Hussain*, UNAT Judgment No. 1237 [2005] VI, U.N. Doc. AT/DEC/1237 (Secretary-General of the United Nations): "*The right to be heard arises also for disciplinary proceedings brought before the Joint Disciplinary Committee, with the exception that in such cases the Secretary General may, for serious misconduct or for waiver of the staff member, take a decision dispensing with the referral to the Committee*".
[375] *Lane*, UNAT Judgment No. 198 [1975], p. 267
[376] Ioanna Tudor, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIOINAL LAW OF FOREIGN INVESTMENT (Oxord, Oxford University Press 2008)

protection of their economic interests[377]. A moment that is frequently referred to for the purpose of illustrating the rise of the concept of international minimum standard of treatment is the address in 1910 to the American Society of International Law by the President of the American Society of International Law and former Secretary of State of the US, Elihu Root, where he stated:

> Each country is bound to give to nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizen's, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form part of the international law of the world. A country is entitled to measure the standard of justice due an alien by the justice it accords its own citizens only when its system of law and administration conforms to this general standard. If any country's system of law and administration does not conform to that standard of justice, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens[378].

Thus, the concept of an international minimum standard of treatment was seen as embedded in very essence of "civilized nations". The first appearance of the concept o in the jurisprudence of international courts and tribunal was in the context of the US-Mexico General Claims Commission, a conciliation commission established for the settlement of claims against one government by nationals of the other for losses or damages suffered by such nationals or their properties. Over the course of three years in the 1920s, the Commission adjudicated a number of disputes with reference to the IMS[379].

[377] Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES. STANDARDS OF TREATMENT (New York, Wolters Kluwer 2009), at 11

[378] Elihu Root, The Basis of Protection to Citizen's Residing Abroad' (1910) 4 AJIL 517 (emphasis added). See Newcombe and Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES. STANDARDS OF TREATMENT (Wolters Kluwer 2009) at 12; Martins Paparinskis, INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREAMENT (Oxford University Press, Oxford 2012), at 2

[379] *Neer* (1926) IV RIAA 60; *Faulkner* (1927) 21 AJIL 349; *Harry Roberts* (1927) 21 AJIL 357; *Hopkins* (1927) 21 AJIL 160; and *Way* (1929) 23 AJIL 466.

In the meantime, the League of Nations had established a Committee of Experts for the Progressive Codification of International Law[380]. In preparation for its 1930 Codification Conference, a number of scholars at Harvard Law School prepared a draft international convention for each of the three topics to be addressed, one of which was the responsibility of States for Damage done in their Territory to the Person or Property of Foreigners (so called "1929 Harvard Draft")[381]. Unfortunately, the views at the Conventions were divergent, and thus no final document emerged. After several years, the UN Secretariat requested Louis Sohn and Richard Baxter to prepare an updated draft to codify the international law on state responsibility, which brought to the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens (the so called "1961 Harvard Draft"). [382] This draft, which is to date considered an authoritative description of the treatment of foreigners in international law, as demonstrated inter alia by the reference made to it by a number of investment tribunals[383], contained three articles imposing responsibility for violation of the standards of the administration of justice, which are reported below (with emphasis added).

Article 6 (Denial of Access to a Tribunal or an Administrative Authority)

The denial to an alien of the right *to initiate, or to participate* in, proceedings in a tribunal or an administrative authority *to determine his civil rights or obligations* is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State denying such access;

(b) if it *unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world*; or

(c) if it otherwise involves a violation by the State of a treaty.

Article 7 (Denial of a Fair Hearing)

The denial to an alien by a tribunal or an administrative authority of a fair hearing *in a proceeding involving the determination of his civil rights or obligations or of any criminal charges* against him is wrongful if a decision or judgment is rendered against him or he is accorded an inadequate recovery. In determining the fairness of any

[380] (1925) 5 League of Nations Official Journal, 143

[381] Leage of Nations Official Journal Special Supplement 53 at 9. The other two topics were 'Nationality' and 'Territorial Waters'.

[382] (1961) 55 American Journal of International Law 548

[383] See Newcombe and Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES. STANDARDS OF TREATMENT (Wolters Kluwer 2009), at 22, footnote 126 for a list of cases.

hearing, *it is relevant to consider whether it was held before an independent tribunal and whether the alien was denied*:

(a) *specific information in advance* of the hearing of any claim or charge against him;

(b) *adequate time to prepare his case*;

(c) full opportunity to know the substance and source of any evidence against him and to contest its validity;

(d) *full opportunity to have compulsory process* for obtaining witnesses and evidence;

(e) *full opportunity to have legal representation* of his own choice;

(f) free or assisted legal representation on the same basis as nationals of the State concerned or on the basis recognized by the principal legal systems of the world, whichever standard is higher;

(g) *the services of a competent interpreter* during the proceedings if he cannot fully understand or speak the language used in the tribunal;

(h) full opportunity to communicate with a representative of the government of the State entitled to extend its diplomatic protection to him;

(i) full opportunity to have such a representative present at any judicial or administrative proceeding in accordance with the rules of procedure of the tribunal or administrative agency;

(j) *disposition of his case with reasonable dispatch* at all stages of the proceedings; or

(k) any other procedural right conferred by a treaty or recognized by the principal legal systems of the world.

Article 8 (Adverse Decisions and Judgments)

A decision or judgment of a tribunal or an administrative authority rendered *in a proceeding involving the determination of the civil rights or obligations of an alien or of any criminal charges* against him, and either denying him recovery in whole or in part or granting recovery against him or imposing a penalty, whether civil or criminal, upon him is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State concerned;

(b) *if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world*; or

(c) if it otherwise involves a violation by the State of a treaty.

As it clear from the text, the understanding of minimum standard of justice for alien was based on the basic notion of due process that would be later codified in 1966 under the ICCPR, with the difference that in cases involving disputes over “civil rights or obligations” –and not criminal charges- there was only a right to “access to a tribunal or an administrative authority”, without the detailed list of guarantees implied in the notion of “fair hearing”. Article 6 made reference to the principles of justice recognized by the principle legal systems of the world, but presumably

because of the wide range of practices to be considered for a rigorous codification, could not provide further content to that notion. Thus, although this Draft never became binding, it is indicative of the divide over the concept of fair trial when it comes to non-criminal matters.

Parallel to these developments, many European countries had started in the late 50s-early 60s to enter into a series of Bilateral Investment Treaties (BIT), as did the United States in the 1970s[384]. Those treaties did not constitute a complete revolution, for in many respects they were similar to the Friendship, Commerce and Navigation (FCN) Treaties that were concluded mainly through the 19th century. However, they differed in one important respect: they had as a primary purpose that of protecting investment abroad. Like the latest generation of FCN Treaties, they included clauses guaranteeing "full protection and security", "the protection required by international law" and "fair and equitable treatment" (FET). Arguably, the boost for the diffusion of the FET in the BITs was the inclusion of obligations to provide fair and equitable treatment in the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 Organization for Economic Cooperation and Development Draft Convention on the Protection of Foreign Property[385]. In contrast with the FCN treaties, BITs contained clauses providing for the jurisdiction of arbitral tribunals, as opposed to the Permanent Court of Justice, to settle disputes. It is only since the late 60s that the first State-to Investor arbitration clause was included in a BIT[386], thereby leading a trend of taking investment claims out of the exclusive competence of investors' home States and thus making investor rights immediately effective. Since then, the number of BITs increased exponentially, together with the number of State signatories, leading to a change in the nature of such treaties to include the objective of investment *promotion*. Dynamics of change are much more complex than this introductory overview is able to convey (one complicating factor above all being the role of Most Favorite Nation clauses), but for our purposes, suffice it to note that the number has grown so significantly that commentators refer to "the treatification" or "the

[384] Alexandra Diehl, THE CORE STANDARD OF INVESTMENT PROTECTION. FAIR AND EQUITABLE TREATMENT (Alphen aan den Rijn, NL, and London, Wolters Kluwer 2012), at 34

[385] Herman Abs and Hartley Shawcross, 'Draft Convention on Investments Abroad' 9 Journal of Public Law 116, art 1; OECD Draft Convention on the Protection of Foreign Property 1967 (1968) 7 ILM 117 art 1(a). See Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice (1999) 70 British Yearbook of International Law 99, 112

[386] Specifically, that between Germany and Gabon in 1969. See Alexandra Diehl, THE CORE STANDARD OF INVESTMENT PROTECTION. FAIR AND EQUITABLE TREATMENT (Alphen aan den Rijn and London,Wolters Kluwer 2012), at 43

multilateralization" of investment law[387]. What this implies for our inquiry is that the obligation to accord fair and equitable treatment, which is a standard feature of these treaties, is so widespread that it can be legitimately affirmed to reflect a general principle of law[388]. In fact, in 2004 the US Model BIT referred to "fair and equitable treatment" for purposes of the IMS as including "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world".

The problem of defining the content of this general principle of law is that the jurisprudence of arbitral tribunals on fair and equitable treatment (FET) is not entirely consistent. This can be in part imputed to the fact that there exists no doctrine of *stare decisis* in investment treaty arbitration (or in international law), and in part to the fact that an extremely variegated amount of obligations exist in the existing network of BITs, some of which have been interpreted with reference to specific contractual agreements between the states and the investors. More importantly, the problem lies in the fact that fair and equitable treatment constitutes a double standard: conduct must be not only fair, but also equitable. Both concepts are in themselves extremely general and open-ended notions. A recent monography on the FET standard identified three possible meanings for "equity or equitableness": (a) the autorization to judge *ex aequo et bono*; (b) the power to interpret the law in a creative way, allowing for the creation of new rules. (c) the measure that allows the avoidance of absurd or unreasonable results[389]. The author did not provide a definite answer as to which of the three criteria is to be followed, but according to some authority in the ICSID case-law[390], it seems possible to exclude the first –a principle that

[387] Jeswald W. Salacuse, The Treatification of International Investment Law, 13. Law and Business Review of the Americas 155, 156-57 (2007); Stefan Schill, THE MULTILATERALIZATION OF INVESTMENT LAW (Cambridge, Cambridge University Press, 2009)

[388] Ioanna Tudor, Great Expectations: The Fair and Equitable Treatment Standard in the International Law of Foreign Investment, Dissertation submitted at the European University Institute in Florence, May 2006, at 103; and Schill, Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law, IILJ Working Paper 2006/6 (Global Administrative Law Series), available at http://www.iilj.org/working%20papers/documents/2006-6-GAL-Schill-web.pdf

[389] Ioanna Tudor, Ibid.

[390] See *ADF Group , Inc. v. United States of America*, Award, 9 January 2003, footnote 40, para 184. See also *Mondev International Ltd.v. United States of America*, Award 11 October 2002, 6 ICSID Reports . See also Christopher Schreuer, Decisions Ex Aequo et Bono under the ICSID Convention, and Gabriel Bottini, The Fair and Equitable Treatment Standard in times of systemic crisis, both available at http://www.abanet.org/intlaw/fall06/materials.html

was also vehemently opposed in the proceedings leading to the adoption of the Statute of the Permanent Court of International Justice[391]. It can be debated which meaning is the more appropriate between the remaining two; however, regardless of the choice, it is apparent that the notion of equitableness in the context of FET claims needs to be linked to the specific State measure in question (be it legislative, administrative, or otherwise).

By contrast, fairness is indicated by the dictionary as "the quality of treating people equally or in a way that is right or reasonable"[392]; in turn, the word "reasonable" is normally interpreted as to remand to concepts such as suitability, necessity, proportionality, transparency and participation[393].Translating all these concepts into concrete prescriptions is a daunting task, and is arguably the reason why one can find in the literature many and different definitions of the notion of FET[394].

Recent contributions attempting to bring clarity to the interpretation of FET inevitably struggle to reconcile different streams[395]. Most compelling seems the suggestion of dividing between three strands of cases: (1) protection of an investor's legitimate expectations (including non-discrimination, as well as non-harassment and coercion); (2) procedural review of government conduct (including for "denial of justice"); and (3) substantive review of government conduct[396].

For our purposes, we can focus on the first two concepts. The closest analogy with human rights case-law is that with the "due process" review of government conduct in the second category, for it relies on the very same principles that this chapter intends to invoke. By contrast, the first category is of interest for the definition of the notion of legitimate expectations, which as we

[391] See Procès-Verbaux of the Proceedings of the Committee of Jurists (1920), The Hague, 16 June -24 July 1920, 296-325

[392] CAMBRIDGE INTERNATIONAL DICTIONARY OF ENGLISH (Cambridge, 1996)

[393] See Federico Ortino, From non-discrimination to "reasonableness": a paradigm shift in international economic law?, Jean Monnet Working Paper 01/05 (2005)

[394] For an overview see Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 (3) The Journal of World Investment & Trade (2005)357

[395] Alexandra Diehl, Ibid.; Ioanna Tudor, ibid.; Martins Paparinskis, Ibid.; Kenneth J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, 43 New York University Journal of International Law and Politics 43 (2010)

[396] Jonhathan Bonnitcha, How Much Substantive Protection Should Investment Treaties Provide to Foreign Investment? (Dphil Thesis, University of Oxford 2012), Chapter 5, on file with the author. Note that the case-law used by Bonnitcha to justify such division does not include conduct that is discriminatory, in bad faith or which constitutes a denial of justice, a

have seen *supra*, assumes great importance in the administrative process. Finally, the third category will not be discussed because, as it was argued in paragraph 1, any notion of "substantive due process" can be considered from the perspective of a violation of the right to be heard only to the extent that the alleged "unfairness" translates into a procedural violation.

Moreover, in support for this view is the evolution of the concept of denial of justice, which is one of the violations of FET belonging to the second category. The doctrine of denial justice, which is inevitably based upon the premise of exhaustion of local remedies[397], refers to a conduct of improper administration of civil or criminal justice as regards an alien, including denial of access to courts, inadequate procedures and unjust decisions (in the words of Vattel, "no access to a forum, excessive delay, or a manifestly unjust and partial decision")[398], which gives rise to state liability for violation of the IMS[399].

One of the latest decisions relying on this doctrine summarized the four conditions where such breach could materialize as those where the relevant court: (1) refused to entertain a suit; (2) subjected it to an undue delay; (3) administered justice in a seriously inadequate way; or (4) clearly and maliciously misapply the law[400].

However, the support for the last of these conditions has not been unanimous. In particular, strong criticism can be found in the seminal (and latest) book on the topic, written by Professor (and arbitrator) Jan Paulsson[401] -which interestingly, was also a member of the tribunal which defined the four conditions just few years earlier. After surveying the definition of denial of justice in the scholarly literature and reviewing a number of decisionS (including *Denham*[402], *Yuille, Shortridge & Co*[403], *Loewen*[404], *Mondev*[405] , *Azinian* and *Waste Management*[406]) to

[397] Antonio Augusto Cançado Trincadé, Denial of Justice and Its Relationship To Exhaustion of Local Remedies in International Law, 53 Philipine Law Journal 406 (1978)

[398] Emer Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW ("Le droit des gens, ou principes de la loi naturelle"), trans. Charles G. Fenwick, Classics of International Law (1916; Buffalo, NY: William S. Hein & Co., 1995)

[399] Andronico O.Adede, A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law, 14 the Canadian Yearbook of International Law 72 (1976).

[400] *Azinian et al. v Mexico*, 1 November 1998, ICSID ARB (AF)/97/2, 5 ICSID Reports 269

[401] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge, Cambridge University Press 2005)

[402] *Lettie Charlotte Denham & Frank Parlin Denham* (*US v. Panama*), 27 June 1933, VI RIAA 334

[403] 7 February 1856, de Lapradelle and Politis, RECUEIL DES ARBITRAGES INTERNATIONAUX (Paris, Pedone, 1905), vol. II, at p. 22

[404] *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 January 2003

illustrate the evolutions of the doctrine, Paulsson concludes dismissing the classic understanding of substantive denial of justice, and asserting its exclusively procedural nature. The nub of his criticism for a theory that would allow liability to arise for gross misapplication of substantive law, thereby excusing bona fide errors by municipal court, goes as follows[407]:

One of the chief difficulties in applying the rule that the *bona fide* errors of courts do not involve responsibility lies in the fact that the question of whether there has been a 'denial of justice' cannot, strictly speaking, be answered merely by having regard to the degree of injustice involved. The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as 'Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?'

Quite convincingly, he points out that what had always been regarded as substantive denial of justice was recognized by international judges and arbitrators for an essentially procedural feature:

What needs to be understood is that even if in extreme cases the substantive quality of a judgment may lead to a finding of denial of justice, the objective of the international adjudicator is never to conduct a substantive view. As Fitzmaurice put it in the lengthier of the two quotations above: 'it is immaterial how unjust the judgment may have been'[408].

In fact, this view of the doctrine resonates well with the latest decision on denial of justice, *Loewen*, where the tribunal declined to recognize any such thing as a distinction between good and bad faith error:

Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an

[405] *Mondev International Ltd v United States of America*, ICSID Case No. ARB (AF)/99/2 , Award , 11October 2002
[406] *Waste Management, Inc. v. Mexico*, award, 30 April 2004, (2004) 43 ILM 967
[407] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge, Cambridge University Press 2005), at 82
[408] At 84 (quoting Alwyn V. Freeman, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE, New York, Longmans, Green & Co., 1939)

outcome which offends a sense of judicial propriety is enough […][409].

To appreciate whether this was a correct restatement of the understanding of denial of justice at the time of the decision, one needs to have in mind the evolution not only of denial of justice, but also more generally of the international minimum standard for the administration of justice. In that respect, it is true that in the early cases, foreign investors borne quite a high burden in invoking the liability of a State: the threshold was that of showing "*an outrage, bad faith or a wilful neglect of duty that is so far short of international standards that every reasonable and impartial man would really recognize its insufficiency*"[410].
With that definition in place, it was hardly possible to challenge any State action, as long as the state could provide a justification for it: to escape the challenge, it was enough for the State to prove that not *every* reasonable man would have recognized the insufficiency, i.e. that one reasonable man could entertain a doubt in that respect.

However, several years later the Permanent Court of International Justice intervened in the debate by ruling in *ELSI*[411] that"*arbitrariness is not so much something opposed to the rule of law, as something opposed to the rule of law. (...) It is willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*." The importance of the step taken by the Court by embracing this standard was emphasized by the tribunal in *Pope & Talbot*, noting that not only it left out the requirement of "*every reasonable and impartial person*", it also replaced the term "*outrage*" with mere "*surprise*" and that of government action with the concept of "*due process*", thereby making the formulation "*more dynamic and responsive to evolving and more rigorous standards for evaluating what the governments do to people and companies*"[412]. In other words, it stressed on the evolutionary nature of the standard, which seems appropriate to

[409]*Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, at 132, (quoting thereafter *Mondev International Ltd v United States of America* ICSID Case No. ARB (AF)/99/2 , Award, October 11, 2002),
[410]See *U.S.A. (L.F. Neer)* V. *United Mexican States*, (1926), RIAA iv. 60 at 61-62. The following paragraph of the award also repeated a well-known principle of international law, i.e. that it is immaterial which branch of government has perpetrated the violation: "*Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial*."
[411] *Electronica Sicula S.p.A.* (ELSI) (*United States of America v. Italy*), ICJ. Reports 1989, p.15.
[412] See *Pope and Talbott*, paras 63 and 64

allow adaptation to an increasingly complex reality. In *Mondev*, the tribunal picked up this suggestion to provide a fresh and more exacting definition: "

To the modern eye, what is unfair or unequitable need not equate with the outrageous or the egregious [...] The content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in the 1920s.[413] [...]In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was *clearly improper and discreditable*[414]

Although one can contend that '*improper or discreditable*" is still a vague and puzzling criteria, the award is nonetheless of great importance for it suggests a relaxation of the requirement of "*shocking or surprising the sense of judicial propriety*", in favor of the more amenable "*a tribunal can conclude that the decision was clearly improper and discreditable*"[415]. In addition, the quoted phrasing used to define the FET has clarified that there is no requirement of bad faith, as it was implied previously by the use of the word "willful".

However, the *Pope & Talbot* tribunal generated criticism for issuing a partial award in June 2001 in which it interpreted Art 1105(1) as including obligations of fair treatment that go beyond the international standards for the administration of justice[416]. Although the ruling was justified on the basis of NAFTA parties' BITs with other states –which granted a higher standard[417], it prompted the NAFTA Free Trade Commission to issue a binding interpretation of Art 1105(1), which affirmed that Art 1105(1) corresponds with the IMS[418]. This interpretation settled any

[413] See ICSID Arbitration no. ARB(AF)/99/2, *Mondev International Ltd* v *United States of America*, p.116 and 123, October 11, 2002, www.naftalaw.org.
[414] Ibid., para 127. This definition has been embraced also by *Loewen Group, Inc. and Raymond L. Loewen v United States (Loewen)*, Award, 26 June 2003, 7 ICSID Reports, para 133
[415]Note that this represents the exact opposite extreme of the Nerr formulation: if in this latter it was necessary showing that all reasonable men (not even tribunals, which would make it easier) would recognize the insufficiency of the decision, here a mere showing of one tribunal interpreting in such way that the decision was (clearly) improper would suffice.
[416]*Pope & Talbot v Canada*, Interim Award, 26 June 2000, para. 110
[417] Ibid., paras 110-118
[418] Free Trade Commission, Interpretation of NAFTA, July 31, 2001: " Minimum Standard of Treatment in Accordance with International Law 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of

doubts concerning the correspondence the obligation contained in FET and the IMS, but the debate between this view and one that sees it as supplementary to that notion is still ongoing[419]. Since the aim of our enquiry is merely to identify a minimum standard, that discussion will not be addressed here. By contrast, credit should be given to another debate that concerns whether the content for such minimum standard is to be found in comparative analysis, both of the legal rules and more generally of the legal culture and the experience of the country in dealing with investors. These arguments are advanced by a number of scholars[420], and have been endorsed by the arbitral tribunals in *S.D. Myers V Canada*[421] *andGenin v Estonia*[422].

Yet rigorous comparativism fails to explain the rise of certain concepts in the interpretation of FET, in particular that of legitimate expectations[423]. The most comprehensive definition of FET with explicit reference to the idea of legitimate expectations, was given in *TECMED*[424], which referred to four main obligations for host States: (1) forward-looking consistency, i.e. "*to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand all the rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations*"; (2) backward-looking consistency, i.e. "*without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan*

aliens. 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)"

[419] See Martin Paparinskis, INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREAMENT (Oxford, Oxford University Press 2012)

[420] See generally, Stephan Schill (ed.) INTERNATIONAL INVESTMENT AND COMPARATIVE PUBLIC LAW (Oxford University Publishing, 2011); see also, with particular reference to legitimate expectation, the Separate Opinion of Thomas Wälde in Thunderbird; Elisabeth Snodgrass, Protecting Investors; Legitimate Expectations – Recognizing and Delimiting a General Principle (2006) ICSID Review of Foreign Investment Law Journal 1, at 25-30; Michele Potesta', The Doctrine of Legitimate Expectations in Investment Treaty Law, Paper Presented at the Society of International Economic Law (SIEL), 3rd Biennial Global Conference (July 9, 2012), Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102771

[421] *S.D. Myers Inc. v. Canada*, First Partial Award of November 13, 2000 (Hunter, Chiasson, Schwartz), 40 ILM 1408 (2001); Richard H. Kreindler, Fair and Equitable Treatment - A Comparative International Law Approach, 3 (3) Transnational Dispute Management (June 2006)

[422] *Genin v. Estonia* (Award), ICSID Case No. ARB/99/2 (June 25, 2001);

[423] Elizabeth Snodgrass, Protecting Investors; Legitimate Expectations –Recognizing and Delimiting a General Principle (2006) ICSID Review of Foreign Investment Law Journal 1, at 25-30; Michele Potesta', The Doctrine of Legitimate Expectations in Investment Treaty Law, at 4

[424] *Técnicas Medioambientales Tecmed, S.A (TECMED) v Mexico* ,CASE No. ARB (AF)/00/2 (May 29, 2003), para. 154

and launch its commercial and business activities"; (3) "*to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments*"; and (4) "*not to deprive the investor of its investment without the required compensation*".

The Tribunal was more precise as to the origin of the concept of legitimate expectations, explaining that because of the good faith principle established by international law, "*the Contracting Parties are required to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*"[425]. It should be noted that this interpretation is not immune from criticism: Sornarajah, for example, contended that expectations should only be accounted for in calculating the amount and appropriateness of compensation, and that the concept of good faith from which it said to originate was only in recent times coming to be explored in common law systems[426].

But the turning point in the evolution of legitimate expectations in the FET case-law, bringing the importance of this concept to the fore, was three years later in *Thunderbird v Mexico*[427]. There, the tribunal for the first time considered that an expectation could arise from informal conduct of the government, i.e. different from the revocation of licenses or permits that had been considered in the past. That same year, the tribunal in *Saluka*[428] set the boundaries of this posture, clarifying that not any kind of unfulfilled expectation would be suitable to give rise to a violation of the FET: the expectation has to be reasonable, which would not be the case for example if the investor believed "*that the circumstances prevailing at the time of the investment remain totally unchanged*"[429]. Furthermore, the tribunal in *Saluka* made clear that the concept is not exclusively based on the investor's perspective, since this would have to be weighed against the legitimate right of the State to regulate. It stressed that this assessment must be made with due regard for the measure of deference that international law has to that effect, and accordingly defined as unfair or unequitable only those actions taken for purposes unrelated to any rational

[425] Ibid.
[426] Muthucumaraswamy Sornarajah, The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?, in Investment Treaty law II: Current Issues, BIICL (2005)
[427] See *Thunderbird v Mexico, UNCITRAL Award January 26, 2006 (*Portal Ariosa, Wälde, Van Der Berg) at 147
[428] *Saluka Investments v. Czech Republic*, Partial Award 17 March 2006.
[429] See *Saluka*, at 304

policy (or discriminatory).[430]

This interpretation of the FET met with success in subsequent cases. In *LG& E v Argentina*[431] , where the tribunal was called to decide whether the unilateral amendment of the "stabilization clauses" (by which Argentina committed to set tariffs adjusted to the US Producer Price index) in the gas distribution licenses was a violation of FET, it pondered the question whether in certain circumstances the investor could have been expected to take protective measures to mitigate certain types of risk. Similarly, in *Metalpar v Argentina*, the tribunal found no violation of the FET for the "pesification" of the economy which had affected the investor's rights and credits *vis a vis* his clients, one of the key considerations was that given the experience of the investor in the field, it was "*unlikely that Claimants legitimately expected that their investments would not be subject to the ups and downs of the country in which they were made or that the crisi that could already be foreseen would not make it necessary to issue legal measures to cope with it*"[432].

It remains to be clarified what conduct in specific might give rise to a claim of legitimate expectation. In *LG&E*, for example, the crucial determination to the tribunal was the finding that the legitimate expectations existed and were enforceable by law. Equally, in *Metalpar* the tribunal's reasoning involved as a primary consideration the fact that there were no specifically enforceable rights, which coupled with the an estimation of the investor's reasonable risk assessment led it to reject the claim of breach of FET. This enforceability-oriented interpretation of legitimate expectations was taken the same year in *BGv Argentina*[433](a case based on the same facts) and in *MCI v Ecuador*, where the tribunal declined to find a breach of FET since there was no legally enforceable obligation on the part of the government[434]. Similarly, in *PSEG v Turkey*[435] the tribunal found a breach of the FET in light of the fact that the investor had vested rights in enforceable contracts, which the government endeavored to renegotiate unilaterally.

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[430] See *Saluka*, at 305
[431] *LG&E v Argentina*, ICSID CASE No. ARB. 02/1 (July 25, 2007)
[432] *Metalpar S. A and Buen Aire S. A. v Argentina*, ICSID Case ARB/03/05, Award on the Merits, 6 June 2008, paras. 151-159
[433] *BG Group v Argentine Republic*, Ad-hoc UNCITRAL. Arbitration, Final Award, Dec. 24, 2007
[434] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, 31 July 2007
[435] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, Case No. ARB/02/5 ICSID, Award, 19 January 2007

Another line of cases dealt with the difference between legitimate expectations which may give rise to a FET violation and mere contractual expectations arising out of a contract between the investor and the State, which are more properly addressed by a domestic civil court. While it is clear that the latter situation would not in itself implicate State responsibility for violation of the FET, the case-law has not been consistent in detailing what additional elements would be required for this to evolve into a breach of FET: while the majority of cases has required that the State was acting *iure imperii*[436], others have deemed sufficient simply an outright or unjustified repudial of the transaction[437], or a "*substantial breach*"[438].

The most pertinent line of cases in the search for the boundaries of a general principle of "legitimate expectations" can be found in situations of informal representations made by the State which have led to the undertaking of an investment. The first case in this respect was *Sempra Energy International v. Argentina*,[439] another case based on the unilateral changes to the adjusted tariffication clauses of the gas distribution licenses, where the tribunal looked beyond the classification of the breaches as "contractual" to note that they constituted integral part of the outcome of major legal and regulatory changes introduced by the State. These changes –opined the tribunal- gave expression to a sweeping change of policy that could be performed only by the State, "and not an ordinary contract party"[440]. It added that:

> [Legitimate expectations] becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations…

Thus, the contract was not simply a contract as one between any public or private party, but was a representation of a kind that could be seen as a specific encouragement towards the

[436] *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 51; *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260; *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, paras. 342-343; *Toto Construzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, paras. 161-162.
[437] *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115.
[438] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 316.
[439] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007,
[440] Ibid., para. 298.

undertaking of the investment. Very similar reasoning was followed by the tribunal in *Duke Energy v Ecuador*[441], where the existence of a contractual agreement, along with the circumstances surrounding the agreement, were able to arouse legitimate expectations.

In *National Grid v Argentina*, another gas license case, the tribunal distinguished the situation from previous awards on the basis that on the addition to the contract, the investor had relied on a prospectus used by the government advertising the tariff regime to attract investment[442].

But how specific would the representation need to be to trigger legitimate expectations? On this aspect, the award in *Total v Argentina* (yet another Argentinean gas case) provided a limiting principle, holding that the expectations would be legitimate *only when* they are *specifically* addressed to a particular investor.[443]Yet in other cases, the investor's expectation was found to exist even in the absence of a contract, on the basis of more informal conduct: in *Metalclad v Mexico*, the tribunal found a breach of FET for the refusal to grant a permit necessary for the construction of an hazardous waste landfill when the investor had received specific assurances by federal officials that the permit would not be needed. In another case involving Mexico, the tribunal compared the assurances given in *Metalclad*[444] –defined "*definitive, unambiguous and repeated*"- to those in the instant case, which it considered "*at best ambiguous and largely informal*" and thus concluded that there was no breach of the FET[445]. Also, another comparison can be done between the award in *MTD v. Chile*, which referred to the Chilean President's toast speech at a dinner with the President of Malaysia as contributing to the creation of expectations[446], and the passage of the award in *El Paso* which considered the public declarations of a Minister not to abandon the convertibility regime (backed up by a declaration by the President to the Argentinian Congress to that effect) as "*political statements*", to which "*limited confidence can be given...in all countries of the world*".[447]

[441]*Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008
[442]*National Grid plc v Argentine Republic*, UNCITRAL (UK/Argentina BIT) – Award, 3 November 2008 http://ita.law.uvic.ca/documents/NGvArgentina.pdf
[443]*Total v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 119
[444]*Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 89
[445]*Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 148
[446]*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case. No. ARB/01/7, Award, 25 May 2004, paras. 63, 125, 133, 156-157.
[447] Ibid., para. 158

More generally, it appears that the value of representations depends on the extent to which the aggrieved conduct is contrary to the regulatory framework in place, or what the investor could reasonably expect from it. Thus, government representations that imply regulatory changes will naturally carry greater weight than general expressions of support for the investment project *in light of* the existing regulatory framework. Once again, the notion of specificity is key to the assessment: to overcome the expectations derived from the existing regulatory framework, the specificity of government's representation must concern not only the target of, but also the conduct or result which is subject to representation –a perfect example being the *Metalclad* case described above. Absent representation, however, there could still be liability if the government's conduct constitutes an unreasonable deviation from the existing regulatory structure. Awards finding breach of FET under these circumstances vary, however, on the extent of deviation necessary for the finding of violation. Thus, in *El Paso* the tribunal held:

> There can be *no legitimate expectation* for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or *unless the alteration of the legal framework is total*[448].

Similarly, the award in *Toto v Lebanon* stood for the proposition that:

> In the absence of a stabilization clause or similar commitment, […] changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment *only in the case of a drastic and discriminatory change in the essential features of the transaction*[449]

Finally, another qualification was provided by the tribunal in *Impregilo v Argentina*, which specified that:

> The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from *unreasonable modifications* of that legal

[448] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 364 (emphasis added).
[449] *Toto Construzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 244

framework[450].

Unfortunately, unreasonableness is not a very helpful criterion in devising the content of the FET standard. More specific elements such as the total alteration of the legal framework or the discriminatory nature of the changes are to be welcomed as a much better guidance. However, those elements would necessarily be context-dependent: as ruled by the tribunal in Duke v Ecuador, "*The assessment of the reasonableness of legitimacy [of the investor's expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State*". In addition, reference should be made to the only award which spells out the exceptional circumstances under which, arguably in any kind of context, a change in the existing legal framework constitutes an unreasonable departure violating legitimate expectations. In *Total v Argentina*, the tribunal held:

> […] a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. *This is the case for regimes, which are applicable to long-term investments and operations*, and/or providing for "fall backs" or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize.[451]

In sum, it can be said that the general principle of legitimate expectations holds that a State is responsible (at pain of triggering a violation of the FET) for regulation adversely affecting one's business if regulation can be characterized as "inconsistent" with the existing legal framework. More precisely, a regulation is likely to be deemed "inconsistent" if (1) it violates specific commitments undertaken by the State (*El Paso*); (2) it alters the legal framework in its totality or it modifies drastically and discriminatorily (*Toto*); or (3) it defeats the purpose of a regulatory regime designed to apply to long-term investments and operations (*Total*) or otherwise uses the legal instruments that govern the actions of the investor or the investment for a purpose different from that usually assigned to such instruments (*TECMED*).

[450] *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Final Award, 21 June 2011, para. 291 (emphasis added).
[451] *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 112

Clearly, the existence of legitimate expectations for foreign investors is strongly indicative of the fact that such expectations would arise for national investor, that is, citizens that are engaged in business activities within the State. And were the legislation to limit the possibility for national citizens to rely on those expectations, that would be in contrast with the widely acknowledged international standards for the administration of justice. Thus, it is possible to assert that a finding of legitimate expectations is sufficient to establish a basis for due process claims in the context of economic adjudication.

b. Notice and right to comment

Under the notion of "notice" of "giving the opportunity to comment" lie all the requirements of "positive engagement" of the public administration. Once again, the central notion is the opportunity to be heard, which requires the administration to provide the individual with (1) the information relevant for the potentially adverse measure; and (2) the context and modalities for the individual to make himself heard.

(i) International Human Rights Law

In general terms, the content of this right has been summarized by the ECHR as the opportunity for the parties to a proceeding, criminal or civil, to be given notice of all the evidence or information presented to the judge, even by an independent prosecutor, with a view to influence its decision, and to discuss them[452].

According to the Court's jurisprudence, this right can be infringed upon when an adjudicator at any stage of the proceedings-including constitutional proceedings- rejects a request to be granted access to the file.[453] However, not all refusals to disclose evidence would trigger a violation, particularly if the non-disclosure is protected by public interest immunity for legitimate

[452] ECHR Grand Chamber 20 February 1996, *Lobo Machado v Portugal*, para 31; 24 February 1995, *McMichel v United Kingdom*, Seres A No. 307-B, para 80; ECHR, 19 November 1995, *Kerojarvi v Finland*, Seris A No. 322, para 42

[453] *Ruiz-Mateos v Spain* (1993) 262 Eur.Cl.H.R. (ser. A). 94

reasons[454] or if the refusals were approved by the domestic courts on proportionality grounds[455]. Importantly, the Court ruled that access to vital documents capable of affecting the outcome must be granted at all times, thus making for a classic example of "core essence" of a right that cannot be subject to balancing[456]. In that particular case, it noted that by not having access to potentially decisive information, complainants were unable to lodge appeal[457].

With regard to one's own evidence (i.e, evidence extrapolated from a defendant), it must be acknowledged that the Court a position that is both instrumental and a deferential: first, it has held that as a general rule, reliance on evidence obtained in breach of another article of the Convention does not necessarily infringe on the overall fairness of the proceedings under Article 6[458], with the only exceptions of serious breaches of Article 3 (which prohibits torture and inhuman treatment) -that will invalidate the proceedings in most circumstances[459]. Secondly, it has ruled that since it is not a court of fourth instance, it will not second-guess the assessment of evidential weight undertaken by domestic courts, unless the particular piece of evidence is totally unreliable because of the suspicious circumstances in which it had been obtained [460]. Again, the reasoning of the Court in this context can be reassessed in the light of Paulsson's suggestion to focus on procedural defects: in particular, by pointing out that the evidence was deemed unreliable by the Court because of the failure of the domestic court to meet the criteria of independence and impartiality, or to respect the principle of equality of arms, and the impossibility to cure that defect on review.

(ii) International Administrative Law

The jurisprudence of administrative tribunals shows a primary concern for granting the civil servant the possibility to be made aware of potentially adverse decisions. For example, notice is

[454] *Paul and AudreyEdwards v United Kingdom*, [2002] ECHR 303 (14 March 2002)
[455] *Rowe and Davis*, 28901/95 [2000] ECHR 91 (16 February 2000) , 30 E.H.R.R. 1
[456] In *McMichael v United Kingdom* (1995) 20 EHRR 205, para. 80
[457] Ibid.
[458] *Khan v. United Kingdom* [2010] ECHR 47486/06, 12 January 2010, para 34-40; *Bykov v. Russia*, Application no. 4378/02, Judgment 10 March 2009, paras, 94-105
[459] See *infra*, note 746
[460] *Lisica v Croatia*, Application no. 20100/06) ECHR Judgment 25 February 2010, paras 47-62

required prior to the non-confirmation of a probatory period[461] and in the case of dismissal for unsatisfactory service[462]; in *Kirkbir*[463], the ILOAT even went as far as to hold that ILO should have given notice of the non-renewal of a fixed-term contract. However, on the other hand, tribunals have retracted from the idea that notice is necessary in all circumstances, particularly where the applicant was already aware[464] or where he was very unlikely to change the situation had he been notified in advance[465]. This is in line with the principle, applicable to many of the violations of procedural requirements, that a mere irregularity without substantial impact on the decision will either be judged immaterial or lead to compensation, short of causing the annulment of the decision[466].

In contrast with the functional view of notice, the right to comment does not admit instrumentalization: it is the "hard nub" of the right to be heard, repeatedly defined "*one of the most important due process rights of [a] staff member*"[467]. This right to be heard "*strictu sensu*" consists of the possibility to adduce facts and pleadings in response to the allegations made by the administration. It is important to understand, however, that there is no right as to the concrete modality to exercise such procedural right: more specifically, there is no explicit right to an oral hearing[468]. Moreover, the right to be heard can be postponed to the later phase of the proceedings, if there is an internal appeal procedure[469]. When such internal appeal procedure is foreseen, however, both parties must be given right to resort to it regardless of its non-mandatory

[461]*Crapon de Caprona*, ILOAT Judgment NO. 112 [1967] (WHO)
[462]*Mila*, UNAT Judgment No. 184 [1974] JUNAT NMos. 167-230, p.133; *Broemser*, WBAT Reports [1985], Decision No. 27; *Nowakowski* (No. 4), ILOAT Judgment No. 248 [1975] (WMO); *Vanhove*, UNAT Judgment No. 14 [1952], JUNAT Nos. 1-70, p. 37
[463] ILOAT Judgment No. 1116 [1968] (UNESCO)
[464]*Suntharalingam*, WBAT Reports [1982], Decision No. 6
[465]*Heyes*, ILOAT Judgment No. 453 [1981] (WHO)
[466]Chittharanjan F. Amerasinghe, THE LAW OF INTERNATIONAL CIVIL SERVICE : (AS APPLIED BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS) (2nd. Ed., Oxford, Oxford University Press 1994), 400-401
[467]*Mustafa*, WBAT Reports [1999], Decision No. 1999, paras 34-36; *Ismail*, WBAT Reports [2003], Decision No. 305, paras. 58, 65-66, 73; *R*, WBAT Reports [2009], Decision No. 396, para. 53.
[468]*Sternfield*, ILOAT Judgment No. 197 [1972] (WHO); Milous, ILOAT Judgment No. 42 [1960] (WHO); Terrain, ILOAT judgment No. 109 [1967] (WHO)
[469]*Suntharalingam*, WBAT Reports [1982], Decision No. 6, at para. 13

origin[470]. The one case where review has been held to be mandatory is that of dismissal for unsatisfactory service[471].

The WBAT has held that such right has a limited connotation in the course of administrative –as opposed to adjudicatory- proceedings, for example not entailing the right to cross-examine witnesses and other safeguards typical of criminal trials[472]. There has been some controversy over the timing of the hearing, and more generally, on length of investigations, but tribunals have found that to the extent that the slowness had not prejudiced the position of the applicant, it had been insufficient to warrant annulment[473].

(iii) International Investment Law

In *Middle East Cement v Arab Republic of Egypt*[474], the claimant was a company active in the business of importation, storage and dispatch of cement in Egypt. The Egyptian authorities decided to prohibit all imports of cement except those relating to the Egyptian Cement Sale Office, and shortly thereafter conducted seizure operations with regard to ships that were engaged in that particular business. Since the ship owner was not on board at the moment of the seizure, authorities notified him according to the procedures provided by the local law, i.e. with order and notice for an auction on board of the vessel, notified to the competent port's police and published in the newspaper. Not receiving any representation by the claimant, the authorities then proceeded to auction the ship. The reason why this case is important is that the Tribunal found *inter alia* that both the attachment minutes and the short newspaper notice on the auction lacked sufficient information for the proper functioning of the notification, i.e. to put the claimant on notice[475]. Note that the Tribunal found this to be the case despitethe compliance with the requirements imposed by local law; although it did not explicitly say so, it is hard to deny that the Tribunal resorted in this case to a general principle of due process, which led to the finding of establishment of a violation of FET. The idea of a general principle that the Tribunal

[470] *Boyle*, ILOAT Judgment No. 178 [1971] (ITU)
[471] *Nelson*, UNAT Judtgment No. 157 [1972], JUNAT Nos. 114-166, p. 348
[472] *R* (No.2), WBAT Reports [2009], Decision No. 396, para. 50
[473] *AD*, WBAT Reports [2008], Decision No. 338, para. 72
[474] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), 12 April 2002
[475] At 147

had in mind can be also derived from the reference to the fact that "*a matter as important as the seizure and auctioning of the ship of the Claimant should have been notified by a direct communication*"[476].

Another investment arbitration presenting a similar fact pattern is *Genin v Estonia*, a case concerning the revocation of a banking license to an Estonian bank (EIB) in which the claimant Mr. Genin was a major shareholder. Although the Tribunal acknowledged that EIB had not fulfilled the legal obligation of reporting information on the ultimate ownership of its shareholder, it also found that "*no notice was ever transmitted to EIB to warn that its license was in danger of revocation unless certain corrective measures were taken, and no opportunity was provided to EIB to make representations in that regard*"[477]. Furthermore, the decision to revoke "*was made immediately effective, giving EIB no opportunity to challenge it in court before it was publicly announced*"[478]. Given the seriousness of the procedural rights affected, one would expect that the award found a FET violation on due process grounds. But the tribunal did not believe that it followed from those conclusions that there had been a breach of FET:

> Any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action[479].

This statement would seem to contradict both recent awards and Paulsson's theory of proceduralism, and revert to early century's standards for denial of justice. However, by reading the following paragraphs of the award it becomes apparent that the adoption of such strict posture in spite of the flagrant procedural impropriety can be based, at least in part, on the consideration that the outcome of the decision was *substantively* justified[480]. Thus, this is just another manifestation of the "instrumentalist" approach to due process, which continues to find sweeping support in the decisions of international courts and tribunals. It is submitted that this approach is problematic not so much for the adherence to instrumentalism, which if supported by

[476] At 143
[477] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, 25 June 2001, 17 ICSID Review-FILJ 395 (2002) , at 358
[478] At 364
[479] At 268
[480] At 352

limiting principles, is undoubtedly a sound and legitimate means of enabling the enforcement of the rules to be efficient, allowing to overcome unnecessary bureaucratism. Rather, the issue arises when such doctrine is followed detached from its limiting principles, allowing *any* kind of procedure to be defeated for the pursuit of the "correct" legal outcome.

Another case concerning a violation of this particular aspect of FET (and the right to be heard) is *Chemtura*[481], a NAFTA arbitration initiated by an American company producing pesticides and being forced to stop sales in Canada due to a government review process on the risks of the particular pesticides sold, that led to their ban. Following the decision, Chemtura requested the establishment of a Board of Review to review the decision, which concluded with a recommendation to the government agency to consider alternatives to the ban; however, following another review process where Chemura was allowed to make observations, the agency eventually decided to confirm its prior decision. Chemura filed a claim to a NAFTA tribunal alleging *inter alia* that the authorities had not given sufficient and specific notice of the review process, had not given practical instructions and sufficient timing to participate in the review, had decided without a scientific basis and without requesting relevant data from the claimant, and had not completed the review in a timely manner[482]. Furthermore, it alleged that the Board of Review was not impartial since it included a member of the agency that had conducted the Special review in the first place. The Tribunal found that the claim of insufficient notice was well-grounded. However, it opined that this did not constitute "*procedurally improper behavior by the [government] which was both serious in itself and material to the outcome of the inquiry*"[483]. It did so on the basis of the consideration that what the claimant would need to prove, on the basis of well-established principles on the burden of proof[484], is that the government acted in bad faith, and that "*the standard of proof for bad faith or disingenuous*

[481] *Chemtura Corporation(formerly Crompton Corporation) v. Government of Canada*, Award, 2 August 2010 (NAFTA).
[482] At 126
[483] At 148
[484] The Tribunal refers here to article 21 (now 20) of the UNCITRAL Arbitration Rules (presumably in its paragraph 4, which provides: "The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them"), but the rule is drawn from the general principle "*onus probandi incumbit ei cui licit*" –which is dealt with *infra*, para. 3.c

behavior is a demanding one".[485] The reason why, in the view of the Tribunal, the evidence was insufficient was that the claimant "*approaches the review not as an overall process, but rather as separate measures […] which are said to be in breach of [the FET]*". By contrast, the Tribunal held that:

> the inquiry must take into account the review process as a whole, including the procedure before the Board of Review, as an additional opportunity offered to the Claimant to put forward its position. Indeed, the mechanisms for the review […] are set out in a complex array of laws and regulations, the purpose of which is precisely that any decisions taken by the authorities in this context are subject to procedural checks and balances. The establishment of the Board of Review was an important component of such arrangements […][486]

In other words, the tribunal confirmed the instrumentalist approach, once again allowing the sacrifice of the exercise of an important element of the right to be heard: the right to notice and to comment *in the administrative process*. Thus, this award might suggest that any violation of those (and possibly other) prerogatives of the right to be heard in the administrative process can be recouped at the review stage. However, regrettably and differently from the European Convention's practice, it did not inquire into the depth of the review to justify such permissive stance.

c. Right to a fair and public hearing within reasonable time before an independent and impartial tribunal established by law

(i) International Human Rights Law

Three aspects of the safeguards contained in the title will be considered under this subparagraph: (1) access to a tribunal (2) independency and impartiality of the tribunal; and (3) a hearing within a reasonable time.

[485] At 137, citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Turkey/Pakistan BIT), Award of 27 August 2009, para. 142
[486] At 145

Starting with the last element, it should be noted that this in itself comprises five sub-elements, such as (a) the right to be present before the court; (b) the right to a hearing within a reasonable time. (c) the right to participate effectively at the hearing; (d) The right that the hearing be public, i.e. that the public, including the media, be allowed to attend in open court; and (e) the right to a public judgment. However, the important element from a confrontational perspective is the right to participate effectively at the hearing, requiring in particular that all evidence be produced in the presence of the accused at the hearing and that he (or his lawyer) be afforded the opportunity to challenge it through adversarial procedure[487]. This implies also the opportunity to question witnesses and comment on their evidence in argument.[488] This right to a hearing is not absolute: there may be proceedings, for example where there are no issues of credibility or contested facts which necessitate a hearing, where the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials.[489] The ECtHR has specified that, if domestic law does not even provide for such opportunity to request the hearing, then there is a violation of article 6[490].

The other element that may affect the purpose of the confrontation is the timing of the hearing: if such hearing does not occur within reasonable time, the value of the right to an adversarial exchange loses its purpose. The reasonableness of the timing is essentially a factual determination, related to which there is a considerable amount of case-law that need not (and indeed cannot) be dealt with comprehensively in this context. Suffice to say that both the ECHR and the IACHR have referred in this respect to three factors to be considered regarding timing, such as the complexity of the case, the procedure followed by the claimant and the conduct of the authorities[491]. The IACHR was inspired in this respect by the more long-standing experience of its European counterpart and thus devised a practically identical set of criteria, referring the complexity of the matter, the judicial activity of the interested party and the behavior of the judicial authorities[492]. However, recent case show that the Court has identified an additional criterion which focuses on "*the adverse effect of the duration of the proceedings on the judicial*

[487] *Barbera, Messegué and Jabardo v Spain* (1988) 11 EHRR 360
[488] *Bricmont v Belgium*, July 7, 1989, Series A, No.158
[489] *Jussila v. Finland* [GC], no. 73053/01, § 38, ECHR 2006, para. 41
[490] *Martinie v. France* (app. no. 58675/00) judgment of 12 April 2006
[491] *Motta v Italy*, judgment of 19 February 1991, Series A No. 195-1 para 30; 23 January 1993, *Ruiz Mateos v Spain*, Series A No. 262, para. 30; IACHR 29 January 1997, Merits, *Genie Lacayo v Nicaragua*, Series C No. 30, para. 77
[492] IACHR, 29 January 2009, *Genie Lacayo v Nicaragua*, Series C No 30, para. 77

situation of the person involved […]; bearing in mind, among other elements the matter in dispute"[493]. Furthermore, the Court has clarified that the reasonable time requirement imposes an obligation on the State to initiate an investigation immediately and without any delay.[494]

On the first aspect in the list above (right to access to court), the ECHR has found violations of article 6 ECHR when an individual had been unjustifiably denied the possibility to "have his day in court"[495]. In technical terms, this means the right to contend facts and law before a tribunal within the sense of article 6 ECHR, meaning that it has the power of reviewing both facts and law with a view to adopting a binding decision[496]. To explain the foundations of the right of access to court, the Court has explicitly referred general principles of international law, reminding that:

> Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). […] The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice[497]

However, it is also clear from the case-law that States can impose restrictions on access to court, as long as they pursue a legitimate aim and do not undermine the very essence of the right[498]. The reason may be a practical one in the interest of potential victims of abuse of litigation (like for example when a requirement of proof of negligence or bad faith is imposed on mental patients in liability actions against those responsible for them[499]) , in the interest of the efficiency of the process of litigation (like for example when shareholders where allowed to initiate only

[493] IACHR, 27 November 2008, *Valle Jaramillo v Colombia*, Series C No.192, para/ 155
[494] IACHR, 10 July 2007, *Cantoral Huamaní and Garcia Santa Cruz v Peru*, Series C No. 167, para 130; 31 January 2006, *Pueblo Bello Massacre v Colombia*, Series C No. 140, para 120; 15 September 2005, *Mapiripán Massacre v Colombia*, Series C No. 134, para 232; 3 March 2005, *Huilca Tecse v Peru*, Series C No. 121, para 66
[495] E.g., *Golder v United Kingdom* [1975] 1 EHRR 524
[496] *Le Compte, Van Leuven and De Meyere*, 23 June 1981 [ECtHR]. Cases nos 6878/75 and 7238/75 , paras 54-61
[497] *Golder v UK*, judgment of 21 February 1975, Series A. no. 18, p. 17 para. .35
[498] See *supra*, para.1
[499] *Ashingdane v United Kingdom* (1985)7 EHRR 528, para. 57

jointly compensation proceeding following nationalization of their company[500]) or in the interest of broader public policy goals (such as national security[501]). In all these circumstances, the Court will evaluate whether there is in a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Considerations may also be of sheer economic convenience, but the Court has stressed that refusal of legal aid in civil proceedings which impedes the exercise of the right of access to court in cassation proceedings or otherwise complex procedures[502] would violate article 6 ECHR if not surrounded by adequate safeguards against arbitrariness[503].

Third, the tribunal before which one is granted access must be independent and impartial. Impartiality can be divided in (a) subjective impartiality, which focuses on the actual existence of bias vis a vis the claimant and must be proved by him (the presumption being otherwise to the contrary)[504]and (b) objective impartiality, which focuses on the appearance or a legitimate doubt as to the absence of bias against *any* of the parties and need to be merely alleged by a claimant (this being sufficient to trigger the rebuttable presumption of actual bias[505]). Differently from the case of subjective impartiality, the focus on the inquiry once objective impartiality is alleged is not on the actual existence of bias, but on whether the pertinent procedure is designed and carried out in a manner suitable of inspiring trust.

By contrast, in a case focused on subjective impartiality the existence of procedural safeguards does not matter, *rectius*, it matters only to the extent that it is able to defeat any actual bias: an example is *Belilos v United Kingdom*, where the Court fond article 6 ECHR violated by the assignment to a Police board of the adjudication of appeals over decisions by members of the police, despite the many procedural safeguards against arbitrariness attached the members of the Police Board. The Court's central reasoning was that "*a member of the Police board is civil*

[500]*Lithgow and others v. The United Kingdom*, Application No. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81

[501]*Tinnelly and Sons Ltd and Others and McElduff and Others v. The United Kingdom*, 62/1997/846/1052-1053 on 10th July 1998, reported at (1998) 27 EHRR

[502]*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26

[503]*Staroszczyk v Poland*, 59519/00 [2007] ECHR 222 , paras 121-139

[504]*Piersack v. Belgium*, judgment of 1 October. 1982, Series A no. 53, p. 15, para. 30; *Le Compte, Van Leuven and De Meyere*, 23 June 1981, Series A no. 43, p. 25, para. 58

[505]*Salov v. Ukraine*, (No. 65518/01) judgment of 6 September 2005, paras. 80-86; *Farhi v. France*, [2007] ECHR 5562 paras. 27-32

servant from police headquarters, liable to return to other departmental duties […] *the ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues*".[506] Similar concerns arise if a member of the adjudicating body[507] or of the jury[508]expresses strong sentiments towards one of the parties, or publicly expresses his or her views in favor of one party[509].

Objective impartiality is closely linked to independence, and has normally being considered in tandem with it.[510] In fact, both require in principle separation between the executive or administrative and the adjudicating function, which is necessary to ensure those "judicial guarantees"[511]. For example, the fact that the same person successively performed two different types of function in a case casts doubts on the structural independence and impartiality of the tribunal[512]. However, the mere appointment by an executive authority is not in itself problematic[513] unless the appointed body takes instructions from the executive[514].

The IACHR has emphatically stressed the importance of independence as a prerequisite for the "*effective observance of the judicial guarantees*"[515], or more generally for the "*right to justice and due process*"[516]. It has held that impartiality requires members not to have any direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy[517]. In one case, the Court has gone as far as asserting the right to challenge judges "*when, regardless of the personal conduct observed by the questioned judge[s], there are facts that can be proven or elements of conviction that may not warrant elimination of*

[506]*Belilos v Switzerland* E.C.H.R., Series A, Vol. 132, 20 April 1988, para. 67
[507]*Kyprianou v Cyprus*,
[508]*Sander v United Kingdom* (2000),
[509]*Lavents v. Latvia*, App. No. 58442/00, 28 November 2002
[510]*Moiseyev v Russia*, para. 175; *Findlay v. the United Kingdom*, judgment of 25 February 1997, Reports 1997-I, p. 281, para. 73; *Bochan v. Ukraine*, no. 7577/02, para. 68, 3 May 2007
[511]*De Wilde, Ooms and Versyp*, judgment of 18 June 1971. Series A no. 12, p. 41, para. 78
[512]ECtHR Decision in *Procola v. Luxembourg*, 28 September 1995, (1995) Reports A 326
[513]ECtHR Decision in *Clarke v United Kingdom* , 25 August 2005 (23695/02)
[514]ECtHR Decision in *Incal v Turkey*, 9 June 1998, Rep. 1 998-1 V, fasc. 78, p. 1547
[515] IACHR, Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser. L/V/II.61 doc. 29 rev. 1, p.51
[516] See Case 11.084, *Peru*, IACHR Annual Report 41 [1994], at 48, para. 34
[517] IACHR, 22 November 2005, *Palamara Iribarne v Chile*, Series C No. 135, paras 145-146

grounds for misgivings or legitimate suspicions of partiality regarding [their] persons"[518]. On independence, the court has clarified that the concept relates to independence from other State powers, and that for this reason the State must establish an adequate appointment process, ensure a fixed term of office and make sure that no pressure is exerted on the judiciary[519]. In one case, it has held that independence can be impaired even by the mere use in the law of elements such as the "Sandinista juridical conscience"[520]; however, based on the particular facts of the case the Court found no violation because the term "sandinista" had only a superficial ideological connotation, and that reference included a statement of the principle of due process and the guidelines were found to be common to general military criminal law -regardless of the political orientation of the State in question[521].

The problem of insulation of judges from external influences is extremely serious in Latin America, and has brought the Commission not only to declare some institutions in Panama and Peru as incompatible with the guarantees of the Convention, but also to formulate a report entitled "Measures necessary for rendering the autonomy, independence and integrity of the Judicial Branch more effective" where it listed the criteria which member states have to implement in order to satisfy the requirements of judicial independence[522]. The Court's

[518] IACHR, IACHR August 5, 2008, *Apitz Barnera et al. [First Court of Administrative Disputes] v Venezuela*, Series C No. 182, para. 63

[519] IACHR August 5, 2008, *Apitz Barnera et* al. [First Court of Administrative Disputes] v Venezuela, Series C No. 182; IACHR, 30 June 2009, *Reverron Trujillo v Venezuela*, Series C No 197; IACHR, 20 November 2009, *Uson Ramirez v Venezuela*, Series C No. 207

[520] IACHR, January 29, 1997, *Paniagua Morales et al. v Guatemala*, Series C No. 37, para 150

[521] Ibid. , para 87

[522] IACHR Annual Report 1992-1993, p. 207 (OEA/Ser.L/V/II.83 (1993). More specifically, such measures were: - providing for personal and material security measures to guarantee, insofar as possible, the physical safety of the members of the judiciary;

- guaranteeing that the executive and legislative branches will not interfere in matters that are the purview of the judiciary;
- providing the judiciary with the political support and the means needed for it to be able to fully perform its function of guaranteeing human rights;
- ensuring the exclusive exercise of jurisdiction by the members of the judiciary, and eliminating special courts;
- guaranteeing that judges cannot be removed from office as long as their conduct remains above reproach, and ensuring that panels are set up to consider the cases of judges who are accused of unethical conduct or corruption;
- preserving the rule of law; and declaring states of emergency only when absolutely necessary, in keeping with Articles 27 of the American Convention on Human Rights and Article 4 of the International Covenant of Civil and Political Rights, structuring this system in such a way that it does not affect the independence of the different branches of government;
- ensuring unrestricted access to the courts and legal remedies and enabling the victim, when called for, to take action to bring those responsible to book;

jurisprudence has elaborated just on some of the aspects indicated in the reports, but on many occasions has been referring to the more developed case-law of the ECHR. In a central part of the report, however, the Court hinted on the essence of those rights by reminding its consultative opinion released in 1987, where it stated that

> […] the Inter-American Court of Human Rights generically identifies the judicial guarantees essential for protection of non-derogable rights during states of emergency: *habeas corpus* as covered in Article 7(6), *amparo* and any other effective recourse before the courts in accordance with article 25(1), and all judicial procedures inherent in the democratic form of government and specified in the domestic law of the states parties to the Convention as set forth in Article 29(c), all of which are to be exercised within the framework and in accordance with the principles of due process of law as set forth in Article 8[523].

In other words, the IACtHR identified the characteristic features of due process by reference to "democratic procedures" and domestic laws within the due framework of article 8; although the reasoning is slightly tautological, it reminds the arguments used by other courts in defining due process as a "general principle of law" in a democratic society. A confirmation of the view that structural independence and impartiality is part of the essential notion of judicial procedures inherent in the democratic form of government can be found in *Castillo Petruzzi v Peru*, a case arising from the alleged "unfairness" of the decision taken by a military court,where the Court affirmed that the right to a fair trial "*implies the intervention of an independent and impartial judicial organ competent to determine the legality of the actions [even] in period of emergency*"[524]. Later cases have clarified, however, that military courts entertain jurisdiction exclusively over non-civilians[525] and with regard to military offenses[526].

- ensuring the effectiveness of the judicial guarantees essential for the protection of human rights, and removing the obstacles that prevent their swift and appropriate application;
- guaranteeing due process of law--indictment, defense, evidence and conviction--in public trials;
- returning to judges the responsibility for disposition and supervision of persons detained;
- guaranteeing that judges will be immediately notified of all facts and situations in which human rights are restricted or suspended, regardless of the legal status of the accused;
- removing the procedural obstacles that cause trials to run on for extended periods of time, so that cases may be tried within a reasonable period and settled by means of judgments covering all points involved;
- ensuring separate hearings of criminal cases and of civil or administrative disputes involving damages for injuries and losses.

[523] IACHR, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8, American Convention on Human Rights, Consultative Opinion OC-9/87 of October 6, 1987, Series A No. 9, para. 31

[524] IACHR, 30 May 1999, Merits and compensation, *Castillo Petruzzi v Peru*, Series C no. 52, para. 131.

[525] IACHR, 29 September 1999, Merits, *Cesti Hurtado v Peru*, Series C No. 56, para. 151

Finally, the IACHR presents the peculiarity of specifying in its article 25 on the right to an effective remedy the "judicial" nature of such remedy, thus differing from Article 13 ECHR which merely requires it to be "before a national authority". Moreover, the case-law of the IACHR has inextricably linked this right with that to be heard contained in article 8, such that virtually no case has been decided by the court on the basis of only one of these articles[527].

For its part, also the (far less voluminous)[528] jurisprudence of the African Commission for Human and People's Right has emphasized the importance of competence and impartiality of the courts, finding a violation of the right to an impartial tribunal where the government had acted against the judiciary by dismissing over one hundred judges, on the ground that this deprived

[526] IACHR, 16 August 2000, *Durand and Ugarte v Peru*, Series C No. 68, para. 118

[527] With the exception of only a couple of instances: see Laurence Burgougue-Larsen and Amaya Ubeda de Torres, LES GRANDES DECISIONS DE LA COURT INTERAMERICAINE DES DROITS DE L'HOMME (Bruylant, Bruxelles 2008), 678, and 683-684. The authors conclude, at 688, that since the end of the mandate of Judge Cançado Trincadé in 2006, who advocated for and established a firm connection between the two articles, it is possible that the jurisprudence will follow certain principles of distinction identified in recent cases and adopt a more technical approach implying the autonomous nature of the two.

[528] However, it should be noted that the Commission did take steps to give further content to the general provision on the right to a fair trial contained in article 7.1 of the Charter on Human and People's Righs , which recognizes to every individual the right to have his cause heard, including (i)the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;(ii) the right to be presumed innocent until proved guilty by a competent court or tribunal; (iii) the right to defence, including the right to be defended by counsel of his choice; (iv) the right to be tried within a reasonable time by an impartial court or tribunal. In particular, the Commission adopted in 1992 Resolution on the Right to Recourse and Fair Trial (Res.4(XI)92) where it:

"1. Considers that every person whose rights or freedoms are violated is entitled to have an effective remedy;

2. Considers further that the right to fair trial includes, among other things, the following:

a. All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination ACHPR / of their rights and obligations;

b. Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

c. Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released;

d. Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court;

e. In the determination of charges against individuals, the individual shall be entitled in particular to:

i). Have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice;

ii) Be tried within a reasonable time;

iii) Examine or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

iv) Have the free assistance of an interpreter if they cannot speak the language used in court;

3. Persons convicted of an offence shall have the right of appeal to a higher court;

4. Recommends to States Parties to the African Charter on human and peoples' rights to create awareness of the accessibility of the recourse procedure and to provide the needy with legal aid;

5. Decides to continue to be seized with the right to recourse procedures and fair trial with the view of elaborating further principles concerning this right".

courts of the personnel qualified to operate impartially[529]. Moreover, the Commission has relied on the notion of impartiality to rule out the possibility for military courts to exercise jurisdiction over civilians[530], as well as to try offences that fall under the competence of regular courts[531].

(ii) International administrative law

In a number of cases, ILOAT found that the committee or selection board used to make the determination under contention was improperly constituted; however, this has been the case only in limited circumstances. So, for example, in *Brisson, Demeter, Van der Vloet and Verdelman*, the tribunal rejected the idea that the principle "*nemo iudex in causa sua*" as inapplicable to the constitution of a committee recommending promotion[532]. By contrast, in *Mauch*, the alleged duty of impartiality owed by persons taking part (even in advisory capacity) in the proceedings of decision-making bodies was found to be breached by the participation of the ILO's medical advisor to a committee; however, this did not lead to the annulment of the decision since it had been taken on unanimity[533]. However, in a later case, neglecting the apparent inconsistency of the outcome with the general approach[534], in *Varnet* the tribunal expressed once again in general terms the importance of impartiality, even in the case of committees with merely advisory functions, by stating:

> It is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice….Because of its purpose, which is to protect the individual against arbitrary action, this rule applies in international organization even in default of any specific text. It follows that, failing any explicit provision in the regulations and rules, the officials concerned are

[529] ACHPR, Amnesty Internationals and Others v Sudan, Communications No. 48/90, 50/91, 52/91, 89/93 (1999), available at www1.umn.edu/humanrts/Africa/comcases/49-90_50-91_52-91_89-93.html.
[530] Communication 224/98, para. 62
[531] Communication 218/98, para. 44
[532] ILOAT Judgment No. 303 [1977] (IPI)
[533] Critical of this approach is Chittharanjan F. Amerasinghe, EVIDENCE IN INTERNATIONAL LITIGATION (Leiden, Boston, Martinus Nijhoff Publishers 2005), at 374
[534] Such inconsistency can be explained on the basis of an "instrumentalist conception" of due process: see *supra*, para. III.1.a

bound to withdraw if they have already expressed their views on the issue in such a way as to cast doubt on their impartiality or if for other reasons they may be open to suspicion of partiality[535].

Finally, it has been held that the coincidence of the person of the original decision-maker with that making the final determination in the internal review procedure is not in itself a violation of due process or evidence of bad faith of the administration[536].

(iii) International investment law

There are no cases so far in investment arbitration where the partiality or independence or local courts has been found to violate the notion of "tribunal" understood by FET standard. This is not surprising, not only because the scrutiny operated in the context of investment arbitration is more deferential than in the context of human rights (the standard being one of "a lack of due process which leads to an outcome that offends the sense of judicial propriety"[537]) but also because the focus of the arbitral awards seems to be on the identification of the functional deficiencies of domestic procedures, rather than on specific safeguards as those that have been developed by the ECHR over the course of the years.

Nonetheless, there is at least one case dealing with a *fading* (as opposed to absent *ab initio*) impartiality due to the intervention of the executive branch aimed to halt domestic proceedings initiated by investors for the protection of their rights under a BIT. Other cases touch upon the issue of impartiality but merely in passing, and deserve merely a mention. All these cases are concerned, technically speaking, with issues of equality of arms, and will therefore discussed in the next subparagraph.

d. Right to equality of arms

(i) International Human Rights law

[535] ILOAT Judgment No. 179 [1971] (UNESCO) at para. 3
[536] *Einthoven*, WBAT Reports [1985], Decision No. 23; Duran (No. 3), ILOAT Judgment No. 543 [1983] (PAHO)
[537] See *Loewen*,*supra* note 404

Equality of arms is a principle according to which every party has to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* the opponent[538]. A prominent commentator, drawing on the cases brought by the Human Rights Commission, has called this as a general principle of law[539]. This bedrock principle of the right to be heard is strictly connected with the notion of impartiality. The right to have this principle respected throughout the proceedings can be differentiated from the right to an impartial and independent tribunal, since the latter focuses on the structure and composition of the tribunal, whereas the former constitutes a check over the continuance of the conditions of impartiality.

Although the ECHR has not identified a definite list of its wide-ranging implications, it has found a breach of the principle with regard to aspects such as the attendance of hearings[540], the neutrality of experts[541], the right to submit evidence and have it considered by the court[542], the right to call witnesses[543], the right to comment on the opponent's observations[544] and the right to be informed about the reasons for the challenged decisions[545]. It has also elaborated on the specific consequences of this principle for the legislative branch, stressing that "*the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute*[546]**"**

At its basic level, the principle is meant to ensure that both parties have access to all evidence: there will be a violation if one party is not been given the opportunity to see the documents relied

[538] see, amongst many authorities, *Niderost-Huber v Switzerland* [1997] ECHR 18990/91 at para 23, 18 February 1997; *Kaufman v Belgium*, Commission Decision of 9 December 1986, D.R. 50 p.90, at115; for the IACHR, see *Castillo Petruzzi et al. case v. Peru*, judgment of May 30, 1999, Series C, No. 52, p. 205, para. 154
[539] Manfred Nowark, UN CONVENANT ON CIVIL AND POLITICAL RIGHTS.CCPR COMMENTARY (N.P. Engel, Strasbourg 1993), Art. 14., Nos. 20-1
[540]*Komanicky v Slovenia*, (App. No 32106/96) (2002) ECHR 4 June 2002, paras 48-55
[541]*Sara Lind Eggertsdottir v Iceland* (App No. 31930/04) (2007) ECHR 5 July 2007, paras 41-55
[542]*Olujic v Croatia* (App No 22330/05) (2009) ECHR 5 February 2009
[543]*Weirzbicki v Poland* (App No. 24541/94) (2002) ECHR 18 June 2002, para. 39
[544]*Andrejeva v Latvia* (App No. 55707/00) (2009) ECHR 18 February 2009, para. 96
[545]*Hentrich v France*, Judgment of 22 September 1994, A 296,, para 56
[546]*Stran Greek Refineries and Stran Andreadis v Greece*, (1994) 19 EHRR 293

on by the other party[547], by a court expert[548], or by the court[549]. Moreover, the Court has recently started to take the position that it is not necessary to show specific prejudice from the non-disclosure[550]. On the other hand, the Court in scrutinizing non-disclosure cases will focus on whether there were appropriate safeguards to equality of arms, not on whether non-disclosure was necessary for the public interest[551].

In some cases the State may be required to establish mechanism that enable a party to have access to evidence beholden by the other party which would have assisted in the legal proceedings[552]. However, in such cases it will be upon the claimant the burden of substantiating that such evidence exists and is in possession of the other party. The Court has even gone as far as to affirm that the meaning of access to evidence in such cases cannot be limited to "reading" but should include taking notes which can be used in the proceedings, and, if necessary, obtaining copies of relevant documents[553].

The extent to which the State is required to ensure equality depends on the nature of the case being adjudicated: for example, the Court has held that in civil proceedings with financial inequality between the parties the State has no duty to ensure total equality of arms, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis a vis* the other[554]. As usual, the Court will look at the entire proceedings, and at the existence of adequate procedural safeguards.

A particular case of impartiality is that of experts. In this respect, it is important to distinguish in the procedure between the figures of party-appointed experts, who serve as mere witnesses, and independent experts, who acquire a more important procedural role. The Court has ruled that neutrality must be guaranteed only in the latter type of experts. It may be complicated to ensure neutrality, particularly where the proceedings concern the review of a complex procedure

[547] *Kuopila v Finland*, 27 April 2000; *Milatova et al. v Czech Republic*, 21 June 2005, App. No. 61811/00
[548] *Augusto v France*, (71665/01) January 11, 2007
[549] *Lobo Machado v Portugal*, 20 February 1996, Reports of Judgments and Decisions 1996-I, pp. 206-07, para 31
[550] *Bulut v Austria*, 22 February 1996, para 84; *Kress v France*, 7 June 2001 (GC), para 74; *Maritinie v France*, 12 April 2006 (GC), paras 45-50
[551] *Edwards and Lewis v UK*, (2005) 40 EHRR 24
[552] *McGinley and Egan v United Kingdom*, [1998] ECHR 51, (1999) 27 EHRR 1
[553] *Matyjek v Poland* (8184/0), judgment of April 24, 2007, para. 59 (citing Foucher v. France, [1997] ECHR 13, para. 36)
[554] *Steel and Morris v United Kingdom*, [2005] ECHR 68416/01 , 15 February 2005, para. 62

involving an expert: in a case where an expert had been heard in the first instance of a criminal proceeding, the Court held that the appointment of the same expert by the appellate court for further explanations led to a violation of article 6 ECHR because it generated doubts on the expert's neutrality[555]. Similarly, in civil proceedings against the government, the appointment for the determination of the quantum of liability of an expert who was an employee in the same department the liability of which was to be quantified (the national hospital) was deemed incompatible with the equality of arms required by article 6 (1) ECHR[556].

To ensure neutrality, domestic procedures should give parties the opportunity to participate at the formation of the expert report, for example by raising additional questions; and the absence of such procedures will hardly be remediable at a later stage of the procedure. In particular, the ECHR found in two occasions that the reliance by a court on an expert report affected by such deficiencies was incompatible with the principle of equality because that court had to address a question that had been the object of the expert report, which therefore appeared decisive for the final determination[557].

(ii) International administrative law

Ruling in a case regarding failed disclosure of evidence deemed necessary for defense, the ILOAT stressed that the principle of right of access to file applies regardless of the type of determination to be made, and more specifically, both to adjudication and to disciplinary cases[558]. This general principle may be subject to exceptions for the protection of higher interests, but refusal to disclose may not be done simply to strengthen the position of the administration or one of its officers[559]. A primary application of this right is in the case of

[555] *Bönisch v Austria*, (1987). 9. EHRR. 191. 85/5, App. No. , at 32

[556] *Sara Lind Eggertsdottir v Iceland*, (51950/04) (2009) 48 E.H.R.R. 52, ECHR

[557] *Cottin v Belgium*, App. No. 48386/99 , not yet published , paras 31-33; *Mantonvanelli v France*, (1997) 24 EHRR 370, 31-36

[558] See ILOAT Judgment 2786, 106th session, 2009, World Health Organization: "Due process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if he or she so wishes, to produce evidence to the contrary. The right to make a defence is necessarily a right to defend oneself before an adverse decision is made, whether by a disciplinary body or the deciding authority (citing Judgment 2496, under 7)"

[559] See ILOAT Judgment 2700, 104th session, 2008, International Labour Organization, (citing Judgment 1756, under 10). In the same judgment, the Tribunal held that "The Tribunal [...] draws attention to the fact that,

appraisal reports, where relevant. In that context, it has been held that the staff member has the right to comment for its rebuttal[560].

Nonetheless, however important the documents are thought to be by the applicant to bridge any possible inequality of arms, it has consistently been held that the production of documents will not be ordered on the speculative basis that something might be found to further the complainant's case[561], but no convincing explanation that all these items of evidence are really relevant[562]

(iii) International Investment Law

As anticipated above, there is one case where the finding of a FET violation was based upon an improper administration of justice of such character that undermined the impartiality required for the adjudication of the dispute. In *Petrobart v Kyrgyzstan*[563], the claimant alleged that the interference by the Vice Prime Minister Kyrgyzstan to seek stay of judicial proceedings, so as to prevent the claimant for recovering payment for the provision of a the services duly rendered to a state-owned joint stock company. The Tribunal, after ascertaining that the domestic court had the discretion to neglect the Vice Prime Minister's letter , noted also that it was not able to establish what the judgment would have been but-for the suspension of the execution. However, it proceeded to nonetheless find that the intervention by the Vice Prime Minister in judicial proceedings, coupled with the willingness of the Bishkek Court to grant the requested stay of execution, created wholly unfavourable and intransparent conditions, and the attempt by the government was contrary to the rule of law in a democratic society. As a result, it concluded that there had been a breach of the FET due to a denial of justice.

Although the award could have been more elaborate on the specific procedural deficiencies motivating this finding (was it for lack of impartiality? Was it discriminatory enforcement? Was

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irrespective of the circumstances, *an official is always entitled to have his case judged in proper, transparent and fair proceedings which comply with the general principles of law*." See ibid., recital 5

[560] *Chatelain*, UNAT Judgment No. 272 [1981] (ICAO), JUNAT Nos. 231-300 para 411; *Berube'*, UNAT Judgment No. 280 [1981] (ICAO), Ibid. para. 500

[561] See ILOAT Judgment 2510, 100th Session, 2006, International Telecommunication Union

[562] See ILOAT Judgment 2558, 101th Session, 2006, European Patent Organization

[563] *Petrobart Limited v The Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce Award, 29 March 2005

it of such gravity that it "shocked the sense of judicial propriety"?), what is to be praised in this decision is the departure from the strictly instrumentalist approach taken not only by investment tribunals, but also by the ECHR. It should be noted that we are not talking about a complete departure from the standard, which would have been the case if the arbitral tribunal had found that the violation of due process, *even if insignificant for the outcome of the dispute*, constitutes a violation of the FET. Rather, what the award has done here, in a situation of agnosticism, is to shift the burden of proof on the materiality of the due process violation for the outcome of the dispute on to the respondent State.

Finally, it worth mentioning that allegations of fraud or corruption have been leveled unsuccessfully by foreign investors against a domestic court in *Rumeli Telekom A.S and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kashakstan*[564]. The Tribunal, after having granted the appearance of the judge and let him be cross-examined, simply dismissed the allegation by pointing to the denial of bribery by both the judge and the government officials allegedly involved[565]. This raises the question of whether international courts and tribunals should not shift the burden of proof upon the defendant once *indicia* of corruption are alleged, similarly to the "doctrine of appearances" of the ECHR.

d. **Burden of proof and standard of proof**

(i) International Human Rights law

There are no specific rules on the presumption of innocence in non-criminal cases. However, this does not mean that none of the guarantees included in articles 6 (2) and (3) will not be required in non-criminal cases, as they might be "*contained in the notion of a fair trial as embodied in paragraph 1*"[566]. An example is free legal aid, a requirement of article 6 (3) which may be a necessary feature also in certain non-criminal cases in order to ensure the equality of

[564] *Rumeli Telekom A.S and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kashakstan*, ICSID Case No. ARB/05/16, Award 29 July 2008
[565] At 655
[566] ECHR in *Albert and Le Compte v. Belgium*, Series A no. 58, para. 30

parties[567]. In this context, I omit the jurisprudence of the ECtHR with respect to the compatibility of presumptions with the right to be heard, which as seen in the previous chapter, is a complex and articulated one. However, for purpose of completeness, it should be mentioned that the ECHR considers the presumption of innocence violated if, without the accused having previously been proved guilty according to law and, notably, without having had the opportunity of exercising his or her rights to a fair defence, a judicial decision concerning him or her reflects a guilty verdict[568].

In the jurisprudence on the IACHR, which generally recognizes the presumption of innocence in criminal cases in article 8 (2), there has been one case where it was explicitly stated that tribunals may rely on circumstantial or indirect evidence (in particular, due to the impossibility of producing direct evidence because of the nature of the claim), but only "*so long as they lead to conclusions consistent with the facts*"[569].

It is worth noting also that the presumption of innocence contained in the AfCHPR[570], technically speaking, applies with full force in the non-criminal context. Although the cases of the Court have not stretched yet its application to the administrative context, in principle this cannot be excluded. In fact, it would seem more appropriate to make analogies to criminal law in the public law sphere, where parties to the proceedings are characterized by an intrinsic imbalance between the administered and the administration, than to the at least theoretically more equalitarian context of civil proceedings.
The AfCHPR Commission found a violation of article 7 (1) in improper instructions given by the judge to the accused[571], but declined to do so in a case where the judge formulated an erroneous

[567] See *supra*, par. 2.c; See also Arnfinn Bårdsen, Reflections on "Fair Trial" in Civil Proceedings According to Article 6 § 1 of the European Convention on Human Rights, 51 Scandinavian Studies In Law 99 (2007), 122
[568] Case No. 10590/83, *Barbera', Mesegue' and Jabardo v Spain*, Judgment of 6 December 1988, Series A No. 146, para. 91
[569] The *Velazquez Rodriguez Case* (1988), IACHR, Series C: Decisions and Judgments NO. 4, para. 130 (p. 135)
[570] See article 7 (1) let. B AfCHPR
[571] Namely, a statement to the effect that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt: see Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, para. 95

presumption by shifting the burden of proof.[572] It did so by referring to the case-law of the ECHR and noting that

> The Court of Appeal thoroughly examined the evidence led at the trial and the effect of the misdirection and came to the conclusion that there was a massive body of evidence against the Applicant which would lead to no other conclusion than that it was the applicant and no one else who murdered the victim and that the quality of the evidence was such that no miscarriage of justice was occasioned[573].

Interestingly, this standard of acceptance of presumptions seems to be as strict as the "beyond reasonable doubt" standard which applies in criminal cases. Therefore, one may wonder if the equalization of criminal and non-criminal proceedings for purposes of Article 7 might not jeopardize or excessively penalize the effectiveness of civil justice.

(ii) International Administrative Law

The WBAT in a couple of recent occasions elaborated on the existence of a principle according the presumption of innocence in administrative proceedings[574], although excluding its application with regard to specific matters such as renewal of a contract[575]. Importantly, the WBAT has recently ruled that when the Bank acts as a prosecutor for enforcement of its rules regarding misconduct, judicial review cannot proceed on the basis that findings of culpability are a matter of discretion[576].

e. Right to a reasoned decision

(i) International Human Rights Law

[572] Communication 240/2001, paras. 28-29
[573] Ibid., para. 25 (emphasis added)
[574] *McKinney* (No. 2), WBAT Reports [1999], Decision No. 206, para. 32; *P*, WBAT Reports [2007] Decision No. 366, paras 58-59; *AJ*, WBAT Reports [2008], Decision No. 380, para. 33; *V*, WBAT Reports [2008], Decision No. 378, para. 35
[575] *AB*, WBAT Reports [2008], Decision No. 381, para. 76
[576] *S*, WBAT Reports [2007], Decision No. 373, para. 44

The ECtHR has ruled that, although adjudicators do not need to deal with every possible point raised by the parties, they will have to address the decisive submissions expressly[577], or at least implicitly with sufficient clarity.[578] Where the rules are vague and open-ended, it is all the more necessary to give sufficient reasons[579].

The Court has also recently had the occasion to specify that the duty to give reasons does not apply only to a court: first, it has noted that there might be a breach of article 6 if the lack of reasons by an *administrative authority* leads to inability to challenge the decision[580]. Secondly, in what has been called a "revolutionary" judgment[581], the Court sitting in Grand Chamber has found a violation for insufficient directions and questions to jurors called to deliver a verdict in a multi-party and complex case in assize court[582]. In the same judgment, while assessing the permissible degree of arbitrariness confirmed the modularity of due process analysis, it held that "*it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies*"[583].

Lastly, in the Court has pushed the duty to give reason as far as to find a violation in case of arbitrary reasoning, due to manifest incoherence[584] ; however, in a later case it has clarified also clarified that this remains an exception , holding that "Article 6 does not guarantee perfect harmony in the domestic case-law". [585]

(ii) **International Administrative law**

[577] *Kyriakides v Cyprus* (App No. 39058) (2008) ECHR 16 October 2008, para 25
[578] *Ferreira Alves v Portugal* (No 4) (App No. 41879/05) (2009) ECHR 14 April 2009, para 36
[579] *De Moore v Belgium*, ECHR, Series A, Vol. 292-A
[580] *AGOSi v UK*, 9118/80; (1986) 9 EHRR 1; Series A no. 108
[581] Paul Roberts, Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in CriminalTrials?, Human Rights Law Review 2011
[582] *Taxquet v Belgium*, November 16, 2010, App.926/05
[583] This is consistent with the judgment of the ICJ in the Corfu Channel case, which posits the need for more grave allegations to be supported by a higher quantum of evidence: see Corfu Channel case (United Kingdom v Albania), Merits, Judgment of 9 April 1949, ICJ Reports [1949], p. 16, at 26. See also the Separate Opinion of Judge Higgins in *Oil Platform*,(2003) 42 International Legal Materials 1385
[584] *Tatishvili v Russia*, ECtHR judgment of 9 July 2007 , paras 59-63; *Antica and R company v Romania*, (26732/03), judgment of 19 December 2006, paras. 32-39
[585] *Nejdeth Şahin and Perihan Şahin*, no. 13279/05, judgment of 20 October 2011, paras 96-68

The duty to state reasons is a counterbalancing element in the presence of discretion: while in cases where no discretion is involved this element loses its importance[586], it is considered an essential procedural requirement where the administration has actually decided on the basis of discretion. This allows the administration to direct the development of the law while simultaneously enabling the system to maintain predictability. The existence of such duty has been found in the context of dismissal for unsatisfactory service[587], but even in case of non-renewal of fixed term contract[588]. Sometimes, tribunals have linked this duty to the rationale of facilitating judicial review[589].

One of the most compelling examples of duty of care before international administrative agencies is that of performance reports: especially where the continuation of an employment relationship depends upon performance, these reports are key to support the case of the employee. Accordingly, the UNAT has found in *Johnson* that, whenever they were missing or incomplete, the applicant had been denied due process[590]. This has been held to be the case even in absence of a specific provision to that effect[591], a point which militates in favor of its consideration as part of the general principles of law.

A corollary of this general principle in the administrative context is that of duty of care, which requires, for example, that whenever a performance report is challenged the administration must conduct an investigation[592] and keep the record thereof[593] . However, the Tribunals have held that in consideration of the administrative features, it will not be necessary to adopt an adversary procedure[594]-both in the context of performance reports and in that of preliminary investigations

[586] See in this sense *Schafter*, ILOAT Judgment No. 477 [1982] (OCTI)
[587]*Suntharalingam*, WBAT Reports [1982], Decision No. 6 at p. 13; *Skandera*, WBAT Reports [1981], Decision No. 2; *Gregorio*, WBAT Reports [1983, part II], Decision No. 14
[588]*Gale*, ILOAT Judgment No. 474 [1982] (EMBL); *Bordeaux*, ILOAT Judgment No. 544 [1983] (CERN); Byrne-Sutton, ILOAT Judgment No. 592 [1983] (ITU)
[589]*Howrani and 4 Others*, UNAT Judgment NO. 4 [1951], JUNAT Nos. 1-7- p. 8 at 17
[590] UNAT Judgment No. 213 [1976], JUNAT Nos. 167-230, para. 249; see also *Lane*, UNAT Judgment No. 198 [1975], JUNAT Nos. 167-230, para. 267
[591]*Garcin*, ILOAT Judgment NO. 32 [1958] (UNESCO)
[592]*Fayemiwo*, UNAT Judgment No. 246 [1979], JUNAT Nos. 231-300, para. 161
[593]*Peynado*, UNAT Judgment No. 138 [1970], JUNAT Nos. 114-166 p. 221; *Johnson*, *supra* note 590, para. 429
[594]*Freeman*, ILOAT Judgment NO. 600 [1984] (EMBL); *Lingham*, ILOAT Judgment No. 628 [1984] (ILO)

leading to disciplinary actions- since the purpose of the process it to gather information and find facts in a fair and impartial manner[595].

(iii) International Investment Law

In *Lemire v Ukraine*[596], the claimant complained about the absence of reasons in a number of administrative decisions taken for the award of radio licenses. The Tribunal clarified at the outset that the FET does not impose a general obligation on licensing authorities to give reasons for their decisions[597]. However, it noted that the authority had repeatedly awarded licenses to politically influential personalities, despite the claimant's objectively greater suitability. As a result, it held that the failure to state reasons in those particular circumstances undermined an objective that was at the heart of the FET clause of the treaty – preventing arbitrary decision-making- and therefore ruled for the claimant[598]. The absence of explanation, however, leaves us with a doubt: was the imposition of the duty to state reasons required because the government was implementing a discretional policy, or was it simply a procedural device that the Tribunal resorted to in order to facilitate the respondent's proof of bad faith?

Rumeli Telekom v Kazahkstan is another investment award where the tribunal gave relevance to the absence of reasons for a finding of FET violation, although in this case the prescription to give reasons (and thereby suspend the contract) was contained specifically in a contract between the investor and the State. As it has been pointed out *supra*, normally a breach of contract in itself (i.e, without legitimate expectations involved) is not sufficient for establishing a FET violation. Thus, it appears that the Tribunal considered the failure to give reasons as something of such importance that it would elevate the breach of contract into the realm of breach of FET. However, one should be cautious with hasting conclusions here for at least two reasons: first, because the lack of reasons was accompanied by the non-compliance with the duty to suspend the contract, a duty which can typically be fulfilled at no cost and the disrespect of which can

[595] *V*, WBAT Reports [2008], Decision No. 378, para. 50 (citing *Rendall-Speranza*, WBAT Reports [1998], Decision No. 197); *R (No. 2*), WBAT Reports [2009], Decision No. 396, para. 96
[596] *Joseph Charles Lemire v. Ukraine* , 28 March 2011, ICSID Case No. ARB/06/18
[597] At 394
[598] Paras. 419-420

easily be seen as a sign of bad faith. Secondly, because the disobedience to the contractual clause could be seen as so blatant to contradict the whole purpose of the regulatory framework that the investor assumed would be applicable, thereby constituting an unfulfilling of legitimate expectations *a laTECMED*[599].

f. Right to appeal

The right to appeal is not specifically provided for by all Human rights instruments.
Only the AfCHPR explicitly confers such right, as the first prerogative of the right to a fair trial contained in article 7:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force

However, the ECHR has repeatedly stated that, even there is no right of appeal, article 6 ECHR applies to such proceedings whenever the law provides it[600]. Moreover, the right to appeal before a tribunal within the sense of article 6 ECHR is often seen by the Court as a necessary counterbalance to the absence of full respect of article 6 requirements in the prior stage of the proceedings. For example, if the complaint concerns partiality of the decision-maker in the first instance, then the court must either have the power of *de novo* review or to remit the case for a decision by an impartial body[601]. This is often invoked for administrative proceedings involving specialized agencies, as it will be better explained in the next chapter[602]. In such cases it could be easily concluded that, if the failure of the administrative agency to meet the requirements of article 6 ECHR is ascertained and a right to appeal is not granted or is not effective, there will be a violation of article 6 ECHR. However, it is important to understand that, if the claimant is not capable of demonstrating that his claim on appeal was not addressed, the ECtHR will be satisfied

[599] See supra note 424
[600] *Chatellier v. France* (34658/07), paras 34-43
[601] *Kingsley v United Kingdom* (2002) 35 EHRR 13
[602] *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, p. 16, para. 29. See *infra*, para. IV.2

by verifying the existence of adequate safeguards in the overall procedure. One case in particular, *Bryan v UK*, illustrates the reasoning of the Court:

The Court notes that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan. In particular, as is not infrequently the case in relation to administrative-law appeals in the Council of Europe member States, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited. However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference .

Furthermore, in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

In this connection the Court would once more refer to the *uncontested safeguards attending the procedure* before the inspector: *the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality* (see paragraph 21 above). Further, *any alleged shortcoming in relation to these safeguards could have been subject to review* by the High Court.

[…]Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (art. 6-1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning.

The scope of review of the High Court was therefore sufficient to comply with Article 6 para. 1 (art. 6-1)[603].

3.Procedural rights in inter-State adjudication

This paragraph focuses on the peculiarities of inter-State adjudication, for the purpose of verifying whether some principles can be elucidated from the "publicness" of these disputes that may be of use in more traditional public law disputes. The main focus will be on disputes before the International Court of Justice and the organs of the Dispute Settlement Body of the World Trade Organization, with occasional reference to the International Tribunal for the Law Of the Sea.

a. Applicability

On the subject of applicability, one important point should be made with regard to the proceedings before the ICJ. By statute, the Court entertains two kinds of proceedings: contentious and advisory. The latter is an exception to the general principle that the ICJ is accessible only to States, and no other subjects of international law; precisely, advisory jurisdiction is a possibility foreseen for international organizations to be parties in a proceeding before the ICJ, upon request submitted to the ICJ. The defining carachter of advisory jurisdiction is that it constitutes a consultative, rather than an adjudicatory exercise: this means that the opinions delivered by the Court pursuant to this procedure have no binding effect, except in those cases where it is specifically stipulated otherwise. Nonetheless, the requirements and the standards of judicial administration followed in this context are not substantially different from those of contentious cases: as recognized by article 68 of the ICJ Rules, "*In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable*". In absence of specification, it is in unclear the extent to which the safeguards of due process will apply with the same force.

[603] *Bryan v UK* (1995) 21 EHRR 342, paras. 46-47 (citations omitted)

An illustrative case relating to this issue was a request for advisory jurisdiction with reference to the judgment of ILOAT handed down in favor of a Unesco official. In that context, the issue of equality of the parties –which the Court has defined as "the major principle concerning the procedure of the court"[604]- had been raised lamenting the fact that staff members had no right to initiate the review of the judgment nor the right to make written and oral presentations that had been vested in Unesco under article 66 of the Court's Statute. The Court decided to follow the procedure established in Resolution 957(X) for the judicial review of the judgments of UNAT, which enabled staff members to transmit their observations to the Court via officials of Unesco, and dispensed with the oral proceedings altogether. In deciding to exercise advisory jurisdiction and to follow this special procedure to that end, the Court pointed out that the requirements of good administration of justice were not impaired by the transmission (as opposed to direct submission) of the observations, and that it was satisfied with the information made available to it (which in its view, justified dispensing with the hearing)[605]. However, the separate opinions of Judges Winiarski, Klaestad, and Zafrulla Kahn highlighted the controversial nature of this procedure, particularly stressing the importance of oral hearings; moreover, Judge Cordova in his dissent contended that good administration of justice required both theoretical and practical equality[606], and that there could be no administration of justice when individuals where unable directly to plead their cases[607].

A second important case of advisory jurisdiction concerned the request for review of a UNAT judgment, where the Court readily accepted to exercise jurisdiction on the basis of the consideration that the procedure followed in Unesco was supplemented by the existence of a "*right guaranteed by Statute*" to transmit the observations of the staff member, which ensured that "*the equality of a staff member is not dependent upon the will or favour of the*

[604] See *Military and Paramilitary Activities in and against Nicara*gua (Merits) case, [1986] 25 (para. 31) and 39 (para. 59); *Application of the Genocide Convention* (Further Provisional Measures) case, [1993] at 337, para. 21; Request for Examination case, [1995] at 296 (para. 28)
[605] *Unesco*, ICJ Reports [1956], at 86.
[606] This point in particular was confirmed in a later advisory opinion: *Review of Judgment No. 273*, ICJ Reports [1982], p. 339
[607] *Unesco*, ICJ Reports [1956], pp. 165-168

Organization"[608]. There, the objection of the automatic dispensation of the oral hearing was overcome because

> it does not appear to the Court that there is any general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements if their case to the review tribunal. General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal. But that condition is fulfilled by the submission of written statements. Accordingly, the Court sees no reason to resile from the position which it took in its Opinion in the Unesco case that, if the Court is satisfied that adequate information has been made available to it, the fact that no public hearings have been held is not a bar to the Court's complying with the request for an opinion[609]

Thus, as to the fact of non-participation of the staff members to the hearing itself, the Court appears to have sided with the submissions of United States and United Kingdom in the *Peace Treaties case*, according to which the impossibility to participate alone does not defeat the fairness of judicial proceedings[610]. In particular, the view is that this principle applies to both contentious and advisory proceedings. More doubts can be entertained, however, regarding any possible erosion of the principle of equality of arms in that context- as evidenced by the contrasting opinions delivered in the *Unesco* case.

Similar views can reasonably be upheld in the context of ITLOS, which in article 138 of its Rules confers advisory jurisdiction to the tribunal in addition to the one already conferred by the Convention of the Law of the Sea to the Seabed Disputes Chamber. Much like in the ICJ Rules, article 130.1 regulates the use of such jurisdiction by providing that "*In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber [and by reference ex article 138.3, the Tribunal] shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases*". To be sure, this is one of the numerous provisions of the ITLOS rules that

[608] *Review of Judgment 158*, ICJ Reports [1973], p. 180
[609] Ibid,pp. 181-182, para. 36 (emphasis added).
[610] See Pleadings, *Peace Treaties (First Phase) case*, pp. 281-82 and 309-319.

adhere closely to those contained in the ICJ rules[611]. For this reason, in the following paragraph the procedures and case-law of the ICJ on the point will be taken as a reference also for the largely equivalent body of procedural law of ITLOS. This seems appropriate given the substantial equivalence of the Statutes and the Rules of the two, and the fact that the jurisprudence of the former must be taken into account by the ITLOS judges when interpreting their respective instruments. Nonetheless, mention will be made here of one case where the importance of the right to be heard as a general principle of law has been recognized by the Tribunal: the *Juno Trader* case[612]. The dispute concerned the alleged violation by Guinea Bissau of article 73, paragraph 2, of the Convention of the Law of the Sea in that the conditions set by the Respondent for the release from detention of the vessel "Juno Trader" (a vessel flying the flag of Saint Vincent and the Grenadines) and the release of 19 members of its crew were not reasonable in terms of the Convention. The article in question established that "*Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security*", which appeared inconsistent with the fact that the local authorities had neither released the vessel nor even made a public decision concerning the sufficiency of the bond posted by the owner of the ship for its release. What is important for our purposes is that, despite the absence of explicit reference of due process considerations in the clause invoked, the Tribunal extracted it from the overall context of the article, asserting that

> The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision[613].

Thus, the Tribunal thought that the mere use of the word "reasonable", combined with the inclusion of fairness among the purposes of the Convention, triggered the application of a certain –elementary- notion of due process. In other words, the Tribunal seemed to endorse the idea that due process (at least in its elementary form) is an essential requisite of "reasonable justice".

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[611] See in this sense Rüdiger Wolfrum, International Courts and Tribunals, Evidence, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 5

[612] ITLOS, Case No. 13, *Juno Trader Case* (*Saint Vincent and the Grenadines v. Guinea-Bissau*), 18 December 2004, available at www.itlos. org

[613] Ibid., para. 77(emphasis added)

As to the WTO, the leading case on the applicability of the "general principle" of due process is the *US-Continued Suspension* case[614], a case concerning a complaint by the European Community for the alleged failure by United States and Canada to implement the ruling of the DSB in *EC-Hormones*[615]. In light of the complexity of the subject matter, the Panel decided to make use of its powers ex art 13 of the DSU by consulting some experts to ascertain whether there was consensus regarding the dangers on the use of hormones as growth promoters in cattle. The European Community (EC) had opposed since the outset the appointment of certain experts which were coming from the Joint FAO/WHO Expert Committee on Food Additives (JECFA), due to the fact that the report of JECFA was the one which United States and Canada relied on to support their arguments. However, the Panel took the view that the participation and preparation of the drafting of that Report should not "deprive the Panel and the parties of the benefit of contribution of internationally recognized specialists". The EC then requested to reconsider the decision at least with regard to two individuals, who had more serious conflicts of interests, but the Panel again rejected to make any change to the process mainly for the reason that, in any case, the decisions taken by the JECFA were taken by consensus, and thus not necessarily reflected their personal views. On appeal, the EC lamented a violation of article 11 DSU, providing the duty for the Panel to make an objective assessment of the matter before it, reminding that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings"[616] and adding that "*it is inherent in the principle of due process that the parties to a dispute are given a fair hearing including that the experts a court, tribunal or panel hears or consults are independent and impartial*". In particular, the EC submitted that the applicable test for impartiality should be "likelihood or justifiable doubts" of bias. It should be noted that the test suggested resembles (if not corresponds with) the test used by the ECHR to in the "doctrine of appearances" that has been described above; however, the ECHR"s "doctrine of appearance" applies to evaluate independence, and not impartiality. Thus, it is not surprising that the Appellate Body, although ruling in favor of the EC concerning the existence of a violation of

[614] *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, (WT/DS320), 16 October 2008
[615] *European Communities — Measures Concerning Meat and Meat Products* (*Hormones*), AB Report, 16 January1998
[616] AB Report, *Thailand- H- Beams*, para. 88

article 11 of the DSU, did not endorse the test suggested; to the contrary, it held that any justifiable doubt of independence or impartiality should be objectively determined or substantiated[617]. What is most important of this case for our purpose is that there was in this case no specific rule attributing due process rights to the parties on the selection and consultation of experts. However, the AB reminded previous occasions where it had found the need for panels to afford due process on specific procedural issues, such as

> requiring that parties to proceedings be afforded an adequate opportunity to respond to claims, arguments or evidence presented by other parties . […] Moreover […] As part of their duties, under article 11 of the DSU, to make an objective assessment of the matter, panels must ensure that due process rights of parties to a dispute are respected [...] Fairness and impartiality in the decision-making process are fundamental guarantees to decision-making[618].

In short, the Appellate Body thought that due process rights are inherent in the decision-making process, and that it is entitled to identify the content of due process with regard to specific procedures –one of which is the selection and consultation of experts.

b. Fair Trial

Courts and tribunals in charge of deciding international inter-State proceedings ensure fundamental elements of due process, such as notice and right to comment to the allegations, *in primis* via the predetermined structure of their proceedings. The first aspect of due process which we have seen above as referred to the context of national adjudication, notice, is ensured in this context by rules providing for a mechanism designed to put the other party on notice: for example, article 43.4 of the ICJ Statute provides that "*A certified copy of every document produced by one party shall be communicated to the other party*". A notification provision is contained in article 24.3 of the Statute of the International Tribunal for the Law of the Sea, and Rule 66 of its Rules of the Tribunal. In the WTO, the situation is slightly more complex, as the request for consultation ex art. 4 of the Dispute Settlement Understanding does not technically

[617] Ibid., para. 446
[618] Ibid, paras. 434-435

trigger the establishment of a panel; however, it does accomplish the purpose of first notification, given that it is a necessary step to that end. The subsequent step, the request for the establishment of a panel, also serve the purpose of notice, and offers the possibility to bring in new objections as long as they relate to the same violation invoked during the consultations[619].

With regard to the possibility to make comments and further adversarial exchanges, safeguards are incorporated in the governing rules by the establishment of specific procedures: first, all inter-state disputes settlement procedures comprehend both a written and an oral part, and the hearing is, at least upon request[620], open to the public. As a result, every party has a right to be heard both via pleadings and orally. Second, the parties have at disposal not only a memorial (for the applicant) and a counter-memorial (for the respondent), but also, where the Court or Tribunal deem it necessary, a reply and a joinder[621]-and in the case of WTO, rebuttals. Therefore, they have multiple opportunities of submitting their observations. As noted by Bin Cheng in its leading contribution on the definition of general principles of law[622], the need to allow each party to comment on the evidence submitted by the opponent derives from the simple consideration that otherwise, a tribunal might have to come to *"a decision upon the evidence produced, notwithstanding any errors, omission or misstatements which may possibly have been made by one party or another*[623]". And the principle "*audi et alteram partem*" requires that whenever there is new evidence admitted, or any alteration of the legal basis of the claim or of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon[624]. The principle holds also with regard to the hearing of witnesses and party experts, for which parties are required to submit a list within a sufficient time before the opening of the oral proceedings and an indicative description of the subject of the questions that they will ask[625]. In the WTO, where there is no specific rule for the hearing of witness testimony, the function of

[619] See AB Report, *Brazil-Aircraft*, para 132
[620] A request is necessary only in the case of WTO. See Article 59 of the ICJ Rules; 74 ITLOS Rules; and art. 9 WTO DSU. The DSU contains a right of attendance to a hearing for specific complainants, in particular in the case of multiple complaints, by providing each of them with "the right to be present when any one of the other complainants presents its views to the panel".
[621] Articles 45.2 and 72 ICJ Rules; 44, 60.2 and 61.3 ITLOS Rules ; and art. 9 and 12 of the WTO DSU
[622] Bing Chen, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge, Cambridge University Press 2006), p. 293
[623] *The Canada Case*, 2 International Arbitration, p. 1733, at 1742
[624] See Bing Chen, ibid. p. 295 and cases cited in footnote 23
[625] Articles 57 ICJ Rules and 72 ITLOS Rules.

advance notification is fulfilled by articles 4 and 7of the Working Procedures (Appendix 3 of the DSU), which require respectively the transmission of written submissions to the Panel ahead of the first substantive meeting, and that of written rebuttals before the second substantive meeting[626].

The third aspect is the right to a hearing within reasonable time before an independent and impartial tribunal established by law. The safeguards on the elements considered here are specifically indicated by the constitutive documents of these institutions. The most fundamental element for purposes of the *contradictoire* is the independence and impartiality of the adjudicating body, which is ensured via articles 2, 16-17 of the ICJ Statute, 2, 7-8 of the ITLOS Statute and the "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes" of the WTO DSU. Finally, is worth mentioning also that the DSU contains in article 19 an additional provision aimed to minimize the risks of procedural impropriety: the prohibition of *ex parte* communications (art. 19). However, it can be argued that the need for such provision in the context of ICJ and ITLOS is superseded by the explicit obligations of the Court to communicate the other party a copy of each document produced by the opponent[627].

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[626] Article 12 of the Appendix also specifies the proposed timetable, allotting 3 to 6 weeks for the submissions by the complaining party, 2 to 3 weeks for those of the party complained against and 2 to 3 weeks for the submission of written rebuttals by each party. The inequality between the parties in the timing for the first submissions has been criticized by Marco Bronckers and Natalie McNelis, Fact and Law in Pleadings Before the WTO Appellate Body, in Friedl Weiss, IMPROVING WTO DISPUTE SETTLEMETN PROCEDURES. LESSONS & ISSUES FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS (Amsterdam, Cameron May 2000)

[627] The Rules of both the ICJ and ITLOS contain a specific obligation for the Registrar to forward to the parties a copy of all pleadings and documents annexed (see article 26 (d) ICJ Rules and Article 36 (f) ITLOS Rules). Moreover, the rules governing the written and oral proceedings discipline the official communications between the parties and the Court. For the ICJ, see article 43 of the Statute
("1. The procedure shall consist of two parts: written and oral.
2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.
3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.
4. A certified copy of every document produced by one party shall be communicated to the other party.
5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates") and articles 56.4 ("No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute or this Article, unless the document is part of a publication readily available") and 60.2 of the Rules ("At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Court and transmitted to the other party"). For the ITLOS, see article 43 of the Statute ("The proceedings consist of two parts: written and oral.

The WTO has identified due process rights beyond the specific procedures of the DSU or the Agreements in a number of occasions, on the basis of the considerations that "[…] *the demands of due process […]are implicit in the DSU"*[628](referring to the right to comment)and that *"[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it*[629]". It has recognized that a Member's right to raise a claim[630] or objection[631], as well as a panel's exercise of discretion[632], are circumscribed by the due process rights of other parties to a dispute, and further that a party must not merely be given an opportunity to comment, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately[633]. Similarly, and for the purpose of ensuring effectiveness of the right to be heard, it has held that due process also serves as a basis for proper notice, in order to limit a responding party's right to set out its defence at any point during the panel proceedings. It is for this reason that the request for consultation and the request for establishment will be seen primary factors in determining the scope of the proceedings, even if if they relate to different types of regulatory measures under the same violation(s)[634]; what is important is the specification in the panel request of the specific provisions of the particular agreements alleged to have been

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2. The written proceedings shall consist of the communication to the Tribunal and to the parties of memorials, counter-memorials and, if the Tribunal so authorizes, replies and rejoinders, as well as all documents in support.
3. The oral proceedings shall consist of the hearing by the Tribunal of agents, counsel, advocates, witnesses and experts"), and 57 ("Without prejudice to the provisions of the Rules concerning the production of documents, each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission to the other party") and 75.2 of the Rules ("2. At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Court and transmitted to the other party.").

[628] AB Report, *India-Patents*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 94.

[629] AB Report, *Australia-Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 278

[630] See, for example, Appellate Body Report, *EC - Tariff Preferences*, para. 113; Appellate Body Report, *US - Oil Country Tubular Goods Sunset Reviews*, para. 161; and Appellate Body Report, *Thailand - H-Beams*, para. 88.

[631] Appellate Body Report, US - Carbon Steel, para. 123; Appellate Body Report, Mexico - Corn Syrup (Article 21.5 - US), para. 50; Appellate Body Report, *US - FSC*, para. 166; and Appellate Body Report, *US - 1916 Act*, para. 54

[632] Appellate Body Report, US - 1916 Act, para. 150; and Appellate Body Report, US - FSC (Article 21.5 - EC), para. 243

[633] AB Report, *US-Gambling*, para. 270

[634] See WT/DS46/AB/R, *Brazil – Export Financing Programme for Aircraft*, decision of 2 August 1999, para. 132

violated[635]. However, the AB has also specified that with respect to certain WTO obligations (for example, those of provisions with multiple obligations), in order to identify the specific measure at issue, it may also be necessary to identify the products related to the measure concerned[636]. All these strictures and limitations are incorporated into the system in the name of due process despite the fact that article 12.1 of the DSU authorizes panels to develop their working procedures[637] and article 12.2 requires panel proceedings to provide "*sufficient flexibility as to ensure high-quality panel reports while not unduly delaying the panel process*". It is perhaps with these provisions in mind that the Appellate Body decided, in *Korea-Dairy Products*, that to find that the incompleteness of the requests for establishment of a panel violated due process the AB should "*take into account whether the ability of the respondent to defend himself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated*"[638]. This instrumental treatment of notice requirements allows the panel to distinguish between alleged imprecisions in the requests that are fundamental and those that are merely cosmetic, so as to limit its attention to the former.

c. Burden of proof and standard of proof

There is no explicit rule in the Statutes of the ICJ or the ITLOS concerning the standard of proof. From the practice of international tribunals, it is generally believed that this corresponds to preponderance of the evidence[639]. The Court of Justice has in some rare instances referred (in dissenting opinions)[640] to "beyond reasonable doubt" and more often, it has spoken in terms of "sufficiency of the evidence"[641]. Addressing the issue in terms of sufficiency may be criticized

[635] AB Report, *European Communities- Bananas*, para. 141
[636] AB Report, *European Communities-Customs Classification of Certain Computer Equipment*, para. 67
[637] AB Report, *Argentina- Measures Affecting Imports of Footwear*, WT/DS56/AB/R adopted on 25 March 1998, paras. 81-81
[638] Report AB, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* , WT/DS98/AB/R, 14 December 1999
[639] Andreas Reiner, Burden and General Standards of Proof, 10 Arbitration International (1994) 325; Charles N Brower, Evidence Before International Tribunals: The Need for Some Standard Rules, 28 International Lawyer (1994) 49; Robert Pietrowski, Evidence in International Arbitration, 22 Arbitration International (2006)
[640] *Anglo-Norwegian Fisheries 196*, Dissenting Opinion of Judge Rezek; *Cameroon v. Nigeria 300-301*, para 194 (Dissenting Opinion Judge Ajibola)
[641] E.g. *Corfu Channel case* (*United Kingdom v Albania*), Merits, Judgment of 9 April 1949, ICJ Reports [1949], p. 16; *Nicaragua case*, at 62 (para 110); *DRC v Uganda*, at 59 (para 173) and 79 (para. 250)

for depriving the determination of a workable benchmark[642], leaving considerable margin in the appreciation of the convincingness of the arguments; however, this is precisely the aim of the ICJ, which shows in its ruling a willingness to retain as much flexibility as possible to meet the evidentiary challenges of international litigation. Nonetheless, it is generally believed that the standard in international litigation is –and should be- preponderance of the evidence[643], with two exceptions: (1) on the establishment of jurisdiction, where the standard can be lower since States have expressed their consent to its exercise. (2) with regard to allegations implying "stigma" , which require a higher degree of confidence - namely, the "beyond reasonable doubt" standard.[644]

A fundamental tenet of the rules of proof is the general principle according to which "*onus probandi incumbit ei qui dicit, non ei qui negat*" (also known as "*onus probandi incumbit ei cui licit*"): in other words, the claimant bears the burden. However, the letter of this general principle may be misleading, since the claim does not necessarily refer to the main cause of action, and includes defenses and other pleadings of a defendant. So for example, the Permanent Court of International Justice (PCIJ) ruled that if one contended that "*some unusual or exceptional meaning was to be attributed to a term, then that party bore the onus of establishing its contention*"[645]. The Court has summarized the situation by stating, more generally, that "*each party has to prove its alleged title and the facts upon which it relies*"[646]. Some scholars have derived from this the obligation for the claimant to establish a *prima facie* case (also known as "*commencement de prevue*") supporting its claim[647]. Yet one should not confuse such concept with the "burden of evidence" used in the common law context, for in international litigation

[642] See *Oil Plaftorm* (2003) 42 International Legal Materials 1379, 1384-1386 (Sep. Opinion of Judge Higgins), 1404, 1412-1415 (Separate Opinion of Judge Buergenthal)
[643] See e.g. at the ICJ Hearings on 12 April 2005, in *Armed Activities (DRC v Uganda)*, CR 2005/3, 25-26 (statement of Professor Philippe Sands)
[644] see Rüdiger Wolfrum, International Courts and Tribunals, entry on the MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW(2006), para. 77
[645] *Legal Status of Eastern Greenland*, Series A/B (No. 53), para. 49
[646] *Minquiers and Ecrehos* (France/United Kingdom), ICJ Reports [1953], at 9
[647] See Juliane Kokott, THE BURDEN OF PROOF IN COMPARATIVE AND HUMAN RIGHTS LAW, at 186; Joseph C. Witenberg, Onus Probandi devant les jurisdictions internationals, 56 Revue Generale de Droit International Publique 322 (1951), 334-340

there is no procedural motion available to preliminary settle a dispute in case of insufficient evidence presented by a claimant.[648]

With specific respect to the quantum of proof, the ICJ has also recognized that although it "*has freedom in estimating the value of the various elements of evidence, it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved*"[649]. One of these principles is the possibility to resort to presumptions shifting the burden of persuasion to the defendant, to the extent that they facilitate conclusions that are supported by other circumstantial evidence. The first time that presumptive reasoning was addressed in a pronouncement by the World Court presumption was in the *Lotus* case:

International Law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing the principles of law and established in order to regulate relations between these co-existing independent communities, or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed[650].

This suggests that the Court pays extreme attention to the need to respect the sovereignty of States, and accordingly will eschew presumptions which might obtain that effect, sustaining only a limited number of general presumptions such as "*Omnia praesumuntur rite esse acta"* (all acts are presumed to be done in conformity with the law)[651], the presumption that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence of the same at a later

[648] In this sense, seethe *Avena* case [2004] ICJ Reports paras. 56-57, and Judge Ranjeva's Declaration, para. 2. Similarly, referring to the absence of a "burden of evidence" concept, see the Mexican-US General Claims Commission's *dictum* in the *Parker* Case, [1926] (*Usa v Mexico*), 4 United Nations Reports of International Arbitral Awards at p. 39: "*The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law', or 'the general theory of law', and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with a view of discovering the whole truth with respect to each claim submitted. As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure*".

[649] *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14, para. 40

[650] *Lotus Case* P.C.I.J. Ser. A, No. 10, p. 4 (1927) at 18

[651] See the Dissenting Opinion of Judge ad hoc Ecer, *Corfu Channel* at 119 substantially supported by the Court's conclusions in *Corfu Channel*, at 18; Cheng, Ibid., at 305

date[652] and the presumption that the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date, also, even where the later situation or state of affairs has in other respects to be excluded from consideration[653]. By contrast, the Court in the *Corfu Channel* case declined to follow the presumption that a State, being in control of its own territory, is aware of an illegal act occurred therein (in particular, the explosions of Albanian mines of which British warships were victims)–although it may be a consideration to establish actual knowledge of the fact[654]. More generally, that case shall be reminded for having set the important reference that:

> This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion […]The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.[655]

Such strict posture may be justified, once again by the objective of preserving deference to state sovereignty, and the idea that the use of such shortcuts should be resorted to only in extreme circumstances, such as in the absence of any sort of proof. By distinguishing between presumptions and inferences, the Court *de facto* maintained the possibility of using presumptive reasoning to facilitate its decision-making, while at the same time avoiding binding itself for the use of the same presumptive reasoning in later cases. Then, a dozen of years later, he Court clarified in *Barcelona Traction* that the ability to draw inferences is based on the view that, if evidence is not produced by a party, it is because disclosure might be contrary to its interests[656].
With regard to the actual rules of evidence, at least two norms compound the basic mechanics according to which the Registrar of the Court transmits every document to the other party: first, the parties have an implicit duty to disclose the evidence available, or more generally to

[652] *Case concerning the Temple of Preah Vihear* (*Cambodia v Thailand*) Merits, Separate Opinion of Judge Fritzmaurice, ICJ Reports [1962], pp. 61-62 (citing Judge Huber in the *Island of Palmas Case*, Vol II. ICJ Reports [1962] p. 866)
[653] Ibid.; see also the Separate Opinion of Judge Basdevant in the *Minquiers and Ecrehos* (France/United Kingdom), ICJ Reports [1953],p. 76
[654] *Corfu Channel*, p. 18
[655] Ibid. (emphasis added)
[656] See *Barcelona Traction* (Second Phase), [1970] ICR Reports 162, 215

cooperate in the presentation of evidence[657]; second, they have the responsibility not to contravene international law in obtaining the evidence they wish to produce before the Court[658]. However, the sanction for non-compliance with these and other requirements in the submission of evidence is substantive rather than procedural, and as a result, it will be the Court on a case-by-case assessment which will determine the weight to be attributed to any irregularity. Along this line, it is to be noted that the Court has no power to compel the production of evidence, but it may take formal note of any party's refusal to produce, and may draw adverse inferences on that basis. In short, the Court enjoys great flexibility in the admission of evidence. This is reflected also in the provisions in article 56, which state the principle that after closure of proceedings no further evidence can be submitted except with consent of the other party, and nonetheless leaves open the possibility for the Court to direct admission of the late-produced document (thereby granting the other party the opportunity to comment upon it and submit further documents in support of the comments).This is the only circumstance where the Court may decide to refuse admission without even looking at the evidence, differently for example from the case of evidence obtained illegally.[659]

One of the most daunting challenges, given the difficulty of gathering evidence when parties are not cooperative to its production, is to properly evaluate the complex and often controversial evidence upon which the Court must rely. For this reason, reliance on experts is particularly important in this type of litigation. According to Article 50 of the Statute and articles 62 (2) and 67 of the ICJ Rules, the Court may at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion for a particular case[660]. Also, parties may decide to call witnesses and must in that case notify the court and the other party (art. 57), so that the latter can prepare the examination of

[657] See Chittharanjan F. Amerasinghe, EVIDENCE IN INTERNATIONAL LITIGATION, *supra* note 533, pp. 96-117 (citing, *inter alia*, the *Avena case*.)
[658] See Anna Riddell and Brendan Plant, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (British Institute of International and Comparative Law 2009, London), at 50 (citing for reference the *CorfuChannel* case)
[659] See *Corfu Channel* (Merits), at 32-36; W. Michael Reisman and Eric E. Freedmann, The Plaintiff's Dilemma: Illegally Obtained Evidence and Inadmissibility in International Adjudication, 76 American Journal of International Law 737 (1982), 747
[660] Similar provisions are contained in the ITLOS Rules, under articles 77 (2) and 82

those witnesses and experts through its agents, counsel or advocates under the control of the President of the Court (art. 65).

Besides this regular party-initiated process, the Court may call upon the agents to produce any document or to supply any explanation (art. 49), as well as the parties to produce such evidence or to give such explanation that it may consider necessary (art. 62 (1)). However, the Court has rather sparingly resorted to these powers, as well as the appointment of experts[661], arguably because it sees its primary function as one of mere supervision of the parties' submission and testimonial evidence[662].

In WTO law, too, general rules on burden of proof are missing[663], but the general rule "*onus probandi incumbit ei cui licit*" applies. This means that the burden lies on the claimant, but also on any party raising an affirmative (as opposed to denial) defence[664]. However, it has been noted that the clarity on this principle has been undermined by an inconsistent use of "the language criterion", focused on the difference between "exception" and "exclusion", and by possibly taking into account other criteria[665].

Moreover, the inconsistent use of the terms "*prima facie* case" has generated some confusion regarding the functioning of the burden of proof[666]. A first meaning of "*prima facie* case" is the production of the amount of evidence necessary to meet what is traditionally known as "the burden of going forward", a concept widely referred to in the common law, where, as explained *supra*[667], parties can file a motion to strike out a claim unsupported by sufficient evidence. Accordingly, meeting the burden of going forward means having sufficient evidence to

[661] See Chester Brown, A COMMON LAW OF INTERNATIONAL ADJUDICATION (Oxford, Oxford University Press), p. 113, 116

[662] Ibid., at 70

[663] The one exception is article 10.3 of the Agreement on Agriculture, which stipulates: "Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question".

[664] *AB Report, United States- Measures Affecting Imports of Wooven Wool Shirts and Blouses from India*, WT/DS33/AB?R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323 at 16

[665] Michelle Grando, EVIDENCE, PROOF AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford, Oxford University Press 2009)

[666] For a comprehensive analysis and critique of the concept of burden of proof in WTO law, see Michelle Grando, Ibid.; James Headen Pfitzer and Sheila Sabune , Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence, International Centre for Trade and Sustainable Development Issue Paper No. 9 (April 2009); Joost Pauwelyn, Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears The Burden?, 1 Journal of International Economic Law 227 (1998)

[667] Para II.3

withstand any possible motion of this kind. A second meaning of "*prima facie* case" refers to the burden of persuasion, that is, to produce the amount of evidence necessary to prevail on the merits, and is traditionally relied upon in those cases where the burden is predetermined by statute or case-law.

The case-law of the WTO shows extensive use of both concepts. For example, in *India-Patents*[668], the Panel found that the European Community had established a *prima facie* case concerning the violation of article Art. 70.8(a) of the TRIPs Agreement, i.e. to provide a means by which applications for patents for such inventions can be filed, based upon the showing that a patent application filed under the administrative instructions could be rejected by the court under the contradictory mandatory provisions of the existing Indian Patents Act of 1970. The Panel then went on to assert that "*the onus [shifted] to India to bring forward the evidence and arguments to disprove the claim by the EC*"[669]. This means that in absence of proof to the contrary, the claimant (the EC) was entitled to a rule in its favour: a "prima facie case" of the second type. By contrast, in *Korea-Alcoholic Beverages* the panel noted that the claims submitted by the European Communities and the United States regarding the preferential tax treatment of Korean soju over certain alcoholic beverages was supported by sufficient evidence only with regard to some of the products for which a violation of article III.2 of the GATT was invoked, precisely those products which had been discussed in the complaints. Thus, it ruled that the complainants had not carried their burden of establishing a "*prima facie case*" with respect to the remaining products. Clearly, this interpretation subscribes to the theory of "prima facie case" as burden of production, i.e. the first type of meaning. However, adherence to this theory is contradicted by the fact that, unlike the common law, there is no possibility for a party to a WTO proceeding to file a motion for preliminary judgment: the evidence will only be assessed for the issuance of the interim report, when the panel has already received submissions and rebuttals by each party, and conducted two oral hearings. Only in one case, has a panel exceptionally issued a communication prior to that moment to facilitate the meeting of the burden, by noting that "*on the basis of the evidence and arguments presented, the panel is unable to form any view on whether the ETI Act of 2000 satisfies the relevant provisions of the Agreement on*

[668] *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, AB-1997-5, Adopted on 16 January 1998

[669] Para. 7.42

Agriculture"[670]. Moreover, the panels may contribute with their fact-finding to the establishment of a "prima facie case", namely by taking into account evidence submitted by the other parties, as well as the oral hearings and the submissions of experts[671]. As a result, the more reliable interpretation of "prima facie case" appears to be the one that equates it with the notion of rebuttable presumption[672]. In practical terms, this means that the burden of proof will be alleviated (and not shifted) through the use of presumptions that identify the applicable "test" for the violation of WTO law invoked, and enable a panel to rule in favor of the claimant whenever that test is met -unless the party who is alleged to have violated the provision comes forward with evidence sufficient to rebut the presumption and engage the panel in a full-fledged assessment of the evidence. In *US-Shirts and Blouses*, citing in support commentators from a number of European legal systems, the Appellate Body has described the situation in these terms:

> […] it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption[673].

Finally, it should be noted that a consistent theory or application of standard of proof has not been developed in WTO law. It appears that the concept of "*prima facie* case" has had an

[670] *United States- Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted on 21 March 2005 at paras 7.980-7.981. See also Michelle Grando, Ibid., at 112 for mentions of other cases where the Panel adopted a proactive approach to fact-finding.

[671] See Article 13 of the DSU, according to which a panel can seek information and technical advice from an individual or an expert group. See also Appellate Body Report, India – Quantitative Restrictions On Imports Of Agricultural, Textile And Industrial Products, WT/DS90/AB/R (23 August 1999) para. 141-142

[672] See Joost Pauwelyn, Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears The Burden?, 1 Journal of International Economic Law 227 (1998), 254

[673] *US-Shirts and Blouses*, p. 14 [citing: M.N. Howard, P. Crane and D.A. Hochberg, Phipson on Evidence, 14th ed. (Sweet & Maxwell, 1990), p. 52; L. Rutherford and S. Bone (eds.), Osborne's Concise Law Dictionary, 8th ed. (Sweet & Maxwell, 1993), p. 266; Earl Jowitt and C. Walsh, Jowitt's Dictionary of English Law, 2nd ed. by J. Burke (Sweet & Maxwell, 1977), Vol. 1, p. 263; L.B. Curzon, A Directory of Law, 2nd ed. Macdonald and Evans, 1983), p. 47; Art. 9, Nouveau Code de Procédure Civile; J. Carbonnier, Droit Civil, Introduction, 20th ed. (Presses Universitaires de France, 1991), p. 320; J. Chevalier and L. Bach, Droit Civil, 12th ed. (Sirey, 1995), Vol. 1, p. 101; R. Guillien and J. Vincent, Termes juridiques, 10th ed. (Dalloz, 1995), p. 384; O. Samyn, P. Simonetta and C. Sogno, Dictionnaire des Termes Juridiques (Editions de Vecchi, 1986), p. 250; J. González Pérez, Manual de Derecho Procesal Administrativo, 2nd ed. (Editorial Civitas, 1992), p. 311; C.M. Bianca, S. Patti and G. Patti, L (Giuffré Editore, 1991), p. 550; F. Galgano, Diritto Privato, 8th ed. (Casa Editrice Dott. Antonio Milani, 1994), p. 873; and A. Trabucchi, Istituzioni di Diritto Civile (Casa Editrice Dott. Antonio Milani, 1991), p. 210].

influence also on the lack of clarity in this area, since the two elements of standard of proof and burden of proof easened through a rebuttable presumption are usually intertwined; as a result, the WTO has used the term "*prima facie*" also as a standard, in contrast with "beyond reasonable doubt" or "preponderance of the evidence". Commentators have invoked the need for clarifications, with almost univocal recommendation to officially adopt the "preponderance of the evidence" standard[674]. One additional suggestion has been to conceive a higher standard of proof for situations where errors are typically most costly for respondents, for example non-violation complaints, situation complaints and cases under the Agreement on the Application of Sanitary and Phytosanitary Measures (since they affect not only trade, but also human, animal or plant life)[675]; and this is no less than formulating *ex ante* presumptions of legality of certain conducts.

d. Right to a reasoned decision

The right to a reasoned decision is specifically provided by statute[676] in the ICJ and ITLOS. In the case of the WTO, since the findings of the DSB are merely recommendations, there is no explicit requirement of motivation neither in the DSU, nor in the Working Procedures for Appellate Review; however, the need for some sort of motivation can be derived implicitly from the function which the Panels and the Appellate Body are entrusted to. In particular, article 11 holds that "*a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements*". The extent to which a Panel or Appellate Body decision is to address each claim is not regulated by rules; however, the practice suggests that decisions taken within this setting address the claims at some length, in a level of details that is comparable to the EU Courts.

[674] Michelle Grando, Ibid.; James Headen Pfitzer and Sheila Sabune , Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence, International Centre for Trade and Sustainable Development Issue Paper No. 9 (April 2009); Joost Pauwelyin, Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears The Burden?, 1 Journal of International Economic Law 227 (1998)
[675] M. Grando, Ibid., at 141
[676] Art. 95 and 107 Rules ICJ; art. 125.1 and 135.2 ITLOS.

In this respect, one case can be mentioned in which the WTO Appellate Body commented on the compliance by the Panel with the duty to give reasons. In the *Brazil-Aircraft* (Canada) case[677], the Panel had established that Brazil had violated the Agreement on Subsidies and Countervailing Duties through a financial incentive schemes contingent on export. One of the controverted aspects of the judgment was whether the reference for the level of export subsidies should be computed in current or in constant dollars, to take into account of inflation. The Panel decided for the adjusted value, adding "*as that will provide a more meaningful assessment as to whether Brazil has increased its level of export subsidies*". It then went on to affirm that the conclusion would have been the same regardless the measure chosen. On Appeal, Canada contested this as amounting to taking a position which was not supported by the object and purpose of the Agreement, and "unreasoned", while Brazil supported it claiming that it was the only solution if the status of developing countries was to be taken into account by the dispute settlement process. The Appellate Body addressed the claim by noting two peculiarities of the dispute: first, that the Panel had not made a legal finding that the level of a developing country Member's export subsidies must be measured, in every case, using a constant value, but rather that this would be appropriate in the instant case; and second, that the outcome would have been the same if the other value had been chosen. Then, completely independently, the AB added *ad abundantiam* (preceded by "moreover" and "in our view") taking into account of inflation was necessary to respect the differential treatment provisions of Article 27 of the Agreement. Thus, the AB was very clear on the fact that when the outcome of the case does not be affected by a choice made by the Panel, the absence of reasons does not invalidate the decision. Moreover, the ruling suggested that due process rights, in particular that to have a reasoned decision, might apply with greater force to decisions the impact of which transcend the individual dispute.

In any case, it is important to stress that the duty to give reasons does not concern all the claims (or arguments) made by a party: the Appellate Body has recognized the possibility for a panel to do "judicial economy", i.e. to address only those claims that are necessary to resolve the matter

[677] WT/DS46/AB/R, *Brazil – Export Financing Programme for Aircraft*, decision of 2 August 1999, para. 160-162

at issue[678]. However, such possibility should not extend beyond its scope, as it would otherwise "*not enable the DSB to make sufficiently precise recommendations and rulings so as to allow for compliance* […]."[679]

4.Procedural rights in criminal adjudication (ICCt, ICTY, ICTR)

The following subparagraph lays out the basic elements of the notion of criminal due process on the basis of two criteria: first, the Statutes, Rules of procedure and jurisprudence of the international criminal tribunals, such as the ICCt, the ICTY and the ICTR. Second, by reference to the jurisprudence of the human rights instruments, such as the European Convention of Human Rights and the Inter-American Convention of Human Rights, to the extent they address the specifics of criminal cases. As noted above in paragraph 2, this discussion will only cover the *residual* elements of the right to be heard which have not been addressed (or not in the same terms) in the non-criminal context, and which pertain to the parties to criminal proceedings.

a. Applicability

Even within the area of criminal law, there may be significant differences in the application of due process depending on the normative instrument relied upon. In fact, while articles 14 ICCPR[680] , 6 ECHR and 8(1) IACHR refer to "criminal charge" ,"criminal offence" and

[678] See e.g. *AB Report, United States-Shirts and Blouses*, para. 18; *India-Patents*,para. 87
[679] AB Report, *Australia-Salmon*, para. 224
[680] "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

"criminal accusation", article 7(1) AfCHPR has a much wider scope of application , not being limited to criminal proceedings[681]. The fact that a single article is used in the AfCHPR with the double purpose of protecting the individuals from criminal and civil proceedings, suggests that the two concepts of due process to a large extent overlap, with the criminal proceedings presenting just a few additional requirements to the core notion of due process.

The second important point on applicability is how the nature of "criminal" is defined, thereby triggering the application of article 6 (2) and (3) ECHR and 8 (1) IACHR. While I have been unable to find any predetermined criteria for the definition of criminal under the IACHR, this aspect has been subject to extensive discussion in the ECHR's case-law, and will be addressed in detail in Chapter IV[682] to verify whether EU competition law can be considered of criminal nature. For present purposes, suffice to say that "criminal" is to be interpreted in an autonomous sense from domestic law, as it is based not only on domestic classification but also on factors such as the nature of the incriminating provision, and the severity of the penalty.

A third issue relates to the types of activities that fall under the scope of application of criminal due process: although this is not explicitly stated in the rules listed in article 6 (3) ECHR, the Court has found on a number of occasions its applicability to investigatory acts, especially when evidence used at trial was collected in violation of Article 3 of the Convention[683]. More generally, the protection of the right to a fair trial ex article 6 ECHR starts when the suspected is officially notified[684], or otherwise becomes aware of the suspicion by being subject to measures that substantially affect him[685]. Similar standards apply for articles 8 (2) (b) and (c) of the IACHR: the IACHR has found a violation of article 8 (2) (b) (prior notification in detail to the

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

[681] "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal".

[682] In particular, paragraph 3.ii.c

[683] *Harutyunyan v Armenia*, (App. no. 36549/03) judgment of 28 June 2007; *Göçmen v. Turkey*, no. 72000/01 17 October 2006; *Jalloh v. Germany*, 11 July 2006, no. 54810/00 (Grand Chamber)

[684] *Eckle v Germany*, (1983) 5 EHRR 1, 15 july 1982, paras 73-75

[685] *Foti v Italy*, (7604/76) [1982] ECHR 11 (10 December 1982) , paras 52-53

accused of the charges against him) when the notification had occurred the day before the judgment was delivered.[686] The lack of notification also triggers a violation of the right to liberty protected under articles 5 and 7 of the respective conventions, which are not discussed in this context.

Finally, it should be recognized here at the outset that criminal tribunals must take into account also the situation of the victims, whose interests may be in conflict with those of the defendants. For this reason, it can be expected that the scope of due process may suffer cutbacks in favor of the protection of the victim[687]. Article 20 of the ICTY Statute and 19 of the ICTR Statute profess the need for the Trial Chamber to ensure not only "*that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused*", but also "*[with] due regard for the protection of victims and witnesses*". Moreover, the Statute makes it clear that the protection of victims and witnesses is of critical importance in the ICTY's proceedings. And with regard to the accused, Article 21(2) of the ICTY Statute and 20 (2) of the ICTR Statute explicitly incorporate into the right to a fair and public hearing a reference ("subject to") to the article (22 and 21) which requires the Tribunals to provide for the protection of victims and witnesses in its RPE.
Other than this peculiarity, much of what is said for the ECHR applies to international criminal tribunals since both the Statutes of Ad hoc tribunals and the ICC Statute incorporate article 14 of the ICCPR.

b. Right to trial by a competent, independent and impartial tribunal established by law

[686] *Castillo v Petruzzi*, paras. 141-142
[687] See in this sense Mykola Sorochinsky, Reconciling Due Process and Victims' Rights: Towards a Power Balance Model of Criminal Process in International Human Rights Law, (January 19, 2009), Michigan Journal of International Law, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1330104. Contra, see Separate Opinion of Judge Stephen, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Decision on the Prosecutor's Motion requesting Measures for Victims and Witnesses, 10 August 1995, 8; Sara Stapleton, Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation, 31 New York University Journal of International Law and Politics 568 (1999).

A strictly separationist view of the concept of "judicial procedure" is one of the most peculiar elements of criminal due process, which distinguishes it from its non-criminal counterpart[688]. The main reason for interpreting "independent and impartial" in a way that compels structural separation of the functions of prosecutor and judge is that, given both the seriousness of the potential restriction to an individual's liberty in the pre-trial phase and the stigma attached, the risk of errors is too high and therefore any indulgence in the standard of rigor for such an important aspect of the right to a fair trial is per se prejudicial, and cannot be compensated by the application of a subsequent judicial review[689]. This issue will be discussed further in chapter IV, with specific regard to the compatibility of the two-tiered system in EU competition law with Article 6 ECHR.

The impartiality of judges in international criminal tribunals is ensured through specific Rules of Procedure and Evidence (RPE), which require disqualification[690] for actual or unacceptable appearance of bias.[691] A rule asserting their independence, by contrast, being the latter an essential feature in the composition of these tribunals, is integral part of the respective Statutes[692].

c. Notice and right to comment

The requirement of notification ("to be to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him") should be distinguished from the right to have adequate time and the facilities for the preparation of his defence, which requires that the prosecutor actually surrenders exculpatory evidence to the defendant (see *infra*, letter d). In fact, all the prosecution need to be do for complying with notification requirements is to inform about the type of offence which one is charged with, as well as the specific acts incriminated and the extent to which those can be linked to the former.

[688] E.g. *De Cubber v. Belgium*, (9186/80) [1984] ECHR 14 (26 October 1984)
[689] See John Hatchard et al., COMPARATIVE CRIMINAL PROCEDURE(London, British Institute of International and Comparative Law 1996), at 231
[690] ICTY RPE Rule 15(A); ICTR RPE Rule 15 (A); ICC RPE Rules 34-35
[691] E.g. ICTY, *Vendzika* (IT-95-17/1-A), Judgment of 21 July 2000, para. 189
[692] ICC Statute, article 40-41; ICTY Statute, article 12; ICTR, article 11

However, it is fair to acknowledge that one who is not notified properly is also not likely to be able to have sufficient time and facilities to prepare the defence: for example, when the ECtHR has addressed the issue of an appellate court that had reclassified the offense without allowing the defendant to submit its observations, it ruled that there had been a breach of both Article 6 (3) (a) and 6 (3)(b).[693]

The right to be informed of the charge is incorporated as a matter of principles in the Rules of Procedure and Evidence of the three international tribunals under consideration[694], and specifically implemented in the pre-trial procedures established by Rule 76 and 77 of the ICC RPE, and Rule 53 bis of the RPE of ICTY and ICTR.

As to the possibility to comment, of course, everything said *supra* concerning the inderogability of the right to comment on evidence that is vital to the outcome applies here, arguably with even greater force.

d. Right to an interpreter , to adequate counsel and to adequate time and facilities to prepare a defense

Under this article are comprised a number of practical safeguards for the defence, which, however, are not confrontational. Rather, what is important for our purposes is the right of access to the prosecution file, which may be crucial to mount an effective defence. The ECtHR has ruled on several occasions that an accused should have the possibility to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings[695]. However, it is also clear from the jurisprudence that such right is not absolute: the interests of national security, or the need to protect certain witnesses from reprisals, may compete with the interests of the defence, and lead to a series of exceptions. For example,

[693] *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II
[694] Article 21 (4)(a) ICTY Statute, 20 (4) (a) and Article 67(1)(a) ICC Statute. See also Article 20 (2) ICTY Statute, Article 19 (2) ICTR Statute and Article 61 (3) ICC Statute (for the suspect).
[695] E.g. *Jespers v Belgium* (App. no. 8403/78) (1981) 27 DR 61; *Rowe and Davis v United Kingdom* 30 EHRR 1, 16 February 2000

the Court has declared compatible with the Convention a restriction under which only the defence lawyer (and not the accused himself) was granted access to the case-file[696].

It should be noted that a fundamental difference exists between the adversarial and the inquisitorial model: only in the latter is the prosecutor under the obligation to make an investigation that is "objective" in nature, i.e. including any possible material evidence in favor of the defence, and provide that evidence to the accused at trial. This principle has been recognized also as applicable to the police in England, but is entirely absent from the American context[697]. The international criminal tribunals are closer to the Anglo-Saxon model in this respect, not imposing any obligation to seek evidence in favor of the defendant; what the statutes do provide is merely an obligation to disclose favorable evidence which happens to be in the possession of the prosecutor. According to Rule 68 (i) RPE (of both the ICTY and the ICTR), the Prosecutor is under the duty to disclose any material which in his actual knowledge may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. This is in addition to the obligation under Rule 66 (b) to permit the defence, upon request, to inspect any books, documents, photographs, tangible objects in the Prosecutor's custody or control, which are material to the preparation of defence[698], or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused". However, for the purpose of lamenting a violation of such duty it will be upon the defendant to show a *prima facie* case that the requested items are material and that the prosecution has custody or control of the evidence[699]. The requirement of a *prima facie* case is in line with the standard endorsed by the ECtHR, which has found refusals to order disclosure a violation of article 6 ECHR only when the applicant had demonstrated that the material not disclosed was necessary to enable him to prepare an effective defence[700]. The ICTY also follows the principle defined by the ECtHR case-law that the availability to the defendant of the material relevant to the defence

[696] *Kamasinski v Austria*, (App. No. 9783/82) [1989] ECHR. 24 (19 December 1989)
[697] See Christoph.M. Safferling, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE,at 75
[698] See also *Prosecutor v Blaskic*, Decision on Standing Objection of the Evidence to the Admission of Hearsay with no Inquiry as to its Reliability, Case No. IT-9514-T (January 1998), para 12
[699] *Prosecutor v Delalic and Others*, Decisio on on Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, Case No. IT-96-21-PT (September 1996), para. 9
[700] *Bricmont v Belgium* ((1990) 12 EHRR 217

should be requested and possibly litigated before the trial judge for his or her ruling on questions of disclosure, and will not be sufficient when granted at the review stage.[701]

The ICC Statute does not only impose disclosure, which is actually stronger in this context, since it is made integral part of the rights of the accused enlisted in article 67. It actually imposes a duty to seek exculpatory evidence[702], much like in the continental systems. Further, it should be noted under article 54 (1) (C) the Prosecutor is explicitly bound by the rights of persons arising under the Statute, which by reference to article 21, includes principles and rules of international law, and internationally recognized human rights.

All this pre-trial protection is also backed up by the duty for the Prosecutor ex Rule 121 RPE and Article 61 (3) of the Statute to provide to the Pre-Trial Chamber and the person accused, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

Finally, Rule 53 confirms the shift with the ICC towards a more inquisitorial (and balanced) approach by stipulating that in deciding whether to initiate an investigation, the Prosecutor shall consider, *inter alia*, whether there are substantial reasons to believe that "an investigation would not serve *the interests of justice*[703]''; and by prescribing (in paragraph 2) that upon investigation, the Prosecutor may conclude that there is not a sufficient basis for a prosecution if ''a prosecution is not in the interests of justice''[704].

On 13 June 2008, the Trial Chamber of the ICC in the *Lubanga case* clarified another important point on the scope of the obligation, holding that a prosecutor is obliged to disclose the confidential information too, even if it were convinced of its immateriality, and the assessment of materiality will be then conducted by the Court:

If the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to article 54 (3) (e) of the Statute, the final assessment as to whether the material in the possession or control of the Prosecutor

[701] *Dowsett v United Kingdom* (59482/98) June 24, 2005, 58 E.H.R.R. 41

[702] "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally"

[703] Article 53 (1)(c).

[704] Article 53 (2)(c).

would have to be disclosed pursuant to article 67 (2) of the Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material. The Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement and cannot order the disclosure of the material to the defence without the prior consent of the information provider[705].

e. Right to examination and cross-examination of witnesses

This right is an important corollary of the principle of equality of arms. It involves two parts: first, to obtain examination of witnesses under the same conditions as the other party, and thus the prosecutor. The "right to obtain examination of witnesses" however is not absolute, since there may be reasons for a court to restrict the possibilities to call witnesses on reasonable grounds, such as for instance irrelevance of the proffered testimony[706] or reasons of protection of integrity of a child or a raped woman[707]. The Court has more recently clarified that it is a matter of balancing the public interest considerations in detecting and punishing crime and the right to a fair trial, thereby emphasizing its relative character. [708]

This relativity is suggested by the specific change to the first draft of the International Covenant on Civil and Political Rights –which served as blueprint for the adoption of regional human rights instruments -, originally stipulating "*right[…]to obtain compulsory attendance of witnesses in his behalf*"[709]: the fact that there is no more mention of the obtention of compulsory attendance suggests that the Contracting Parties decided to remove this prerogative from the right. Thus, this aspect of the right differs from those of having the same conditions of the other party and the right to cross-examine witnesses, which are absolute in nature.

[705] Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled"Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the StatusConference on 10 June 2008"

[706] *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B

[707] *Scheper v. the Netherlands* (dec.), App. no. 39209/02, 5 April 2005; *S.N. v. Sweden*, (34209/96) [2002] ECHR 546 (2 July 2002)

[708] *Al Khawaja and Tahery v The United Kingdom* App. No. 26766/05 and 2228/06, 15 December 2011, paras 120-165

[709] See Manfred Nowak, UN CONVENANT ON CIVIL AND POLITICAL RIGHTS. CCPR COMMENTARY (Strasbourg, Engel, 1993), at 261

Moreover, the possibility the exercise of this aspect of the right is subject to strict conditions, as the ECtHR has held that in order to give rise to a Contracting Party's liability for inability of a defendant to call a particular witness, he would have to prove that this has prejudiced his rights of defence and the fairness of the proceedings as a whole[710]. Given the focus on the proceedings "as a whole", the Court seems to be willing to accept failures to make even decisive witnesses appear at trial whenever the party had the opportunity to question the witness at an earlier stage[711] ; however, more recent cases clarified that pre-trial testimony is sufficient to make-up for later absence of the witness at the hearing only if the pre-trial testimony was accompanied by adequate procedural safeguards[712] , and the witness has not subsequently changed its position.[713]

The main concern in the ECHR in determining the reach of this right is that the parties are given equal treatment: for example, this has led to declare incompatible proceedings where a court of appeal declined to admit an expert testimony for defendant after the first instance court had based its judgment on the opinion of an expert appointed by the prosecutor; [714]but on the other hand, to sustain the validity of proceedings where a reviewing court had heard only the Attorney General and not the accused in light of the fact that the role of the figure of the Attorney General, in a inquisitorial type of proceeding[715], is one of securing the respect for the law[716].

Finally, the ECHR has admitted unidentified witnesses only in exceptional circumstances, of safety of the victim[717] and protection of the integrity of a child[718]. By contrast, the Commission of Inter-American Human Rights has never considered compatible with the Convention when

[710]*Krempovskij v. Lithuania* (dec.), no. 37193/97, 20 April 2000, para. 7;
[711]*Isgro v Italy*, February 19, 1991, Series A no. 194
[712]*Melnikov v Russia* (App. No. 23610/03), 14 October 2010, paras 70-84
[713]*Vladimir Romanov v Russia*, (Application no. 41461/02), judgment of 24 July 2008, paras 97-106
[714]*Bönisch v Austria* , Appl no 8658/79, Séries A no 103, 6 May 1985
[715] For the opposite conclusions with regard to the public prosecutor in an adversarial type of proceeding, see E *Commisison of Human Rights, Paraki v Austria*, Appl. No. 596/59, Decision 19 December 1960, 6 YB, 714; and *Dunshirn v Austria*, Appl. No. 789/60, Decision 15 March 1961, 6 YB, 714
[716] E Commission of Human Rights, *Ofner v Austria*, Appl. No. 524/59, Report 23 November 1962, 6 YB, 680; and *Hopfinger v Austria*, Appl. No. 617/59 Report 23 November 1962, 6 YB, 680.
[717]*Kostovski v Netherlands* (1989) 12 EHRR 434. However, the Court has found a violation of article 6 ECHR where the anonymous witness' evidence was considered decisive for the outcome: see *Ludi v. Switzerland* (1992) 15 EHRR 173; and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, p. 711
[718]*S.N. v. Sweden*,(34209/96) [2002] ECHR 546 (2 July 2002)

unidentified witnesses are allowed to testify[719]. In turn, the ICTY's and the ICTR's Statute explicitly contain[720] (of the ICTR Statute) the duty to provide in the RPE for the protection of victims, namely (but not only) through the conduct of in camera proceedings and the protection of the victim's identity. The ICTY and the ICTR implemented this provision through article 69 RPE[721]. Thus, in part due to this apparent conflict between international criminal tribunals and IACHR standards, the practice of the ICTY of authorizing under certain circumstances anonymous testimony has been criticized comparing it to a military tribunal, which often has limited rights of due process.[722]

f. Right to equality of arms

Many aspects of equality of arms have been dealt with under the rubric of other rights in the current paragraphs, and others have been already described while discussing the principle in the civil context. However, it is important to understand that the breadth of the criminal equality of arms is wider, being functional to the defense from the infliction of a greater penalty. This is derived from the different conception of "fairness" in the two contexts[723]. An illustrative example of how this difference may play out is the observation that, while the ECtHR has found a violation of Article 6 in a case of a law that automatically denied access to the case-file for a defendant in the pre-trial stage of a criminal proceeding (allowing instead only his counsel)[724], it reached the opposite conclusion with regard to the same set of facts concerning a civil party in a criminal proceeding[725].

[719] IACHR, Second Report on the Situation of Human Rights in Colombia, OECA/Ser.L./V/II.84, Doc. 39, rev., 98
[720] art. 22, and art. 21 respectively.
[721] In the ICC Statute, the rule of reference is article 68 ICC Statute
[722] ICTY, *Tadíc* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 28
[723] See *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p.19, para. 32, where the Court has accepted that the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as in cases concerning the determination of a criminal charge ("the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases").
[724] *Foucher v France* (1998) 25 E.H.R.R. 234 ECHR
[725] *Menet v. France* (no. 39553/02), 14 June 2005

A further circumstantiation should be made to acknowledge that in international criminal tribunals, the principle of equality of arms has its limitations, in the sense that it necessarily will have to give way to some flexibility due to the greater difficulty of securing evidence, both for the occasional inability to compel a swift and effective cooperation by the States involved and for the time-lag between trials and the occurrence of the events. The need for a more flexible approach was recently invoked in the *Tadic* case, where the defendant was invoking precisely the first kind of difficulty (lack of State cooperation). The Trial Chamber, after affirming that there was no such principle of equity that would impose a court to remediate the conditions of inequality independent from the control of the court, stated:

> Under the Statute of the International Tribunal, the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts[726].

Thus, the Ad Hoc Tribunals tend to see equality of arms merely in a procedural sense, disregarding any potential substantive inequality even if of such proportion that is likely impair the ability to defend oneself. The only possible defense against such situation is to invoke Rule 73 (D) of the ICTY. A liberal interpretation of this rule allows preliminary motions for the accused to invoke abuse of process, which the ICTR Appeals Chamber as defined as a discretionary doctrine "*by which judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of the serious and egregious violations of the accused's rights would prove detrimental to the court's integrity*"[727]. However, it has been noted that the invocation of this doctrine by defendants has so far proven unsuccessful[728].

g. Burden of proof and standard of proof

[726] Tadíc (IT-94-1-A), Judgment of 15 July 1999, para. 52. *Kayishema et al.* (ICTR-95-1-A), Judgment (Reasons), 1 June 2001, paras 63-71; *Milutinovic et al.*(IT-99-37-AR73.2), Decision on Interlocutory Appeal on Mortion for Additional Funds, 13 November 2003

[727] *Barayagwiza* (ICTR-97-19-AR72), Decision 3 November 1999, para. 74

[728] *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000; *Milosevic* (IT-02-54), Decision on Preliminary Motions, 8 November 2001, para. 48; *Dragan Nikolic* (IT-94-2-AR73), Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, paras. 30-32; Roza Pati, DUE PROCESS AND INTERNATIONAL TERRORISM: AN INTERNATIONAL LEGAL ANALYSIS (Leiden, Martinus Nijoff 2009), at145.

The main issue with regard to the burden of proof is that of presumption of innocence, which not only is specifically provided for by the three international criminal tribunal under consideration[729], but also has been defined as a "general principle of law"[730].
An implication of this principle in the context of international criminal tribunals is also that, in order for an indictment to be sustained at the pre-trial stage (for example, under article 19 (I) of the ICTY Statute), the Prosecution will have to make a *prima facie* case, that is, a credible case which if not contradicted by the defence would be sufficient basis to convict the accused of the charge[731]. Moreover, in the context of the ICC, an explicit prohibition of any reversal of the burden of proof of guilt [732]is included in the guarantees that form part of the rights of the accused, as is the specification that silence cannot be a consideration in the determination of guilt.[733]

On this particular issue of reversal of burden of proof in criminal law, the ECHR has recognized the problem of conflict between the presumption of innocence with procedural presumptions that establish guilt without an adversarial proceeding and independently from the applicable standard of proof. This was the case in *Klouvi v France*, where the defendant in an unsuccessful proceeding for rape and sexual harassment could rely on an irrebuttable presumption providing automatic guilt of false accusation (libel) for the claimant of the first sexual harassment case[734]. The Court has distinguished between presumptions of fact and presumptions of guilt, declaring only the latter incompatible with article 6 ECHR[735]. The discussion regarding the differentiation between presumptions of fact and presumptions of law, as well as to their permissibility, will not be repeated in this context[736].

[729] Article 21 (3) ICTY Statute, Article 20 (3) ICTR Statute and Article 66 ICC Statute
[730] Nowak, Art. 14, No. 35
[731] See Christoph.M. Safferling, TOWARDS AN INTERNAITONAL CRIMINAL PROCEDURE, p. 183; Judge McDonald, *Jordic et al.*, Case No. IT-95-14-I, confirmation of the indictment, 10 november 1995; Judge Hunt, *Milosevic et al.*, 24 May 1999
[732] Art. 67 (1) (i) ICC Statute
[733] Art. 67 (g)
[734]*Klouvi v. France* (30754/03), 30 June 2011. The finding of violation of the presumption of innocence led France to address the pitfall, enacting a new law on 9 July 2010 which modified the rule established in article 226-10 of the Criminal Code.
[735] E Commisssion of Human Rights, *X v UK*, Decision of 19 July 1972, App. No. 5124/71, 42 CD, 135 (in particular, the presumption was one that a man living with a prostitute was living on her earnings)
[736] See supra, chapter II

The IACHR has clarified also that indirect evidence (such as circumstantial evidence, indicia, and presumptions) may be considered in reaching a decision, provided that it leads to conclusions consistent with the fact[737]. The conflict with the "reasonable doubt" standard adopted by the ICJ appears stark. On the other hand, however, it is interesting to note that in the same case the Commission referred to a number of points on which there is striking similarity with the ICJ, namely its discretion in admitting untimely evidence and attributing to it the appropriate weight, as well as its inability to exercise investigatory powers within an uncooperative State's jurisdiction. It then reminded that the international protection of human rights should not be confused with criminal justice, since the objective is protection and compensation of the victims , rather than punishment of the guilty; and considering that the State could not rely on the defense that the complainant has failed to present evidence on the merits due to its control over the territory, it proceeded to infer its responsibility from the systematic repetition of kidnapping with actual or constructive knowledge of the Hondurian government officials, combined with other circumstantial evidence[738].

In the *ad hoc* criminal tribunals, too, alternatives to direct evidence are not excluded, although they would normally carry less weight: in one occasion, the Appeals Chamber of the ICTY, after acknowledging the inferior weight of hearsay evidence compared to testimony given under oath and subjected to cross-examination, pointed out that this (the lessened weight) will depend upon the infinitely variable circumstances which surround hearsay evidence[739]. More generally, the rules of evidence ensure that the tribunals have great flexibility to adapt to the difficulty of fact-finding in international disputes. For example, Rule 89 of the ICTY (and ICTR) Statute[740] states that

[737] IACHR, *Velazquez Rodriguez Case*, p. 130; *Gangaram Panday Case*, Judgment of January 21, 1994, Inter-Am.Ct.H.R. (ser. C, no.l6), (1994) para. 49
[738] IACHR, *Velazquez Rodriguez*, para 131-159
[739] *Aleksovski* (IT-95-14/1-AR73), Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15
[740] The ICC RPE contain in Rule 63 (2) a similar provision to letter B of this Rule, providing: "A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69"

[…](B)In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
(C) A Chamber may admit any relevant evidence which it deems to have probative value.
(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial[…]

Rule 95 then states the two grounds of exclusion, namely (1) evidence which was obtained by methods which cast substantial doubt on its reliability or if its admission; or (2) if is antithetical to, and would seriously damage, the integrity of the proceedings. This provision is broad enough to comprise all evidence obtained in violation of international human rights standards or principles recognized as being essential for the protection of the accused, including certain fair trial rights[741]. However, a mere breach of the procedural rules of the tribunal in question is not sufficient for the exclusion of evidence[742] .

Regarding admissibility of hearsay, the different Trial Chambers of the ICTY have adopted a different position: one approach has been to admit such type of evidence , recognizing that the "*right to cross-examination guaranteed by article 21 (4) (e) of the Statute applies to the witness testifying before the Trial Chamber and not to the initial declarant whose statement had been transmitted to this Trial Chamber by the witness*[743]", but then consider the lack of cross-examination in attributing weight to it. The other, more common law-like approach, is to use the unreliability stemming from the lack of cross-examination in deciding whether such evidence should be admitted[744].

[741]*Prosecutor v Delalic and Others*, Decision on Zdravko Muci's Motion for the Exclusion of Evidence, Case No IT-96-21-T (September 1997), para. 55
[742] Rüdiger Wolfrum, International Courts and Tribunals, Evidence, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 84; Chittharanjan F. Amerasinghe, 326-327,334-41. Contrast, however, with the Decision of the ICTR Appeals Chamber, 3 november 1999, *The Prosecutor v. Jean-Bosco Barayagwiza* - Case No. ICTR-97-19-AR72 (holding that the only remedy for a detention for more than 6 months without notification of the charge and possibility to appear before a tribunal was that the appellant be released and have the charges against him dismissed)
[743]*Prosecutor v Blaskic*, Decision on Standing Objection of the Evidence to the Admission of Hearsay with no Inquiry as to its Reliability, Case No. IT-9514-T (January 1998), para 12
[744]*Posecutor v Kordic and Cerkez*, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, Case No. IT-95-14/2 (July 1999)

Another concern on the burden of proof is the extent to which the public authority is allowed to rely on evidence obtained illegally. The ECtHR has circumscribed the possibility to admit illegally obtained evidence to cases where the defence has had the opportunity to challenge it, and even then, only if corroborated by other evidence[745]. Moreover, the Court has recently revised its approach to evidence obtained in violation of Article 3 (right to be free from torture and inhuman or degrading treatment or punishment) by adopting a categorical stance[746], instead of the typical instrumental assessment of whether that evidence was decisive[747].

h. Right to a reasoned judgment and right of appeal

The right to appeal is provided by all international criminal tribunals[748], and by Article 8 (2) (h) of the IACHR and article 7 (1) (a) of the AfCHPR, and has been inserted into the ECHR via Protocol No. 7 to the Convention[749]. Yet the provision in the Protocol is followed by a limitation, allowing Contracting States to provide exceptions "*in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal following an appeal against acquittal*". One case in the ECHR concerned a disproportionate restriction of the right to appeal, particularly in requiring that the appellant to the Cour de Cassation in France surrendered to custody in order to file the claim[750].

The IACHR jurisprudence has provided more content to the definition of the right to appeal: at the structural level, the conditions are that the reviewing court must be different and superior in the organic hierarchy, and must intervene before the decision has become definitive; whereas at the procedural level, the court must have all the judicial features that make it apt to adjudicate the case[751]. As anticipated above[752], an essential precondition for the effective exercise of the right to

[745] *Schenk v Switzerland*, Judgmeent of 12 July 1988, Series A. No. 140, para. 47-48
[746] *Levinta v. Moldova*. 17332/03. Levinta, judgment of 16/12/2008, paras. 101-106; Ashot Harutyunyan v. Armenia, Application no 34334/04, 16 June 2010, paras. 58-66
[747] Case 43/1994/490/572, *Saunders v United Kingdom*, [1997] 23 EHRR 313
[748] Rule 151 RPE and Article 81 of the Statute of the ICC, 108 RPE and 25 of the Statute of the ICTY, 108 RPE and 24 of the Statute of the ICTR
[749] Protocol No. 7 to the ECHR, Article 2
[750] *Papon v France* (App. 64666/01), 25 July 2002
[751] IACHR, 2 July 2004, Merits and Compensation, Herrera Ulloa v Costa Rica, Series C No. 107, paras. 158-163
[752] *Supra*, chap III.2

appeal is the statement of reasons in the judgment of first instance. In fact, the Commission of Inter-American Human Rights explicitly referred in its 1993 Annual Report on the judiciary to the obligation for the judgments to cover all points of the cases[753]. In one case where the Commission was confronted with the question of whether the Argentinian Supreme Court could legitimately dispense with the detailing of the reasons for its judgment, it implicitly admitted that the rationale of the duty to give reasons is one of enabling the exercise of judicial review:

> Although it is true that the conviction has become final, Argentine Law provides for an exceptional remedy --the review of *res iudicata* decisions --for situations in which, after judgment has been rendered, there is a discovery, for instance, of "documents that are decisive or were unknown, misplaced or made unavailable by force majeure or by the accusing party" (Article 551 of the Code of Criminal Procedure). Thus, the appeals that have been lodged may have decisive consequences on the legal status of the defendant, if a decision should be made to review the judgment[754]

The AfCHPR, in its case-law, has specified that the right to appeal concerns both the right of access to court and the right to appeal from a first instance to a higher court.[755]Even more importantly, the Commission has clarified that the appellate court should have jurisdiction over both facts and law.[756]

The duty to give reason in the judgment is provided by article 23 of the ICTY Statute and 22 of the ICTR Statute ("It shall be accompanied by a reasoned opinion in writing"), as well as article 74 (5) of the ICC Statute ("The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions").
More interesting is the question of whether a general right to appeal in international criminal law can be asserted, a question that was addressed squarely by the Appeals Chamber of the ICTY in a contempt judgment arising from the Tadić proceedings[757]. The Chamber confirmed the existence of such right, and importantly, grounded this statement on the right to a fair trial

[753] 1993 Annual Report on the judiciary, available at www.cidh.org
[754] IACHR, Case 9850, Argentina, 1990-1991 Annual Report 41 at 75, para. 18
[755] Communications 159/96, 97/93, 27/89,71/92, 49/91 and 99/93
[756] Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, para. 94
[757] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, p. 3 (Feb. 27, 2001)

contained in Article 14 of the ICCPR, which it defined “an imperative norm of international law to which the Tribunal must adhere”.

5. A taxonomy of procedural guarantees: what do they mean in the context of economic adjudication?

In the following subparagraphs, an attempt will be done to find common ground in the jurisprudence of international courts and tribunals in the three areas considered to assert the concept of a minimum core. Then, identifying general considerations on the concept of minimum core, subparagraph (d) will describe its implications in the context of economic adjudication.

a. Guarantees in public law adjudication

There seems to be a great deal of convergence with respect to the elements that trigger the applicability of the right to be heard: granted that in all cases there must be a genuine dispute, at a minimum, it is required the existence of some legitimate expectation that is normatively protected (ECHR and IAL); and at the most, this will have to amount to a fundamental right (IACHR). However, the IACHR in this respect is clearly in dissonance from the general trend, and the ECHR has adopted the broad criterion of there being simply a dispute over the determination of rights and obligations, including over the existence, the scope or the manner in which they are exercised.

The prospect for the right to notice and comment to any allegations appears to be split in two different segments: on the one hand, the right to be put on notice is of fundamental importance when it is capable of affecting the outcome of the proceedings (IHR, IAL and IL); on the other hand, a violation of such right which is not capable of the same will be remediable by conferring the right at another stage of the proceedings, typically on appeal (ECHR, IAL), and in the case of investment case-law will possibly not give rise to liability even in absence of an appeal, unless it amounts to “ a willful disregard of due process or an extreme insufficiency of action”.

As to the right to access to court, including the possibility to request a hearing, it is clear that it can be restricted for legitimate reasons, as long as the core essence of the right is not abridged (ECHR) or the impartiality or competence of the tribunal is undermined (IACHR); in this respect, the ECHR and IAL follow the "doctrine of appearance", except for the narrow case of subjective impartiality which must be proved by the applicant. The issue of impartiality has come up in investment law, but the awards have not produced a reliable basis for the affirmation of a core minimum (and even less so for the existence of any possible "doctrine of appearance"). Even in the context of ECHR, then, it is difficult to identify a core minimum beyond the availability of any means of legal process.

Other implications of the principle of equality of arms have not given rise to such definite features in this area of law, but arguably this is due to the high standard to trigger liability for a violation of due process in this context. Generally speaking, it can be argued that although the principle is an integral element of due process in all fields, a minimum core cannot be found (or asserted) in the absence of a consistent body of case-law in the cognate areas of IAL, and especially, IL. The position of the expert and the safeguards attached to its impartiality appear to be an important area of application of the principle of equality, warranting its independence and the possibility for the parties to challenge its report, but again, no consistent practice can be found across the three areas considered.

The treatment of indirect or circumstantial evidence and its interaction with the burden of proof, and where applicable the presumption of innocence, is another area where a common position cannot be identified, ranging from a permissive (IACHR) to a very strict, "beyond reasonable doubt" approach (AfCHPR) and an intermediate approach which is willing to accept it only as long as the definition of the weight to be attached to circumstantial evidence is not left entirely to the discretion of the authority (IAL).

Finally, the right to a reasoned decision seems to be an integral part of the right to be heard in all these areas, for such right would be useless if one's arguments are not also listened to. It is interesting to note the expression of the intensification of this principle, under the ECHR, for in the face of heavier penalties.

b. Guarantees in inter-State adjudication

In inter-State adjudication, the concept of due process has a different meaning due to the very different nature of the subjects involved. On the one hand, the fact that individual rights are only indirectly affected allows the relaxation of certain stringent rules designed for the protection of those rights. On the other hand, the fundamental attribute of sovereignty that characterizes States leads the international adjudicator to adopt a more deferential position -particularly evident in the gathering of evidence and the use of presumptive reasoning.

First, it is interesting to note that in this area, the application of the right to be heard (or more generally, due process) arises simply out of the involvement of the international adjudicators, even if it were under the advisory capacity (although in such case, with a reduced incidence of the principle of equality).

Second, impartiality is always presumed, mainly because of the existence of adequate "constitutional" guarantees in the formation and administration of the judicial organs. This does not imply that any deviation of impartiality should be proved beyond any reasonable doubt, but neither is a "doctrine of appearance" available to facilitate a party's allegation in this respect: it has been asserted that any doubt regarding impartiality should be "justifiable and substantiated" (WTO).

Third, the organs for inter-State adjudication have all incorporated in their rules of procedure also a mechanism that guarantees notice and extended possibilities for comment. Fourth, although there are no specific rules regarding standard of proof or burden of proof, the general principles are that of "*onus probandi incumbit ei cui licit*" and that the standard of reference is one of preponderance of the evidence except for more serious allegations (ICJ), or more generally where the cost of errors is significantly higher for respondents (WTO).

Fifth, and final, it is undisputable that the right to a reasoned decision is an essential part of the right to be heard, and whose scope is only limited by the need to confine the judgment to the claims necessary to resolve the matter at issue (WTO).

c. Guarantees in criminal proceedings

Before addressing the results of the comparative analysis with reference to the right to be heard in criminal proceedings, it appears necessary to stress the fundamental difference of criminal due process. First, given the greater interference with fundamental liberty, it is more compelling to conceive a fundamental right for the individual to defend himself through a process that is objectively unbiased, in a more pronounced way that in the civilian context –where the consequences of most errors can be undone by remedying at a later stage.

Second, one needs to understand that in this context, a variety of guarantees of "fairness" come into play which are not necessarily linked to the promotion of the fundamental right to be heard, but draw on broader considerations. Safferling refers to three components of fair trial: (1) institutional guarantees such as impartiality and independence of the tribunal; (2) moral principles in the procedure, such as the presumption of innocence and the equality of arms; and (3) rights conceived in a classically narrow manner, as legal claims to be free of something or to be given something, such as the right not to be arbitrarily detained or the right to counsel[758].

Although we have seen that these three sets of principles are by and large followed also in the civil context, their strictest observance is in under most human rights instruments only required in the criminal context (the exceptions being the AfCHPR, which makes no difference between the two kinds). What is certain is that all principles developed in the former context are to be considered minimum standards in the latter: therefore, in approaching the rather succinct list of guarantees for criminal due process, one has to bear in mind that these are merely the additions to the ones identified above.

The focus of the applicability enquiry will be on two different elements: for one, the definition of "criminal" in an autonomous sense, based not only on domestic classification but also on the nature of the incriminating provision and the severity of the penalty; and secondly, the possibility of affecting the rights of individuals irremediably- which is indeed the rationale for imposing greater caution to governmental action in this area.

A first corollary of this rationale is that the prosecutor is under the duty of handing over exculpatory material to the defendant, so that the equality of the parties is not only formal and proceedings are more likely to discover the truth. In this respect, it was shown that the

[758] Christoph J. M. Safferliing, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE, (Oxford, Oxford University Publishing 2001), 30-31

international human rights and criminal tribunals tend to favor the inquisitorial stance typical of the civil law tradition, which is thought to be more consistent with the idea of "fairness".

A second corollary is the absolute inderogability of the character of impartiality and independence, in the recognition that any determination done by a tribunal which does not respect the minimum requisites of impartiality and independence is likely to move away from the search for an objective truth. This principle plays out, importantly, also in the context of appointing experts, where the previous relationship with the prosecutor is permissible only if the latter has the duty to seek the truth (as it is in inquisitorial systems).

Third, with regard to evidence, while the prohibition of using illegal evidence is constant at least with regard to that obtained through the most serious violations (namely, through degrading or inhuman treatment), there is less consistency on the permissibility of unidentified witness testimony and the reach of the strict necessity to uphold the right to cross-examination at the first instance level.

Finally, it should be reminded that in all contexts analyzed, it is plainly accepted that all criminal accusations must meet a "reasonable doubt" standard –in accordance with the presumption of innocence.

6. The minimum core and its implication in economic adjudication

From the results of the comparison, it is apparent that although there are some areas where the practice demonstrates the non-derogable character of the procedural guarantees, these areas constitute a very thin layer in the wider array of rights and obligations that are comprised within the concept of right to be heard.

Thus, if we were to define the minimum core simply on the basis of the minimum rights recognized under each of the systems considered, the claim would be extremely limited: bringing together the three different contexts, it would only be possible to say that in every system of adjudication having an impact over people's fundamental rights, the process that is "due" corresponds to : (1) any form of legal process which respects the guarantees of independence and impartiality; (2) the right to receive notice of the allegations and the basic evidence in support, and comment upon them, to the extent that not doing so may prejudice the outcome of the

dispute. (3) the right to a reasoned decision, addressing every essential claim (and not argument) for the resolution of the matter.

It should be added to this general framework that, when a right recognized by this minimum core is not respected before the adjudicator of first instance, it will have to be upheld at some other stage of the adjudicatory process – namely the investigatory phase or on appeal or judicial review. It is for this reason that the summary of the results of public law adjudication neglected to mention the right of an individual to a fair appeal, for this would be strictly necessary only when required by the defectiveness of the prior phase(s) of the proceedings. Thus, one distinction can be made between rights that can be limited only provided that the violation is remedied at some other stage of the proceedings, and rights that can be limited regardless, in light of some countervailing consideration.

However, it was submitted in paragraph 1 that the definition for a minimum core should not be limited to the ascertainment of the minimum common denominator; instead, it should be informed by considerations of morality, in particular driven by the liberal values of human dignity, equality and freedom. And while considerations of equality and freedom are rather obvious and prevailing throughout the procedures utilized in the three different contexts analyzed, the idea of dignity seems to surface only in very limited circumstances, such as when evidence was obtained using inhuman or degrading treatment or when impartiality and independence or flaws in the process of notice and comment invalidate a particular decision.

These situations seem to be all characteristic of an idea of individual as necessary element of the adjudicatory process, something akin to (but stronger than) the "right to consideration" proposed by Galligan as guarantee against arbitrary treatment in the administrative process[759]. In all these situations, doing away with the possibility for the individual to affect the outcome would mean simply treating that value as instrumental, and the fact that is not so (that is, that a set of inderogable practices can be found) suggest that it is precisely around the idea of dignity that the minimum core is designed.

[759] Galligan, Ibid., 108

The next step of this reasoning is to recognize that dignity implies more than the three basic prerogatives listed at the beginning of this paragraph, and if embraced in its full value might well extend to other practices in our comparison which have not attained the required widespread level of adoption, because the adjudicators from different backgrounds and focuses have not reached sufficient consensus. True, this must take note of the possible conflicting values – and therefore one should be very cautious before proposing anything that steps into sensitive areas which underpin the whole structure of international adjudication, such as the principle of State sovereignity.

However, the normative argument could be made that the scope of "minimum core" shall be expanded to concept such as (1) the possibility to request a hearing; (2) the "doctrine of appearances"; (3) the possibility to challenge experts and expert reports; and finally (4) the presumption of innocence.

In fact, all the first three situations feature an aspect of dignity which would be frustrated if the party (be it individual or State) were simply prevented from expressing himself, his right to consideration being circumvented through the use of strict procedures which do not appear to provide countervailing benefits. By contrast, the fourth situation relates to the essential dignity of both States and individuals to be left free from unwarranted interference with their life or the conduct of their affairs.

This provides us with a more complete and uniform theory of core defence rights- or prerogatives of the right to be heard. What is still far from uniform, though, is under which standard the presumption of innocence can be rebutted, a question that essentially can be rephrased as "What is the standard of proof"? The answer to this question is extremely context-dependent, ranging from a "beyond reasonable doubt" to a "prima facie" evidence and passing by the "clear and convincing" evidence and "preponderance of the evidence standards. However, this does not mean that adjudicators apply scientifically and uniformly those standards: in fact, it has been suggested that while "beyond reasonable doubt" is usually referred to as a 90 to 95 % standard, the level of certainty relied upon can be as low as 74% and 52.5%[760]. Moreover, it has

[760] See Nancy Amoury Combs, FACT-FINDING WITHOUT FACTS (Cambridge, New York, Cambridge University Press, 2010), 350, referring to studies by Rita Simon, Beyond a Reasonable Doubt- An Experimental Attempt at Quantification, 6 Journal of Applied Behavioural Science 203, 207 (Nov. 2, 1970) and Francis C. Dane, In search of Reasonable Doubt: A Systematic Examination of Selected Quantification Approaches, 9 Law and Human Behaviour 141, 150 (1985)

been argued that adjudicators tend to minimize the expected level of regret that they will feel as a result of the conviction[761].The key argument is that there is an inherently subjective part of the standard of proof that undermines any attempt to restrain *ex ante* the processing of reasoning and related beliefs in the adjudicator's mind leading to the formation of the final determination. A second important argument is that the standard, together with the burden of proof, has the function of allocating errors between the parties[762]. Therefore, it seems appropriate to not only accept, but formally endorse different degrees of certainty for different situations- without necessarily, however, following the conventional distinction criminal/non-criminal. Rather, the important element in defining the level of certainty is how society considers that the errors should be allocated, which in most occasions, is reflected in the seriousness of the allegation or of the penalty. Thus, formally acknowledging a distinction that is not based on the criminal/non-criminal dichotomy but rather directly on the gravity or seriousness of the matter at dispute seems to bring the standard of proof at least more closely in line with the subjective beliefs of judges. Moreover, this can be easily reconciled with the practice of the International Court of Justice of demanding a heightened standard for more grave allegations, and with the idea of modularity of due process that has appeared *supra*[763], requiring due process to be more forcefully respected in face of heavier penalties. In short, the proposal is to enact a minimum standard of proof, for example preponderance of the evidence, and then allow judges to situate a particular case within different ranges dependent on the seriousness of the allegation or the penalty.

At this point, it remains upon us the task of specifying how the identified and the proposed minimum core would translate into the context of economic adjudication. At the outset, it shall be reminded that economic adjudication refers to the resolution of a dispute where the decision is taken predominantly on the basis of economic arguments. This means that the adjudicator, at some stage in the process, must take a deliberate choice between competing economic theories. As it was pointed out in chapter I, the best way to guide the adjudicator through this process is by setting rebuttable presumptions which facilitate his assessment of economic evidence. Following this approach, the choice to be done by the adjudicator is one in the norm construction, rather

[761] Richard O. Lempert, Modeling Relevance, 75 Michigan Law Review 1021, 1032 (1977)
[762] See Erik Lillquist, Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability, 36 University of California Davis Law Review 85, 102 (2002)
[763] Paragraph 2d (i)

than in the mere application of the law to a particular dispute. Therefore it is the compatibility with the right to be heard of this methodology, and not of the settlement of basic economic disputes, that will be tested here. Two different moments would need to be distinguished in this process: 1) when the presumption is for the first time formulated to operate against the defendant and an identified class of like situations. 2) when the presumption derived from previous cases is tentatively applied.

To start, we shall refer to the core elements identified as common minimum denominator across the different systems of adjudication. The first element, the impartiality and independence of the tribunal, will be certainly as important in the traditional context of adjudication. The second element, by contrast, is more controversial in the context of presumption: how is one to respond to a situation where he is put in a combination of proof of a fact and presumption that the proved fact leads to the fact to be ultimately proven by adjudication? One way, the most obvious one, is to deny the existence of the basic fact; the alternative is to contest the validity of the presumptive reasoning. Note that this can be done only when the presumption has been fetched by the adjudicator, and not when it has been imposed or allowed by statute. The reason why this is the case is that, while the latter type of presumption is in all effects a rule of law, the former is "burden shifting device" used by the adjudicator to facilitate his reasoning. By construction, presumptions of fact operate in such way that the presumed fact follows automatically, so that in effect, the right to comment on all points of fact seems to be forfeited in favor of an efficient and predictable application of the law. Granted that greater predictability and greater efficiency are legitimate public objectives, but how can this be reconciled with the fact that the right to notice and comment is part of the (inderogable) core minimum of the right to be heard? The only possible solution to this conflict is to argue, precisely, that the right is fully operational with respect to the use of the presumption, and more specifically, quarrel whether it was a reasonable one.

Finally, even in the case of the third element of the minimum core-the right to a reasoned decision- there may be situations where the right appears sacrificed for the attainment of administrative efficiency: this is the case if the adjudicator, in formulating the presumption, does not give full account of the elements that brought him or her to undertake that step, not only from

a factual viewpoint but also from a legal and policy perspective. This way of proceeding when setting a presumption is the only solution which allows to limit discretion through the development of new norms in consistence with due process. Thus, the role played by these two components of minimum core in scrutinizing presumptions goes hand in hand with the theory that was put forth in chapter III.4, drawn upon the developments in the jurisprudence of the ECHR and the US Supreme Court.

The other values which were identified above as normative elements for a prospective conception of core minimum do not significantly alter the framework that has been described. However, two of them (the possibility to request a hearing and the possibility to challenge an expert report through which the presumption was established) substantially facilitate the dialogue between the adjudicator and a party, affording the latter a specific array of tools for accomplishing the ultimate goal of either reversing or undermining the validity of the presumption. Another one ("the doctrine of appearances") is a further institutional guarantee that goes in addition to that of independence and impartiality, and is only tangentially related to the particular framework of presumptions. Finally, the last element (the presumption of innocence) acts as a guarantee against the automatic application of reverse burdens (i.e., presumptions) without first giving a party the opportunity to comment on its operation. As we will see in chapter V, this generates significant problems in the context of EU antitrust enforcement.

PART THREE: RIGHT TO BE HEARD AND PRESUMPTIONS IN EU ANTITRUST ENFORCEMENT

1. Normative framework

To understand the relationship between the right to be heard and presumptions in EU antitrust enforcement, one needs to start with a clear grasp of the competition rules within the European Union, including to what extent they are presumptive in themselves (that is, prior to being subject to adjudication). Secondly, and before considering the right to be heard in the context of application of the presumptive rules used in European antitrust to decide upon the legality of a given conduct, it is important to clarify the extent to which a defendant is procedurally entitled to be heard within the system of EU antitrust enforcement. For this reason, the following chapter will contain a summary of the relevant rules applicable to European competition proceedings.

a.The TEU and the TFEU

The most important rules for our purposes, which can be said to have "constitutional status"[764] with the European Union, are the rules embodied in the Treaty. In that respect, it is important to make two distinctions: first, between the rules setting forth the principles and aims of the Union, from those regulating more institutional matters; second, between the normative framework prior and subsequent to the entry into force of the Lisbon Treaty, which has brought fundamental changes.

In making this classification, it should be clear at the outset that the basic substantive rules for the general definition of anticompetitive practices, which belong to the body of principles and aims of the Union, have remained unchanged since the establishment of the European Economic

[764] Notwithstanding the failed ratification by France and Netherlands of the Treaty Establishing a Constitution for Europe in June 2005, it should be acknowledged that the rules of the EU Treaty are *de facto* constitutional in nature, whereby "constitutional" refers to constituting the power and procedures for the EU institutions to operate in the pursuit of the specific objectives identified by the Treaty.

Community in 1957[765]. The antitrust rules, as opposed to the broader notion of rules concerned with competition in the market –which includes rules on state aid and services of general interest- are two, one concerned with agreements between undertakings, and the other concerned with abuses of market power by dominant undertakings.

The first article, formerly article 85 (currently 101) of the Treaty, contains three different parts: 1) a prohibition of all "*agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*". The object of this provision is deliberately broad, to cover practices where a specific agreement cannot technically be found, but nonetheless, undertakings manage to coordinate their behavior in the market. This has consequences, as it will be shown in chapter 5, on the proof required for the establishment of a violation of this article. Secondly, it should be noted that the outlawed practices are characterized for being anticompetitive in their object or effect, which means that not necessarily will they be detrimental for competition in the particular case. Hence, a proper identification of the practices that are deemed to fall in the "object" category appears central.

Third, the article contains a jurisdictional test – the potential of affecting trade between Member States- which implies that only practices of a certain magnitude, and again regardless of the actual effect on trade, will be caught by the prohibition: thus, once again, legal certainty demands the definition of a clear threshold for the determination of a "potential effect" on trade.

Fourth, and last, this section of the article ends with a list enumerating specific instances of conduct which will be covered by the provision, namely "(a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts". The first three examples describe the most serious restraints of competition, commonly referred to as "hard-core" restraints, which

[765] Somewhat similar provisions were contained in the Treaty Establishing the Coal and Steel Community (articles 60, 63 and 66), but with some significant differences.

will hardly escape the prohibition; more ambiguous are those listed in letters (d) and (c), where therefore a consideration of the specific circumstances of the case (e.g. the dissimilarity of the conditions or the equivalence of the transactions, the existence of a competitive disadvantage, and the nature or commercial usage) will always be warranted.

2) the sanction of automatic nullity ("voidness") for any agreements or decisions found to be caught by paragraph 1.

3) the possibility of exemption from the prohibition of paragraph 1 for any agreement, decision or concerted practice which fulfills four conditions: (a) contributes to improving the production or distribution of goods or to promoting technical or economic progress (b) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (c)does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question; (d) allows consumers a fair share of the resulting benefit. The general interpretation of this provision is that it allows consideration for broader public policy interest than economic welfare; however, as it is shown *infra*[766], it is not entirely clear how such interests should be weighed.

The second article, formerly 86 and currently 102, contains a general clause laying out the prohibition. The former states that" Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

First, one should not that the application of the prohibition is, once again, limited by the potential trade affectance: this serves to mark the boundaries between the application of European competition rules and possible national competition rules.

Second, it should be stressed that, different from the American antitrust counterpart, this unilateral conduct prohibition requires the prior existence of a dominant position in the market, and thus does not consider attempts to create such position. Third, it is also critical to recognize that the provision is not aimed at firms that simply use such position, but require its abuse.

The second clause then clarifies that the abuse may, in particular, consist in:

[766] See para 1.3 iii

"(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
As it is apparent, the incriminated conducts under letters (b), (c) and (d) are strikingly similar to those contained in letters (b), (d) and (e) of article 85; the only difference is that (b) and (d) in article 86 contain a further element, that is, require that the conduct be "to the prejudice of consumers" and "placing [trading parties] at competitive disadvantage". This difference can be seen as a consequence of the absence of an exemption clause as the one in article 101.3, and the subsequent need to account for potential benefits of the agreement within the definition of the coverage of the prohibition. By contrast, the fact that letter (d) does not, on its face, require such balancing is indicative of the aberration with which the drafters were seeing conduct impairing the freedom of contract for consumers in the marketplace, reminiscent of the ordo-liberal descendance of European competition policy. In practice, however, the case-law demonstrates that the balancing of pro-competitive effects has been read into any manifestation of the abuse prohibition.

Coming to rules which, instead, have undergone amendments since the beginning of the European Community, we should distinguish between the phases prior and subsequent to the adoption of the Lisbon Treaty. During the former, the goals of the Union were set out in article 2 of the Treaty of Rome, which provided that:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Thus, the objectives identified by article 2 appeared to be a mixture of economics and social policy; simplifying, it could be argued that the article expresses three types of concerns: (1) market integration (2) economic development and competitiveness; (3) welfare and social justice.

In this tripartite dimension, however, it is clear from the words of the article that one of the goals (integration) is an absolute priority ("*by establishing a common market and economic and monetary union and by implementing common policies or activities*"), with the others that could be seen as either the ultimate goals that are to be pursued following the achievement of the former, or, more restrictively, as a specification of the criteria to be used for its accomplishment.

It is important to acknowledge that competition was not mentioned *per se* as an end towards which the Union's action was geared; rather, it was listed in the subsequent article among the common actions to be undertaken by the EU in the pursuit of those ultimate objectives, namely: (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; (d) the adoption of a common policy in the sphere of agriculture; (e) the adoption of a common policy in the sphere of transport; (f) *the institution of a system ensuring that competition in the common market is not distorted;* (g) the application of procedures by which the economic policies of Member States can he coordinated and disequilibria in their balances of payments remedied; (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market; (i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living; (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources; (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development[767].

[767] Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 3 , 298 U.N.T.S. 11 (emphasis added). Although with limited practical relevance for our purposes, it should be noted that, following the adoption of the Treaty of Amsterdam of 1992, the consolidated version of the Treaty of Rome contains an expanded and

Technically, such actions are simply means to achieve the primary ends listed in article 2. However, this terminology is in contrast with the fact that the Courts have often referred to the protection of competition as "an objective"[768]. For this reason, it has been argued that the better approach is to refer to objectives contained both in article 2 and in article 3 (and 4), with the difference that the latter are "immediate" and the former "long term"[769].

This could legitimately be seen as a basis for relegating competition policy to a second rank in the Community's priorities, requiring the prevalence of the objectives identified by Articles 2, at the very least that of market integration. In fact, this is evident in the reliance by the Commission on several grounds, including non-economic ones, for the determination of its decisions in the area of competition policy. Non-economic considerations have been relied upon in exempting agreements or allowing concentrations: that was the case, for example, in the

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rephrased list of objectives, reading as follows: "a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; (d) measures concerning the entry and movement of persons as provided for in Title IV; (e) a common policy in the sphere of agriculture and fisheries; (f) a common policy in the sphere of transport; (g) a system ensuring that competition in the internal market is not distorted; (h) the approximation of the laws of Member States to the extent required for the functioning of the common market; (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment; (j) a policy in the social sphere comprising a European Social Fund; (k) the strengthening of economic and social cohesion; (l) a policy in the sphere of the environment; (m) the strengthening of the competitiveness of Community industry; (n) the promotion of research and technological development; (o) encouragement for the establishment and development of trans-European networks; (p) a contribution to the attainment of a high level of health protection; (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States; (r) a policy in the sphere of development cooperation; (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development; (t) a contribution to the strengthening of consumer protection; (u) measures in the spheres of energy, civil protection and tourism."

[768] See CFI, T-259/02 to 264/02 and T- 271/02, *Raiffeisen Zentralbank Österreich AG and Others v Commission*, 14 December 2006, ECR, 2006, p. II-5169, §255. See also ECJ, C-289/04 P, *Showa Denko KK v Commission*, 29 June, 2006, ECR, 2006, p. I-05859, § 55, judging that free competition within the common market "constitutes a fundamental objective of the Community under Article 3(1)(g) EC." See also ECJ, 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, 6 March 1974, Rec, 1974, p. 223, § 25, referring to "the objectives expressed in article 3(f) of the treaty and set out in greater detail in Articles 85 and 86."

[769] See Scordamaglia, The Lisbon Treaty and Competition:much ado about nothing?, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889141, citing Heike Schweitzer (2007), Competition Law and Public Policy: Reconsidering an Uneasy Relationship - The example of Art.81, EUI Working Paper LAW No.2007/30, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092883

*Ford/Volkswagen*decision (later upheld in *Matra Achette*[770]), where an agreement to create a joint venture between two auto makers was considered worth of an exemption also because, among other things, "*it is estimated to lead, inter alia, to the creation of about 5000 jobs and indirectly create up to another 10000 jobs, as well as attracting investment in the supply industry. It therefore contributes to the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also further integration by linking Portugal more closely to the community with one of its important industries*[771]". Similarly, in *Metro I*, the Court referred to employment as "part of the framework of objectives to which reference may be had pursued according to article 85 (3)"[772]. In the merger control area, *Comité Central d'Entreprise de la Société Anonyme Vittel*[773] is the case that best summarizes the relevance of non-economic (in this case, social) considerations

> […] the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty. The Commission may therefore have to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the level or conditions of employment in the Community or a substantial part of it.[774]

However, letting aside the role of market integration –upon which we will return in Chapter 5.1, has led the EU to being the most intransigent in the appreciation of possible redeeming virtues of practices having the effect of partitioning the EU single market- it should be noted that in all the cases involving public policy considerations, those was never officially recognized as determinative of the final outcome. In *Ford/Volkswagen*, for example, the Commission explicitly recognized that "*This [the creation of jobs] would not be enough to make an exemption possible*

[770] Judgment of the Court of First Instance (Second Chamber) of 15 July 1994. - *Matra Hachette SA v Commission of the European Communities*, ECR 1994 Page II-00595
[771] Case IV/33.814 ° *Ford/Volkswagen*, OJ 1993 L 20, p. 14, at 36.
[772] Case 26/76, *Metro SB v Commission*, [1977] ECR 1875, at paragraph 43. In particular, the Court considered that the establishment of supply forecasts for a reasonable period constituted a stabilizing factor with regard to the provision of employment which improved the general conditions of production, especially when market conditions are unfavourable, and therefore should be considered in the merger analysis.
[773] Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel and others v Commission*, [1995] ECR II-2147
[774] Ibid., at 38

unless the conditions of article 85 (3) were fulfilled, but it is an element which the Commission has taken into account"[775]. In *Metro I,* the Court considered that the establishment of supply forecasts for a reasonable period constituted "*a stabilizing factor with regard to the provision of employment which improves the general conditions of production, especially when market conditions are unfavorable*", and therefore should be considered in the merger analysis –not clarifying what type of weight this consideration should get, and whether this would be in any way independent from the efficiency-driven type of assessment established by article 101.3. Similarly, in *Comité Central d'Entreprise de la Société Anonyme Vittel* the Court referred to the *primacy* given to the establishment of a system of free competition and of an alleged *reconciliation* of it with the social objectives referred in Article 2 of the Treaty, and concluded its reasoning affirming that "*Article 2(1)(b) of Regulation No 4064/89 requires the Commission to draw up an economic balance for the concentration in question, which may, in some circumstances, entail considerations of a social nature*"[776].

This would seem to imply that social considerations may only enter into the analysis as part of the economic balancing, i.e. for their effects on the competitive process. In fact, the ECJ held in *Albany* that when the Community policy (such as, for instance, the cultural role of books, the environment and the social policy) are hard to reconcile, "the policy other than competition will be narrowly construed"[777].This opinion is shared by Giorgio Monti, who points at the *CECED* case[778] as an illustrative example of how those considerations are to be assessed within 101.3[779].

In *CECED*, the Commission identified reduced pollution levels as a gain in economic efficiency. The agreement, entered into by most manufacturers of washing machines in the European Community and designed to phase out washing machines which consumed high quantities of electricity, was considered anticompetitive for two reasons: first, it reduced consumer choice; second, it had the effect of placing those manufacturers without any expertise in building the more energy-efficient washing machines at a competitive disadvantage, as they would need to

[775] *Ford/Volkswagen*, ibid. (emphasis added)
[776] *Comité Central d'Entreprise de la Société Anonyme Vittel*, Ibid., at 39
[777] See Art. 3 (j) and (k) Albany (C-67/96 and others of 1999, par. 437), dealing in particular with the collective agreements about condition of work and employment
[778] *CECED*, O.J. 2000, L 187/47 paras. 30–37.
[779] Giorgio Monti, Article 81 EC and Public Policy, Common market law review, 39 (5) 1094

adapt to the new market conditions in order to stay on business. In addition, the combined market share of the undertakings parts of the agreement amounted to more than 90%. However, the Commission reasoned that the agreement would create a market where only washing machines that are more technically efficient would be available, which in turn would lead to reduced electricity consumption. According to the Commission, "*the future operation of the total of installed machines providing the same service with less indirect pollution is more economically efficient than without the agreement.*" This would seem to translate environmental benefits into economical jargon and to consider those only to the extent that they generate efficiencies. However, what was more problematic was the notion of consumers which the Commission used as a basis for this decision:

> […]the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.[780]

This disconnect between the beneficiaries of the agreement and the market in the context of which the agreement is to be assessed seems to be somewhat at variance with earlier decisions[781], but was saluted as justified by the high priority placed on sustainable development in the EC

[780] *CECED*, O.J. 2000, L 187/47 paras. 30–37and 56 .

[781] See for example *Philips/Osram* ("the use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities ») O.J. 1994, L 378/37 para 27; *KSB/Goulds/Lowera/ITT*, O.J. 1991, L 19/25 para 27("The advantages arising from the cooperation benefit consumers at the very least through the improvement in the quality of water pumps. Moreover, two aspects of the new pumps, i.e. energy conservation and the fact that the fluids handled by the pump are not polluted, are environmentally beneficial. This effect is reinforced by the higher performance capacity of the pumps. This constitutes an improvement in operating characteristics. At least at present, a further advantage is that these pumps are offered to consumers at the same price as cast-iron pumps.") ; *BBC/Brown Boveri*, O.J. 1988, L 301/68 para 23 (" The cooperation between BBC and NGK is aimed at developing a fundamental technologuical innovatiojn, which can be done more quiclly and cheaply on a collaborative basis. [...][If, through the use of high-capacity batteries, the peak loading which occurs at certain times in public power supply networks is successfully relieved, the output of the public power supply network need not be tailored to this peak load and a more economic use can be made of existing power station capacity.Dependence on oil imports from third countries will also be reduced. The overall benefits to be derived from the use of electrically driven vehicles are even greater. Any electrically driven vehicle causes no damage to the enviroment through harmful exhaust emissions or loud engine noise. There is therefore much to be said for the cooperation arrangement in terms of improvements of the quality of life of consumers through the developments of batteries for vehicles").

Treaty[782]. In any case, it would be a daunting task, and a bit of a stretch, to argue that the case-law pre-Lisbon treaty provided a clear-cut methodology for both the identification and the balancing of non-economic objectives.

In the latter phase of European integration, i.e. from the moment in which the Treaty of Lisbon was ratified by all member States and entered into force, one notices immediately a drastic change not only in the content (as well as the numbering) of many of the "constitutional" articles. Those that are of interest for present purposes are Article 3 TFEU, which replaces the substance of Article 2 EC; Articles 3–6 TFEU, which reallocate in two different articles and to some extent amend the competences formerly attributed by Article 3 EC; and Article 119 TFEU, which simply moves the provisions of Article 4 EC to the Title on Economic and Monetary Policies. The most significant change regards the reform of former Articles 2 and 3 TEC: in title 1, among the provisions attributing the Union's and the Member States' respective competences , the only reference to competition appears in Article 3(1) TFEU, which provides simply that the "*Union shall have exclusive competence in […] b) establishing of the competition rules necessary for the functioning of the internal market*". Thus, the Union retains exclusive competence in the establishment of the competition rules. However, differently from the previous version of the Treaty, there is no list of either intermediate or ultimate objectives. In fact, a number of the objectives that used to be integral part of (former) Article 3 TEC can be found in the following title, called "Provisions of General Application". First, Article 7 provides a general policy-linking clause[783], thus generalizing the mechanism previously adopted for consumer protection by article 153(2)[784]TEC and for the promotion of a high level of

[782] See Martin Wasmeier,The integration of environmental protection as a general rule for interpreting Community law, 38 Common Market Law Review, 159.

[783] The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

[784] Article 153 provided : « 1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. 2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities »

employment by Article 127(2) TEC[785], which are now contained separately in article 12 and 9 and 147(2) TFEU.

It should be noted that this is policy-linking in its weaker form, which is opposed to the stronger clause contained in current article 11(formerly Article 6 TEC) which in stipulating that "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*" poses particular attention to the promotion of a certain policy (sustainable development).

Article 8 restates the letter of ex Article 3(2) TEC), according to which in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9 contains a policy-linking clause for requirements linked to not only the objective of a "high level of employment", but also the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Finally, Article 11 contains an even stronger policy-linking clause, mandating affirmative action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The substitution of the long list of activities and policies in former article 3 with a shorter and concise list of competences has the notable effect of removing the terms "*where competition is free and undistorted*". This has been perceived by some commentators as a move by certain political leaders, particularly the proponent French president Nicolas Sarkozy[786], to lessen the rigidity of competition policy in the EU[787]. Allegedly, it was part of an attempt to allow greater latitude to governmental intervention to the protection of national champions, to be achieved with the addition of a reference to the "protection of citizens" as an objective in the EU's

[785] "The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities"

[786] See Conférence de presse finale de M. Nicolas Sarkozy, Président de la République, à l'occasion du Conseil Européen à Bruxelles, 21-22 Juin 2007. Available at http://www.ambafranceau.org/france_australie/IMG/pdf/Conference_de_presse_finale_de_Sarkozy.pdf (speaking about "*une réorientation majeure des objectifs de l'Union*")

[787] See Nicolas Petit and Norman Neyrinck, A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union, The CPI Antitrust Journal January 2010 (2), 3-4 ; Alan Riley, The EU Reform Treaty And The Competition Protocol: Undermining EC Competition Law, CEPS POLICY BRIEFS, (September 24, 2007) ; Andreas Weitbrecht, From Freiburg to Chicago and Beyond—The First 50 Years of European Competition Law, European Competition Law Review 2, 81-88 (2008).

relations[788]. The plan eventually failed, to a large extent because the latter amendment never saw the light, and in part because the impact of the former was minimized through the introduction of a Protocol to the Treaty entitled "Protocol (n.27) on the Internal Market and Competition", providing that "*The High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that: to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union*". The legal value of this protocol is also reinforced by Article 51 of the Treaty on the European Union ("TEU") which stipulates that "*The Protocols and Annexes to the Treaties shall form an integral part thereof*". However, on the other hand, the introduction in article 3 (3) of the concept of "social market economy"[789] suggests that perhaps, the concept of market-oriented mechanism will be interpreted in a more flexible fashion. According to some commentators, the introduction of the Protocol would be enough to make up for the removal of the clause competition amongst the objectives of the treaty, and thus no downgrading has occurred[790]. An intermediate view is taken by Scordamaglia-Tousis[791], which, reminding that the Court of Justice cited Articles 10 and 3(1)(g) of the Treaty to impose on Member States the duty to abstain from enacting measures enabling private undertakings to escape from the constraints imposed by Articles [101-109][792], suggests that the absence of the word "competition" among the objectives may signal a different type of scrutiny over State measures.[793] Accordingly, this would diminish the weight of competition relative to the other objectives remain enshrined in the Treaty (such as environmental and consumer protection, a

[788] See Fabian Zuleeg and Sara Hagemann, Sarkozy Sneaks in The "P" Word, European Voice, 27 September 2007.
[789] Article 3 (3) states: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced"
[790] See Michel Petite, La place du droit de la concurrence dans le future ordre juridique communautaire, Concurrences, I-2008; Michel Waelbroeck, La place du droit de la concurrence dans le future ordre juridique communautaire, Concurrences, I-2008.
[791] Andrea Scordamaglia-Tousis, *supra* note 769, at 3-5
[792] Case C-13/77, *Inno / ATAB*, [1977] ECR 2115, para.33
[793] Andrea Scordamaglia-Tousis, Ibid. , pp. 4 and 7

high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health), arguably to the point that the state is entitled to balance those values against the protection of competition. This would normally require facing the challenge of incommensurability, but is not an impossible task[794]. In this respect, the position of the European Court of Justice (in line with that of Advocate General Kokott) has been that public policy objectives may only be considered to allow derogation from a Union objective when there is a legal obligation on the party infringing Union law to achieve the particular policy objective[795]. Whether this interpretation requires a reconsideration of the case-law on state liability for induced violation of the competition rules, it remains to be seen.

b. The EU Charter of Fundamental Rights

The other fundamental innovation brought about by the Lisbon Treaty which affects competition proceedings is article 6 TEU, which consists of three important paragraphs. The first stipulates that:

> The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, *whichshall have the same legal value as the Treaties*. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted *in accordance with the general provisions in Title VII of the Charter* governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions[796].

Although this provision merely constitutes the official recognition of the binding value of an instrument that had been already proclaimed by the Union in 2000 and referred to by the European Courts ever since, this represents without doubt a stepstone in the development of Union law. By itself, this provision attracts the application of 54 other articles in the *acquis communitaire*. In addition, its reference to the provisions of Title VII of the Charter ensures respect for two other principles which are crucial for the alignment of the *acquis*

[794] See Christopher Townley, ARTICLE 81 AND PUBLIC POLICY, (Oxford, Oxford University Press 2009)
[795] Case C-221/08 Commission v Ireland (n 49) [50], (n 48) [46]–[47].
[796] Article 6 (1) (emphasis added)

*communitaire*with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): first, that the meaning and the scope of the rights enumerated by the Charter is equal to that of the corresponding rights laid down by the Convention –without prejudice of the Union law providing more extensive protection[797]. Secondly, article 52(1) codifies the well-established principle of proportionality, with the addition that "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law *and respect the essence of those rights and freedoms*[798]".

Not only, that, but the following two paragraphs create the basis for the accession of the European Union to the ECHR, of which so far only individual countries have been members: article 6 (2) mandates the Union to accede the Convention, although not specifying a time-frame; additionally, article 6 (3) provides that fundamental rights *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms* become part of the Union's general principles of law. This implies, *inter alia*, that those principles will be binding even in the absence of specific legislation implementing them.

Why is this systemic revolution so important for competition law? The implication of this reinforced regime for the protection of fundamental rights is not only that the Commission will have to adhere to such standards in the exercise of its investigatory powers, but also, more fundamentally, an structural reform may be necessary to ensure full respect for the right to a fair hearing referred to in article 41[799] and 47(2) of the Charter[800], and which is to be interpreted in light of the requirements laid out by the ECHR in its jurisprudence on art. 6 (1) ECHR. This is because of the markedly administrative system which EU antitrust embraced, whereby the same

[797] This is the so called "clause of equivalence" in article 52 (3) of the Charter.

[798] "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"

799 Right to a good administration, which implies also a "[…] right of every person to be heard before any individual measure which would affect him or her adversely is taken".

[800] « In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

entity (the Directorate General for Competition of the European Commission, hereinafter DG Competition) is essentially in charge for both the enforcement and adjudication of the competition rules. This model, which was adopted following the blueprint of the French administrative system that has been widely followed in European Member States, aims at the maximization of administrative efficiency, but is naturally more exposed to the risk of an imperfect administrative justice. As a profilactic measure, the system is equipped with a number of safeguards, some of which have been spontaneously created by the administrative authority in reaction to criticism for alleged lack of legitimacy. The first safeguard lies in the adoption of the final decision not only by the Political Head of DG Competition (the "Commissioner for competition") but by the College of the 27 Commissioners by unanimity. This implies that, although the decision will in fact be drafted by those same individuals who have been conducting the investigation, the decision-maker will formally be a different figure. It is doubtful whether such formality is sufficient to satisfy the principle "*nemo iudex in causa sua*", particularly since the analysis under article 6 ECHR focuses on the substance. The unanimity rule for the adoption by the College of Commissioners is aimed to ensure not only the responsibility of the whole institution for the decisions adopted, but above all to avoid undue influence by the Commissioner concerned on the other members of the College. Precisely to minimize the risk of possible "*defaiances"* at the Commissioner's meeting, prior to the adoption of a decision the Commission arranges specific inter-service consultations, whereby members of different departments can raise their objections. Nonetheless, it appears undeniable that normally, a Commissioner's decisions in his/her area of expertise will be granted a certain degree of epistemological deference. Commentators have even stated that decisions are "generally rubber-stamped by way of a formal adoption by the College of Commissioners"[801].

Another safeguard lies in the intervention of the Advisory Committee, a permanent organ constituted by a number of representatives each coming from the competition authority of the respective Member States. Its mandatory opinion is required for all cases in which the Commission wishes to adopt a decision establishing a violation of art. 101 or 102 or declaring their inapplicability in the case at hand, withdrawing group exemptions, ordering provisional

[801] Anne MacGregor and Bogdan Gecic, Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings, 3 (5) Journal of European Competition Law & Practice, (2012) 425

measures or accepting the commitments proposed by one or more undertakings. The opinion is released prior to the adoption of the decision and must be taken in the utmost account by the Commission, who will have to explain the manner in which it has impacted the final decision. The ration behind this safeguard is one of making the Commissioner aware of the national authorities' point of view, to avoid a decision exceedingly detached from national realities. However, it seems hardly conceivable that a body who is not been involved in the investigation, and which is therefore not equipped with the evidential material in possession of the Commission, can in fact exercise a significant constraint on decision-making: in fact, a famous practitioner has declared that he has not seen or heard in 30 years an occasion where the Committee voted against the Commission.[802]

A third, and rather structural safeguard is the presence of the Chief Economist Team, an institutional adjunct to the Commission and staffed with competent economists of industrial organization. Its staff is only called to operate in the most complex cases, to ensure that the Commission's conduct be in line with the data available, and more generally, with economic thinking. The intervention of the Chief Economist Team usually intersects with another safeguard, Peer Review Panels, which are panels composed of officials of DG Competition not involved in the case, called in complex cases to identify and rectify possible mistakes, and thereby strengthen the foundations for the designated decision.

Another important role is played by the Hearing Officer and the judicial review, but those will both be treated in more detailed further down in this chapter. Finally, there exists also the possibility to lodge a complaint with the European Ombudsman, an independent figure who receives complaints for any conduct of EU institutions that is deemed to have violated the law, the principle of good administration or human rights. The Ombudsman may start an investigation, identify any violation and then propose a solution to address the problem through recommendations. These recommendations have no binding value; however, they have some persuasive influence over the Commission, and are *inter alia* responsible for the publication of the Manual of Procedure of DG Competition following the *ELB* case (2011).[803]

[802] Ian Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures', European Law Review (2009), 34 (6) 834

[803]European Ombudsmann decision closing the investigation triggered by complaint n. 297/2010/(*ELB*)GG.

In light of the debatable effectiveness of the aforementioned safeguards, various commentators and a number of court cases[804] have questioned whether the system for the enforcement of competition law in Europe, where the Commission carries out both a prosecutorial and an adjudicative function, might not lead to a violation of article 6 of the European Convention of Human Rights (ECHR).

Most arguments have been grounded on the first paragraph of such article, which provides that "*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". The usual allegations are that competitions decisions involve the determination of civil rights and obligations, and that because of the combination of its functions, the Commission is not an "independent and impartial tribunal" as the ECHR would require. The argument goes that, although the Commission does not fall within the meaning of "independent and impartial tribunal"[805], it is *de facto* a tribunal since its decisions are immediately binding even if challenged before the General Court (except for those exceptional

804Donald Slater, Sébastien Thomas and Dennis Waelbroeck, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform? European Competition Journal Vol.5, Issue 1, p.97; Dennis Waelbroeck and Daniel Fosselard, Should the Decision-making power in EC Antitrust Procedures be Left to an Independent Judge?- The impact of the European Convention of Human Rights on EC Antitrust Procedures (1994) 64 Yearbook of European Law 111_42; Jürgen Schwarze, Rainer Bechtold and Wolfgang Bosch, Deficiencies in European Competition Law: Critical Analysis and proposals for change, GleissLutz Rechtsanalte, Stuttgart, 2008 ; Ian Forrester, Due process in Competition Cases: a distinguished institution with flawed procedures, European Law Review 2009, 34 (6), p. 817 , Arianna Andreangeli ,The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings', European Law Review vol 31 issue 3 pp 342-363; Arianna Andreangeli et al. (2009) Enforcement by the Commission: The decisional and enforcement structure in antitrust cases and the Commission's fining system, Brussels, European Union OPC. For the case-law of the EU, see *inter alia* the judgments of the ECJ of 15 July 1970, Cases 45/69, *Boehringer Mannheim v Commission* [1970] ECR 153; 7 June 1983, Cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] ECR 1825, p. 1920; judgments of the CFI of 10 March 1992, T-11/89, *Shell v Commission* [1992] ECR II-757, para 39; 14 May 1998, Case T -348/94, *Enso Espanola v Commission* [1998] ECR II-1875. 20 February 2001, Case T – 112/ 98, *Mannesmannröhren-Werke AG v Commission*, [2001] ECR II-729, para. 60. As to the ECHR jurisprudence, see the decision of the European Commission of Human Rights of 9 February 1990, *M & Co v Federal Republic of Germany*, Appl. 13258/87, 64 D & R 138 (1990), where the ECHR held that applicants were not allowed to launch a procedure against Germany on the basis of Article 6 of the Strasbourg Convention for action required of Germany by EU law to enforce a competition fine imposed by the European Commission, given that Germany had transferred its powers to the EU and the EU was not incompatible with its membership of the Strasbourg Convention given that fundamental rights received an equivalent protection under EU law; see also, more recently, the application lodged and pending before the CFI in the Case T-56/09, *Saint Gobain Glass France and Others v. Commission.*

805See the judgment of the ECJ of 30 October 1978 , Case 218/78 R, *Heintz van Landewyck SARL v Commission*, [1980] ECR 3125, para. 81, and the judgments of the CFI of 7 June 1983, Cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] 3 CMLR 221 para. 7; 26 April 2007, Joined cases T - 109/02, 118/02, 122/02, 125/02, 126/02, 128/02, 129/02, 132/02 and 136/02, *Bollorè and others v Commission*, Rec.2007, p.II-947, para. 86; 8 July 2007, Case T-54/03, *Lafarge SA v Commission*, [2008] ECR II-0000, at 47

cases where *interim* measures are granted)[806]. An even more critical view is taken by those that, being possible to qualify competition proceedings as criminal in the sense of the ECHR, they would have to respect the more stringent requirements of articles 6 (2) and 6 (3), namely the presumption of innocence and the right to cross-examination[807]. Alternatively, a more moderate view holds that, since a considerable amount of time lapses before one can exercise his right to be heard before the General Court, competition proceedings may in specific cases fail the test of the "reasonable time" requirement[808] of art. 6 (1) ECHR.

Opponents of these views contend pointing to the absolute necessity to have in place such an enforcement structure for efficiency reasons[809], and place emphasis for that purpose on a *caveat* that the ECHR jurisprudence has established with respect to the scope of application of article 6 (1) ECHR: starting from the *La Compte* case[810], the European Court of Human Rights (ECtHR) has repeatedly held that the determination of civil rights and obligations or the prosecution and punishment of offences which are 'criminal' within the meaning of article 6 *can* be entrusted to administrative authorities, provided that the persons concerned are able to challenge any decisions made before a judicial body that has full jurisdiction and that provides the full guarantees of article 6 (1) ECHR. Similarly, the ECtHR has stated that, in specialized areas of

806See *infra*, para. IV.3a

807 Right to cross-examination is the only requirement imposed by article 6 (3) which would have a direct impact on EU competition proceedings. The entire article reads as follows: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

808The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities: see judgments of the ECJ of 17 December 1998, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, para. 29, and 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, para. 187

809See *inter alia* Wouter Wils, The combination of the Investigative and Prosecutorial Functions and the Adjudicative Function in Antitrust Enforcement: A Legal and Economic Analysis, World Competition 27 No. 2 (2004), 201-224.

810Judgment of 23 June 1981, *LaCompte, Van Leuven and De Meyere v Belgium*,A/43 para 51. On the same line of reasoning, see judgment of 1 February 1983, *Albert and Le Compte v Belgium*, A/58 para 29; judgment of 21 February 1984, *Ozturk v Germany*, Series A/73, p. 46; and judgment of 24 February 1994, *Bendenoun v France*, A/284 para 56.

administrative nature, *"where the issues to be determined require a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims"*[811], it is sufficient for the court to exercise a restricted jurisdiction and leave the determination of facts to an administrative body, " *particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by art 6 (1)*"[812]. However, when the determination of facts lies at the heart of the judicial proceedings and of the applicant's contestation (as it is often the case for competition law proceedings), the EctHR requires that the review Court have the power to rehear the evidence or to substitute its own views to that of the administrative authority, for otherwise there would be a risk "*that there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute*"[813]. In *Schmautzer*[814], for example, the Court held that where a sanction is imposed by an administrative body not fulfilling the requirements of a "tribunal" within the sense of article 6 ECHR, there must be full jurisdictional review of the decision, with the power to quash on all respects, on questions of facts and law. In the same year, the ECHR clarified in *Kyprianou*[815] that a "*full retrial of the case*" would be needed in such circumstances, where the reviewing court would have full competence to deal *de novo* with the accusations. That is, the review could not be limited to an inquiry into manifest factual errors, but requires an "*ab initio, independent determination of the criminal charge against the applicant*", with the sanctioning authority not enjoying "*any margin of appreciation in imposing a sentence on the applicant*".It is clear, then, that it is crucial for the validity of both the exceptions to have in place a robust system of judicial review.

Recently, the ECJ seems to have implicitly endorsed this view of a fully-fledged, curative judicial review: in *Otis*[816], the Court declined to find a breach of the right to a fair hearing in the

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811 ECtHR, *Tsfayo v UK*, App. No 60860/00, All ER (D) 177 (Nov 2006)

812*Jane Smith v. The United Kingdom*, 25154/94, European Court of Human Rights, 18 January 2001; *Bryan v United Kingdom* (1996) 21 EHRR 342, *Chapman v. United Kingdom* (2001) 33 EHRR 399, *Grecu v Romania* (App. no. 56326/00, 2007), p.62

813Judgment of the ECtHR of 14 November 2006, *Tsfayo v UK*, App. No 60860/00, All ER (D) 177 (Nov), para. 48. See also Donald Slater, Sébastien Thomas and Dennis. Waelbroeck, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform? European Competition Journal Vol.5, Issue 1, p. 97

814 ECtHR Schmautzer, 28 September 1995, Case 31/1994/478/560, at 36; similarly, see ECtHR, *Silverster's Service Horeca*, 4 March 2004, Case 47650/99

815 ECtHR, *Kyprianou*, 27 January 2004, Case 73791/01

816 ECJ judgment in *Europese Gemeenschap v Otis NV and others*, Case C‑199/11, not yet reported

context of follow-on action for damages initiated by the EU Commission -where national courts are prevented from taking decisions contrary to those taken by the EU Commission and therefore may be considered to deviate from the principle of equality of arms ex article 47 of the Charter- primarily because "*EU law provides for a system a system of judicial review which affords all the safeguards required by Article 47*"[817]. Similarly, in *Vebic*[818], the Court viewed appeal proceedings as a whole together with the proceedings for the appealed infringement of competition law, ruling that effective enforcement would be jeopardized if the competition authority were precluded from participating in the appeal of its own decisions[819]. Importantly, it concluded that Member States are free to set up their own rules for competition proceedings as long as these do not jeopardize the effectiveness of EU competition law *or* the observance of fundamental rights, thereby accepting in the specific that a defective system of judicial review combined with an administrative enforcement system would run against those principles[820].

Two additional arguments are often underestimated by this type of discussions: first of all, as recently recalled by one of the critics of the current enforcement systems[821], the ECtHR has not ruled so far in favour of the applicability of this "efficiency" justification to competition law proceedings. This has an important bearing on the prospects for future pronouncements by the court on these issues, as it implies that in order to hold the EU accountable for violation of "due process" under art. 6 (1) ECHR there would be no need for the ECtHR to overrule established case-law. Based on previous case-law, however, it is reasonable to assume that the ECtHR will not provide a definite and general answer to whether such justification can be used in the competition enforcement domain: it will rather look at the specific context, and may accept such justification only to the extent that (1) specific violations of due process can be corrected in the

[817] Ibid., at 56

[818] Judgment of the ECJ on 7 December 2010, Case C-439/08, *VERBIC v. The Belgian Competition Council*,[2010] ECR I-12471

[819] Ibid., at 58 (echoing paragraph 74 of Advocate General Mengozzi's Opinion): "[…]if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly 'captive' to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU"

[820] Ibid., at 63

821Ian Forrester, op.cit. note 1, p. 821

following phase of the proceedings. (2) such violations are not irremediable or decisive for the further continuation of the proceedings[822].

Secondly, and along the same line of reasoning, a distinction should be made in this regard between charges that fall under the meaning of criminal established by the Convention and charges classified as "criminal" under both domestic and convention law: for the latter hypothesis, in which criminal charges are more serious, the case-law of the ECHR has clarified that such "efficiency" justification cannot find application[823]. Now, even if the categorization as criminal of any fine imposed pursuant to Regulation 1/2003 is explicitly ruled out[824], and even if the same regulation excludes its application to national laws which impose criminal sanctions on natural persons, nonetheless, an exception remains with respect to those cases in which « such sanctions are the means whereby competition rules applying to undertakings are enforced »[825]. In such cases, it seems difficult to argue against the qualification of "criminal" under both domestic and convention law, for this is in line with the three criteria identified by the ECHR jurisprudence for the autonomous definition of "criminal charge" under the Convention: the classification of the offence under national law, the nature of the offence and severity of the penalty[826].

Without going into the details of each of the three criteria (which will be done in paragraph 3.c), it can be maintained that, where national law establishes a threat of imprisonment for resistance to inspections[827], the proceedings can be deemed criminal in the Convention's sense as at least two out of the three criteria militate in favour of such qualification. An argument can be made that, given the increasing trend toward criminalization of anti-cartel laws in Europe and the reliance of the European Commission on the procedures established by national law for the

822Decision of the European Commission of Human Rights of 4 July 1983, Case *H v UK*, App. no. 100000/82, D.R., vol. 33 p.265

823 Judgment of the ECHtR of 26 October 1984, De Cubber v Belgium, Series A no. 86 para. 31-32 and *Findlay v Findlay v. the United Kingdom*, judgment of 25 February 1997, Reports 1997-I, p. 281, para. 79

824 Article 24 (5) Regulation 1/2003

825 Recital n. 8, Regulation 1/2003

826 judgment of the EctHR of 8 June 1976, *Engel v Netherlands*, series A No. 22[1979-80] 1 EHRR 647

827 Note that this can be either a result of the national competition law, or even a more general national legislation that makes hindering an official proceeding a criminal offence, as it the case for Sweden: see in this regard Johan Coyet and Malin Persson Giolito, Putting your Hands in Someone Else's Drawers – Some Thoughts on the Use of Coercive Measures When Conducting Dawn Raids in the Homes of Directors, Managers and Other Staff Memebers, in Martin Johansson, Knut Almestad, Josef Azizi, Marino Baldi, LIBER AMICORUM IN HONOR OF SVEN NORBERG: AN EUROPEAN FOR ALL SEASONS (Bruylant 2007), 153

execution of dawn raids where an investigated company refuses to surrender to the Commission's inspection[828], the two-tiered system described above could be found to fall foul of the requirements of a fair trial ex article 6 ECHR: this seems to be an inevitable conclusion for those cartels in which decisive evidence is gathered through dawn raid inspections, at least with regard to those countries that have in place an anti-cartel legislation that applies criminal sanctions for resistance to inspections ordered by the Commission[829].

Recently, the debate about the applicability of article 6 ECHR to competition proceedings has been refreshed by the delivery of the *Menarini* judgment, which will be surveyed in paragraph 3. Its significance for our purposes of application of article 6 ECHR is that, given the Court's qualification of the (look-alike) Italian antitrust proceedings as criminal, EU antitrust will be required to comply with the requirements (presumption of innocence and right to cross examination) imposed by articles 6 (2) and 6 (3).

c. Regulation 1/2003

Regulation 1/2003 lays out the procedural framework for the enforcement of the antitrust rules. This framework replaces former Regulation 17/62[830], and represents a fundamental revolution in European competition procedure for a number of reasons.

The most visible and practical was that the prior notification obligation, which required companies to notify any agreement or practice falling under article [then 81] 101 TEC in order to benefit from an individual exemption, was abolished to introduce a self-assessment system[831]. The prior notification system had the important function of enabling the Commission to develop a competition policy in its early years, as well as of promoting a competition culture at the national level. Its demise can be largely imputed to the fact that the system had become too burdensome; moreover, by the end of the 1990s, all countries members to the EU had in place a

828 Article 20 (6) Regulation 1/2003

829 The problem lies in the fact that the Commission's decision is not a warrant, as would be required under the ECHR case-law, because it is not granted judicial authorization: see Imran Aslam and Michael Ramsden, EC Danw Raids: A Human Rights Violation?', Competition Law Review. Vol 5 No 1, p. 70, and Alan Riley, The ECHR Implications of the Investigations Provisions of the Draft Competition Regulation (2002) International Comparative Law Quarter 51 1 (55) 64

830 EC Council, Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, No 1/2003/EC, 16 Dec. 2002, Official Journal, 2003, L 1.

831 See Art. 1

national competition law. Therefore, it was about time for national courts and competition authority EU competition policy to be empowered in the application of EU competition law[832].

This required some coordination: first, the Regulation provided that "*the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfill the conditions of Article 81(3)*", although leaving leeway for national competition laws to be stricter in prohibiting or sanctioning unilateral conduct[833]. Presumably, the possibility to adopt a stricter standard with respect to unilateral conduct is

Second, and very importantly for our purposes, it clarified the concept of burden of proof so as to facilitate a uniform application of EU antitrust law: "*In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.*[834]"

Finally, two provisions should be mentioned that were introduced to ensure the uniform application of EU*:* Article 16 clarified that "*national courts* [interpreting articles 81 or 82] *cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated";* similarly, article 16.2 imposed such "uniformity obligation" on competition authorities, with respect to the decisions taken by the Commission.

In short, this set of articles provided the basis for the establishment of a decentralized system of EU antitrust enforcement, while maintaining a great deal of uniformity. There remains, however, an area of discretion in the procedural rules adopted by member States for the enforcement and the adjudication of EU antitrust disputes. Accordingly, an interesting question is how far does the principle of national procedural autonomy, which allows national legislation to discipline procedural law that has not been preempted by the EU as long as this does not discriminate

[832] See Art. 4-6
[833] Art. 3
[834] Art. 2

against Community claims (principle of non-discrimination) or render the exercise of Community rights "virtually impossible or excessively difficult" (principle of effectiveness).[835] In particular, a question that will be relevant for the analysis of presumptions in EU antitrust is whether Member States must consider a presumption developed by the Commission or the European Court of Justice as pre-empting contrary national procedural law. In *T-Mobile*[836], the Court was asked specifically this question by way of preliminary reference from a Dutch court, and answered in the affirmative. It reasoned that the presumption derives from the concept of "concerted practice"; accordingly, it "*stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law*"[837]. However, one may also imagine presumptions that are not crafted as an interpretation of a substantive rule of law, but rather, simply as a procedural device to facilitate a certain outcome. Would this type of presumption allow an overriding national procedural rule with conflicting effect on the substantive rule? In light of the principle of effectiveness, one would be tempted to say that this cannot be so: in fact, the rule developed by the case-law requires that the exercise of the Community rights (in particular, the right to a finding of violation of article 101 or 102) be not made "virtually impossible or excessively difficult", and that could be the case if the purpose of a presumption were to be frustrated by the operation of national law. However, it is possible to conceive of an EU presumption which sets the burden in such a way that it makes practically impossible for the defendant to be heard; in such circumstance, it is precisely in order to be compliant with the principle of effectiveness, that the national law is entitled to override the

[835] ECJjudgment of 16 December 1976 in Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989, para. 5; ECJ judgment of 16 December 1976 in Case 45/76, *Comet BV v. Produktschap voor Siergewassen*, 1976 E.C.R. 2043, paras. 12; ECJ judgment of 27 February 1980 in Case 68/79, *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, 1980 E.C.R. 501, para. 25; ECJ judgment of 7 July 1981 in Case 158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel*, 1981 E.C.R. 1805; ECJ judgment of 19 November 1991 in Joined Cases C-6/90 and C- 9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, 1991 E.C.R. I-5357, paras. 42-43; ECJ judgment of 9 June 1992 in Case C-96/91, *Commission v. Spain*, 1992 E.C.R. I-3789, para. 12; ECJ judgment of 14 December 1995 in Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, 1995 E.C.R. I-4599, para. 12; ECJ judgment of 24 September 2002 in Case C-255/00, *Grundig Italiana SpA v. Ministero delle Finanze*, 2002 E.C.R. I-8003, para. 33; ECJ judgment of 21 February 2008 in Case C- 426/05, *Tele2 Telecommunication GmbH, formerly Tele2 UTA Telecommunication GmbH v. Telekom-Control- Kommission*, not reported, para. 51.

[836] Case C-8/08 *T-Mobile Netherlands BV and Others. v. Raad van bestuur van de NederlandseMededingingsautoriteit* C-125/85 to C-129/85. See also *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307

[837] Id., at 51-52

presumption, so as to ensure respect for the right to a fair trial enshrined in the Charter of Fundamental Rights be respected.

The remainder of the Regulation addresses matters such as the types of Commission decisions(7-10), forms of cooperation between competition authorities and courts (11-), between competition authorities and between courts themselves, powers of investigation of the EU Commission (22), Penalties (23-24), limitation periods (25-26), hearing and professional secrecy (27-28), exemption regulations (29), to conclude with some general (30-33) and transitory provisions (34-45). These provisions are not central to our discussion, and will therefore be ignored in this context and discussed only to the extent necessary as a particular case warrants it.

d. Guidelines and other soft-law instruments:

An introduction to the normative framework of EU antitrust would not be complete without mentioning the role of soft-law. The role of soft-law in EU law has increased exponentially not only from a quantitative viewpoint, but also in the weight attributed to such instruments as sources of authority by the EU courts[838]. Of course not in contention that such documents do not have, in themselves, binding legal nature; however, the fact that the Commission and the Courts rely on them generates legitimate expectations, which need to be fulfilled. That is, the Commission is free to depart from notices, guidelines and reports only to the extent that such departure is justified by the specificities of the case, "*under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment and protection of legitimate expectations*[839]".

This does not mean that once the Commission formulates rules or standards within soft-law documents, they are written in stone: as a matter of fact, there is no claim under the "doctrine of legitimate expectations" in EU law if (1) a change in the law is foreseeable or frequent changes in the position are a characteristic feature of a given economic situation; (2) the rule can be

[838] Oana Stefan, Soft Law in Competition Law: A Matter of Hard Principle?, 14 (6)European Law Review (2008) 753, 800

[839] Judgment of the Court (Grand Chamber), 28 June 2005, joined Cases C -189, 202, 205, 208 & 213/02 P, *Dansk Rørindustri and Others v. Commission, [2005]* ECR I-5425

subject to review in accordance with the legislation on the basis of which it was adopted; or (3) the rule can be altered at any time by decisions taken by EU institutions within the limits of their discretionary powers[840]. Moreover, it is important to remind that according to the well-settled jurisprudence, soft law cannot depart from binding rules of law[841], including previous case-law[842].

While the first soft-law documents applicable to EU competition law were issued in 1962, being a Notice on exclusive agency contracts made with commercial agents[843] and a Notice on patent licensing agreements[844], those are of limited applicability to our context simply as they concern firms in very specific situations in the market. By contrast, the brief subparagraphs that follow will sketch the essence of the soft-law instruments directly relevant to the substantive issue of scope of the antitrust prohibitions with regard to 4 general categories.

i. On the *de minimis* exemption from article 101

The first soft-law document of relevance is the Notice on agreements of minor importance which do not appreciably restrict competition under article [101] (1) of the Treaty establishing the European Community (*de minimis*).[845] This notice is not to be confused with the Guidelines on the impact on trade[846], which much like the *de minimis* Notice, confines the application of competition law to agreements of a certain magnitude, and does so on the basis of certain market share-based (as well as some turnover-based) presumptions. More fundamentally, the difference

[840] Karol P. E. Lasok, Timothy Millet, Anneli Howard, JUDICIAL CONTROL IN THE EU : PROCEDURES AND PRINCIPLES (Richmond Law & Tax, 2004) , at 623 ; see also Case 88/78 *Hauptzollant Hamburg-Jonas v Herman Jendermann* OHG [1978] ECR 2477 at 2489 ; Case C- 216/87 *R v Minister of Agriculture, Fisheries and Food, ex p Jaderow* [1989] ECR 4509, paras 45-47 ; case C-177/90 *Kuhn v Landwirtschafstkammer Weser- Ems* [1992] ECR I-35, paras 13-15, [1992] 2 CMLR 242 ; Case C-63/93, *Duff v Minister of Agriculture and Food* [1996] ECR I-569, para 20 ; Case C-149/96 *Portugual v Council* [1999] ECR I-8395, para 75 ; Case C-17/98 *Emesa Sugar (Free Zone) Nv Aruba* [2000] ECR I-675, para 36 ; Case C-1/98 P *British Steel v Commission* [2000] ECR I-10349, para 52 ; T-1/96 *Boecker-Lensing and Schulze-Beiering v Council and Commission* [1999] ECR II-1, para 47.

[841] Case C-266/90 Soba [1992] ECR I-287

[842] Case T-9/99 *HFB Holding* para 446; Case T-65/99 *Strintzis Lines Shipping v Commission* [2003] ECR II-5433 para 168; Case T-213/00 *CMA CGM and others v. Commission* [2003] ECR II-913 para 262

[843] [1962] OJ 139/2921

[844] [1962] OJ 139/2922

[845] OJ C 372, 9.12.1997

[846] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [Official Journal C 101 of 27.4.2004]

between these two instruments is that the Notice sets out substantive criteria to identify what collusive conduct is capable of restricting competition (appreciably), whereas the Guidelines establish simply a jurisdictional test for the application of EU competition rules- which implies that conduct not meeting the requirements of the notice may still be subjected to national competition proceedings.

The Notice identifies two categories of agreements: those between actual or potential competitors and those between non-competitors. Given the intrinsically higher threat to competition posed by the former, the threshold for triggering the application of article 101 is slightly lower (10%) than the latter (15%); however, in both categories there are a number of agreements that are restrictions that are considered "hardcore" and therefore trigger the application of article 101 regardless of the actual market share. Those restraints are: (i) between competitors, price-fixing, output limitations, market allocation; (ii) between non competitors, minimum resale price maintenance, restriction of territory (unless only of active sales, or to non-members of a selective distribution system, or of components used to assemble the same products), selective distribution systems prohibiting anything other than out-of-place selling, and restriction of component selling by supplier.

According to the Notice, the Commission merely "[…] *quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article* [101](1)".[847]

Moreover, the Notice states clear in paragraph 6 what flows from the very nature of soft-law, i.e. that the notice "*is without prejudice to any interpretation of Article [101] which may be given by the Court of Justice or the [General Court] of the European [Union*]". Thus, the criteria laid out by the Notice can be defined in two alternative ways: either as presumptions of non-appreciability (the first set) and appreciability (the second set), which can be rebutted by contrary

[847] Notice, para 2 (citing *ad exemplum* The judgment of the Court of Justice in Joined Cases C-215/96 and C-216/96 *Bagnasco (Carlos) v Banca Popolare di Novara and Casa di Risparmio di Genova e Imperia* (1999) ECR I-135, points 34-35)

evidence before Courts (the first set) and before the Commission or the Courts (the second set); or, more categorically, as rules of law that establish a safe-harbour (the first set) and presumptions which identify an exception to the former (the second set) and may be rebutted before the Court. We will see in chapter 5 whether choosing one definition or the other makes a practical difference.

ii. On the definition of the relevant market

In the Notice on the definition of the relevant market for purposes of competition law[848], the Commission explains in detail the techniques that are uses to assess the competitive constraint faced by every firm involved with the practice under scrutiny[849].
The definition of the relevant market is a central element in a competition case. Although it has been suggested that it is not a necessary requirement for a valid completion decision[850], for example regarding conduct which fall under the "object" category[851], Courts have also asserted the opposite[852]; moreover, this opinion neglects that a summary market delineation, at least in the form of identification of identification of the market participants, is a prerequisite even for "object" cases. By contrast, the undeniable truth to it is that often no detailed market definition will be necessary: if under all the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information[853].

The relevant market is drawn upon two parameters: purchased products or services ("product market") and location of the transactions ("geographical market"): the relevant product market is constituted by "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their

[848] OJ C 372, 9.12.1997, p. 5–13
[849] Notice, at 2
[850] Thomas E. Kauper, The Problem of Market Definition Under EC Competition Law, 20 (5) Fordham International Law Journal (1996), 1687
[851] See *infra*, paras. V.4b and V.5b
[852] Case 6/72, *Europemballage Corp & Continental Can Co Inc v Commission* [1973] ECR 215
[853] At 27

intended use"[854]; by contrast, the relevant geographic market is defined as comprising "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas"[855].

The criteria that are applied in industrial organization theory to find out in specific cases where two products belong to the same market include the following:

- price correlation analysis, i.e., determining whether the price curves of the two products follow a similar figure
- stationarity analysis, i.e., determining whether there was a big or small amount of fluctuations in the curve of the relative price over the time
- price elasticity –or SSNIP (which stands for Small but Significant and Nontransitory Increase in Price)- test , i.e., determining whether, based on the hypothetical monopolist test, there is a high substitability of demand.
- critical loss test , i.e. running a similar comparison but determining whether the value of actual losses that are likely to result from a price increase is higher than a threshold—the critical loss—which is equal to the level of sale losses for which a given price increase is just profitable.

At first sight, by suggesting the use of a benchmark of 5 to 10% price increase, the EU Commission's Notice seems to incorporate hypothetical monopolist test. However, the Notice acknowledges that the hypothetical monopolist test is "one way of making this determination"[856], though there is no suggestion on what other approaches might be taken. In addition, in the past the concepts of demand-side substitability and supply-side substitability have not been applied consistently[857]. As a result, the Commission retains significant discretion as to the methodology it chooses for defining markets.

[854] At 4
[855] At 5
[856] At 15
[857] See Kauper, Ibid.

What is clear is that it will focus on three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. Moreover, the Notice does indicate the factors that it will consider to make its determination:

- Evidence of substitution in the recent past
- Launches of new products in the past, when it is possible to precisely analyse which products have lost sales to the new product
- Estimates of elasticities and cross-price elasticities
- For the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence
- Views of customers and competitors, when significantly backed by other evidence
- Consumer preferences. Consumer surveys on usage patterns and attitudes, data about consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies are taken into account, but the methodology followed in consumer surveys carried out *ad hoc* by the undertakings involved or their competitors will be scrutinized with great care; naturally, marketing studies that have been commissioned in the past and that are used by the companies in the course of their business to take decisions have naturally greater value than contemporary documents.
- Different categories of customers and price discrimination
- Barriers and costs associated with switching demand to potential substitutes.

In practice, this has led to place more consideration for demand-side factors (such as physical characteristics of the product/service, intended end-use, product prices and consumer preferences) than for supply-side factors, which are usually critical for conducting a proper hypothetical monopolist test such as the “SSNIP” test. This tends to make the analysis less predictable and “scientific”.

Subsequently, the Notice indicates also the type of evidence the Commission considers relevant to reach a conclusion as to geographic markets:

- Past evidence of diversion of orders to other areas.

- Basic demand carachteristics.
- Views of customers and competitors, always in addition to other evidence.
- Current geographic pattern of purchases.
- Trade flows/patterns of shipment.
- Barriers and switching costs associated to divert orders to companies located in other areas.

Under the definition of both types of market, a central role is played by the significance of barriers to entry. This is a disputed subject in the economic literature: one view (followed by more "hands-off" economists such as those of the so called "Chicago school") opines that there are only 2 kinds of entry barriers: a minimum efficient scale of operation (largely in anticipation of demand) and government regulation of any kind. The more traditional view, on the other hand, contends that entry barriers are far more common, and can be created by the conduct of companies in the market: they refer for example to discount practices and the possibility of raising rivals' costs. A more modern (some would call "neo-Chicagoan") alternative focuses also on strategic considerations, such as the reputation established by the company both with its customers and *vis a vis* its competitors. The Commission's Notice states in that respect that "*the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others*[858]". This would seem to suggest that the Commission endorses a basic, Chicagoan approach by focusing on major structural impediments; however, in the Notice one cannot identify a specific statement to endorse the position taken in this debate, and therefore there is significant room for debate and uncertainty.

Another peculiarity of the Commission's methodology for defining market is that it takes into

[858] At 42

account the continuing process of market integration, when defining geographic markets, especially in the area of concentrations and structural joint ventures. Thus, the Notice explains that "A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns"[859]. This factor, and the fact that its weight may in a particular case prevail over pure economic considerations, attest the fundamental importance of market integration principles in EU competition policy.

iii. On the application of article 101 (3)

In the early years of EU competition law, article 101 (3) was frequently applied to exempt agreement notified to the Commission for authorization. The Commission had the exclusive competence in the application of EU competition law, and the combination of an increasing number of notifications and a limited amount of resources prompted it to create a series of regulations, called "Block Exemption Regulations"(BER), that identified *ex ante* some categories of agreement that would fall under the exemption. An example are the Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices[860] (recently replaced by Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices[861]), Council Regulation No 2821/71 on application of Article 85 (3) [now 101 (3)] of the Treaty to categories of agreements, decisions and concerted practices[862], the Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements[863] and some sector-specific regulations in agriculture, insurance, postal services, professional services, transport and telecommunications.

[859] At 32
[860] Official Journal L 336, 29.12.1999, p. 21-25
[861] Official Journal L 102, 23.4.2010, p.1-7
[862] Official Journal L 285 , 29.12.1971 p. 46-48
[863] Official Journal L 123, 27.04.2004, p. 11-17

It is important to note that, differently from the rules established by the *De Minimis* Notice (as much as the Notice on Market Definition), the rules contained in BER have binding value, and therefore, constitute irrebuttable presumptions of legality, also known as "safe harbors". Safe harbors are particularly appreciated by lawyer since they resolve economic controversies with clear-cut rules, creating predictability and legal certainty. Nevertheless, however detailed and comprehensive the BER may be, they will always need to resort to general categories and exceptions based on previous experience, which by definition cannot cover all the cases of agreements and concerted practices (much less so when new typologies are generated by the need to adapt to technological development or new business patterns). Moreover, precisely because of the need to resort to generalization, atypical situations will usually not be covered by the Block Exemptions Regulations. For these reasons, the possibility to obtain an individual exemption ex article 101 (3) remained central to the understanding of the provision. When with the modernization of 2003 the EU empowered national courts and competition authorities to apply the EU competition rules, the problem arose as to how uniformity in the field of article 101 (3) could be maintained. Some guidance was seen as particularly needed due to the paucity of case-law addressing the specific factors relied upon in the context of 101 (3), where the Commission had been traditionally granted a margin of discretion and the depth of judicial scrutiny had been correspondingly lower.

The issuance in 2004 of the Guidelines for the application of article 101(3)[864] was therefore hailed as welcome news for undertakings and antitrust counsels. Even though the guidelines are largely a restatement of the case-law of the ECJ, the Commission also specified that they are intended to "*explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation*"[865]. Of course, the Commission acknowledges that this is without prejudice to the present and future case law of the Court of Justice and the General Court concerning the interpretation of Article [101] (1) and (3).

As it can be derived from this statement, the Guidelines do not only concern the interpretation of article 101 (3): they also include a section (paras. 13-32) setting out the analysis to be conducted under article 101 (1). This is useful because the Guidelines spell out with clarity some of the principles contained in the case-law which may not have been applied consistently: one example,

[864] OJ No C 101 of 27.4.2004
[865] At 7

which will be touched upon *infra*[866], is the fact that "*balancing of anticompetitive and pro-competitive effects is conducted exclusively within the framework laid down by article [101] (3)*".[867]This position has not been immune from criticism[868].

The Guidelines declare as falling under article 101 (1) any instance where at least one undertaking *vis-à-vis* another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced [869]. It follows that "*coordination can take the form of obligations that regulate the market conduct of at least one of the parties as well as of arrangements that influence the market conduct of at least one of the parties by causing a change in its incentives*"[870].

It is also mentioned that tacit coordination may be considered to occur if "*there is an invitation from one undertaking to another, express or implied, to fulfil a goal jointly*" [871]. This permissible presumption of tacit agreement can even go as far as allowing an agreement to be inferred from an ongoing commercial relationship, but importantly, the presumption is not without limits: the existence of an agreement cannot be simply derived from the unilateral acts within the context of on-going business relations[872]. The clarifications include the object of agreements, which is to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation; and opening the gates to potential speculation, the guidelines recognize that "*Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties*"[873].

[866] Chapter V

[867] At 10, referring to Case T-65/98, *Van den Bergh Foods*, [2003] ECR II . . ., paragraph 107 and Case T-112/99, *Métropole télévision (M6) and others*, [2001] ECR II-2459, paragraph 74, where the [General Court] held that it is only in the precise framework of Article 81(3) that the pro- and anti-competitive aspects of a restriction may be weighed

[868] See Ginevra Bruzzone and Marco Boccaccio, Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search For the Proper Mix, 32 (4) World Competition (2009), 476-477

[869] Reference is made to joined Cases T-25/95 and others, *Cimenteries CBR*, [2000] ECR II-491, paragraphs 1849 and 1852; and Joined Cases T-202/98 and others, *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission of the European Communities*, [2001] ECR II-2035, paras.58 to 60.

[870] According to Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297, and *Cimenteries CBR*, [2000] ECR II-491 paragraph 3444, it is not required that co-ordination is in the interest of all the undertakings concerned.

[871] See e.g. Joined Cases 25/84 and 26/84, *Ford*, [1985] ECR 2725

[872] Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure*, [2004] ECR I . . ., paragraph 141

[873] At 16

Paragraph 18 then explains the methodology used to make the determination of whether an agreement has the effect of restricting competition in one of the aforementioned parameters, known as "counterfactual analysis", and guides its application in the context of inter-brand and intra-brand competition. Paragraphs 21-24 of the Guidelines explain the salient features of a restriction "by object", where it will be unnecessary to show actual effects on the market. As stated by the Guidelines, "[t]*his presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules*"[874]. The Guidelines list indicative factors such as the content of the agreement, the objective aims pursued by it, the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market[875]. However, as it will be discussed *infra*[876], the boundaries of this category are far from clear. The Guidelines indicate that *non-exhaustive* guidance (alluding to the fact that further guidance will be found in the case-law) can be found in Commission block exemption regulations, guidelines and notices: in that respect, "*Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers. As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales*[877]

The section of the Guidelines dedicated to Article 101 (1) concludes by explaining the application of the "ancillarity doctrine", according to which a restriction will be allowed if it is necessary and proportionate to a main non-restrictive transaction. However, the necessity needs to be objective, and it is questionable whether the objectivity criterion can be interpreted to include the pursuit of non-economic values. One useful suggestion in that respect is made by the Guidelines in the section on article 101 (3), where it is stressed that the scope of this doctrine is

[874] At 21
[875] At 22
[876] Chapter V.2
[877] At 23, citing paragraph 25 of the Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2), and Article 5 of Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3).

to be seen in context with the statement that "*Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded.The purpose of Article 81 is to protect effective competition by ensuring that markets remain open and competitive. The protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations and not for undertakings to regulate themselves*[878].

In the section dedicated to Article 101 (3), the Guidelines delve deep into the assessment of efficiency gains, which are specifically mentioned as the only potential pro-competitive effect of a restrictive agreement[879]. Importantly, the Guidelines settle the question of relevance of other public policy objectives by stating that "goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101](3)[880]". Another clause of general application specifies that the benefit for consumers may manifest themselves in a related market, but only if the group of consumers affected is substantially the same[881]. This appears to be in contrast with the broad notion of consumers which has been endorsed by the EU Courts in some cases, such as *CEDEC*[882], *Compagnie Maritime Belge*[883], *Glaxo Smithkline*[884] and *Asnef-Equifax*[885] , and has received scholarly criticism[886].

As to the question of assessing efficiencies, the Commission declares to be willing to accept only those claims which substantiate the following:(a) The nature of the claimed efficiencies;
(b) The link between the agreement and the efficiencies; (c) The likelihood and magnitude of each claimed efficiency; and (d) How and when each claimed efficiency would be achieved. In

[878] At 47. Reference is made to Case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO)*, [1995] ECR II-289
[879] At 35
[880] At 42, citing to that effect Case T-17/93, Matra, ECR [1994] II-595, paragraph 139 ; and Case 26/76, Metro (I), [1977] ECR 1875, paragraph 43
[881] At 43
[882] See *supra*, para. IV.1a
[883] GC, T-86/95, *Compagnie Generale Maritime and others v Commission* [2002] ECR II- 1101, at 343
[884] T-168/01, *Glaxo Smithkline v Commission* [2006 ECR II-2969
[885] Case C-238/05, *Asnef-Equifax v Ausbanc* [2006] ECR 1-11125
[886] See Damien Geradin, Anne Layne Farrar and Nicolas Petit, EU COMPETITION LAW AND ECONOMICS, 169-170, andJames Aitken and StephanieMitchell, Efficiency Defences under Article 81 EC – Is the Hurdle Getting Higher?, Competition Law (2009) 64-65 referred therein.

particular, undertaking must "*describe in detail how the amount has been computed*" and "*the method(s) by which the efficiencies have been or will be achieved*"[887] .

Letting aside the burden that this stringency will generate on companies, a doubt can be casted on the convenience of adopting such posture in the context of de-centralized enforcement, where it is questionable whether national courts applying EU competition law will be sufficiently proficient in economics to appreciate the validity of the arguments (and the evidence) submitted by the parties. If they are to take these criteria seriously, this will often imply nominating experts to conduct the efficiency assessment, thereby making private litigation longer and more costly. In that context, a key role will arguably be played by the courts' willingness to grant interim relief awaiting the experts' determinations.

Similar considerations can be applied to the assessment of passing-on of efficiencies, a point on which the guidelines provide a net clarification by focusing on 4 factors:(a) The characteristics and structure of the market, especially its degree of concentration; (b) The nature and magnitude of the efficiency gains; (c) The elasticity of demand; and (d) The magnitude of the restriction of competition[888].

The Guidelines make a list of the type of efficiencies that may be taken into account, dividing in cost efficiencies (such as synergies[889], economies of scale[890], economies of learning[891] and economies of scope[892]) and qualitative efficiencies; the section (para. 69-72) dedicated to an illustration of the latter, however, does not provide any concrete example beyond the concept of "technical and technological advances"[893]. This is unfortunate particularly in light of the unclear role of non-economic factors and the apparent call by the same Guidelines to a value judgment[894]. All in all, the qualification of a benefit as efficiency is likely to remain an area of substantial uncertainty.

[887] At 56
[888] At 96-98
[889] At 65
[890] At 66
[891] Ibid.
[892] At 67
[893] At 70
[894] See Guidelines, at 49; Damien Geradin et al., Ibid., at 165

Finally, the Guidelines determine the factors that will be relied upon in the assessment of the market for the purpose of the fourth condition, namely the "no elimination of competition".

In doing so, the Guidelines emphasize the importance of potential competition, and define barriers to entry as including, *inter alia*, the following: (i) The regulatory framework with a view to determining its impact on new entry. (ii) The cost of entry including sunk costs. (iii) The minimum efficient scale within the industry, i.e. the rate of output where average costs are minimised. (iv) The competitive strengths of potential entrants. (v) The position of buyers and their ability to bring onto the market new sources of competition.(vi) The likely response of incumbents to attempted new entry. (vii) The economic outlook for the industry may be an indicator of its longer-term attractiveness. (viii) Past entry on a significant scale or the absence thereof.

Thus, the Guidelines take a position on a question that was left open in the Notice on the definition of the relevant market in 1997, by incorporating the advances of economic theory with respect to buyer power (v) and adopting a Neo-Chicagoan approach with strategic considerations such as reputation (vi) and past market performance (vii and viii).

iv. On the enforcement priorities for article 102

The Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms ("Guidance Paper") represents the culmination of a long process of review of the principles governing unilateral conduct pursuant to article 102. This process started in 2005, when DG Competition published a Discussion Paper on the application of article 102 to exclusionary abuses with the aim to generate discussion with undertakings, the antitrust community and the various stakeholders "*as to how EU markets are best protected from dominant companies' exclusionary conduct*"[895].

After the "modernization" of antitrust enforcement, the evident conflict between the effects-based rules on agreements and concerted practices, the institution of the Chief Economist Team and the still largely form-based approach to unilateral conduct was all too apparent in the eyes of any antitrust expert. Specifically, the call for reform came from a general movement to bring EU

[895] Competition: Commission publishes discussion paper on abuse of dominance, Press Release IP/05/1626, Brussels, 19th December 2005

antitrust law in line with economic theory, and out of a growing criticism for the "structural" approach which the EU seemed to adopt in the enforcement of its anti-monopoly law[896]. The Commission declared to have the intention "*to concentrate its resources on those anti-competitive practices that are most likely to cause harm to consumers*"[897]. The intention to embrace a "consumer welfare" approach was repeated a number of times by public speeches made by high-ranking Commission officials[898], despite the perception by part of the scholarship that it would be inconsistent with the (ordoliberal) roots of EU competition law[899].

Following the public consultation, the Commission issued on 3 December 2008 a considerably thinner document (the Guidance paper) with the intention to "*contribute to the process of introducing a more economics based approach in European competition law enforcement*"[900]. Once again, it confirmed the endorsement of the consumer welfare standard by stressing that "*The Commission will base itself on convincing evidence and sound economic analysis on how and whether the reduction in competition is likely to lead to consumer harm*"[901].

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[896] E.g. Eleanor M. Fox, Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness, 61 Notre Dame Law Review 981,1004(1986); Per Jebsen and Robert Stevens, Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union, 64 Antitrust Law Journal 443(1996); David B. Sher, The Last of Steam-Powered Trains: Modernising Article 82, 25 ECLR 243(2004); John.Kallaugher and David B. Sher, Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82,25 European Competition Law Review 263(2004); Dennis Waelbroeck, Michelin II: A Per Se Rule Against Rebates by Dominant Companies? 1(1) Journal of Competition Law and Economics 149(2005)

[897] Ibid.

[898] E.g. Speech by former European Commissioner for Competition Policy Neelie Kroes,PreliminaryThoughts on Policy Review of Article 82, Fordham Corporate Law Institute, NewYork, 23 September 2005, 2; Neelie Kroes, Exclusionary abuses of dominance : the European Commission's enforcement priorities, Speech at the FordhamUniversity Symposium, NewYork, 25 September 2008, 2; Philip Lowe, The Commission's current thinking on Article 82, BIICL AnnualTrans-Atlantic Antitrust Dialogue,15 May 2008, 2, 3.

[899] Heike Schweitzer, The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), EUROPEAN COMPETITION LAW ANNUAL 2007 : A REFORMERD APPROACH TO ARTICLE 82 EC (Oxford, Hart Publishing, 2008) 119, 161. Liza L. Gormsen, Article 82 EC: Where are we coming from and where are we going to? (2005) 2 TheCompetition Law Review 5,10; Kati .J. Cseres, COMPETITION LAW AND CONSUMER PROTECTION (The Hague, Kluwer Law International, 2005) 82; Giuliano Marenco, The Birth of Modern Competition Law in Europe, in Armin Von Bogdandy, Petros .C. Mavroidis and Yves Mény (eds), EUROPEAN INTEGRATION AND INTERNATIONAL COORDINATION : STUDIES IN HONOUR OF CLAUS-DIETER EHLERMANN (The Hague, Kluwer Law International, 2002) 303; Ekaterina Rousseva,'Modernizing by Eradicating: How the Commission's NewApproach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints' (2005) 42 Common Market Law Review 587, 590, 591.

[900] Commission memorandum, Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant forms—frequently asked questions, MEMO/08/761, Brussels, 3 December 2008.

[901] Ibid.

However, a number of commentators have criticized that, in the final document, the Commission does not seem to follow consistently the ultimate lodestar of consumer welfare that it seemed to have committed to[902]. As a first and preliminary remark, it appears that, unless one focuses merely on dynamic efficiency, there is no reason why the Guidance Paper should not have covered exploitative abuses: differently from exclusionary abuses, those are visible and directly demonstrable, and accordingly, they are more likely than speculative abuses to cause consumer harm[903].

A second remark concerns what has been referred to as the "schizophrenia" in the alleged move away from formalism[904]. To be clear, there are a number of cases where the Commission shows its commitment to an economics-based approach:

- it declines to reinstate the well-established presumption of dominance in case of market shares above 50%, and replaces the positive presumption with a negative presumption for market shares below 40%. Critics have complained that such presumption does not allow reliance on a true safe harbor[905], but to the Commission's defense, it should be recognized that this is what one gets when economic analysis is implemented to a greater degree: different would have been if the Commission had announced a commitment to rely on a "hard and fast" or a "more straightforward" approach.
- it goes much further than the Notice on Market Definition by identifying as barriers to entry not only minimum efficient scale assets and government regulation, but also the results of the undertaking's own conduct –mentioning in the specific where it has made significant investments which entrants or competitors would have to match, or where it

[902] Damien Geradin, Is the Guidance paper on the Commission's Enforcement Priorities in Enforcing Article 102 TFEU Useful?, in Federico Etro, Ioannis Kokkoris (ed.), CHALLENGES IN THE ENFORCEMENT OF ARTICLE 102 (Oxford. University Press, 2010); Philip Mardsen, Some Outstanding Issues From the European Commission's Guidance on Article 102: Not-So Faint echoes of Ordoliberalism, in Federico Etro, Ioannis Kokkoris (ed.), CHALLENGES IN THE ENFORCEMENT OF ARTICLE 102 (Oxford. University Press, 2010); Assimakis Komminos and James R.M. Killick, Schizophrenia in the Commission's Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis, Global Competition Policy, 5 February 2009

[903] See Pinar Akman, The European Commission's Guidance on Article 102TFEU: From Inferno to Paradiso? 73 (4) The Modern Law Review 605 (2010), at 610

[904] See Assimakis Komminos and James R.M. Killick, Schizophrenia in the Commission's Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis, Global Competition Policy, 5 February 2009

[905] Ibid.;

has concluded long-term contracts with its customers that have appreciable foreclosing effects. Although this signals a more interventionist approach to markets, it is certainly in line with economic thinking and, importantly, it is made transparent.

- it amends the traditional SSNIP test by adding a "profitability" requirement in the price rise, which makes it a "critical loss" test and therefore addresses the famous problem of the cellophane fallacy[906]. This, however, will be an effective fix only to the extent that the Commission will be confident (and capable) of determining the competitive price: a determination that it is often difficult, if not impossible[907], and frowned upon[908]. And one could expect it to be even more so, when the parameters to be measured are quality or choice.

However, on the other hand, the Commission contradicts its "pro-economics" approach when after proclaiming "anticompetitive foreclosure" as ultimate standard for its enforcement priorities, and defining it as "a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices[909]to the detriment of consumers", it fails to give a definite benchmark of proof by stating that it will address such anti-competitive foreclosure "*either at the intermediate level or at the level of final consumers, or at both levels*"[910]. Given the Paper's name and purpose, it is

[906] The cellophane fallacy is the name attributed to a frequent flaw in the process of measurement of market power, i.e. when the power is undervalued because the original price used for reference in the hypothetical monopolist was already supra-competitive.The name derives from a famous American case, involving the sale of cellophane, where the fallacy was for the first time recognized by the Court: U.S. v. du Pont, 351 U.S. 377 (1956)

[907] See P. Akman, Pinar Akman, THE CONCEPT OF ABUSE IN EU COMPETITION LAW. LAW AND ECONOMIC APPROACHES (Oxford, Oxford University Press 2012), at 612; Simon Bishop and Michael Walker, THE ECONOMICS OF EC COMPETITION LAW; CONCEPTS, APPLICATION AND MEASUREMENT. (London, Sweet & Maxwell 2nd ed. 2002), 43; Allison Jones and Brenda Sufrin, EC COMPETITION LAW (Oxford, OUP 3rd ed. 2008), 586.

[908] Mario Mariniello, Fair, reasonable and non-discriminatory (FRAND) terms: a challenge for competition authorities, 7 (3) Journal of Competition Law and Economics 523 (2010); Nicolo Zingales and Alessandro Turina, Economic Analysis and Evaluation of Fair Prices: Can Antitrust and International Taxation Learn from Each Other?, 5 (10) Comparative Research In Law And Political Economy (2009)

[909] The Paper notes that the expression "increase prices" is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services- can be adversely affected.

[910] At 19. It is worth noting also that the Commission, differently from the Discussion Paper, clarifies that the concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the

submitted that the Commission could have defined a more precise and clear-cut test through the use of a presumption.

Moreover, when the Paper goes into detail describing the factors that will be considered to assess "*anticompetitive foreclosure*", it gives prominent importance to structural factors -such as "*the position of the dominant undertaking*", "*the conditions on the relevant market*", "the position of the dominant undertaking's competitors" and "*the position of the customers or input suppliers*"- and then dispenses with any proof of consumer harm in the remainder three elements –i.e, "*the extent of the allegedly abusive conduct*", "*possible evidence of actual foreclosure*" and "*direct evidence of exclusionary strategy*"[911].

Finally, there is one more issue of the general framework where the Commission resorts to presumptive reasoning and that is worrying from an economic perspective. The Commission leaves open the possibility to rely on a non-mandatory or permissible presumption, one of which being that "*If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred*". Although in principle this presumption is legitimate for the pursuit of consumer welfare, there is a risk that due to its very general character it will be used as a sword by the Commission by resorting to a loose interpretation of "raising obstacle to competition" and maintaining a strict approach towards the production of efficiency –which according to the Paper, it will do.

The Guidance paper presents a number of other controversial points on the test adopted for the assessment of illegality and on the issue of objective justification. Since this subchapter is merely intended to provide the basic features of the Guidance Paper, a more detailed analysis of those points is conducted in Chapter V.4.

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immediate product and of products provided by intermediate producers. Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

[911] Along with this reasoning, see Damien Geradin, Is the Guidance paper on the Commission's Enforcement Priorities in Enforcing Article 102 TFEU Useful?, in Federico Etro, Ioannis Kokkoris (ed.), CHALLENGES IN THE ENFORCEMENT OF ARTICLE 102 (Oxford, Oxford University Press, 2010) at 7; Nicolas Petit, From Formalism to Effects? – The Commission's Communication on Enforcement Priorities in Applying Article 82 EC, 32 (4) World Competition, 496 (2009)

2. The Hearing Officer

The importance of the role of the hearing officer stems as a direct consequence of the administrative system used for the enforcement of EU competition law. In light of the peculiar structure of the enforcement, the establishment of an institutional safeguard for the protection of the right to be heard appeared necessary. Whether and to what extent this mechanism is sufficient, is subject to intense debate[912]. The following paragraph will provide a synthetic historical background and an overview of the concrete functions of this figure.

a. The creation of the Hearing Officer

The figure of the Hearing Officer was introduced in European competition policy since September 1982[913]in order to ensure that a potential addressee of the SO has the opportunity to be heard from a Commission official who is experienced in competition but independent from the directorate, and thus not involved in the case[914]. Specifically, the Mandate contained a list of rules conferring to this figure the power of scrutiny over a variety of Commission's acts, and thereby indirectly creating a right for parties to a commission's proceedings to avail themselves of his power.

From a fairness perspective, the initiative by the Commission to create this new post was sincerely laudable, as it amounted to spontaneously imposing a self-restraint on its own powers. Realistically, the rationale underlying such innovation was the growing criticism for the lack of transparency and impartiality of the proceedings[915]. In addition, one can claim that this

[912] See *supra*, para. 1.b

913 See XII Report on Competition Policy 1982 (Luxembourg, Office for Official Pubblications of the European Community), para 36, later amended by Commission Decision 94/810 ESC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (i.e., the "enlarged Mandate"), and subsequently by Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, (OJ L 162, 19.6.2001, p. 21 (hereinafter "the Mandate") and by Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 (hereinafter, "the revised Mandate")

914Until 1982, hearings took place within DG IV, and were chaired by the Director General.

915To be precise, it is common belief that the creation of the Hearing Officer's post followed the publication by the House of Lords of a Report on the European Union in June 1982, which criticized the lack of impartiality of the

represented a strategic move towards a more effective enforcement, reflecting the historical[916] and doctrinal recognition[917] that fairness of procedures has a direct bearing on the rate of compliance and law-abidingness within a particular legal system.

However, it is also important to note that entrusting a third party with ensuring fairness and transparency on the DG Competition's operations has proved to be a double-edged sword: first of all, because this is a perfect mechanism for undertakings to slow down proceedings, submitting to the Hearing Officer a variety of requests that are of dubious purpose, and may reveal to be simply well engineered dilatory tactics. This inevitably affects the efficiency of the DG Competition's enforcement machine, and given its policy[918] of using as the value of 10% of the turnover of a company in the previous business year as a cap for the maximum fine that can be imposed, it may have an adverse impact on the ability of the enforcer to impose truly dissuasive sanctions. In this respect, however, it can be noted that the possibility of "gaming" the calculation of the maximum threshold has been considerably narrowed by the European Court of Justice (ECJ), holding in a recent judgment that the turnover must be reflective of the normal economic activity and thus it is justified for the Commission to refer in exceptional circumstances to business years different from the previous one[919]. Nonetheless, this does not take away the fact that the Hearing Officer *can* be used for dilatory tactics.

Secondly, the progressive delegation of powers to the Hearing Officer has created the paradox that if an undertaking fails to bring a dispute arisen with DG Competition before the Hearing Officer, for which it has decision-making power, this can be taken as acceptance of the position expressed by DG Competition and weigh against the party before the European Courts, if it were to raise this procedural matter[920].

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hearings before the Director General and thus the inability of the parties to a Commission's proceedings to be heard effectively. Nevertheless, this does not put in discussion the merits of the Commission in having finally implemented such initiative.

916A famous quotation from the common law is "Justice should not only be done, but should manifestly and undoubtedly be seen to be done": The *King v Sussex Justices*, ex parte McCarthy, [1924] 1 K.B. 256, 2259 (Hewart, C.J.)

917 Tom Tyler, WHY PEOPLE OBEY THE LAW (New Heaven, Yale University Press 1990).

918Regulation 1/2003, article 23 (2)

919Judgment of the ECJ of 7 June 2007, Case C – 76/06, *Britannia Alloys v Commission*, Rec.2007, p.I-4405, paras. 40-44. For a more detailed explanation, see the Opinion of the Advocate General Bot in the same case, delivered on 1 March 2007, paras. 38 -77

920Judgment of the CFI of 8 July 2004, Case T-44/00, *Manneslannrhren-Werke v Commission* [2004] ECR II-223, para. 51 et seq. A confirmation of this approach can be found in the Opinion of the Advocate GeneralGeelhoed in

These side-effects certainly did not materialize under the 1982 mandate, for the powers of the Hearing Officer were really of limited remit, and the scope for misuse by the defendants of such powers almost non-existent. At the outset, the Hearing Officer's scrutiny over a case regarded only the phase of decision, which was identified as the oral hearing and any decision taken subsequently, and did not culminate in the adoption of a final document explaining to the Commission the overall conduct of DG Competition during the proceedings. The report that was submitted by the Hearing Officer was what would be nowadays called the "interim report"[921], which concerned the developments at the hearing and his observations, but could also contain observations on substantive issues, relating *inter alia* to the need for further information, the withdrawal of certain objections or the formulation of further objections. This report was given exclusively to the Director General and the director responsible, hence there was nothing written that could be relied upon by the alleged infringer of competition law as conclusive evidence[922] of bad administration in case of annulment proceedings before the courts[923].

In 1994, with the first revision of the Mandate, this aspect was modified introducing the so called "final report", essentially corresponding to the old report but which could in exceptional cases be disclosed outside DG Competition. Such report was indeed in principle merely for internal purposes, and could be attached to the draft decision submitted to the Commission *only if* the Commissioner of Competition deemed it appropriate "*in order to ensure that when [the Commission] reaches a decision on an individual case it is fully apprised of all relevant information*"[924]. From the very wording of this provision, and the discretion that was left to the Commissioner to decide whether to make this report public, one can see that the role of the Hearing Officer had been conceived originally more as one of strengthening the Commission's case, rather than conferring rights on individuals. However, this initial picture of the Hearing

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Case C-308/04 P, *SGL Carbon AG*, para. 101, and the judgment of the Court in that same Case (which follows the Opinion), para. 96.

921See *infra*, para. 3.4

922There were, of course, the minutes of the oral hearing, but these are simply the presentation of contrasting views represented at the hearing, and do not in any way include conclusions drawn by the chair of that hearing

923On the impossibility to use the Report in court, see the judgment of the CFI of 10 March 1992, Case T – 15/89, *Chemie Linz c Commission* [1992] ECR 1275

92494/810 ESC, EC Commission Decision of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (i.e., the "enlarged Mandate"), Article 10

Officer has with the time become less accurate, starting from the introduction by the 1994 Mandate of decision-making powers concerning the participation to the hearing of third parties, the authorization of the persons to be heard orally, the possible extension of time limits for replies, and most importantly the resolution of disputes on access to file issues. From that moment onwards, the array of functions of the hearing officer made it progressively move away from the sort of peer-review focus for which it had been initially conceived, growing into a form of external control that increasingly resembles that of a judicial (or quasi-judicial) body.

A great obstacle to this transformation was the central issue of the publicity of the report: what is the material benefit from the Hearing Officer's oversight, if the people who eventually decide the case (i.e., the college of Commissioners) can remain completely unaware of its findings? On this matter, the revision of the Mandate in 2001 presented a significant improvement, establishing that a final report on the right to be heard, containing the conclusions drawn from the hearing and procedural issues including disclosure of documents and access to file, time limits for replying to the Statement of objections (SO) and the proper conduct of the oral hearing, must be attached to the decision, sent to the parties with the decision and published in the Official Journal[925]. However, the reform was not so radical as to have the Hearing Officer completely abandon its "peer-reviewing" role: the new Mandate, as the previous one, preserved the so called "interim report" and its merely internal purpose. From an efficiency viewpoint, the usefulness of this exercise is even more questionable now that DG Competition has introduced "peer review panels"[926] for virtually every case involving procedural or technical complexities.

Finally, one further important step was taken to depart from the traditional model: the post of the Hearing Officer was detached from DG Competition, and attached only for administrative purposes to the Cabinet of the Commissioner for competition. Here too, the move represented a significant improvement from the system previously in place, but not a net separation from the sort of "restrained oversight" that follows as a natural consequence of the fact that the controller

925Article 15 of the Mandate

926There is apparently no official public notice of a commitment to use peer review panels systematically, but a first mention of this intention was done in October 2003 by the Commissioner: see Commissioner Monti, EU competition policy after May 1994, Speech delivered at the 30th Annual Fordham Conference on International Law and Policy (New York, 24 October 2003)

(the hearing officer) is controlled by the hierarchical superior (the Commissioner) of the controlled (DG Competition). Through this residual attachment, in fact, the Commissioner for Competition is able to have a significant influence on future developments of the Hearing Officer: he has the authority to decide, for example, the amount of resources to be devoted to the fulfilment of the Hearing Officer's objectives, as opposed to the traditional (and arguably more "populist") objective of enforcing the competition rules. And while nothing prevents him from preserving the only remaining bit of internal reviewing function of the Hearing Officer, i.e. the "interim report", recent public statements[927]suggest that there is some margin of manoeuvre to accomplish the final, missing reforms for the creation of an independent quasi-judicial body. As a first step in that direction, it suggested here that the hearing officer be completely separated not only from DG Competition, but also from the Cabinet of the Commissioner for Competition, and attached for administrative purposes to the Secretary General.

b. What does the Hearing Officer protect? In-built procedural guarantees

Already as early as in the eighties and nineties, the ECJ down-played allegations of lack of "fair trial" stating that the mere availability of an action for annulment before the CFI under art 230 of the Treaty[928] and the observance of procedural guarantees laid down by the regulations governing the enforcement of competition law allow the Community's competition enforcement system to meet the requirements of a fair trial for the undertakings concerned. Much emphasis by the Court was placed on the fact that notwithstanding the fact that DG Competition cannot be

927See Joaquin Almunia, EU Antitrust policy: the road ahead, Speech at the International Forum of Competition Law, 9 March 2010, Brussels. Available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/81&format=HTML&aged=0&language=FR&guiLanguage=en:"[…] there is always the need to consider possible improvements […] while I believe that our administrative system is sound, I am always open to listen to constructive criticism with a view to ensure that our procedures are conducted in an objective and impartial manner".. See also Joaquin Almunia, Los nuevos retos de la política de competencia de la UE, Speech delivered at the Comisión Nacional de la Competencia Lunes 15 de marzo de 2010, Madrid: "[…]Siempre estaré dispuesto a escuchar críticas constructivas y a mejorar nuestras reglas de funcionamiento para aumentar su transparencia"

928Judgment of the CFI of 14 September 2004, Case T- 156/94, *Siderurgica Aeristrain Madrid SL v Commission*, [1999] ECR II-645 paras. 102 and 109. See also, more recently the judgment of the CFI of 14 May 1998, Case T - 348/94, *Enso Espanola*, *v Commission* [1998] ECR II-1875, holding that the Commission is subject to 'effective' judicial review by an independent and impartial judge.

qualified a Tribunal within the meaning of article 6 (1) of the European Convention of Human Rights[929], it must observe the procedural guarantees laid down by EU law[930].

What did the ECJ exactly mean, when referring to the "procedural guarantees" laid down by EU law"? The following (non-exhaustive) list, representing the guarantees that the Court found to have been respected by the Commission in that particular case, may serve as an illustration of the broader concept: i) The obligation to schedule a hearing within a reasonable time, if requested by the investigated parties. ii) The obligation to grant application to be heard to any natural and legal person that shows a sufficient interest[931], and if so, afford them the opportunity of making known their views in writing within such time-limit as the Commission may fix[932]. iii) The obligation to grant access to file pursuant to the applicable regulations. iv) The right for undertakings or associations of undertakings against which proceedings are commenced to "propose that the Commission hear persons who may corroborate "the facts set out in their written observation on the objections raised against them"[933]. v) The right for undertakings against which the proceedings are commenced to request the Commission to hear third parties[934]. vi) The obligation to consult with the Advisory Committee.

In short, the ECJ understands procedural guarantees to constitute rights of the parties to a Commission's proceeding (and in some limited circumstances of third parties[935]) to which correspond, in most occasions, Commission's obligations (an exception being made for those cases where the Commission enjoys a broad discretion on the conferral of the privilege). On the other hand, while some obligations impinge on the Commission by default, i.e. without the need for any impulse by the parties, certain others only arise upon submission and approval of a request in that sense. The example reported here may not entirely reflect the current situation, particularly as the decision-making power in some matters has moved from DG Competition to the Hearing Officer. Nonetheless, it is worth noting that the combination of Regulations 17/69

929See *supra*, note 805
930Judgment of the ECJ of 30 October 1978, Joined cases 209/78 R to 215/78 R and 218/78 R, *Heintz van Landewyck SARL v Commission* [1980] ECR 3125
931Article 19.2 Reg. 17/69
932Article 5 Reg. 99/63
933Article 3.3 Reg. 99/63
934Within the meaning of Article 5 of Reg. 99/63
935See *infra*, para. 3

and 99/63 already contained an extensive list of guarantees for the undertakings part to a Commission proceeding. The rationale and purpose of those guarantees was essentially the same of their "modernized" version in Regulation 1/2003 and 773/2004: ensure respect for the “right to be heard” and “right of access to evidence”. One might even claim that the whole system has always been in fact designed around one concept, as the latter is rather instrumental to the exercise of the former[936]. Yet this classification may be too narrow, and overlook that the right of access to evidence has a critical importance in itself for allowing a party to ascertain whether the conclusions reached by DG Competition are supported by adequate evidence. This is arguably based on a different rationale than the mere "participation" to the decision of the entities directly affected by it: the objective is to make sure that the administration of justice is transparent[937], and thus to impose a "check" on DG Competition even for cases where the parties do not intend to lodge an application for annulment. It becomes clear then the analogy of this twofold objective with the function of the hearing, which the acting Hearing Officers have recently portrayed as "check" and "balance" depending on the circumstances[938]. The rationale of procedural guarantees, and as a consequence the role played by the Hearing officer, may then turn to be different from context to context.

Some clarification in respect of the hierarchy and the coexistence of these two objectives can be seeked in the Guidance paper (“Guidance”) recently published by the Hearing Officer in conjunction with the Best practices on the submission of economic evidence and the Best Practices on the conduct of proceedings concerning article 101 e 102 TFEU (altogether “Best Practices”)[939]. In this document, the Hearing Officer does not make plainly a distinction between procedural guarantees depending on whether they ensure the respect of the *contradictoire* or the right of access to evidence. It rather proposes a more basic classification:

936Stephan Wernicke, In Defense of the Rights of Defence: Competition law procedure and the changing role of the Hearing officer, Concurrences No. 3- 2009, para. 22 (“*A corollary of the right to be heard is the right to have access to file*”).

937This is also recognized by official publications of the Commission: see H. Johannes and J. Gilchrist, 'Role and Powers of the Hearing Officers under the enlarged mandate', EC Competition Policy Newsletter vol 1 No 4 Spring 1995, p. 12

938 Michael Albers and Karen Williams, Oral Hearings – Neither a Trial Nor a State of Play Meeting, Competition Policy International Journal March 2010 (1), p. 4-5

939Both documents are available on DG Competition's website, at http://ec.europa.eu/competition/consultations/2010_best_practices/index.html

(1) Rights of defence, which "*mainly relate to questions concerning the truth and relevance of the facts and matters alleged and the documents used by the Commission to support a claim that there has been an infringement of competition law*".[940]

(2) Procedural rights of complainants and all other parties to a Commission procedure.

The existence of two different kinds of procedural guarantees is thus recognized by the Guidance. However, it is a somewhat broader classification than the one suggested above, as both the right to be heard and the right of access to the file would seem to fall within the category of "rights of defence". The fact that the definition of rights of defence starts with the word "mainly" hints at the fact that the Hearing Officer does not intend these as constituting simply an explication of the principle of *contradictoire*, but rather prefers to leave the concept open[941]. This definition is closely aligned with recent case-law, which has qualified the right to a fair trial as "*a fundamental principle of Community law and[…] part of the rights of defence*"(emphasis added)[942].

Whatever the notion of "rights of defence" refers to, it shall be kept in mind that they have been *all* identified as fundamental rights forming an integral part of the general principles of law, whose observance the Court ensures[943]; Accordingly, given the supremacy of principles over rules, it follows that more weight ought to be attached to rights of defence than to those procedural guarantees belonging to the category of "procedural rights". Does this mean that the latter category should be subject to a balancing with the effectiveness of competition enforcement? One may well argue that the answer ought to be in the affirmative[944]. But the guidance does not give a definite response to the consequences of such qualification, rather focusing on outlining the different breadth of those rights.

940Guidance, para. 4, citing in support the following case-law: judgments of the ECJ of 15 October 2002 , joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99, P, *Limburgse Vinyl Maatschappij and others v Commission* [2002] ECR I-8375, para. 91; 13 February 1979, Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, para. 11.

941Other procedural rights pertaining to this category are the right to have a lawyer, the privilege against self-incrimination and, as mentioned above, the right of access to the file.

942Judgment of the ECJ (Grand Chamber) of 10 July 2008, Case C-413/06 P, *Bertelsmann AGand Sony Corporation of America v Commission*, Rec.2008,p.I-4951, para 61

943judgment of the ECJ of 7 January 2004, Joined cases C-204/00 P,C-205/00 P, C-211/00 P, C-213/00 P, C217/00 P and C-219/00 P, *Aalborg Portland v Commission*, [2004] ECR I-123, para 19

944Alternatively, the consequence of the different value of these rights may be simply that alleged victims of violations of procedural rights will not be able to benefit from the facilitation on the burden of proof that the case-law seems to have established in favour of rights of defence.

Specifically, it does so by exploring the different phases of the Commission's procedure: (A) The investigative phase, (B) Procedures potentially leading to a prohibition decision, (C) The oral hearing, and (D) The Post-oral hearing.

A description of the main issues related to each of these phases is sketched throughout the following subparagraphs, in the attempt to give a clearer picture concerning potential deficiencies of the system with regard to the right to be heard.

Two separate sections are dedicated by the Guidance to the admission to the procedure of third parties and to the so called “other procedures”. While the latter contains some important remarks on the role of the Hearing Officer in commitment decisions that will be briefly discussed after the description of the four phases mentioned above, this article will not specifically address the former section in light of the fact that third parties other than complainants, if admitted, have a somewhat different status and enjoy only limited procedural rights. In essence, their right to be informed of the nature and subject of the proceedings is constrained by the discretion of DG Competition to determine the means by which they will be informed, and the scope of the right to make known their view is by consequence dependant on whether the information provided by DG Competition enables them to do so[945]. For the present purposes, suffices to say that while at first blush, one may find regrettable that there is currently no legislative provision allowing the Hearing Officer to ensure that DG Competition delivers all the information necessary and relevant for these third parties to make known their view, it is not to be underestimated the capacity of the Hearing Officer to operate "behind the curtains" in the particular case, to convince DG Competition that a broader array of information should be conveyed.

i. The investigative phase

The recognition of defence rights during the course of the investigative phase has been a critical issue, surely not meant to be covered when the Commission "launched" the Hearing Officer enterprise. Moreover, the fact that defence rights, and in particular the right to be heard, has no

945Guidance, para. 17

application in the investigative phase has found support from the jurisprudence of the ECtHRin the *Saunders* case[946].

Rather, the expansion of the rights of defence to this area is the result of some relatively recent judgments where the Luxembourg's jurisprudence, perhaps warned by prior developments in Strasbourg[947], rebuffed the Commission for failing to give adequate protection to the right to be heard[948]. It is also thanks to these judgments that the "Hearing Officer enterprise" passed the stage of being merely a reviewing and strengthening of the internal case, and developed into a more effective external check on the DG Competition's operation.

As a result of that case-law, the investigated can now count on the right to be informed of the purpose and the subject-matter of the investigation now explicitly recognized by DG Comp except for cartel cases[949], the right not to self-incriminate and the right to be represented by a lawyer, as well as the right to raise confidentiality issues with the Hearing Officer. It should be noted, however, that notwithstanding the critical importance of this expansion of the rights of defence, the Hearing Officer recognizes his limited role in this phase of the proceedings: like the ECJ stated in *Dalmine*[950], an undertaking subject to investigatory measures can only rely in full on its rights of defence once a SO has been notified to it. It is for this reason that it will look into the confidentiality issues only upon request of the investigated undertakings, and will address them *"if raised in the reply to a Statement of Objections"*[951] . This stimulates a needle questions regarding the disposability of rights of defence: is it really acceptable for the European legal

946 Judgment of the EctHR of 17 December 1996, Case 43/1994/490/572, *Saunders v United Kingdom*, [1997] 23 EHRR 313, para. 68

947 See, in particular, two lines of cases brought by the European Commission of Human Rights: The first follows the decision of 4 July 1983, *H v UK*, Req. no. 100000/82, *supra* note 822. The other one is based on the decision of 13 December 1982 no. 9453/81, D.R. vol. 31 and 13 July 1983 no. 9022/80, D.R. vol. 33, p. 21, establishing that the due process guarantees are applicable to the investigative phase in criminal matters, notably in a legal system where the collection of evidence is essentially carried out at this stage.

948 judgments of the ECJ of 7 January 2004, Joint Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland v Commission*, [2004] ECR I-123, para. 63 (citing the judgment of the ECJ of 21 September 1989, Cases 46/87 et 227/88, *Hoechst v Commission*, Rec. p. 2859, para. 15); 8 July 2008, Case T-99/04,*AC- Treuhand*, Rec.2008,p.II-1501, paras. 51-56 (citingthe judgment of the ECJ of 21 September 2006, Case C 105/04, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, Rec.2006 p. I-8725, paras 47-50)

949Best practices on the conduct of antitrust proceedings concerning articles 101 and 102 TFEU, paras. 14 and 23

950Judgment of the ECJ of 25 January 2007, Case C-407/04 P, *Dalmine v Commission* [2007]ECR I-829, para 59. See also the judgment of the CFI of 8 July 2008, Case T-99/04, *AC-Treuhand* AG *v Commission* [2008] WLR (D) 229, paras. 76 et seq.

951Guidance, para. 11

system that a public figure known as the "guardian of fair proceedings"[952] lacks the power to stop violation of rights of defence from materializing even when he is aware of it? Especially in light the fact that right of defence are fundamental rights, shouldn't it enjoy more powers to secure their respect?

For the sake of completeness, it should ne noted that the new Mandate of the Hearing Officer, published and entered into force in 2011, provides an additional power for the Hearing Officer to act upon request of undertakings or association of undertakings which have been subject to an investigative measure, so as to order DG Competition to inform them of their procedural status[953].

ii. Procedures potentially leading to a prohibition decision

Most of the work of the Hearing Officer is carried out following the notification of the Statement of Objection, which marks the entry into the territory of the procedures potentially leading to a prohibition decision. The procedural rights for the addressee in this phase include getting proper access to file[954], applying to the Hearing Officer for any dispute concerning the disclosure by the Commission of confidential information which might be necessary to exercise the right to be heard, and requesting an extension of the time-limit to reply to the SO.

An important feature of the decision of the Hearing Officer in case of disputes on the disclosure of confidential information, which involves a balancing test between the third party's interest to confidentiality and the addressee's right to be heard, is that they can be immediately challenged to the General Court (and more specifically, only by the party who has provided the information in question). This is, once again, a procedural right that originates from the case-law of the Court of Justice[955], which also established the procedure that the Commission must follow were it to

952Guidance, para. 3

953 Decision of the President of the European Commission of 13 October 2011 on the function and the terms of reference of the hearing officer in certain competition proceedings (2011/695), OJL 275, 20.10.2011, p. 29, Article 4 (d)

954According to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004

955 Judgment of the ECJ of 24 June 1986, Case 53/85, *AKZO Chemie BV and AKZO Chemie UK Ltdv Commission*, (1986) E.C.R., p. 1965, para. 29

consider to disclose an information for which confidentiality is claimed (the famous "AKZO procedure")[956] .

By contrast, it seems remarkable that no legal recourse is provided to immediately challenge the Hearing Officer's decisions concerning access to file[957] and extensions of deadlines. Recently, the Court ruled in the *Intel* case against the possibility of appealing decisions refusing the extension of deadlines and access to certain documents necessary to ensure rights of defence, stressing that *"the decisions refusing to grant access to those documents and, subsequently, to extend the deadline for service of the reply to the SSO, even though they may constitute an infringement of the rights of the defence, are merely preparatory measures whose negative effects will be felt only in the event of any final decision finding that there has been an infringement"*[958]. While the accuracy of this statement is irrefutable, it is submitted here that the fact that the negative effect will only materialize at a later stage of the proceedings does not mean that, as the reasoning of the Court implied[959], those acts are not capable of immediately and irreversibly affecting the interests of an investigated party. Because of the wide discretion enjoyed by the Commission in "complex economic assessments", and the consequent inability of an appellant to engage the Court in a discussion on the merits of its economic arguments, it seems at least questionable to assume that an investigated party will be able to obtain after the adoption of the final decision a valid remedy for any injustice that might be caused through interlocutory acts. The conclusion logically follows then that such acts ought to be amenable to judicial review according to article 263 of the EC Treaty[960]. In absence of spontaneous

956 Such decision has to be notified to the company concerned, which has to be given the opportunity to bring an action before the Court of First Instance with a view to having the Commission's assessments reviewed. The information may then not be disclosed before one week after the decision has been notified.

957 This possibility was explicitly ruled out in the judgment of the CFI of 18 December 1992, Joined Cases T – 10, 11, 12 and 15/92, *Cimenteries CBR v Commission* [1992 ECR II-2667; [1993] 4 CMLR 259. The approach was also endorsed by Advocate General Léger in his opinion in Case C-310/93P, *BPB Industries andBritish Gypsum v. Commission* [1995] ECR I-865, at footnote 101 and para. 122

958 Order of the President of the CFI of 27 January 2009, Case 457/08, *Intel v Commission*, para. 56

959 *Ibidem*, paras. 52-53

960 Of this opinion Matthew Lewitt, Commission Hearings and the Role of the Hearing Officer: Suggestions for Reform , 1998 European Competition Law Review 6, p. 406, quoting for comparison judgment of the ECJ of 11 November 1981, Case 60/81, *IBM v Commission* [1981] 3 CMLR 635; judgments of the CFI of 10 July 1990, Case T- 64/89, *Automec v Commission* [1990] ECR II-367;[1991] 4 CMLR 177; 27 June 1995, Case T – 186/94, *Guerin Automobiles v Commission* [1995] ECR II-1753; [1996] 4 CMLR 685. Orders of the CFI of 14/03/1996, Case T – 134/95, *Dysan Magnetics and Review Magnetics v Commission* [1996] ECR II-81; 9 June 1997, Case T – 9/97, *Elf Atochem v Commission* [1997] 5 CMLR , 844. In a similar fashion, see the Opinion of the Advocate General in *BPB Industries andBritish Gypsum v. Commission* [1995] ECR I-865, footnote 101.

legislative action in this regard, we will probably just have to wait, as for *AKZO* on disclosure of confidential information, for a court case to establish the possibility of lodging direct appeal against those measures, thus officially recognizing the otherwise lack of effective access to justice.

iii. The oral hearing

Ensuring the objectivity of the oral hearing was the very purpose for the creation of the Hearing Officer's post, and initially its main focus. This is the reason why the powers of the hearing officer for the preparation and chairing of the hearing were well developed already in the first Mandate. Still, it is surprising that throughout the two revisions of the Mandate the need has never been felt to expand the scope of these provisions so as to confer participants to the hearing with some of the procedural guarantees that are considered ordinary in a trial-like situation. The absence of specific rules may lead on certain occasion to adverse effects on the dialectic process of the hearing: for example, since there are no specific rules regarding the standard to be met by third parties called on to testify as experts, it is not to unimaginable that in response to the intervention of these "experts", participants exhaust the limited time which is allotted to them in attacks to the reliability of such experts, instead of focusing on more important elements of the case. One may wonder then why the Hearing Officer has not adopted some Rules of procedure akin to those that are used by the General Court, though obviously reduced in length and scope, to minimize such problems.

Concerning the preparation of the hearing, the Mandate provides that the Hearing Officer establishes the date, duration and location and the attendants. The timing however will be usually a result of a compromise of the parties' availability with that of the other participants. In this respect, some criticism has been expressed stressing that the date should be fixed primarily in the interests of the addressees of the SO, whereas the current Mandate does not contain any criteria and the discretion enjoyed by the Hearing Officer in that regard is too broad[961].

961Stephen Kinsella, Is it a Hearing if Nobody is Listening?, Competition Policy International Antitrust Journal, 2010 (1) p. 4

Another criticism can be raised in connection with the contacts that the Hearing Officer may take with the undertakings concerned. To facilitate the focus of the hearing on the critical issues, he may let them know in advance the issues on which he would like to hear their point of view. He may also invite them to a prior meeting with him, and if necessary with the relevant Commission's department; and ask for prior submission of the main content of the statements of the persons to be heard at the hearing[962]. While this sort of "anticipation" of the hearing is no doubt useful to speed up the procedure and thus increase the efficiency of the hearing, a doubt may arise as to whether other participants to the hearing, and especially the addressees, would not be entitled to benefit from any anticipation made *vis a vis* any participant to the hearing : it seems feasible, for example, and certainly fair that they obtain from the Hearing Officer non-confidential information about the object of the discussion to which an undertaking has been invited, as well as the material submitted in advance by the undertakings on behalf of the persons to be heard at the hearing. Along the same lines of preparing the ground for the operation of the *contradictoire*, a potential improvement in the preparation of the hearing would be the establishment of a rule (possibly, included in the Rules of Procedure the convenience of which was emphasised above) according to which the Commission must disclose in advance the main content of its presentation, and allow the Hearing Office to send it to the parties concerned so as to enable them fully to exercise their right to be heard.

Concerning the chairing and the organisation of the hearing, the most crucial and recently debated issue regards the absence of a process of cross-examination of leniency applicants. More often than not, investigations in cartel cases are driven by information submitted by fellow cartel members who have applied for the Leniency Programme. Given the fundamental importance of the right to be heard in the European legal system, it should naturally follow that the undertakings accused have the opportunity to confront with the accuser and contest the evidence provided, as would be required for criminal charges by article 6 (3) of the ECHR. However, due mainly to issues of confidentiality and fear of retaliation, it is hardly plausible that a leniency

962Art 11 of the Mandate

applicant will attend the hearing[963] . This is often recognized as one of the major failures of EU competition enforcement in securing protection of fundamental rights, which implies that until the system does not find a fix for such problem, it cannot be affirmed that the Hearing Officer ensures full respect for the right to be heard. Unfortunately, the Hearing Officer's inability lies within the very nature of the hearing, which has been conceived as an entirely voluntary process. As a result, it has no power to summon witnesses, nor have the participants to the hearing an obligation to answer questions or tell the truth. Even if some recent developments appear to show, as noted above[964], that the delegation of decision-making powers to the Hearing Officer has turned failures to submit applications to him into evidence that could be used against an aggrieved party in further legal proceedings, this is clearly not the case for applications for oral hearing, since the hearing officer lacks any decisional powers as to the subject matter of the controversy.

We can thus only imagine how *could* the hearing officer manage cross-examination of leniency applicants, *if* it had the powers to issue subpoenas. Arguably, the problem of confidentiality could be to a large extent dealt with by making use of article 13 of the revised Mandate, according to which "[…]*The hearing officer may also decide to hear persons separately in a closed session, having regard to their legitimate interest in the protection of their business secrets and other confidential information*". By holding *in camera* hearings where only the accused, the leniency applicant and their lawyers are present, the Hearing Officer would be able to preserve confidentiality *vis a vis* third parties –shielding both the accused and the accuser from private enforcement actions, for example- while ensuring the respect for the right to be heard.

iv. The Post-oral hearing

The post-oral hearing phase is the phase during which the Hearing Officer submits, as indicated above, an "interim report" to the Commissioner. Such report, which addresses all procedural issues relating to the fairness of the procedure, may also contain observations on specific issues brought to the attention of the Hearing Officer by any part during the procedure, as well as on the

963For this reason it has been proposed the establishment of a direct relationship between the amount of leniency and the effective participation to the hearing: see J.Modrall and R Patell, 'Oral Hearings and the best practices guidelines', Competition Policy International Antitrust Journal, 2010 (1), p. 4

964See *supra* note 44

substance of the case. Yet no right is vested on any party to the proceedings concerning such report. This can be attached under two different points of view: first, the existence of such provision seems to contrast with the objective of ensuring respect for the right to be heard, to the extent that the very exercise of such right is not fed into the subsequent decision of the Commissioner (except in cases where he spontaneously decides to react to the Hearing Officer's comments). Secondly, as stressed above, the convenience of a provision as such is even more questionable after the establishment of "peer review panels": a skeptical eye may well perceive this as an unnecessary duplication.

In addition to the submission of the report, the Hearing Officer may have a responsibility as a follow-up of the hearing. In particular, such responsibility arises only if he deems it appropriate, after consulting the director responsible, in view of the need to ensure respect for the right to be heard[965]. It consists in affording persons, undertakings and associations of persons or undertakings the opportunity to submit further written comments after the oral hearing, within a fix date that is determined by the Hearing Officer. This is no doubt a valuable addition for the purpose of respecting the principle of *contradictoire*, which may sometimes require the extension of the dialectic process beyond the time allotted by the hearing officer. Therefore, this provision provides the opportunity to repair some potential deficiencies of the hearing, and in line with well-settled ECHR case-law, it may affect the fairness of the entire proceedings[966]. From the right to be heard viewpoint, the protection afforded by this provision could be seen as defective to the extent that it remains discretionary on the Hearing Officer to authorize such submissions. Given its specific competencies and expertise, it seems unlikely that the Hearing Officer will let the need for an extension of the *contradictoire* beyond the hearing go unnoticed. Nonetheless, it can be argued that, precisely for the same reason as for the interlocutory acts

965 Art 12 (4) of the revised Mandate

966As reminded by the ECtHR in *Le Compte, supra* note 6, "*L'article 6, 1 s'il consacre le droit à un tribunal […], n'astreint pas pour autant les contractants à soumettre les contestations sur [des]droits et obligations de caractère civil' a des procedures se déroulant à chacun de leurs stades devant des 'tribunaux' conformes à ses diverses prescriptions. Des imperatives de souplesse et d'efficacité, entièrement compatibles avec la protection des droits de l'homme, peuvent justifier l'intervention préalable d'organes administratifs ou corporatifs […] ne satisfaisant pas sous tous leurs aspects à ces memes prescriptions*". The ECHR jurisprudence has also consistently assessed the existence of a violation of article 6 looking at the proceedings in their entirety, rather than at a single stage of the proceedings : see for example, on the "reasonable time" requirement, the judgment of the ECtHR of 24 November 1993 in *Imbroscia v Switzerland*, série A n° 275, para. 36, and the case-law cited therein

referred to in para. 3.1 above, decisions by the Hearing Officer regarding such matters should be amenable to judicial review.

Finally, a further task of the Hearing Officer during this phase is to address the issues raised by the parties in relation to a Supplementary SO or a Letter of Facts (i.e, a letter stating that the Commission intends to rely on new evidence that corroborates the objections already made). Importantly, the Best Practices recognize that "The procedural rights which are triggered by the sending of the initial Statement of Objections apply *mutatis mutandis* in case a Supplementary Statement of Objections is issued, including the right of the parties to request an oral hearing.[967] ». It follows that in case of a new SO, the hearing officer will essentially explete the same functions as those described in paragraphs 3.2 and 3.3. By contrast, the implementation of the right to be heard may suffer some limitations in this phase with respect to the contestation of new factual elements (as opposed to new grounds for violations of competition rules) adduced as evidence: after receiving a letter of facts, the undertakings will only be granted the possibility to express its position within a fixed deadline and the position will only be expressed in writing. This appears to be in contrast with the practice of the majority of EU member states and the major jurisdictions outside the EU, where as noted by the Organization for Economic Cooperation and Development (OECD), there must be an oral hearing before the members of the decision-making body that will ultimately take the decision[968].

v. Other Procedures

The Guidance concludes the analysis of the different context of operations with a final section which concerns two types of procedural rights that are by their nature very different to the ones listed so far. The first regards complainants: according to the distinction made by the Hearing Officer above, complainants do not enjoy rights of defence but are entitled to the respect of some procedural rights. Concretely, however, these rights are functional to allow the exercise of the right to be heard and thus very similar (although with a different objective and narrower in

967 Best practices on the conduct of antitrust proceedings concerning articles 101 and 102 TFEU, para. 98
968 OECD country studies – European Commission – Peer Review of Competition Law and Policy – 2005, p. 63, available at http://www.oecd.org/dataoecd/7/41/35908641.pdf.

scope) to those enjoyed by undertakings that are addressees or potential addressees of the SO. In particular, once complainants are informed by the Commission that it considers that there are insufficient grounds for pursuing a complaint, and that it gives them a definite time-period to submit observations in writing, they are entitled to: 1) submit a reasoned request to the Hearing Officer for an extension of the deadline. 2) request the Commission to access the documents in its possession upon which it has based its preliminary assessment. 3) submit a reasoned request to the Hearing Officer for disclosure of documents in possession of the Commission to which access was not given. Additionally, complainants enjoy procedural rights where their complaint is being pursued by DG Competition: namely, they are entitled to receive a non-confidential version of the SO and make their views known within a time limit set by DG competition. But the list of entitlements stops here, notably cutting short of the right to request a hearing. They have, of course, the right to be admitted by DG Competition to any hearing that might be scheduled within the procedure related to the case for which they have submitted a complaint. They have also the opportunity to request to be heard orally following the letter through which the Commission has notified them of the intention to reject the complaint. Only the addressees of the SO, however, have the right to request a hearing.

The existence of such different scope of protection for procedural rights is important and well-founded, for the entitlement of complainants to such requests would place a substantial administrative burden on the Commission and would be, arguably, not required by international human rights standards. The ECHR, for example, akin to other international human rights treaties, limits the right to a fair trial to situations involving "the determination of [one's] civil rights and obligations or of any criminal charge against [oneself]". The decision of a case for which one has complained clearly does not give rise to claims concerning his civil rights of obligations: even if it may affect him indirectly through the impact of competition in the market, his civil rights and obligations will remain untouched. However, it is interesting to note that the formulation of the notion of "beneficiaries" of the right to be heard in the Charter of Fundamental Rights is broader in this respect, referring to the "right of every person to be heard before any individual measure which would affect him or her adversely is taken". The argument could be made, thus, that strict adherence to the Charter of Fundamental Rights requires interpreting such article to confer complainants with the right to request a hearing. A less

demanding interpretation would be, of course, to consider the provision as merely imposing the obligation to make known one's own view (for example, though the possibility to present observations in writing). Still, one could easily imagine cases in which the ability of the complainant to request a hearing serves to repair violations of due process occurred in a pathological situation. This option of conferring complainants with the right to request a hearing perhaps limited to some specific circumstances, like the absence of a request in that sense by the addressees or the emergence of new elements of fact following the hearing requested by the addressees, deserves at least some consideration after the entry into force of the Lisbon Treaty.

Finally, the Hearing Officer can be called to intervene at any stage during the procedure of negotiation of commitment ex article 9 of Regulation 1/2003, in order to ensure the effective exercise of their procedural rights[969]. The Guidance went even beyond that, specifying that a final report will be prepared in cases of commitment Decisions "*taking into account that the undertaking concerned has been put in a position to propose adequate commitments, or to modify them following a market test*"[970]. The problem in this context is one of complexity: it seems unlikely that -given the limited time and resources- the Hearing Officer will be able to properly assess whether the undertaking was in the position to offer "adequate commitments". Grasping the notion of "adequate" in complex cases arguably requires more than a skimming through some thousands of pages. Arguably, this inadequacy could be at least minimized by allowing the Hearing Officer to sit in at the actual negotiations between DG Competition and the proposing party, so as to allow him to gain first-hand knowledge about how the different interests at stake have played out in the negotiation. It is important to bear in mind, however, that this arrangement would probably not be required under any of the current due process standards: undertakings are free to engage into a negotiation to propose commitments and are free to leave it at any time. Moreover, commitment decisions do not establish any violation of competition law, nor do they impose any fine. Accordingly, it seems hard to square these procedures into the notions of "individual measure which would affect [one] adversely" and "determination of rights and obligations" referred to by article 41 (2) of the Charter and 6 (1) ECHR. Nonetheless, such a solution should be considered so as to avoid the risk that the Commission uses such

[969] Article 15 of the revised Mandate
970 Guidance, para. 68

negotiated procedures, and the alternative of a fine as a threat, to *de facto* impose solutions at its will and circumvent the procedural guarantees that the competition enforcement system otherwise provides. In those circumstances, it would not be an overstretch if the EctHR were to hold that the protection of individual rights afforded by the EU is "manifestly deficient", in such a way as to rebut the "presumption of equivalence" [971]and to find the EU liable for miscarriage of justice under article 6 (1) ECHR.

3. Judicial Review

As every society based on the rule of law, the EU provides a mean by which the individuals or entities affected can lodge an application for judicial review of a decision taken by the public authority, including to lament a violation of due process. Under article 263 of the Treaty, the Court of Justice of the EU has jurisdiction to review the legality of any act or regulation adopted by a European institution by which they are «individually concerned »[972]. This allows any natural or legal person the interests of which have not been adequately represented or protected by the institution in the formation of the act to request the General Court to review the original reasoning leading to the formation of the act, and determine with a fresh mind whether the institution concerned had the competence, misused its powers or violated an essential procedural requirement, the Treaties or any rule of law relating to their application[973]. However, when compared to a situation in which the process of formation of the act duly takes into account in the first place all the interests concerned, the effectiveness of this *ex-post* control can only be limited, as it suffers from two main disadvantages.

a. Timing of review

The first, obvious disadvantage is a timing issue: on average, letting aside the special categories of staff cases, intellectual property and appeals from the Civil Service Tribunal, the General

[971]See *Bosphorus Hava Yollari Turizm ve Itcaret Anonim Şirketi v Ireland* (App 45036/98), 30 June 2005 [GC] (2006) 42 EHRR 1
972Article 263 (4) TFEU
973Article 263.2 TFEU

Court delivers its judgments in 33 months[974] from the date in which the application was submitted. During this period, undertakings and individuals will *de facto* have to live with the consequences of the contested act without having access, in the short-term, to an effective legal remedy. To minimize the likelihood that such situation might give rise to substantiated claims of "denial of justice"[975], article 104 of the Rules of Procedure of the General of the Court affords the applicant the opportunity to apply in cases of urgency for *interim measures* which can have a suspensory effect on the enforcement of a decision of any measure adopted by an institution. However, the case-law has demonstrated that the conditions for such type of requests to be granted, based upon the showing of *fumus boni iuris* (i.e., a *prima facie* case) and *periculum* (i.e., a serious and irreparable harm) *in mora*, are extremely rigorous. Well known is the rejection in 2008 of the application for interim measures in the *Microsoft* case, where the applicant argued that the disclosure of the information relating to the interoperability of a product with competitors' products that had been ordered by the Commission would have altered the market conditions in such a way that that Microsoft would not only lose market share but also would no longer be able to regain the market share lost. On that occasion, the Court made clear that it is for the undertaking concerned to adduce any factual evidence to support its argument, in that particular case by demonstrating that there would be obstacles preventing it from regaining a significant part of the share which it could have lost as a result of the remedy[976].

More recently, the General Court confirmed in the *Intel* case[977] its general skepticism towards the fulfilment of the conditionslaid down by the case law: in rejecting an application submitted by Intel to avoid the consequences of a final decision which would be taken on the conclusion of a Commission's procedure in breach of its rights, it stressed that the occurrence of the harm alleged depended on a future and hypothetical event, namely the adoption by the Commission of a final decision unfavourable to the applicant[978].

b. Scope of review

974Statistics referred to the year 2009, available at http://curia.europa.eu/jcms/jcms/Jo2_7000/
975Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge, Cambridge University Press, 2005)
976Order of the President of the CFI of 22 December 2004, Case 201/04, *Microsoft v Commission*, para. 319
977Order of the President of the CFI of 27 January 2009, Case 457/08, *Intel v Commission*, para. 85
978Unfavourable decision which, for the record, materialized approximately 100 days after the order of the Court

i. Substantive Deference

The second disadvantage of actions for annulment *vis a vis* full participation to the proceedings leading to the adoption of the act is the limited scope of the protection that this legal tool can afford.

In that regard, a distinction should be made between the scope and intensity of judicial review: while the former describes the areas of administration which are subject to review by the courts, the latter refers to the standard that is followed by those courts in deciding whether the action was appropriate. In EU competition law, the scope of review is different between article 261, which confers unlimited jurisdiction "with regard to the penalties provided for in such regulations", and Article 263 TFEU which limits the EU Courts' jurisdiction to a review of the legality (also called "annulment jurisdiction") of the acts of the institutions, including Commission decisions in competition matters. This means that the review will hinge upon the specific grounds, and will not encompass substantive assessments of the measures the Commission chooses to implement or policies it pursues in a given case. Rather, the objective is to control that the decisions are not illegal under one of the 4 grounds of annulment listed in article 263, namely:

- lack of competence
- infringement of an essential procedural requirement
- infringement of the Treaties or of any rule of law relating to their application
- misuse of powers

The first ground simply refers to the institutional competence to adopt a given act. The second is less clearly defined, as it will be for the Court to decide whether a given procedural requirement is essential. Nonetheless, the body of case-law developed so far provides the indication that this would be the case at least for the duty to give reasons[979], the duty to grant a hearing[980] and

[979] Case 24/62 *Germany v EEC Commission* [1963] ECR 63 at 69, CMLR 347 at 367; Case 158/80 *Rewe Handelsgesellschaft Norn mbH v Haptzollamt Kiel* [1981] ECR 1805, [1982] 1 CMLR 449; Case 131/86 *United Kingdom v Council* [1988] ECR 905, [1988] 2 CMLR 364; Case 45/86 *Commission v Council* [1987] ECR 1493, [1988] 2 CMLR 131; Case C-181/90 *Consorgan-Gestão de Empresas Lda v Commission* [1992] ECR I-3557

[980] See for example Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, at 1080, [1974] 2 CMLR 459 at 477, 478; Case C-32/95 P *Commission v Lisrestal* [1996] ECR I-5373 at I-5396

various requirements of legislative procedures[981]. The third is also not a finite and immutable category, as it includes general principles of EU law and implementing legislation. Finally, the fourth ground is about the use of a power with the main or exclusive purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty[982].

As a result, the conventional view is that, except for the amount of fines for which article 261 confers unlimited jurisdiction, the judicial control operated by the EU courts over the competition decisions of the EU Commission is simply a legality control, by which judges cannot substitute their reasoning to that of the institution.[983] In contrast to that, a scholar has advanced the argument that article 261 should be interpreted as empowering the Courts to operate a full review of the decisions imposing pecuniary sanctions and periodic payments, not limited to the actual penalty[984]. Allegedly, the possibility of doing so was implied by the acknowledgment by General Court when that:

> An action in which the [Union] judicature is asked to exercise its unlimited jurisdiction with respect to a decision imposing a penalty necessarily comprises or includes a request for the annulment, in whole or part, of the decision[985]

Notwithstanding the fact that the General Court has shown an increasing willingness to engage in the examination of the Commission's assessments[986], the bar for contesting the Commission's reasoning in several aspects of competition decisions remains high: due to the view by the Court

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[981] Lasok & Millet, JUDICIAL CONTROL IN THE EU, at 109, 111

[982] Case T-87/05, *EDP v Commission* [2005] ECR II-3745; see also Case 6/54 *Netherlands v High Authority* [1954-46] ECR 103 at 116; Case 15/57 *Compagnie des Hauts Fourneaux de Chasse v High Authority* [1957-58] ECR 211 at 230

983 In competition law proceedings, the usual assertion is that the Court cannot substitute its assessment with the legal and economic appraisal of the Commission: see judgment of the ECJ of 15 June 1976, Case 74/74, *CNTA SA v Commission* [1975] ECR, paras 21- 22; judgment of the CFI of 15 July 1994, Case T - 17/93 *Matra Hachette v Commission*[1994] ECR II -595; judgment of the CFI of 12 December 2006, Case T – 155/04 *SELEX Sistemi integrati Spa v Commission* [2007] 4 CMLR 10, para 28

[984] Damien M. B. Gerard, Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?, in 36 (4) European Law Review (2011) 457, 477.

[985] Order of November 9, 2004 in *FNICGV v Commission* (T-252/03) [2004] ECR II 3795 at 25; Case T-69/04, *Schunk*, [2008] ECR II-2567 at 246

986*See for example the judgment of the CFI of 6 June 2002, Airtours plc v Commission [2002] ECR II-2585; 22 October 2002, Case T-310/01, Schneider Electric SA v Commission [2002] ECR II-4071; 25 October 2002, Case T-5/02, Tetra Laval BV v Commission [2002] ECR II-4381; 13 July 2006, Case T-464/04,* Impala v Commission[2006] *ECR* II-2289

that the Commission has engaged in complex economic appraisals, the Court will limit its analysis to "manifest errors of appraisals or misuses of power".

The concept « complex economic assessments » as limit to the scrutiny of the Community judicature in competition law was used for the first time in the 1966 judgement of the ECJ in *Consten - Grundig*, where the ECJ held:

> Review by the Community judicature of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article [81](3) of the Treaty, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers

Thus, it all started with the idea that the Treaty conferred discretion in the assessment of the conditions laid out by former article 85 (now 101) (3) and had originally been used until 1984 only with respect to the application of article 81.3 (now 101.3). Subsequently, starting from *Remia* in 1985, its scope expanded to the application of article 101 and 102 more generally[987].
This tendency to refer to « complex economic assessments » has even gone further, encompassing in some instances « complex technical assessments»[988], « complex ecological assessments »[989], «complex economic factors subject to rapid change»[990], «complex economic,

[987] Case 42/84 *Remia v Commission*, (n 15). See also, Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para. 62; Case C-7/95 P *Deere v Commission* [1998] ECR I-3111, para. 76 ; Case T-131/99 *Shaw v Commission*, 2002 E.C.R. II-2023. Joined Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires « CB » and Europay International SA v Commission* [1994] ECR II-49, para. 109. See also, Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission* [1995] ECR II-289, para. 288.Case T-201/04. *Microsoft v Commission*, [2007] ECR II-3601, para. 87. Case T-112/99 *Métropole télévision and Others v Commission* [2001] ECR II-2459, para. 114 ; Case T-168/01 *GlaxoSmithKline v Commission*, (n 19) para. 57.

[988] Case T-201/04. *Microsoft v Commission*, [2007] ECR II-3601, para. 87 ; and Case T-301/04. *Clearstream Banking AG and. Clearstream International SA. v. Commission of the European Communities* [2009] ECR II-3155 ; T-340/03 *France Télécom v Commission* [2007]. ECR II-107

[989] Case T-374/04 *Germany v Commission*, 2007 E.C.R. II-4431

[990] Judgment of the Court of 8 March 1998, *Executif regional wallon*, Joined Cases 82/87 and 72/87, ECR p. 61573, para. 21

social, regional and sectorial assessments»[991], and "economic and social assessments which must be made in a Community context"[992].

As emphasized by a growing strand of literature[993], the outcome of an increasing number of court cases in competition law is being determined by reference to "complex economic assessments", leading to a deferential approach to judicial review. The idea of "complexity" has been used to cover not only the possibility of granting an individual exemption or making prospective assessments in merger control, but also the definition of the relevant market, including the classification of different types of product, the assessment of exchanges of price information, the tests determining the existence of predatory prices.[994]

In order to fully grasp the concept of the proper scope of judicial review in matters which are subject to administrative discretion, it is important to remind the distinction mentioned in chapter 1 between policy-related (or political) discretion from the so called "technical discretion". While the former refers to the possibility for the administration to freely choose between one action and another, the latter originates from the leeway granted to the public authority to make its determination on whether the application of the law is triggered by occurrence of certain facts. More precisely, the authority has to determine whether the factual situation presented falls within the scope of application of open-ended concepts used by the law to guide the decision-making.

For this purpose, it should be noted that the use of open-ended language in the statute constitutes

[991] E.g. *Landbroke*, Case T 57/94, para 52; *Deutsche Post*, Case T-265/02, para. 90 ; *Italy v Commission*, Case C-372/97, para. 83 ; *Spain v Commission*, Case C-409/00, para. 93

[992]*Philip Morris Holland Bv v Commission*, Case 730/79, para. 24 ; Deufil, Case 310/85, para 18 ; *Matra*, Case C-255/91, para 24 ; *Spain v Commission*, Case C-351/98, para 74 ; *Spain v Commission*, C-409/00, para 93 ; *Italy v Commission* , Case C-372/97, para 83 ; *Italy v Commission*, Case T-211/05, para 169. Judgment of the General Court of 8 October 1999, *Sportartikel*, Case T-110/97 [1999] ECR II-02881, para 46

993 Ian Forrester, A Blush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review", paper presented at the 14th Annual Competition Law and Policy Workshop of the European University Institute, June 19-20, 2009, to be published in 2009 Competition Law Annual (Hart Publishing); Vivien Rose, Margins of Appreciation:Changing Contours in Community and Domestic Case Law, (2009) Competition Policy International Vol. 5 No. 1.; Andreangeli, and others , *supra* note 804; Steven M. Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalization of the Marginal Review, 2 Journal of European Competition Law & Practice 295 (2011);

[994] Case T-131/99 *Shaw v Commission*, 2002 E.C.R. II-2023, para 39 ; Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote* (SCPA) and *Entreprise minière etchimique (EMC) v Commission* [1998] ECR I-1375.case T-446/05, *Amann & Söhne* [2010] ECR II-1255, at para 136 ; joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Cement* [2004] ECR I-123, at para 279 ; case C-280/08 P, *Deutsche Telekom* [2010] ECR II 477, at paras. 143-148; case C-202/07 P, *France Télécom* [2009] ECR I-2369, at para 7.

an invitation for the administration to fill in the content of the norm; and in doing that, the administration may be using its expertise for two different purposes: either to make a policy choice over the convenience of a particular interpretation of the norm given the circumstances; or simply a technical determination over the necessary interpretation of the norm in a particular way- precisely, because the facts warrant such interpretation.

Now, as far as political discretion is concerned, it seems hard to contest "marginal review" is an as the appropriate standard of scrutiny: if the legislator has bestowed discretion to the executive, in fact, letting the judiciary intervene and second-guess the policies pursued by the Commission or the Council would not only be counter-productive, it would also upset the inter-institutional balance struck by the treaty. It has also been suggested that it would be inappropriate for courts to exercise *de novo* judgment in circumstances where the initial decision-maker has conducted an oral hearing, and evaluated the cogency of the witnesses, which process the reviewing court will rarely wish or be able to replicate[995].

Thus, if the discretion at issue is couched in open-ended terms one of technical nature, the question becomes whether the technical discretion is intended to make policy determinations based on expertise -to which "marginal review" would apply- or simply technical assessments on the basis of widely accepted rules of experience in the field –where a full judicial scrutiny is all the more necessary. The type of the scrutiny in the case of judgments of merely technical nature has been "*the technical nature of a case should not cause the Court to forsake its duty, under article [19 (1) TEU], to ensure that the law is observed"*[996]

In other words, as effectively described by Judge Bellamy[997] and recently restated by Judge Jager[998] and similarly by Judge Forwood[999]: "complex economic assessments" could (and in the

[995] Paul Craig, EU ADMINISTRATIVE LAW (Oxford, Oxford University Press, 2006), 469

[996] Case C-269/90, *Hauptzollamt München-Mitte v. Technische Universitat München*, [1991] ECR 1-5469, para. 13. In the same case, Advocate General Jacobs suggested that where technical questions are to be examined, the Court should do that with the support of independent experts, but without substituting its own opinion for that of the experts.

[997] Bellamy divides facts subject to competition adjudication in 3 categories: basic facts; economic facts (which pose to the judges questions of mixed law and facts); and "facts probably moving away from facts strictly so-called and almost entering the question of policy". See Christopher Bellamy, Standard of Proof in Competition Cases' in OECD Roundtable on Judicial Enforcement of Competition. Law of November 27, 1997

[998] Jager, *supra* note 993

[999] Nicholas Forwood, The Commission's more economic approach – Implications for the role of the EU Courts, the treatment of economic evidence and the scope of judicial review, in Mel Marquis, Claus-Dieter Ehlermann,

author's view, should) be interpreted to refer to those assessments that transcend the application of economics and involve "policy facts". Along the same line, Judge Vesterdorf argued, defending the standard of review adopted by the General Court in *Airtours* and *Tetra Laval*, that a greater margin of discretion should be accorded to pure economic assessments, whereas less to inferences drawn from primary facts concerning the likely creation or strengthening or strengthening of a dominant position[1000].This is to be read in conjunction with his outspoken recognition that the creation of the General Court as a court of both first and last instance for the examination of facts was "*an invitation to undertake an intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound*"[1001].

It should also be noted that even in case of "policy discretion", the "policy space" of the interpreter is not without limits: in fact, the EU Courts have repeatedly found that the development of a consistent practice in the determination of a certain choice may give rise to legitimate expectations[1002], particularly if founded upon a clear definition of the position[1003] and not surrounded by qualifications and reservations[1004]. This means that, once the meaning and scope of the open-ended notions have been clarified, the room for an alternative interpretation in later cases vanishes and the executive will be operating its choices under a so called «guided discretion ». This is, concretely, what happens when specific rules or guidelines are published by the executive, but also, in light of its duty to defer to the rulings of the Court of Justice, when the latter gives clarifications on the interpretation of a particular provision of the EU legislation. In the *Sun Chemicals* merger[1005], the General Court based its conclusions precisely on this argument, stating that in releasing guidelines, the Community institutions had auto-restricted any

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EUROPEAN COMPETITION LAW ANNUAL 2009 : THE EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES (Oxford, Hard Publishing 2011)

[1000] Bo Vesterdorf, Certain Reflections on Recent Judgments Reviewing Commission Merger Control Decisions, in Mark Hoskins and William Robinson (eds.), A TRUE EUROPEAN, ESSAYS FOR JUDGE DAVID EDWARDS (Hart, 2003), Chap. 10, at 140

[1001] Case T- 7/89, *Hercules v Commission* [1991] ECR II-867, I.B.1. See also Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, Opinion of AG Cosmas, at para 54.

[1002] Case 129/87 *Decker v Caisse de Pension des Employés Primmés* [1988] ECR 6121, paras 14-16; Case 14/88 Italy v Commission [1989] ECR 3677, paras 28-31

[1003] Case C 188/88 *NMB (Deutschland) GmbH v Commission* [1994] ECR II-323, para 103; Case C-292/97 *Karlsson* [2000] ECR I-2737, para 63; Case C-107/97, *Rombi v Arkopharma* [2000] ECR II-15, para 59; Case C-332/00 *Belgium v Commission* [2002] ECR I-3609, para 58

[1004] Case T- 229/94, *Deutsche Bahn v Commission* [1997] ECR II-1687, paras 114-116

[1005] Case T-282/06, at 55

possible discretion in deciding on which facts to base their decisions. Regrettably, this is not often appreciated by the General Court in reviewing competition decisions. Partially, this may be due to the practice of both courts to cite verbatim paragraphs of previous judgements, and use them in contexts that could be distinguished in light of the evolved legislative framework and/or the particular facts with which the executive took issue. A good example of this phenomenon is the courts' referral to the catchword « complex economic assessments » to justify a variety of actions in the merger context, even though substantive clarification has been achieved through the establishment of a new Regulation in 2004 and a number of soft-law instruments; but this is true in general for all those types of rules in the area of economic regulation that have significantly evolved over the last years.

What is the implication of this conception of judicial review for competition policy? Given the various sets of guidelines released in these two areas and the development of a vast body of case-law, it implies that the amount of discretion left in the hands of the Commission is increasingly shrinking. Thus, it is striking that this tendency is not paralleled by a corresponding change in the approach of Community courts to judicial review: notably, the concept of « complex economic assessments » is still often used by the courts to justify the absence of scrutiny over the actions of the Community with respect to a number of policy areas. Now, it is to be noted that the advocated « more economic approach » makes economics central, as it is on the basis of the economic effects (and not merely of the facts) that an action will be categorized as legal or illegal. Therefore, if the courts simply shy away from an inquiry into the reasonableness of ordinary economic assessments, competition law is likely to be the discipline which suffers most dramatically from a phenomenon of mechanic reference by the Court to this undefined notion of discretion.

All that said, one cannot fail to acknowledge that some areas remain where the executive still enjoys significant discretion, even in presence of clear economic benchmarks for the categorization of a given action as legal or not. This is not only because the particular cases differ from one another, but more importantly because economists use different methodologies to evaluate economic data and thus some measurement problems exist.

To that extent, the « guided discretion » mentioned above falls back into the box of policy-related (or political) discretion, so that the institution concerned will only have to explain in broad terms why it has chosen a particular method over another, without there being the need to spell out all the benefits and drawbacks of the two. This approach was confirmed in the area of public health by the CFI in *Pfizer v Council*[1006], where it ruled that « *when the scientific evidence is not conclusive, the competent authority must weigh up its obligations and decide either to wait until the results of more detailed scientific results become available or to act on the basis of the scientific information available: it has inherent political discretion* ».

One may conclude from the above that the Community courts should pay deference only when the discretion remains truly "political" in nature, in the sense that the statute grants the institution the power to make an assessment and that is not eroded by means of delegation, adoption of a consistent practice or issuance of guidelines.

ii. Procedural deference

Judicial review is also frequently not able to render justice to the aggrieved parties through its jurisdiction on violations of essential procedural requirements, which ideally represent the "typical" ground of appeal to challenge a procedural deficiency such as the violation of the right to be heard, and entitle the Court to raise the issue of its own motion[1007]. The problem with such ground of appeal is that the Court has adopted a rather restrictive approach to qualifying a procedural rule as essential to ground on it the annulment of a Commission's decision: it requires the undertaking concerned to bear the burden of proving that the contested act would have been different if the procedure had been respected[1008].

Fortunately, the General Court has distinguished this line of case-law from another one concerning the more serious violations of procedural requirements that protect fundamental principles of EU law, such as the right to be heard: in those circumstances, the aggrieved party

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1006 Case T 13/99, at 60-61

1007 judgment of the ECJ of 7 May 1991, Case C-304/89, *Oliveira v Commission*, ECR 1991, I- 2283, para. 18

1008 judgments of the ECJ of 29 October 1980 , Joint cases 209 a 215 et 218/78,*Van Landewyck c Commission*, para.47; 23 April 1986, Case 150/84, *Bernardi c Parlement*, para. 28; 10 july 1980, Case 30/78, *Distillers Company c Commission*, Rec. p.. 2229, para. 27; judgments of the CFI of 27 November 1990, Case T-7/90, *Kobor c Commission*, Rec . p . II-721, para. 30; 17 December 1991, Case T-7/89, *Hercules c Commission*, para. 56.

can lament violation of an essential procedural requirement simply by showing that the breach of the procedural rule has played a role in the contested decision, that is, if it concerns the gathering of evidence which the Commission has used to reach the decision[1009]. This means that an applicant for annulment will be relieved from having to prove the 'but-for' outcome where the violation has tainted a piece of evidence relied upon by the Commission in its decision[1010]. However, it will not prevent the Court from annulling merely a part of the decision if the remainder can stand on its own. Moreover, it is not clear whether such rule, which resembles the unforgiving exclusionary rule generally applied in criminal cases, could be invoked for the exclusion of the assessment of evidence legitimately collected (where the assessment was carried out in violation of the right for the parties to have their submissions duly considered) or of evidence that has been gathered violating procedural rules that are not meant to protect a fundamental right such as the right to be heard.

In light of the exposed, it is understandable why the availability of an action for annulment ex article 263 of the Treaty should only be considered as a safeguard, designed to operate when for some particular reasons the affected parties have not been able to exercise their participatory rights throughout the first phase, i.e. the process that led to the adoption of the final act. Judicial review cannot be taken as a panacea for the violation of rights of defence, nor as a systematic fix for the problems of competition law proceedings. Even the General Court has acknowledged, in this respect, that judicial control cannot be a substitute for a thorough investigation of the case in the course of the administrative procedure[1011].

iii. From *Engel* to *Menarini* and its aftermath

[1009] E.g., Case T-54/03, *Larfage SA v Commission*, [2008] ECR II-120, para 70; Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP et T-61/02 OP, *Dresdner Bank e.a.v Commission*, [2006] ECR II-3567, para 158.

[1010] This brings the EU case-law in line with the holdings of the ECtHR concerning failure of the public authority to disclose exculpatory evidence to the accused: according to the ECtHR, it is not necessary to show specific prejudice from the failure to disclose. See *Bulut* (1996) 24 EHRR 84; *Kress v France*, judgment of 7 June 2001 (GC) para 74; *Martinie v France* (2007) 45 EHRR 15 (GC) paras 45-50

1011 Judgment of the CFI of 29 June 1995, Case T-36/91, *Solvay v Commission*, ECR 1995, II-1833, para 108: "[...] any infringement of the rights of defence which occurred during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure".

As pointed out above in paragraph 2b[1012], counterclaims for violations of the right to a fair trial ex Art. 6 ECHR have been repeatedly invoked by defendants in EU antitrust enforcement. However, such defenses have constantly been dismissed, mainly for lack of jurisdiction. This is despite the fact that the ECJ has recognized early on that fundamental human rights are enshrined in general principles of Community law and protected by the Court[1013], and despite the occasional citation by the same Court of the ECtHR's jurisprudence, especially after the proclamation of the Charter of Fundamental Rights in 2000[1014]. Few cases had been brought to Strasbourg, however, which involved competition law proceedings. A cursory review of those cases appears therefore necessary to appreciate the escalation that brought to the judgment of the ECtHR in *Menarini* on 27 September 2011[1015], which arguably marks the beginning of a new era for competition enforcement. In doing such review, one must bear in mind that the case-law has become directly relevant in light of the acquired binding value of the Charter of Fundamental Rights and the expected accession of the EU to the ECHR, as noted supra in paragraph 1b.

At the outset, it should be clarified that the scope of the rights invoked under article 6 ECHR depend on the determination of whether the proceedings at issue are of criminal nature. The leading case in this respect is *Engel v. The Netherlands*[1016], where for the purpose of qualifying the nature of disciplinary proceedings held before a military court in The Netherlands, the Grand Chamber of the ECtHR laid out three criteria:

1) the classification under domestic law. This criterion, which is the least determinant, focuses simply on the qualification of the very proceedings which are object of the complaint -and not, for instance, proceedings which may arise in conjunction with those.[1017]

2) the nature of the offence. In particular, the analysis will turn to the characteristics of and objectives sought by the law with the particular prohibition, such as:

[1012] See, more specifically, *supra* note 928-930

[1013] Judgment of the Court on 12 November 1969, Case 29/69, *Erich Stauder v City of Ulm*, [1969] ECR 419, para. 7

[1014] See for example, judgment of the Court on 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof V Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* [2003] ECR 1-4919, paras. 71-77

[1015] ECtHR, *A. Menarini Diagnostics S.R.L. c. Italie*, judgment of 27 September 2011, App. no 43509/08

[1016] ECtHR, *Engel v. The Netherlands*, a judgment of 8 June 1976

[1017] ECtHR,*Neste v. Russia*, judgment of 3 June 2004 (admissibility decision in re applications no. 69042/01 et al.), para. 2

- whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character[1018];
- whether the proceedings are instituted by a public body with statutory powers of enforcement [1019];
- whether the legal rule has a punitive or deterrent purpose[1020];
- whether the imposition of any penalty is dependent upon a finding of guilt[1021];

3) the severity of the penalty. This criterion focuses not so much on the actual penalty, but rather on the maximum amount that the relevant law provides[1022]. In principle, this criterion is alternative to the previous one, and may in itself suffice for the qualification of a proceeding as criminal. However, the Court has also held that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge[1023].

Despite the significance of this ruling, it took a number of years for undertakings to challenge commercial law for having denied a fair trial. The first shake for competition law occurred when Société Stenuit, a company that had been fined for involvement in a market allocation scheme, was denied the right to benefit from an amnesty law which applied to criminal penalties, in particular due to the administrative character of the sanction under French law[1024]. The company, after exhausting internal remedies, lodged a complaint before the now defunct European Commission of Human Rights seeking a declaration that the proceedings were in fact criminal in the sense of the Convention, and lamenting a violation of the right to a fair trial. The Commission, after a review of the specifics of French competition law, concluded with a report in favor of the complainant in light of the nature of the law –being aimed at the protection of general interests of society (free competition) as it is often the case in criminal law- and both the

[1018] See, e.g. ECtHR,, *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, para. 47
[1019] See ECtHR, *Benham v. the United Kingdom*, judgment of 10 June 1996, Reports of Judgments and Decisions 1996 III, para 56
[1020] See ECtHR, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 21, para. 53; *Bendenoun v. France*, Ibid.
[1021] See ECtHR, *Benham v. the United Kingdom*, para. 56
[1022] ECtHR, *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, para. 72; *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, p. 17, para. 34
[1023] ECtHR, *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, para. 47
[1024] ECtHR, *Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A

severity of the fine- potentially reaching up to 5% of the annual turnover- and the deterrent effect which derived therefrom. Ultimately, the case was struck out of the record because "*[t]he President of the Republic's Order no. 86-1243 of 1 December 1986 on free prices and competition, which provided in particular for the creation of a Competition Council (Conseil de la concurrence), [had] to a large extent remedied the problems of principle raised by the Commission in its report*[1025]".

Shortly after *Société Stenuit*, an important ruling established a violation of the right to fair trial with regard to French tax surcharge proceedings[1026], in particular because the authority had proceeded to the enforcement before the Court made a determination on the request for stay of the proceedings. The Court define tax proceedings as criminal on the basis of the following: (1) the law setting out the penalties covered all citizens in their capacity as taxpayers; (2) the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; (3) it was imposed under a general rule whose purpose is both deterrent and punitive; (4) the surcharge was substantial. This was followed after few years by a very similar judgment concerning tax surcharge proceedings in Sweden[1027], where the Court relied on the criminal character of the proceedings to find a violation of the "reasonable time" requirement in that the authority took almost 3 years for reconsideration of the assessments.

In 2002, competition proceedings were brought to the attention of the European Court of Human Rights,[1028]once again upon complaint against France, this time for the violation of article 8 ECHR in conducting searches and seizures in the context of a competition investigation. This violation arose out of the procedures for the conduct of search and seizures, which did not set out any requirement of judicial authorization; however, those procedures were later amended in 1986 providing the need for authorization by the President of the *tribunal de grande instance* within whose territorial jurisdiction the premises to be searched are situated, or a judge delegated by him plaintiff obtained a favorable opinion by the Commission, and for (delegated) supervision and authority of the judge who authorized them. As a result, the judgment only established just

[1025] *Ibid.*,
[1026] ECtHR, *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284
[1027] ECtHR, *Janosevic v. Sweden*, judgment of 23 July 2002, at para 67
[1028] ECtHR, *Société Colas Est and Others v France* (2004) 39 EHRR 17. 49 C-94/00 Judgment of 16 April 2002

compensation for the applicant company, short of imposing France any amendment to its competition laws.

The following year, another decision by the Court determined that national competition law proceedings, this time in Finland, violated the right to a fair trial.[1029] The complaint was not based upon structural problems, though, but simply upon the fact that the Supreme Administrative Court had engaged in *ex parte* communication with the Competition Office, gathering evidence which the complainant had no opportunity to comment on; and since the Court established that this could have affected the outcome of the proceedings, it ruled that a breach of article 6 ECHR had occurred.

Just a few months thereafter, the Court rendered a judgment in yet another competition case regarding *ex parte* communications: in *Lilly*[1030], a company who had been fined for abuse of dominant position had unsuccessfully lodged appeal to the Paris Court of Appeal alleging that the reporting judge's report and the decision of the *Conseil de la concurrence du la concurrence, de la consommation et de la répression de fraudes* (" DGCCRF") were based exclusively on the investigation of the officers of DGCCRF, without having heard the Lilly and without having gathered a medical expert opinion . The rejection of the appeal was justified by stressing that:

> the engagement of the reporting judge in an inquiry is not obligatory (…) In particular, Lilly France benefitted of a process of evidence-gathering and of an adversary (*contradictoire*) procedure (…) in fact, its representatives were audited for the inquiry of the DGCCRF (…) it has been notified of the objections, it has been able to access the file and of making its observations in writing; (…) the reporting judge analyzed, in a precise and systematic manner, the complex of objections and documents provided by the party; (…) pursuant to the appreciation power that the law confers upon him with regard to the conduct of investigations, he was able to determine that there was no need to hear the representatives of the undertaking ;(…) it has been given in useful time the report of the reporting judge and it has been put in the position to present its observations"[1031].

[1029] ECtHR, *Fortum Corp v Finland*, judgment of 15 July 2003, [2004] 38 EHRR 36
[1030] ECtHR, *Lilly v France* - 53892/00 [2010] ECHR 1884 (15 September 2010).
[1031] At 21

The applicant company complained that it had not received a copy of the report submitted by the reporting judge to the Court of Cassation, whereas the Advocate-General had.The applicant appealed again unsuccessfully, this time to the *Cour de Cassation*, which started formulating its decision upon receiving the report of the *Conseiller Rapporteur* (reporting judge), a copy of which had been given only to the advocate general- and not the applicant. As a result, Lilly submitted an application to the ECtHR alleging a violation of the right to a fair trial, in particular the principle of equality of arms. Here, the Court distinguished between the summary of facts, procedure and of the grounds of appeal, and the advisory opinion rendered in the report: while the latter can remain secret to the parties as well as to the advocate general, the former must, where appropriate, be communicated to the parties and the advocate-general on equal terms. Not having been the case, the Court found that a violation of article 6 ECHR had occurred.

Arguably the most interesting and telling judgment in the era before *Menarini* was *Neste v. Russia*[1032]**,** a case involving an oil company accused of having engaged in concerted practices with competitors. After conducting an investigation, the Territorial Administration for St. Petersburg and the Leningrad Region of the Ministry for Anti-monopoly Policy and Business Support ("TU MAP") charged Neste and other companies ("the applicants") with the a violation of article 6 (1) of the Competition Law and ordered to pay the profits obtained as a result of the breach. The applicants then lodged an application for judicial review to the Commercial Court of St. Petersburg and Leningrad and requested access to the files on the basis of which the decision had been adopted, but the request was denied on the ground that they contained "commercial secrets". Those files were provided only to the Commercial Court in response to a judicial order, but the applicants were on the same ground denied access to them until the day of the hearing. At the hearing, the TU MAP used graphic charts to support its allegations, but the applicants were authorized only to examine (and copy) the charts. Thus, in appealing to the Appellate Court the decision upon which the Commercial Court confirmed the decision, the applicants lamented that the time given to assess possible defects of the charts was insufficient. The Appellate Court reversed, but then on further appeal to the Federal Court, the decision of TU MAP was upheld. As a result, the applicants sought relief via complaint to the ECtHR, alleging violation of the

[1032] ECtHR, *Neste v. Russia*, judgment of 3 June 2004 (admissibility decision in re applications no. 69042/01 et al.).

principle of equality of harms and of the right to have reasonable time for the preparation of defense. In addition, they alleged that the findings of the courts had been unreliable and not based on a reasonable interpretation of the evidence submitted, which required proof beyond reasonable doubt, and thus there had been a violation of the presumption of innocence. A first important element of this judgment is that it focused exclusively on whether the Russian competition proceedings in question could be qualified as criminal, since from that depended the applicability of the rights invoked. Therefore, the Court implicitly admitted that not only the presumption of innocence, but also the right to a reasonable time for the preparation of the defence and the principle of equality of arms would not attach to non-criminal proceedings. As to the merits of the qualification, the Court clarified that although section 22-1 of the Competition Law provides that breaches of antimonopoly law may entail criminal responsibility, that could be only upon separate proceedings conducted by a public prosecutor's office; thus, domestic classification was not in favor of the qualification as criminal. It then proceeded to ascertain the other two *Engel* criteria: first, it noted that the statute had limited scope, applying only to "relations which influence competition in commodity markets" and perhaps more importantly, the powers of antimonopoly authorities are not aimed at deterrence, but "at prevention of disturbances of competition and its restoration if disturbances take place". Second, it simply pointed out that the order of the TU MAP was intended as pecuniary compensation for damage, rather than as a punishment to deter re-offending. Accordingly, the ECtHR rejected the application on inadmissibility grounds.

In 2006 the European Court of Human Rights delivered a path-breaking judgment in another tax case, *Jussila*[1033] . In this case, the applicant complained that the right to be heard orally was a constitutive element of fair trial in criminal cases, and since tax surcharge proceedings were demonstrably criminal, there had been a violation of article 6 ECHR (in particular, of the provision entitling to "*a fair and public hearing* [...] *by an independent and impartial tribunal established by law*"). The most important part of the Court's decision for our purpose is one that recognizes the expansion of the notion of a "criminal charge" within the meaning of Art. 6 ECHR beyond the traditional categories of criminal law -which the Court defined as "hardcore" criminal law- and provided that outside those categories, "*criminal-head guarantees will not*

[1033] ECtHR, *Jussila v Finland*, judgment of Grand Chamber 23 November 2006, App. No. 73053/01, para. 31

necessary apply with the same stringency". This allowed the Court to conclude that, in the case at hand, the hearing was not necessary since the applicant had had the opportunity to be heard in writing. This ruling has important implications not only for the concept of hearing, but for a number of guarantees in the context of non-hardcore criminal cases. Interestingly, in referring to the "expansion" of criminal law beyond its traditional reach the Court brought, *inter alia*, the example of competition law. It should be noted, however, that this decision was not unanimous: Judge Loucaides, joined by Judges Zupančič and Judge Spielmann, contended that the distinction between hardcore and non-hardcore criminal cases is a difficult one, and that judicial proceedings for the application of criminal law, in respect of any offence, by the omnipotent State against individuals require, more than any other judicial proceedings, strict compliance with the requirements of Article 6 of the Convention so as to protect the accused "against the administration of justice in secret with no public scrutiny".

Finally, a case can be brought to the attention that is not related to competition law, but that challenges a structure where the investigating authority is also in charge for the adoption of the final decision: in *Dubus*[1034], the Court condemned France for the violation of article 6 ECHR in light of the lack of any clear distinction between the functions of prosecution, investigation and adjudication in French disciplinary proceedings which it carachterized as "criminal. The breach was found for the inadequacy of the existing safeguards of impartiality, explaining that a cumulation is compatible with the need for impartiality only to the extent that there is no "prejudgment" on the part of the Commission.

But as anticipated above, the case that really shook off the administrative system for competition law enforcement is the judgment recently handed down by the Third Chamber of the ECtHR in *Menarini*[1035].Menarini Diagnostics was a pharmaceutical company who had been found by the Autorita' Garante per la Concorrenza ed il Mercato (AGCM) guilty of price-fixing and market allocation for diabete testing, and therefore imposed a fine of 6 milion euros. While the company took issues with both the exposition and the qualification of facts of the AGCM, its appeal on the merits was rejected by the Administrative Tribunal (TAR) of Lazio on the ground that when the

[1034] ECtHR, *Dubus S.A. v. France*, 11 June 2009, App. no 5242/04
[1035] ECtHR, *A.Menarini Diagnostics S.R.L. c. Italie*, judgment of 27 September 2011, App No. 43509/08

administration enjoys a discretional power, the administrative judge can only verify whether the attached decision is logic, appropriate, reasonable, and correctly motivated, and cannot substitute his substantive assessment to that of the authority.

The decision was further appealed to the Consiglio di Stato (State Council), which repeated analogous reasoning. Only with respect to the sanction, does the reviewing court exercise full jurisdiction, being empowered to verify the adequateness of the penalty to the infringement, and where necessary replace it. Menarini Diagnostic then applied to the ECtHR, alleging a violation ex art 6 ECHR of the right to a fair hearing before an independent tribunal *on the merits of all the criminal charges.* It is to be noted that on the issues raised in the complaint, the Italian administrative system described above corresponds precisely to the model of administrative enforcement upon which the EU antitrust system is based; therefore, it was clear since the outset that the ruling would have serious repercussions for the legality of the EU antitrust system.

The points of contention in the case were essentially two: first, whether the proceedings were criminal in nature; second, if the response to the former is to be given in the affirmative, was the scrutiny exercised by administrative judges over the accusations consistent with the right to a fair trial?

Any doubt regarding the first point was quickly dismissed on the basis of the criteria identified by previous rulings of the ECtHR, namely *Engel* and its progeny: the protection of competition affects the general interests of society, and the fines were both severe (although not replaceable with custodial sanctions in case of non-payment) and deterrent[1036]. Perhaps the reference to the possibility to execute fines upon threat of custodial sanction gives a hint that the Court intended to follow the subdivision of criminal into hardcore and non hardcore, but that remains a speculation.

What is more important is that in fact on the second point, the Court explicitly declared that to satisfy the requirements of article 6 ECHR, judicial control of administrative decisions imposing a sanction must be of "full jurisdiction", meaning that the judge must have the power to quash and reform, in all respects, in points of facts and points of law, the attached decision. While this appears blatantly in contrast with the structure configured in both the Italian and the EU antitrust enforcement system, the Court went on to assess the actual exercise of judicial

[1036] At 38-44

control in the case at hand, and found that it had gone beyond a "simple legality control", constituting therefore control of "full jurisdiction": in particular, it found that the judges had considered in depth whether the competition authority had made an appropriate use of its powers, whether the contested decision was well founded and proportionate, even from the technical point of view[1037]. As a result, it decided that there had been no violation.

Such a controversial decision was accompanied by a vigorous dissent of Judge Pinto De Albulquerque, and a concurring opinion of Judge Saio siding with Pinto De Alburquerque on points of law, but nonetheless reaching the same conclusion of the majority due to purely factual reasons –namely, the fact that TAR Lazio had gone beyond the scope of its mandate. Both judges referred to the strident contrast between the position taken by the Court and the reasoning followed by the national judicatures. Judge Pinto De Alburquerque reviewed extensively the national case-law, illustrating that on the decision-making process followed by the AGCM, 4 phases can be distinguished and on two of them (the 2nd and the 3rd) the Consiglio di Stato had declared judicial control to be "weak": 1) the establishment of facts; 2) the contextualization of the competition rule, which by referring to undefined concepts (such as the relevant market, the abuse of dominant position, the agreements restrictive of competition) needs an exact individualization of the elements of the imputed infringement; 3) the confrontation of facts with the parameters already contextualized; and 4) the application of the sanction. He then went on to criticize more generally (similarly to Judge Spielmann in Jussilla) the tendency to accept the idea of a criminal law "at two speeds":

L'acceptation d'un « pseudo-droit pénal » ou d'un « droit pénal à deux vitesses », où l'administration exerce sur les administrés un pouvoir de punition, imposant parfois des sanctions pécuniaires extrêmement sévères, sans que s'appliquent les garanties classiques du droit et de la procédure pénale, aurait deux conséquences inévitables: l'usurpation par les autorités administratives de la prérogative juridictionnelle du pouvoir de punir et la capitulation des libertés individuelles devant une administration publique toute-puissante. Si des raisons tenant à l'efficacité et à la complexité technique de l'organisation administrative moderne peuvent justifier l'attribution d'un pouvoir de punition aux autorités administratives, elles ne peuvent néanmoins pas justifier que celles-ci aient le dernier mot quant à l'exercice de ce pouvoir répressif. Le mouvement souhaitable de dépénalisation ne peut pas se transformer

[1037] At 64

en un chèque en blanc donné à l'administration. Il faut que, à la fin de la procédure de sanction administrative, il y ait un juge envers qui les administrés puissent se tourner pour demander justice, et ce sans aucune limite[1038].

However, he concluded with the positive note that the new code of administrative procedure of 2010 has remedied the inconsistency with the ECHR, by providing specifically -in article 134 (a) the extension of the jurisdiction administrative tribunals to the merit for those decisions imposing administrative pecuniary sanctions. Yet, taking the rationale of this judgment into the context of EU competition proceedings, this portrays a gloomy picture for the compliance of the current system with the right to a fair hearing: if the Italian system has endeavoured to fix the problem of insufficient judicial scrutiny through a statutory provision, the same cannot be said for the EU: annulment jurisdiction ex article 263 TFEU is still very much a legality control, which would only exceptionally (as it occurred in *Menarini*) meet the requirement of article 6 ECHR.
Can this judgment be seen as a signal from the ECtHR that it will not fail the EU administrative system, as long as the review by the General Court does not shy away from a reasonableness and proportionality inquiry, including the technical aspects of the cases it will be called to decide? Arguably, this is the best way to see the aftermath of the *Menarini* judgment in the EU Courts. In fact, just a couple of months after *Menarini* the European Court of Justice handed down two important judgments, on 8 December 2011, where it explicitly referred to the need for the General Court to conduct an "in-depth review":

[t]he Courts cannot use the Commission's margin of discretion[…]as a basis for dispensing with the conduct of an in-depth review of the law and the facts[1039]

In both cases, this statement came after the recognition that:

As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is

[1038] ECtHR, A. *Menarini Diagnostics S.R.L. c. Italie*, Dissenting Opinion of Judge Albulquerque, at 9
[1039] Case C-389/10 P *KME Germany AG, KME France Sas and KME Italy Spa v European Commission*, Judgment of the Court of 8 December 2011, para. 129 ; Case C-386/10, *Chalkor AE Epexergasias Metallon v European Commission*, judgment of the Court of 8 December 2011, para. 62

factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it[1040].

The latter paragraph is not new to the EU jurisprudence. As noted by Judge Jaeger, it has been always used since *Tetra Laval*[1041] in connection with the more "famous" paragraph identifying an area of discretion for complex economic assessments. Initially applied only in the merger area, it has been exported to article 101[1042] and 102[1043].

[1040] *KME*, para. 12; *Chalkor*, para. 54 (both citing Case C-12/03 P, *Commission v. Tetra Laval* (``*Tetra Laval II*''), judgment of 15 February 2005 [2005] ECR I-987, paragraph 39, and Case C‑525/04 P *Spain v Lenzing* [2007] ECR I‑9947, paragraphs 56 and 57)

[1041] Judgment of the Court of First Instance of 25 October 2002, *Tetra Laval BV v Commission of the European Communities*, ECR 2002 II-04381 at 38-39 ("The basic provisions of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations. […] Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect).

[1042] Judgment of the General Court of 28 April 2010, *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission* , ECR 2010 II-01255 (« First of all, it should be pointed out that, inasmuch as it involves complex economic appraisals on the part of the Commission, the definition of the relevant market is amenable to only limited review by the Community judicature [citations omitted]. However, this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and whether that evidence is capable of substantiating the conclusions drawn from it ») (citing case T‑201/04 *Microsoft v Commission* [2007] ECR II‑3601, paragraph 482)

[1043] Judgment of the General Court of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v European Commission*N, ECR 2010 II-02805, paras 31-32 (« [I]t follows from settled case-law that, although as a general rule the Community judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Court cannot substitute its own assessment of matters of fact for the Commission's […] However, while the Community judicature recognises that the Commission has a margin of assessment in economic or technical matters, that does not mean that it must decline to review the Commission's interpretation of economic or technical data. In order to take due account of the parties' arguments, the Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it »)

Looking at the two statements, it doesn't seem too much of a stretch to affirm that the former is merely a generalization for the latter, which specifies what in-depth review means in the context of administrative discretion. However, if this is the case, the significance of the latest addition (i.e., that the Court will engage in "in-depth review") is merely rhetorical. Was that perhaps simply a veiled message to Strasbourg that the Court believes the system for judicial review in EU can keep up the expectations stemming from the prospective adherence of the EU to the ECHR? Only time will tell.

What is certain is that the judgment has left some open questions. How much depth of judicial review does article 6 ECHR concretely require? The formulation by the ECtHR of "in all points, in questions of facts and law" does not answer the question of under what standard: would, for example, a manifest unreasonable standard (the so called "*Wednesbury unreasonableness*") suffice where the Court engages nonetheless in the review of facts?

Further, does the difference between hardcore and non hardcore criminal still matter? In this respect, it has been noted that the implicit acceptance by the ECHR of the imposition of a fine by an administrative rather than a judicial authority implies that the criminal head guarantees do not apply with full stringency[1044]. Advocate General Sharpston's Opinion in *KME* suggested that this would be the correct view[1045], but then did not get much in the details because the case posed solely the question of legality of the system of judicial review with respect to the legality of the fine, for which the treaty confers explicitly "full jurisdiction".

4. Right to Be Heard and Procedural Guarantees in EU Antitrust: State of Play and The Way Forward

[1044] See Marco Bronckers and Anne Vallery, Fair and Effective Competition Policy In the EU: Which Role For Authorities and Which Role For the Courts After Menarini ? 8(2) European Competition Journal (2012) 283, 301, referring to T Bombois, L'Arrêt Menarini c. Italie de la Cour Européenne des Droits de l'Homme – Droit Antitrust, Champ Pénal et Contrôle de Pleine Juridiction47 Cahiers de Droit Européen (2011) 541, 556

[1045] See Opinion of the Advocate General Sharpston, at paras 65-70. Of the same view was Advocate-General Mengozzi seemed to be of the same view in his Opinion of 17 February 2011 in Case C-521/09 P, *Elf Aquitaine* [2011] ECR 0000, at paras 30-31. See also Advocate-General Bot on 2 April 2009, *Papierfabrik August Koehler v Commission* (C-322/07 P, C-327/07 P and C-338/07 P) [2009] ECR I-7191, paras 134-136

The preceding paragraphs have analysed the normative framework for EU antitrust enforcement and assessed the role of judicial review and of the Hearing Officer, in the attempt to appraise the compatibility of the current procedures with the right to be heard. As a preliminary remark, it must be said that the Hearing Officer and the courts play in parallel, since they both operate, for purposes of our analysis, to identify and correct potential violations of the law which occur in DG Competition's proceedings. The main difference is that the law of which the Hearing Officer aims to ensure the respect is exclusively procedural, and thus his activity has only a limited field of application when compared to the courts (even though, at the internal level, the Hearing Officer may in fact exercise a control that resembles -at least for its scope- that operated by the Court). Another difference is that the scrutiny of the Hearing Officer, in cases of disputes for which its decision is requested, goes into the merit of the matter in question, substituting its reasoning with that of DG Competition; by contrast, the courts adopt a more deferential stance, using criteria such as misuse of powers or manifest error, often associated with the notion of "complex assessments".

What conclusion have we reached, in terms of the question posed in paragraph 1.b? The short answer would be that the doubts about the compatibility of such two-tiered system with article 6 (1) seem to be not unfounded. Not simply because of the two-tiered structure in itself, but rather because the system in place fails to give sufficient guarantees that any violation of the right to a fair trial suffered in DG Competition's proceedings will be corrected elsewhere. More specifically, judicial control seems generally inadequate to fulfil this task, with the exception of gross violations (i.e., violations of rights of defence that have played a role in the formation of the decision), for which the standard of protection developed seems compatible with the test used by the Strasbourg Court. These are arguably by and large correspondent to the violations described in the second limb of the *H v UK* test, i.e. those irremediable or decisive for the further continuation of the proceedings, which cannot tolerate ex-post corrections. Only in these cases, does the two-tiered system of justice seem apt to give proper consideration to the violations of the right of defence, by way of conceding the annulment of a decision without having to proof causality.

In addition, the depth of review in a variety of cases is limited by reference to the concept of "complex appraisals", which is far from being clear and uniformly applied across the board in

European law. I suggested above what seems the most reasonable interpretation, advanced most convincingly by Judge Jaeger: defining "complexity" on the basis of the *nature* of the assessment, accord limited review only to those choices which cannot be performed automatically on the basis of some accumulated knowledge, regardless of the *type* of expertise that they require. In addition, it seems appropriate also to acknowledge the need for a carve-out from the notion of complexity of those concepts that are merely technical[1046], which has been used in *Microsoft*[1047] to shield the Commission's reasoning from full review.

A second solution seems to emanate from some recent, albeit inconsistent, case-law regarding the notion of "unlimited jurisdiction" within the sense of article 261 TFEU. As a preliminary remark, it must be recognized that the concept of "*plein juridiction*" that is referred to in the ECHR, as much as that of "unlimited jurisdiction" ex art 261 TFEU, is not necessarily inconsistent with the existence of a certain level of discretion. The ECtHR, for example, has ruled that in non-criminal cases, judicial scrutiny should not go as far as to encompass certain elements of discretion and expediency that are best left to the acting administrative authorities: thus, the domestic judges should consider whether the authorities have acted "properly and within the limits of the law" and should refrain from considering whether the decision has been "well founded in substance" in light of all the features of the case, except for exceptional circumstances[1048]. Similarly, it has been suggested by a former Advocate-General and President of the General Court that in reviewing fines, the Court simply verifies the conformity with the relevant Commission's Guidelines.[1049] This is in recognition of the margin of discretion enjoyed by the Commission in setting fines; however, as the Court stated in *Wieland-Werke AG v Commission of the European Communities*[1050]

[1046] Suggesting this particular solution is A. Scordamaglia-Tousis, EU CARTEL ENFORCEMENT: RECONCILING EFFECTIVE PUBLIC ENFORCEMENT WITH FUNDAMENTAL RIGHTS, Doctoral Thesis submitted at the European University Institute (Florence, March 2012), on file with the author, at 139

[1047] *Microsoft v Commission* [2007] ECR II‑3601,paras. 87-89, 379, 482

[1048] ECtHR, *Kaplan v UK*, Application No. 7598/76, [1982] 4 EHRR 64, para 159 ; ECtHR, *Obermeier v Austria*, [1991] 13 EHRR 290, para. 70

[1049] Bo Vesterdorf, The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?, Competition Policy International (June 2009), 7

[1050] Case T-116/04, *Wieland-Werke AG v Commission of the European Communities*, judgment of 6 May 2009, [2009] ECR II-01087, para. 33

Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard prejudge the exercise by the Community judicature of its unlimited jurisdiction.

In fact, suggesting the contrary (i.e., that the Court should engage in full review on the merits) would lead to a mechanism incompatible with the "inter-institutional balance" existing within the EU, and particular between the Commission and the Union judiciary, for it it could entail a significant shift of power from the Commission to the newly established specialised court as regards the determination of the objectives of competition policy[1051]. Thus, it would seem that the requirement of fair trial is only that defendants have the possibility to appeal any criminal charge to a tribunal which does not merely exercise judicial review, but rather, has the power to quash and reform the decision in all points of fact and all points of law. This power, however, does not mean that the control should be particularly stringent; it simply means that nothing in the decision should be pre-emptively foreclosed from the Court's review. It is for this reason that for the EU to come in compliance with the notion of fair trial ex art 6 ECHR, it would be sufficient if the unlimited jurisdiction of article 261 were expanded from the mere penalty to all aspects of the decisions attached. This would be consistent with article 31 of Regulation 1/2003, which provides that "*The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed*"(emphasis added). Some recent cases appear to indicate willingness by the Courts to adopt this view: in both the *Schunk*[1052] and the *Amann*[1053] cases, the Court held that

"Under article It should be added that, under Article [261 TFEU] and [Article 31 of Regulation No 1/2003], the Court of Justice and the [General Court] have unlimited jurisdiction in actions challenging *decisions* whereby the Commission has fixed fines and may, accordingly, not only annul the decisions taken by the Commission but also cancel, reduce or increase the fine imposed. Thus, *the Commission's administrative practice is open to full review* by the Community judicature".(emphasis added)

[1051] Written evidence submitted by the Office of Fair Trading, HOUSE of LORDS SELECT COMMITTEE, XV Report: an EU Competition Court, session 2006-07, 23 April 2007, p. 6.
[1052] Case T-69/04, Judgment of the Court of First Instance of 8 October 2008, *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission of the European Communities*, [2008] ECR II-02567, paras. 23 and 41
[1053] Case T-446/05, Judgment of the General Court of 28 April 2010, *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission*, [2010] ECR II-01255, para. 144

Similarly, the Court held in *Limburgse Vinyl*[1054] and *Prym*[1055] that

"[…]the unlimited jurisdiction conferred on the Community judicature authorises it to vary the contested *measure, even without annulling it*, by taking into account all of the factual circumstances, so as to amend, *for example*, the amount of the fine"(emphasis added).

As recently pointed out by a commentator[1056], this would be in line with the interpretation of article 31/2003 given by the first systematic commentary of the Treaty provisions on competition and on Regulation 17/62 [1057](the predecessor of Regulation 1/2003) and more importantly, with the letter of the equivalent provision to article 261 TFEU in the Treaty Establishing European Coal and Steal Community.

If none of these routes of reform is taken, it remains the problem of what to do with respect to all those violations of the right to be heard that cannot be addressed by the system of judicial review. In that hypothetical, as much as under the present conditions, ensuring that the EU system does not fall foul of the first limb of the test would require the Hearing Officer to meet the challenge. Unfortunately, we have ascertained from a survey of his functions that he is not equipped to do so, and that some amendments to its Mandate would be most needed in this respect. This has given us the opportunity to review the history of the Hearing Officer and the evolution of its (limited) powers. Without doubts, the intrinsic value of the Commission's initiative in establishing this post has to be recognized and recollected with admiration. Nonetheless, it is arguable that if the post had been not created, Member States would have been much more likely to be condemned by the Strasbourg Court for breach of the right to fair trial for EU competition decisions, and as a consequence would have pushed to implement some changes in the European system for competition enforcement in order to avoid further liability under

[1054] Joined Cases C-238, 244, 245, 247, 250-252 and 254/99 P)Judgment of the Court of 15 October 2002, *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA , Elf Atochem SA (C-247/99 P), Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission of the European Communities*, ECR [2002] I-08375 para. 692

[1055] Case C-534/07, Judgment of the Court of 3 September 2009, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission of the European Communities* [2009] ECR I-07415, para. 86

[1056] Damien M. B. Gerard, Breaking The Deadlock of EU Antitrust Enforcement: Re-Empowering the Courts?, 36 European Law Review (2011), 457, 476-477

[1057] ArvedDerringer (ed.), LES RÈGLES DE LA CONCURRENCE AU SEIN DE LA C.E.E. (ANALYSE ET COMMENTAIRES DES ARTICLES 85 A 94 DU TRAITÉ [1965] Rev. March Comm. 148

article 6 ECHR. It is therefore not clear whether the alternative to the *status quo* would have been better. What is in any event appreciable is that the Luxembourg courts have in several occasions given their contribution towards the shaping up of a system of procedural guarantees that circumscribes competition proceeding in order to avoid the friction with the right to a fair trial under article 6 ECHR.

The figure of the Hearing Officer, which represents the guardian of these procedural guarantees, is a figure that affords the Commission the opportunity to reconcile the objective of effective enforcement of competition with the value that those guarantees are meant to protect. Notwithstanding the Hearing Officer's commitment to the respect of those guarantees, the analysis above has shown that there are several occasions where it is simply not able to ensure its observance, even where it is apparent that the fundamental importance of those guarantees ought to prevail over the objective of effective enforcement. One explanation for that may be that the original Mandate was drafted by members of DG Competition, who while regulating some specific grey areas of tension between rights of defence and effective enforcement of competition have humanly and understandably preferred to tilt the balance in favour of the latter. Regardless of what the driver was, the fact that the existing legal framework still tends to privilege the former objective appears clear. This imbalance prevents the rectification by the Hearing Officer of certain violations of due process which might, in specific cases, lead to a finding of violation of both the Charter of Fundamental Rights and the ECHR. It is for this reason that, whereas the Hearing Officer's stated mission is to ensure that the hearing is properly conducted and to contribute to the objectivity of the hearing itself and any decision taken subsequently, it is submitted here that its role may actually be broader. As a matter of fact, his functions are not limited to ensure the respect of the procedural rights contained in the antitrust regulation: he also overviews the case in its entirety, checking for the Commission's compliance with a variety of rules *and principles*. Notably, the word "principles" needs to be emphasised here, for the scrutiny of the Hearing Officer on a case cannot be merely confined to those issues for which the Mandate confers upon him a specific power. By contrast, as recognized by article 3.1 of the Mandate, “the hearing officer shall take account of [...] *principles laid down by the Court of Justice and the [General Court] of the European Communities”* (emphasis added) As a

result, the Hearing Officer can act "in defence of the rights of defence"[1058] also when such rights are not explicitly provided by a specific regulation: this would be consistent not only with the higher hierarchical value of "principles" over "laws", but also with well settled case- law[1059]. It would also, incidentally, send a strong signal regarding his emancipation from DG Competition and reinforce the rhetoric of effective separation from DG Competition.

Another occasion for the Hearing Officer to demonstrate a proactive approach towards the evolution of its role would be, as suggested above, the creation of a set of Rules of procedure applicable for the organisation and the conduct of hearings. This would make the process more rigorous and transparent, and could also represent a first step towards the consideration of the hearing as an obligatory participation. This organisational measure would first of all benefit the exercise of the rights of defence, allowing to streamline the process of confrontation and honour the principle of *contradictoire*. Secondly, it would have a direct impact on the pursuit of the objectivity of the hearing, given the increased ability for its participants to organize efficiently their agenda.

This is, however, as far as the Hearing Officer can push the quest for due process with the current Mandate. He is constrained, unfortunately, not only by the lack of adequate resources but also by a set of rules that are too basic, and do not provide him with sufficient teeth *vis a vis* DG Competition's enforcement machine. Any extension of powers depends, in the next few years, on what the priorities of the new Commissioner will be. There is some reason, however, to be optimistic: the issue of "due process" is in the eyes of everyone. The fact that it has been the object in the last year of 21 public speeches, including one of the former Commissioner[1060], two

1058 Stephan Wernicke, "In Defence of the Rights of Defence": Competition law procedure and the changing role of the Hearing officer, Concurrences No. 3- 2009

1059 See e.g. judgments of the ECJ of12 February 1992, C 48/90 et C 66/90, *Netherlands v Commission*, Rec. p. I 565, para. 44; 24 October 1996, *Commission v Lisrestal and Others*, C-32/95 P, Rec. p. I-5373, para. 21; 5 October 2000, Case C 288/96, *Germany v Commission*, Rec. p. I 8237, point 99; 9 June 2005, Case C 287/02, *Spain v Commission*, Rec. p. I 5093, point 37; and 13 September 2007, Joint cases C 439/05 P et C 454/05 *P Land Oberösterreich v Commission*, para.36; judgment of the CFI of 19 June 1997, Case T-260/94, *Air Inter v Commission*, [1997] ECR II-997, para. 60

1060Neelie Kroes, The Lessons Learned, Speech at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University, New York, 24 September 2009

of the former Director General[1061], seven of the new Director General[1062] and eleven of the new Commissioner[1063], is a strong signal that this is the right moment to advance proposals. This solution, as opposed to the threat of an enhanced type of judicial control, is preferable because, as recognized by global administrative law scholarship, "it may be easier to transplant rule of law principles into hostile terrain through an internal or inspectorial review system than through a court system external to the administration which falls outside the dominant power structure".[1064] For that purpose, it is submitted that the most important, substantial but at the same time simple and concrete reform that the Commissioner could bring about with respect to the hearing process is to make the so called "interim report" available to the public, or at least to the alleged infringer(s). Such an innovation would really come a long way towards greater respect for the right to be heard, would enhance transparency and trustworthiness in the Commission's enforcement machine and would significantly increase the importance of the Hearing Officer's role. As argued by a Commission official in the early nineties, the diametrically different approach of the EU and the US (where all decisions and tentative decisions of the hearing examiner are made part of the record and are served on the parties so that they may take

1061Philip Lowe, Reflections on the past seven years – Competition policy challenges in Europe, Speech at GCR 2009 Competition Law Review, Brussels, 17 November 2009; Due process in antitrust, Keynote address at the CRA Conference on Economic Developments in Competition Law , Brussels, 9 December 2009

1062 Alexander Italiener, Challenges for European Competition Policy , Speech at the International Forum Competition Law of the Studienvereinigung Kartellrecht , Brussels, 9 March 2010; London, UK European Policy Forum Roundtable, 18 May 2010;St. Gallen, Switzerland St Gallen International Competition Law Forum, 20 May 2010; Safeguarding due process in antitrust proceedings, Fordham law School, New York, 23 September 2010; Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer OECD Competition Committee Meeting, Paris, 18 October 2011; "Quantity" and "quality" in economic assessments, Charles River Associates Annual Conference, Brussels, 7 December 2011; Recent developments regarding the Commission's cartel enforcement, Studienvereinigung Kartellrecht Conference, Brussels, 14 March 2012

1063 See *supra* note 927; Joaquín Almunia, Competition and consumers: the future of EU competition policy, European Competition Day Madrid, 12 May 2010; New Transatlantic Trends in Competition Policy Friends of Europe Brussels, 10 June 2010; Due process and competition enforcement IBA – 14th Annual Competition Conference Florence, 17 September 2010; The past and the future of merger control in the EU Global Competition Review's conference Brussels, 28 September 2010; Competition Policy: State of Play and Future Outlook European Competition Day, Belgium Brussels, 21 October 2010; Competition Policy: State of Play and Priorities European Parliament, ECON Committee Brussels, 30 November 2010; Recent developments and future priorities in EU competition policy International Competition Law Forum St. Gallen, 8 April 2011; Fair process in EU competition enforcement European Competition Day Budapest, 30 May 2011; New challenges in mergers and antitrust IBA annual competition conference Florence, 16 September, 2011; Antitrust enforcement: Challenges old and new 19th International Competition Law Forum, St. Gallen 8 June 2012

1064 Carol Harlow, Global Administrative Law: The Quest for Principles and Values, 17 (1) European Journal of International Law (2006) 187-214, at 208

exceptions or submit their observations[1065]) [could] be justified by the role played by the Hearing Officer in the decision-making process, which was far more limited (and indeed almost insignificant) in the EU[1066]. However, given the direct connection of the Hearing Officer to the final decision-maker, its progressive empowerment and the specific attribution of the duty to report to the Commissioner, a serious doubt can be cast on whether such enormous difference is still justifiable.

1065See the Administrative Procedure Act, 5 U.S.C. Para 557 (c) 1988
1066Julian Joshua, The right to be heard in EEC Competition Procedures, 15 Fordham International Law Journal 16 (1991-1992), p. 80

VI. Presumptions in EU antitrust enforcement

1. A clarification: the role of interpretation in competition law

It is undisputed that competition law has as its main aim the protection of the competitive process. This is the core objective of competition rules not only in the European Union, but in the vast majority of antitrust jurisdictions[1067]. Yet the definition of the content of this objective in practice involves exercise of a great deal of judgment in determining how competition is to be viewed both in general by the legal system and in the particular case at issue by the public authority. The claim of this paragraph is that, once the public authority attributes a meaning to competition within a particular setting, any deviation from the conceptual understanding of the term in subsequent cases should be consistent with it. So for example, if an authority ever defines the concept of competition in terms of protection of small businesses meeting certain specific carachteristics, any endorsement in further cases of competition in terms of protection of consumers or freedom to compete which is at odd with the prior interpretation should be recognized as an inconstitency and therefore be explained in detail. It wouldn't be impossible for the public authority to return upon the definition and declare it superseded by a new conceptual understanding, but it should do so with reasons.

Traditionally, and especially in the United States, competition law is thought of as a means to promote economic efficiency. In the EU, however, two factors complicate a comparison with other antitrust jurisdictions. First, the interaction of this objective with the prominent role of market integration in the European Treaty: indeed, this has been recognized by virtually all commentators as an important consideration, if not an objective, of EU competition policy, having led to a number of judgments which are otherwise inexplicable on grounds of pure industrial organization[1068]. Second, the descendance of EU competition law from ordoliberal

[1067] See the International Competition Network's Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

[1068] See e.g. Christian Ahlborn and Jorge Padilla, From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EU competition law, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EX (Oxford, Hart Publishing, 2008), 55; Laura Parret, The Objectives

theory, which dominated economic thinking in Germany during to the negotiation of the EEC Treaty. Evidence of the linkage can be found in the fact that belonging to this school were both Walter Hallstein -the first President of the European Commission- and Hans von der Groeben -one of the two principal drafters of the Spaak Report (which eventually formed the basis for the adoption of the EU Treaty) and the first competition Commissioner[1069]. The basic tenet of ordoliberalism was the distrust for private economic power, in part sparked by the aftermath of the rise of Hitler during the Weimar republic, and a corresponding emphasis on the concept of economic freedom. The role of competition policy was central in ordo-liberal theory, which considered competition "*the most ingenious instrument of deprivation of power in history*"[1070]. Accordingly, the imperatives of preventing the accumulation of economic power and abolishing monopolies were instrumental to the functioning of a free profit-based economy. Where the abolition of monopolies was not possible, ordoliberals prescribed the imposition on the dominant company of the obligation to behave "as if" competition existed.

The initial influence of Germany on EU competition policy, justified by the fact that Germany had competition laws in place since the 1920s[1071], persisted for a number of years –an indication being that the director-general of the Commission's competition directorate has been assigned to a German up until 2002[1072]. Arguably, such influence has imprinted the structure of article 101 TFEU, constituted by a broad prohibition and the possibility of justification, and the "as if" criterion is reflected in the fact that the law of unilateral conduct prohibits an abuse, instead of the concept of "monopolization" which is adopted in many other antitrust jurisdictions[1073]. Although the conventional wisdom is that the traces of ordo-liberalism have gradually faded with the modernization of former article 81 and the recent move towards an "economics-based

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of EU Competition Law and Policy, 6 (2) European Competition Journal (2008), 339; Giorgio Monti, Article 81 and Public Policy (2002) 39 Common Market Law Review 1057, 1064

[1069] David Gerber, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (Oxford, Clarendon Press, 1998)

[1070] Christian Ahlborn and Carsten Grave, Walter Eucken and Ordoliberalism: An introduction from a Consumer Welfare Perspective, 2 (2) Competition Policy International (2006) 196, 200; David Gerber, Fairness in Competition Law: European and US Experience, presented at the Conference on Fairness and Asian Competition Laws 2004, available at http://www.kyotogakuen.ac.jp/o_ied/information/fairness_in_competition_law.pdf

[1071] Andreas Weitbrecht, From Freiburg to Chicago and beyond - the first 50 years of European Competition law" European Competition Law Review (2008) 81

[1072] See Suzanne Kingston, GREENING COMPETITION LAW AND POLICY (Cambridge, CUP 2012), 83

[1073] Ibid.,

approach" in article 102, many commentators have noted that such traces have not definitively abandoned European competition policy, particularly in the assessment of unilateral conduct[1074].

Even letting these two complicating elements of EU competition law and policy aside, it must nonetheless be conceded that there is no unanimous understanding of the concept of "competition". Even accepting that the ultimate objective of protecting competition were the same for all antitrust jurisdictions[1075] , there would still be different ways by which this objective can be pursued. A leading antitrust scholar classified the possible alternatives as follows:

"One is the microeconomic model popularly used in the United States today, which counsels no antitrust intervention unless the transaction is likely to diminish aggregate consumer or total wealth (thus, the critical importance of the welfare triangle to show output limitation). According to this methodology, there is no "exclusionary" violation; the violation is exploitation.

The second methodology […] looks at the market structure and dynamics, and asks whether the practice interferes with and degrades the market mechanism. Freedom of trade (and competition and innovation) without artificial market obstruction *is presumed* to be in the public interest, especially the public's economic interest. Barriers must be justified. By this metric, significant unjustified exclusionary practices are anticompetitive and should be prohibited.

A description of frameworks would not be complete without acknowledging a third. Some nations expand the concept of harm to competition to include harm to the competitive dynamic among small and

[1074] See for example Philip Marsden, Some Outstanding Issues from the European Commission's Guidance on Article 102: Not-So-Faint Echoes of Ordoliberalism, in Federico F. Etro and Ioannis I. Kokkoris , COMPETITION LAW AND THE ENFORCEMENT OF ARTICLE 102; Pinar Akman, The European Commission's Guidance on Article 102TFEU: From Inferno to Paradiso? 73 (4) The Modern Law Review 605 (2010,; Assimakis Komminos and James Killick, Schizophrenia in the Commission's Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis, Global Competition Policy, 5 February 2009

[1075] Something which does not account for the controversy between those who believe that the goal of antitrust policy should be the maximization of productive efficiency and those who believe it should be allocative efficiency; and the more frequent discussion of whether, accepting the relevance of distributional concerns, antitrust should be aimed at the maximization of total welfare or consumer welfare. For the most provoking contribution on this topic, see Robert Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (New York, Free Press 1978)

middle-sized firms. This approach tends to protect small firms from efficient competition, such as sustainable low-price competition, and therefore is protectionist[1076]."

In practice, it is rare to find (if ever) explicit recognition of the embracement of the latter type of model: at least in principle, representatives of all jurisdictions pledge that their respective antitrust laws are aimed simply to protect the process of competition. For a more accurate assessment, however, it is appropriate not to limit the inquiry to the letter of the statute or the pledges of public officials, and to verify instead the application of the law in that jurisdiction. Following this criterion, which is what really matters to a citizen or a company operating in the market, one need not undertake a lengthy and complicated analysis to notice significant difference between rhetoric and actuality, that is, between the principles which appear to be treasured and promoted by a relevant statute and the actual methodology followed in their implementation[1077].

Of course, one can assert that the main reason as to why such divergence exist lies in the nature of enforcement discretion[1078], which is vested in the public authorities in charge for the enforcement of the competition rules. To be sure, discretion is an inevitable component of administrative action, which is instrumental to the efficiency of the enforcement apparatus and essential to the pursuit of the public good. However, such discretion must be exercised within limits, i.e. in a reasonable manner and in such a way that it does not to encroach upon the legitimate expectations of individuals.

[1076] Eleanor M. Fox, What Is Harm To Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust Law Journal 371 (2002), 372 (citations omitted and emphasis added)

[1077] This phenomenon appears to be accentuated in the jurisdictions of developing countries, where the provisions are maintained deliberately loose to allow for the intervention. A striking example of divergence between principles and implementation characterizes the new Chinese Antimonopoly law: for a commentary on the dangers of misuse, see Eleanor M. Fox, An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints, 75 Antitrust Law Journal 173

[1078] Enforcement discretion is used here as a broad term to refer to the latitude of discretion enjoyed by competition authorities in a variety of matters, comprising the identification, selection and conclusion of a proceeding. See Nicolas Petit, How much discretion do, and should, competition authorities enjoy in the course of their enforcement activities? A multijurisdictional assessment, Concurrences, N° 1-2010, n°30047, pp. 44-62 (differentiating between "detection discretion", "target discretion", "process discretion" and "outcome discretion"); Maurizio M. Delfino, ENFORCEMENT DISCRETION IN ANTITRUST: A COMPARATIVE ANALYSIS OF THE E.E.C. AND THE U.S. SYSTEMS (Stanford, Stanford University 1982).

In this respect, the central limit of discretion is consistency, meaning that the authority should follow the principles adopted in prior rulings and should motivate in its decisions any instance of differentiation between like cases, explaining why a different treatment would be warranted by the specific circumstances. To facilitate this process, both authorities and reviewing courts identify patterns, based on certain defining features, which will be used as guidance for the assessment of future cases. Obviously, the authoritativeness of the identification of a certain pattern or defining feature achieves its maximum level of recognition when it is confirmed by a ruling of the court of last instance, which has the final word on the correct interpretation of the law. However, that court's scrutiny will only operate at the edges of the area of enforcement discretion, leaving the public authority with a significant leeway in the interpretation of the law. As a result, the guidance provided by the administration is of particular significance in those areas where discretion exists, since it provides both a restraint for the future use of that discretion and a workable benchmark that can be used by companies in the market to make determinations in their daily activity and to challenge any potential misuse of discretion before the reviewing court. Accordingly, the administration's promulgation of soft-law plays an important paper in providing a level playing field, by codifying accepted practices and clarifying the metrics by which the authority commits to undertake any given assessment. This activity appears crucial in the domain of competition law, where both the scope and the terminology of the norms tend to be, due to the vague and open-ended nature, subject to controversy: in light of this intrinsic uncertainty, it is particularly welcome that an authority provide content to rather general norms by clarifying their applicability in a more specific context. In doing that, the administration provides an authoritative interpretation of the meaning of key terms such as "competition", "consumer", "unfair", "barriers to entry", "agreement", "dominance", "abuse" and so forth, thereby narrowing the scope of discretion and providing enhanced confidence and legal security to the operators in the market. It is in this light that should be seen the various instruments of soft-law that the European Commission has developed in recent years.

The European Union is indeed an instructive example of how such interaction between authorities and courts has developed allowing the interpretation of the law to progressively attune to economic wisdom. For one thing, the fact that throughout these years of development a

divergence of views existed with regard to the assessment of a variety of concepts clearly indicates the pervasiveness of problems of "translation" in law and economics[1079]: namely, the extent of disagreement between the European Commission and the EU courts shows that reference to a legal concept in economic terms can lead to stark differences in interpretation of that concept. From a more optimistic perspective, it can be observed that the legal system has demonstrated being able to modernize itself to adapt to the advancements in the understanding and incorporation of economic theory: policy documents, including guidelines and notices, have been issued in great numbers over the past decade. Still, there remain significant areas affected by the "uncertainty gap", where the Commission has declined to commit to a univocal and determinative set of criteria and where the Union's courts have failed to fill in through their interpretation of the norms of the treaty.

Arguably the most important area of uncertainty in EU competition law pertains to the very concept of competition, and what amount to a restriction of competition. Note that this uncertainty affects core criteria for the ultimate determination of legality, and therefore, risks undermining all the other clarification efforts. A comparison of a few early cases with more recent ones provides a good illustration of how the understanding of "competition" has evolved.

The first case which the Commission had to deal with was *Consten & Grundig v Commission*[1080]. Grundig, a manufacturer of electronic hardware, signed an exclusive agreement with the distributor Consten assigning the entire region of France, and agreeing to let it acquire and use Grundig's trademark in France as a way to enforce the exclusivity of its deal. Accordingly, when Consten's competitor UNEF engineered to buy the goods for a lower price in the neighboring Germany and sell them in France, Consten sued for trademark infringement. As a defense, UNEF petitioned the Commission to invalidate the agreement between Consten and Grundig as contrary to the rules embodied in article 101 (then 85) of the Treaty. Grundig applied for an exemption under article 101.3, alleging that the agreement was necessary to ensure higher quality service in the French market, but did not convince the Commission that this should be

[1079] See *supra*, chap I

[1080] ECJ Judgment of 13 July 1966, Case C-56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 249

permissible –in particular, because the agreement did not seem indispensable for the attainment of the objective pursued. But the more controversial part was the assessment of the application of article 101, where the Commission's analysis focused on the market for distribution of Grundig's product, instead of the more competitive picture of the market for electronic hardware. While the Advocate General Karl Roemer in his opinion criticized the Commission for such an oversight, the ECJ affirmed the decision holding that " […] *there is no need to take account of the effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition*[1081]". Although not providing a detailed quantitative explanation for such finding, the Court reasoned that "*because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated*". This judgment was hailed with criticism by commentators[1082], blaming the imperfect economic analysis on the ordo-liberal origins of European competition law.[1083]

In the aftermath of *Consten & Grundig* undertakings lacked clear guidance on whether the relevant object of analysis in the assessment of a vertical agreement would be intra-brand competition (i.e., within distributors of the same brand) or inter-brand competition (i.e., within producers of different brands), and more generally what would the weight of values other than economic efficiency be in the Commission's purview.

The first point was developed in *Societe' Tecnique La Miniere*[1084], where the Court was invested with a preliminary reference from the Court of Appeal in Paris concerning the validity of an exclusivity clause in a distribution contract. In assessing the question of how to determine under what circumstances an agreement should be caught by the provision in article 101.1, the Court

[1081] At 342

[1082] Klaus Newes, The Commission's First Major Antitrust Decision (Grundig-Consten) 20 Business Law 431 (1964-1965); Vincent Verouden, Vertical Agreements And Article 81 (1) EC: The Evolving Role of Economic Analysis, 71 (2) Antitrust Law Journal 525 (2003)

[1083]Similar criticism has been leveled against the freedom of choice-based conception of dominance endorsed by the Court of Justice in*Continental Can*, where it held that "It can also be regarded as an abuse if an undertaking holds a position so dominant that *the objectives of the treaty are circumvented byan alteration to the supply structure which seriously endangers the consumer's freedom of actionin the market*, such a case necessarily exists if practically all competition is eliminated" (emphasis added). See *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72. [1973] ECR p. 00215, at 26

[1084] ECJ Judgment of 30 June 1966, Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, at 249

established the seeds for the introduction of the category of "infringements by object" by clarifying that, although an agreement cannot fall automatically under the prohibition set out in Article 101 (1) TFEU, "[it] *can contain the elements provided in the said legislative provision by reason of a particular factual situation or of the severity of the clauses protecting the exclusive dealership*"[1085]. Further, it laid down the criteria that (1) it must have as its object or effect the prevention, restriction, or distortion of competition within the common market; (2) the precise purpose of the agreement needs to be considered in the economic context in which it is to be applied; and (3) it will be caught if, on the basis of a set of objective factors of law or of fact and having regard to what can reasonably be foreseen, it is to be feared that it might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States[1086].

Only about 40 years later, in*, Métropole Television*[1087] did the General Court rule more squarely on the issue of what type of competition is regarded as falling within the object, classifying *Societe' Tecnique La Miniere* as part of:

"a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in [Article 101(1)] of the Treaty. In assessing the applicability of Article [101(1)] to an agreement, *account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned*[1088]".

In the same case, the Court rejected the view that European competition law would have embraced a so called "rule of reason" where the pro- and anti-competitive effects of an agreement must be weighed in order to determine whether it is caught by the prohibition laid

[1085] Ibid. at 248
[1086] Ibid., at 250
[1087] CFI Judgment of 18 September 2001, Case T-112/99, *Métropole télévision (M6) and Others v Commission of the European Communities*, [2001] ECR II- 2459
[1088] Ibid, at 76 (emphasis added), citing in particular cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission [1998] ECR II-3141*, para. 136; ECJ Judgment of 12 December 1995, Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, para. 10, and Case T-77/94 *VGB and Others v Commission* [1997] ECR II-759, paragraph 140, as well as the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, para. 31

down in article 101 (1)[1089]. A similar stance was taken more recently in the *O2* judgment of 2006[1090], where the ECJ said the following about the "European" rule of reason in the assessment of some network sharing and national roaming arrangements between T-Mobile and O2:

> Such a method of analysis, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article [101(1) TFEU]. […]The examination required in the light of Article [101(1) TFEU] consists essentially in taking account of the impact of the agreement on existing and potential competition and the competition situation in the absence of the agreement, those two factors being intrinsically linked[1091]

As a result, the understanding that taking into account the context of the agreement does not equate with weighing its pros and cons can be considered settled. However, the Court in *Métropole télévision*was more specific than in *O2*, clearing any doubt on the appropriate methodology for the "counterfactual" methodology to ascertain the existence of a restriction: the comparison of the competition in the market in light of the agreement with the hypothetical degree of competition without the agreement, namely with a lesser restrictive alternative[1092]. Differently from what one could extract from the more general wording of *O2*, it is implicit that the lesser restrictive alternative may be the stipulation of a less restrictive agreement –and not necessarily the lack of agreements at all.

It has taken even longer for the EU Courts to weigh in with some clarity on the second point (i.e, the weight to be attached to values other than economic efficiency). What has been clear since

[1089] Ibid., at 76

[1090] CFI Judgment of 2 May 2006, T-328/03, *O2 (Germany) GmbH & Co. OHG v Commission of the European Communities*, [2006] ECR II-1231

[1091] Ibid., at 69 and 71 (citations omitted)

[1092] See Damien Geradin and Ianis Girgenson, The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach (December 11, 2011). Available at SSRN: http://ssrn.com/abstract=1970917 or http://dx.doi.org/10.2139/ssrn.1970917, at 9; Damien Geradin, Anne Layne-Farrar and Nicolas Petit, EU COMPETITION LAW AND ECONOMICS (Oxford University Press 2012), 127-128. Note, however, that the comparison must be objectivized, referring not so much to the subjective motives of the parties to the agreement but to the objective situation of two reasonable undertakings in that context: see Guidelines on the Application of Article 81 (3), para. 18: "*the question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting*"

the outset is that, as seen in chapter IV, protection of competition in the market is one of the several means for the Community to reach its several objectives, namely an harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. Thus, despite the insistence of the Courts in referring to it as "an objective"[1093], it has always been clear that competition policy is not an ultimate goal: it is merely one instrument which, however important, is simply used for the attainment of one of the Union's objectives. More enigmatically, the EU treaty does not clarify which objective in particular is sought through protection of competition in the market, and what the role/weight of competition policy would be in that respect. As a result, it is natural that the pursuit of the undisputed economic objective of efficiency is combined with other objectives, which may have some basis in economic theory but which are primarily driven by non-economic considerations. Now, given that such considerations may in specific cases conflict with the interest of protecting economic efficiency, the interpreter of the EU competition provisions will need to face the question of how such conflicts ought to be resolved[1094].

The most vivid explanation of the interaction of economic efficiency with other objectives can be found in *Metro I*[1095], where the Court was called to decide upon the legality of a selective distribution system set up by a supplier of TV and Hi-fi equipment:

> […] Although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded.
> The powers conferred upon the Commission under Article 83 (3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end

[1093] See supra, chap 4.1
[1094] For recent literature on this specific topic, see Christopher Townley, ARTICLE 81 AND PUBLIC POLICY (Hart Publishing, 2009); Ben Van Rompuy, ECONOMIC EFFICIENCY: THE SOLE CONCERN FOR MODERN ANTITRUST POLICY? (Alphen aan den Rijn and London , Kluwer Law, 2012)
[1095] ECJ Judgment of 25 October 1977, Case 26/76 *Metro-SB-Grossmärkte GmbH & Co KG v. Commission* [1977] ECR 1875

certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.

But even if we were to accept the priority of efficiency over other objectives, that wouldn't solve the dilemma of what is to be taken as a measure of efficiency. Efficiency in what parameter, and with respect to whom? Some hints can be glanced from *Sto Lekos Kai Sia EE v Glaxo*[1096], wherethe European Court of Justice phrased the notion of "effective competition" in the following terms:

In the light of the above mentioned Treaty objective [market integration] as well as that of ensuring that competition in the internal market is not distorted, there can be no escape from the prohibition laid down in Article 82 EC for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States, practices which, by partitioning the national markets, neutralise the benefits of *effective competition in terms of the supply and the prices* that those exports would obtain *for final consumers* in the other Member States

The Guidelines on the application of Article 101 (3) are even more detailed in that respect, referring to the need to assess the anticompetitive effect "on the parameters of competition in the market, *such as price, output, product quality, product variety and innovation*"[1097]. Unfortunately, this doesn't address the question of whether the restriction of competition in one of these parameters must necessarily be shown to have adverse effects on final consumers.In a second *GlaxoSmithKline* case[1098], the General Court (then Court of First Instance) answered this specific question, ruling that the purpose of European Union competition law '*is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question*".[1099] Seen in combination with the "modernization move" started in 2003 by the European Commission, this represented an attempt

[1096] Case C- 469/06 *Sto Lekos Kai Sia EE v Glaxo Smithkline, AEVE Farmakeftikon Proionton*, not published, at 66 (emphasis added)
[1097] Guidelines, at para. 16 (emphasis added).
[1098] *CFI Judgment of 27 September 2006, Case T-168/01 GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission [2006] ECR II-2969*, para. 63
[1099] CFI Judgment of 27 September 2006, Case T-168/01 *GlaxoSmithKline Services Unlimited, formerlyGlaxo Wellcome plc v Commission* [2006] ECR II-2969 , para. 118 (emphasis added), citing Joined Cases T-213/01 and T-214/01 *Oesterreichische Postsparkasse and Bankfuer Arbeit und Wirtschaft v Commission* [2006] ECR II- 1601 para 115; Cases 56 and 58-64 *Établissements Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 349; and Case 28/77 *Tepea v Commission* [1978] ECR 1391 , para 66.

to attune the treaty rules to the mainstream economic thinking. More specifically, this ruling appeared to endorse the principles of effects-based approach that had been advocated by economists[1100] and which constituted the seed for the reform of the Commission's approach to unilateral conduct[1101].

However, on the appeal of this judgment, the ECJ retreated from such a plain endorsement of economic/effects-based analysis, holding that it was unsupported by the case-law and the history of the treaty[1102]. Quashing the General Court's ruling, it expressly stated that it is not necessary to demonstrate that consumers are deprived of the advantages of effective competition in terms of supply or price[1103]. Thus, it implicitly reminded that the term "competition" does not merely refer to consumer welfare, at least not as it generally understood in economic theory, since in certain cases (in particular, those that are classified as "restrictions by object"[1104]) it will be merely the purpose of the agreement that counts.

In effect, this interpretation appears closer than the General Court's ruling to the wording of the treaty; the fact that this is a more accurate literal interpretation of the treaty in light of the case-law can also be perceived by pointing to Advocate General Kokott's opinion in *British Airways*, where she declared that it is competition "*as an institution*" which the rules protect[1105], meaning that the primary beneficiaries are not consumers, but rather, non-dominant firms. Such view was subsequently endorsed by the ECJ's rulings in *T-Mobile*[1106] and *France Telecom*[1107].

[1100] Economic Advisory Group for Competition Policy, An Economic Approach to Article 82 (Brussels, 2005)

[1101] For example, in the Discussion Paper –the document which precedes the Guidance Paper and set the start for a public consultation on the intended reform, the Commission stated "the aim of Article102 TFEU concerning exclusionary abuses is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources". See European Commission, DG Competition Discussion Paper on the Application of Article 82 of the Treaty to ExclusionaryAbuses (Brussels, December 2005), available at http://ec.europa.eu/competition/ antitrust/art82/discpaper2005.pdf.

[1102] ECJ Judgment of 6 October 2009, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 *P GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission* , para.62

[1103] Para. 63; see also Joined Cases C-468/06 to C-478/06 *Sot Le´los kai Sia EE and Others v GlaxoSmithKline* [2008] ECR I-7139, para. 65.

[1104] *Infra*, para. 4

[1105] *British Airways Plc v Commission of the European Communities*, (C-95/04P) [2007] 4 CMLR 22, para. 106("Article 82 EC refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure").

[1106] *T-Mobile Nethelands BV v Raad van Bestuur van Nederlandse Meddingingsautoriteit* (C-8-08) [2009] 5 CMLR 11 , para. 38

[1107] *France Télécom SA v Commission of the European Communities* , Case C-202/07 P, ECR [2009] I-02369, 2 April 2009, para. 105

More recently, in *Telia Sonera*, the ECJ came out with the solomonic statement that the beneficiaries of the protection of competition are actually both consumers and (non-dominant) undertakings, as well as the broader concept of "public interest".

The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union[1108].

Judgment like this, with vague and ambiguous references to the objective of competition law, do not add a great deal of clarity to the legal system. While the hopes at the start of the modernization were that a more cogent and predictable framework would be established, and followed by Commission and EU courts, this idea clashed with the observation that the core concepts of this law are still far from settled. The only thing that seems to be settled, with respect to "restriction of competition" by object, is that not in all cases is there need to prove effects to establish a violation of competition, being sufficient to show that such would be the "object" of the practice. This reasoning applies both to article 101 and article 102 TFEU. Unfortunately, without the benchmark of effects, everything becomes more fuzzy and hard to predict; what is more, it allows the Commission to pursue those cases on purely speculative grounds, where harm to competitor is in itself sufficient to infer harm to consumers.

Yet, the Commission had clearly given the impression, both in the adoption of soft-law and through its communications or other public speeches, that it was embarking or had embarked on a consumer welfare standard for the enforcement of EU competition laws. While we have seen the first phenomenon, the latter can be observed through a selection of public communications made either by the Commission, or by a Commissioner or Director General for Competition in public events.

"Competition policy endeavours to maintain or create effective conditions of competition by means of rules applying to enterprises in both private and public sectors. Such a policy encourages the best possible use of

[1108] ECJ Judgment of 17 February 2011, Case C-52/09,*Konkurrenzverket v Telia Sonera Sverige* , para. 22 (citing, to that effect, Case C‑94/00 *Roquette Frères* [2002] ECR I‑9011, paragraph 42); C-46/87 and 277/88 of 21 September 1989, *Hoechst*, para. 25

productive resources for the greatest possible benefit of the economy as a whole and *for the benefit, in particular of the consumer*"[1109].

"Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy […] *competition is not an end in itself but an instrument for achieving consumer welfare and efficiency*[1110]".

"In our view, the objective of Article 82 is the protection of competition on the market *as a means of enhancing consumer welfare and ensuring an efficient allocation of resources* […] I am aware that it is often suggested that – unlike Section 2 of the Sherman Act - Article 82 is intrinsically concerned with "fairness" and therefore not focussed primarily on consumer welfare. As far as I am concerned, I think that competition policy evolves as our understanding of economics evolves. In days gone by, "fairness" played a prominent role in Section 2 enforcement in a way that is no longer the case. I don't see why a similar development could not take place in Europe[1111]".

"In the Commission's view, *the ultimate objective* of its intervention in the area of antitrust and merger control *should be the promotion of consumer welfare*[1112]".

The Commission has only more recently begun to explicitly recognize, however faltering, that this objective is in tension with its actions to the rescue of "competitors", and as a result to include in public statements an acknowledgement of the wider picture:

Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions
But competition does not only deliver benefits for consumers. It also delivers benefits for business and the economy as a whole[1113].

[1109] European Commission, Ist Report on competition policy 1971, 11-12 (1972)
[1110] Neelie Kroes, Member of the European Commission in charge of Competition Policy, Delivering Better Markets and Better Choices, European Consumer and Competition Day, London, 15 September 2005 (emphasis added)
[1111] Neelie Kroes, Member of the European Commission in charge of Competition Policy, Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute,New York, 23 September 2005 (emphasis added)
[1112] PhilipLowe, The Design of Competition Policy Institutions for the 21st Century—the Experience of the European Commission and DG Competition No 3 Competition Policy Newsletter 1(2008), p. 6
[1113] Joaquín Almunia Vice-President of the European Commission responsible for competition policy, Competition and consumers: the future of EU competition policy, European Competition Day Madrid, 12 May 2010 (emphasis added)

Consumer welfare is not just a catchy phrase. It is the cornerstone, the guiding principle of EU competition policy.Our objective is to ensure that consumers enjoy the benefits of competition, a wider choice of goods, of better quality and at lower prices. *Understandably, not all our cases deal with consumer products. We often look at intermediate markets – involving raw materials or essential inputs – where the "consumers" are corporate customers seeking competitive conditions of supply.But the competitiveness of these firms, and in particular SMEs, is also essential for "consumer welfare" and our economy. I would like to make one point clear here: the role of competition authorities is not to deliver these benefits directly to consumers, but to create the best conditions for a well-functioning market*[1114].

Admittedly, these are recognitions of the need to protect businesses under certain circumstances, *in addition* to the "cornerstone" of consumer welfare. In fact, it may simply all boil down to a terminological clarification, taking the distance from the notion of "non-professional buyers" which is traditionally used in consumer protection law (where consumer is simply "a natural person who is acting for purposes which can be regarded as outside his trade or profession")[1115]. According to the Commission:

The concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles[1116].

However, as broad as this notion may be, it would be clearly improper to use it to legitimate the protection of competitors on the same level of the supply chain, unless this is done on the basis of a presumption that quantity and variety will eventually lead to consumer welfare. But then, the presumption must be within reasonable limits, as the ECHR's case-law required.

[1114] Joaquín Almuni,a Competition- what's in it for consumers? European Competition and Consumer Day Poznan, 24 November 2011 (emphasis added)
[1115] See e.g. Directive 85/577, Art. 2; Directive 87/102, Art. 1(2)(a); Directive 93/13, Art. 2(b); Directive 97/7, Art. 2(2); Directive 98/6, Art. 2(e);Directive 99/44, Art. 1(2)(a); Directive 2000/31, Art. 2(e); and Directive 2005/29, Art. 2(a) ("consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession).
[1116] Guidelines on the Application of article 101. 3, para. 84

Thus, to conclude, the notion of consumers appears to be central to EU competition policy, and accordingly consumers' interest should be given priority over other economic objectives in the case of conflict. However, there remains substantial uncertainty in the interpretation of both the concept of "competition", "restriction of competition" and their relationship to consumers, and unless those core concepts are clarified, EU competition enforcement is likely to remain dependent on political choices rather than on the pursuit of objective economic principles.

2. Modes of antitrust analysis, burden of proof and the role of presumptions in competition law

The fact that those fundamental concepts mentioned above have not been fully clarified does not imply that the Commission can decide to bring cases as it pleases, suggesting an allegedly correct interpretation of those concepts to which the Courts will merely pay lip-service. In fact, as it has been seen in chapter IV, EU Courts do exercise thorough review over most aspects of its decision, and retain the last word over the interpretation of the primary and secondary law of the EU. There are, however, areas where the Court will refrain from second-guessing the reasoning of the Commission in consideration for the discretion that is inherent in its function[1117], and it is precisely on open-ended concept such as "competition" or "restriction of competition" that the Commission is granted such discretion in the first place. Thus, unless the Commission has pre-empted its future interpretation by way of regulation or guidelines, or it unreasonably departs from its previous practice, it is unlikely that it will be found to be wrong on the interpretation of such concepts. Therefore, it is reasonably able to give the appropriate shape to the content of the competition rules, with the proviso that those interpretations will become part of the law officially only when they will receive the benediction of the Court. In this sense, the uncertainty is an advantage for the Commission not only because it facilitates its task of proving the infringements, but also and especially because it allows it to adapt the standard to the changing economic circumstances and the advancements of economic theory.

[1117] See Opinion of Advocate General Tizzano, *Tetra Laval* , Case C-12/03 P, *Commission v. Tetra Laval* (``*Tetra Laval II*''), judgment of 15 February 2005 [2005] ECR I-987., para 89 (recalling that the rules of the division of powers between the Commission and the Courts do not allow the judicature to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution).

In addition, the Courts themselves have contributed to the creation of the situation of uncertainty, alternating judgments with a formalistic approach[1118] to others exhibiting painstaking level of economic analysis for the proof of procompetitive or anticompetitive conduct[1119]. This is to a large extent due to the slower capacity of the Court as an institution to adapt to changes in the understanding of markets or more generally, of economic theory, which translates in a sometimes resilient attachment to the old form-based approach. Occasionally, courts have developed (*rectius*, sanctioned) rules designed to facilitate proof of anticompetitive behavior by referring to certain proxies that, throughout the years, have become outdated[1120]. To be sure, this happens continuously in a variety of legal systems, with a degree of slowness which is inevitably dependent on the rigidity that the rules encapsulate. For this reason, due to changing nature of the prevailing economic theory, it is preferable for a system not to commit *ex ante* to categorical rules, which like irrebuttable presumptions, do not allow defendants to show countervailing specifications. It is for this very reason that competition law statutes tend to be open-ended in the first place, so as to allow the development of alternative interpretations by the courts and to adapt the system to the rising needs.

Whether the effect that the law wants to minimize and deter is harm to consumer or harm to competition, it rarely goes as far as requiring direct proof of that effect. This is because the law recognizes that proof in competition cases can be very hard to obtain, and particularly so when cases refer to conduct that is secretive and is investigated after a considerable lapse of time.[1121] For this reason, competition laws are designed in a way that allows the incriminated conducts to be proven by reference to certain tests which are reasonable proxies for the ultimate objective that competition law aims to protect. Such tests represent a compromise between two opposite

[1118] E.g. ECJ Judgment of 13 February 1979, Case 85/76, *Hoffmann-La Roche* &. Co. AG v Commission [1979] ECR 461

[1119] An often cited example of the latter type of approach is judgment of the General Court of 29 September 2011, Case T-44/07, *Ryanair Ltd v European Commission*

[1120] An example is the evolution of the standard for refusal to license intellectual property rights: from a generic "exceptional circumstances" in *Magill* (ECJ Judgment of 6 April 1995, Joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* , para. 50) to the three cumulative exceptional circumstances in *IMS Health* (Case C-418/01, *IMS Health v NDC* [2004] ECR I-5039, para. 38) to the "new product test" in *Microsoft* (CFI Judgment of 17 September 2007, Case T-201/04, *Microsoft Corp. v Commission of the European Communities*, para. 643-665)

[1121] See to that effect, CFI judgment of 8 July 2004 in Cases T67/00, T-68/00, T-71/00, T-78/00, *JFE Engineering and Others v Commission*, para. 203

type of errors in the enforcement of the law: type I errors, also known as false positives, which occur when enforcers detect and punish conduct that was not anticompetitive; and type II errors, or false negatives, which occur when anticompetitive conduct is not detected or punished.
The tests for anticompetitive behavior are thus decided depending on the likelihood that the conduct described in the proxy will effectively result in one of these two errors. Whether a system will prefer to err on the side of false positive or false negatives, is also captured within the test, and often a matter of intense discussion[1122].

At the most basic level, two opposite modes exist to develop standards: one extreme is to formulate a rule that admits no exception, and requires no contextual analysis, but merely punishes conduct which meets the specified requirements. This is traditionally known as "*per se*" rule, because it attributes liability simply on the basis of the ascertainment of the conduct *per se*[1123]. The reasoning behind the creation of such rules was explained by the US Supreme Court as following:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price-fixing, *United States v. Socony-Vacuum Oil Co*., 310 U. S. 150, 310 U. S. 210; division of markets, *United States v. Addyston Pipe & Steel Co*., 85 F. 271, affirmed, 175 U. S. 211; group boycotts, *Fashion Originators'Guild v. Federal Trade Comm'n*, 312 U. S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 332 U. S. 392[1124].

[1122] For example, an intense discussion developed in the United States when in 2009 the Attorney General of the US Department of Justice decided to withdraw the Section 2 Report, jointly issued with the Federal Trade Commission, on the basis of an alleged excessive focus of the report on false positives. See Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law, available at http://www.justice.gov/opa/pr/2009/May/09-at-459.html

[1123] Of course, analogous reasoning can be done for the rules attributing "per se" legality, which are not considered here as the inclusion of an individual within the per se legality box has no adverse consequences.

[1124] *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958)

The other extreme is a rule which defines the illegal conduct on the basis of an open-ended concept, such as the interpretation of the word "reasonable", and allows parties to advance claims over why the most appropriate interpretation of that concept would support their case, on the basis of the facts at issue. This is known as the "rule of reason", and is said to technically apply in the majority of cases in the United States[1125]. In the EU, courts have always chosen intermediate tests, rejecting the idea of adopting any of the two extreme approaches.

As a matter of fact, it is the very structure of the Treaty which makes it impossible to speak of a "*per se*" rule in the context of agreements, which is the area where a number of country (*in primis* the United States), since paragraph 3 of article 101 TFEU allows the application of an exemption from the prohibition when the criteria are met. Hard-core restrictions are unlikely to qualify for the exemption[1126], but nonetheless are not categorically excluded. Moreover, according to the Court even paragraph 1 is written in such way that it would be impossible to derive from it a *per se* prohibition:

> As article [101] (1) is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature[1127].

On the other hand, again due to the existence of a third paragraph for the assessment of efficiencies, the Court has clarified in *Métropole Télévision*[1128] that the assessment under article 101 (1) is fundamentally different, as it does not weigh anticompetitive and procompetitive effects.

Under article 102, by contrast, there is no paragraph 3 which prevents the adoption of a *per se* rule; however, it is widely acknowledged that *per se* rules of liability are undesirable in unilateral

[1125] Jesse W. Markham, Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law , Fordham Journal of Corporate and Financial Law, Forthcoming; Univ. of San Francisco Law Research Paper No. 2011-25. Available at SSRN: http://ssrn.com/abstract=1916223

[1126] In particular, they are considered unlikely to satisfy the requirement of "indispensability": see Guidelines on the application of Article 81(3) of the Treaty, para. 76

[1127] ECJ Judgment of 30 June 1966, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, Case 56-65, para. 248

[1128] ECJ judgment of 18 September 2001, Case T-112/99, Métropole télévision (M6) v Commission, [2001] ECR II-2459at 76

conduct cases, since most unilateral practices are potentially beneficial to competition and therefore should be evaluated within their particular context. Given the absence of a paragraph 3-type of restraint, the Commission and the Court could in theory commit to decide on a case-by-case analysis, evaluating all procompetitive and anticompetitive effects to determine whether the conduct at issue harms consumers. However, this would be both extremely cost-and time-consuming, and arguably prejudicial to the undertaking in the Common market, which would like clear guidance. As a result, some criteria have been devised throughout the years to determine what conduct is to be considered illegal. Until recently, the development of criteria was an exclusive domain of the EU Courts, but this has changed with the start of the Article 82 Review, which has brought the issue of "form-based approach" of unilateral conduct to the fore, and has produced a set of indications with the Guidance paper released in 2008.

As it will be explained below, some of the criteria identified by the Guidance paper can be defined as presumptions of law; this is in fact the case for any standard that departs from the rule of reason, if it is accepted that the ultimate standard is consumer welfare. What is central in this kind of presumptions is their strength, i.e. the extent to which the party against which they operate is able to rebut them: on the basis of the relative strength of the presumptions, conducts may end up in the category of illegality or in that of legality, and the system may produce more type I or type II errors.

The US Supreme Court has adopted a different approach, which blends *per se* rule and rule of reason in the same inquiry -the so called "quick look" approach. Since it is believed that the adoption of this particular approach would be the best way to overcome the issues presented by presumptions of law, it is appropriate to make an overview of a couple of cases which illustrate the rise and the features of this analysis.

In *Broadcast Music Inc v Columbia Broadcasting System*[1129], the collecting societies ASCAP and BMI were accused to have engaged in unlawful practice by issuing blanket licences to musical compositions at fees established uniformly (as percentage) by them for all composers across the country. Obviously, the practice had a price-fixing effect; however, the arrangements were also allowing the integration of sales, monitoring, and enforcement against unauthorized

[1129] 441 U.S. 1 (1979)

copyright use, which would be difficult and expensive problems if left to individual users and copyright owners. The main issue concerned whether the *per se* rule should be followed for this type of arrangement, condemning it as illegal. The Supreme Court endeavoured to distinguish this situation from the "literal" price-fixing, based on the reasoning that "*It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act*"[1130], and decided to establish a new kind of analysis: if defendants can show a facially valid pro-competitive justification, then the conduct should be analysed under the rule of reason. This analysis , thereafter named by lower courts "quick look", had the benefit of allowing potentially new practices to be exempted from the per se analysis, but without renouncing to the administrability benefits of saving costs in the absence of a *prima facie* rebuttal.

Just a year later, in *Catalano Inc v Target Sales Inc*[1131], the quick look was applied in the opposite sense, quashing an unjustified resorting to rule of reason analysis. The lower courts had applied the rule of reason to a secret horizontal agreement among competitors to fix credit terms (requesting to brew-retailers payment upon delivery), concluding that it did not contravene antitrust laws because it removed a barrier to entry and it increased visibility of prices. However, on appeal the Supreme Court disagreed, alleging that the elimination of interest-free credit has the effect of raising prices and accordingly, if there is no potential redeeming value, no further inquiry was required.

But the definitive establishment of the "quick look" analysis in US antitrust is often attributed to the Supreme Court's judgment in *FTC v Indiana Federation of Dentists*[1132], where a federation of dentists was charged by the Federal Trade Commission of conspiracy for having issued a policy that required its members to withhold x rays from dental insurers. The rule was deemed to have an effect on competition assuming that consumers would normally prefer to have a doctor that is cooperative with the insurance company, so that they can be reimbursed. However, despite the horizontal agreement resulting in reduction of choice, the Supreme Court recognized the difference between this case and a traditional hard core restriction, therefore establishing the rule that although naked horizontal restraint cannot be saved by a showing of the lack of market

[1130] Id., at 1,9
[1131] 446 U.S. 643, 647-50 (1980)
[1132] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)

power, the defendant can escape liability by showing some countervailing competitive virtues (which the Federation failed to show). The most important element of the case is that the Court dispensed with the market power requirement by demonstrating that the conduct had a detrimental effect in the market[1133] , quoting Professor Areeda's treatise[1134] to the effect that market power is "*but a surrogate for detrimental effects*".

This is the main reason why this case is profusely cited today , having established that what courts should do when analysing a restraint to identify whether it falls in a category that is patently anticompetitive ("hardcore restriction") is to have a primary view of the conduct in question ("quick look"), without undertaking a market definition[1135]. It is important to understand, however, that this is just the primary analysis; because in case a defendant shows anoffsetting efficiency justification, then the court would engage in a full-blown rule of reason.
Note that this is substantially different from the analysis that will be described below when referring to "object" infringements in EU competition law: whereas in the first step of the process both analysis recognize the obvious anticompetitive nature of the conduct, the European "quick look" provides the possibility for the defendant to show a pro-competitive justification, but that justification will be assessed under very stringent conditions, amounting to a considerably more difficult test than prevailing on a rule of reason analysis as under the American quick look. In other words, the presumption of illegality set by is much stronger and difficult to rebut in that context.

Besides right to be heard issues, which will be addressed more specifically in the next paragraphs, there is another point worth mentioning that speaks to the superiority of the American quick look approach. By creating the conditions for an intellectual exchange between the plaintiff and the defendant company under the rule of reason, the American approach allows courts and competition authorities to analyse in depth new types of conducts, and rule upon their

[1133] at 460 ("as a result […], dental insurers were, over a period of years, actually unable to obtain compliance with their requests for submission of xrays")
[1134] Philip Areeda, ANTITRUST LAW (Aspen Law & Business, New York 1986)
[1135] This point in particular was confirmed in *National Collegiate Athletic Ass'n v. Board of. Regents*, 468 U.S. 85, 98 (1984); and *Chicago Professional Sports Limited Partnership and Wgn Continental National Basketball Association*, 961 F.2d 667, 673 (7th Cir.1992).

compatibility with the competition rules. That is, the in –depth analysis allows courts to distinguish between similar cases, where the conduct is on balance potentially procompetitive or neutral to competition. Note that this is accomplished without foregoing the administrability of the *per se* approach, but only once the defendant has been able to show a facially procompetitive justification. Granted, the extent to which the courts will engage in in-depth analysis will depend on the standard which they will require to be satisfied for the *prima facie* validity of the justification. Nonetheless, this will allow the system to evolve more quickly, as more "borderline cases" will be distinguished from the "traditional" equivalents. By contrast, the approach followed by the EU, with split assessment of the pro-competitive effects, frustrates the possibility for defendants of "borderline cases" to signal the inadequacy of the rule as applied to "traditional cases"; moreover, it inevitably obtains the effect of chilling potentially pro-competitive business conduct.

Now, it is important to recognize that by noting the difference between the "object" inquiry in the EU and the "quick look" approach in the US, we are simply referring to two presumptions: one that demands a very high threshold for rebuttal, and another that contents itself with a *prima facie* case. But in both jurisdictions, presumptions play a central role. In fact, in competition law courts are routinely confronted – to be sure, in the vast majority of cases- with the two scenarios that are typical conditions for the establishment of presumptions[1136]: complex assessments which would be drastically simplified by establishing a workable diagnostics; and informational asymmetry of the parties that calls for the use of different rules concerning their satisfaction of the burden of proof. This implies that competition law is an area where legal presumptions play a crucial role to ensure both the effectiveness and the administrability of the system. In the pursuit of these goals, legislators and courts in various jurisdictions around the world have complemented the competition provisions of the relevant statutes with presumptions aimed at lightening up the evidential burden, in most circumstances to alleviate one or more parties of a legal proceeding from the need to engage in a full-blown economic analysis to validly sustain the respective position[1137].

[1136] See supra, chap I.5

[1137] For example, prohibition of parallel imports: see the decision of the CFI on 27 September 2006, Case T-168/01, *GSK v Commission*, [2005] ECR I-4609, paras 89-104

Like in other areas of law, presumptions in competition law are primarily based on the experience with the consequences of certain patterns of conducts: once the adjudicators have acquired the necessary confidence with a particular practice, then an assumption is drawn concerning the repetition of such consequences, which will determine the outcome of a particular claim unless sufficient evidence to the contrary is produced to refute the presumption. What amount of evidence is considered sufficient will vary across jurisdiction and, perhaps more importantly, depending on the fact that has to be proven[1138] and on the type of proceedings through which competition laws are enforced.

In the EU, courts always recognize –at least in theory[1139]- the possibility of rebutting presumptions of illegality, or presumptions of fact that might lead to a finding of illegality. By contrast, there are jurisdictions where certain practices are deemed to be conclusively illegal: once a certain set of facts is alleged and substantiated with sufficient proof by the plaintiff, there is no way for the defendant to escape liability.

This difference of treatment reveals a value judgment which legal systems are called upon: that of attributing more weight to the pursuit of certain particular goals over others within a country's competition law. Clearly, one such goal is that of legal certainty. The importance of administrability, and of the legal certainty that derives thereof, can hardly be overstated: not only it is a value that deserves respect in itself, but also, since it refers to the elements that trigger antitrust scrutiny, it has a direct impact on the extent to which firms and individuals are able to exercise their property rights as they see fit. In the landmark case where the US Supreme Court over-ruled its almost centenary precedent on the *per se* illegality of minimum resale price maintenance, the dissenting opinion written by Justice Breyer (joined by three other Justices) put forth 3 types of considerations in the evaluation of pros and cons of the use of *per se* rules: (1) potential anticompetitive effects; (2) potential benefits; and (3) administration. After considering

[1138] For example, depending on whether that fact is by itself probative of the infringement and whether it is supported by circumstantial evidence. As the ECJ explained in *T-Mobile*: "the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve". See *T-Mobile*, para. 60.

[1139] See *infra*, para. 5

the potential competitive effects of resale price maintenance, the opinion stresses the importance of administrability, and the impact that such value might have on the antitrust rules:

> Economic discussion, such as the studies the Court relies upon, can *help* provide answers [to the questions of how often harms and benefits occur, and how easy it is to separate the two]. But antitrust law cannot, and should not, precisely replicate economists (sometimes conflicting) views. This is because antitrust law, unlike economics, in an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgments to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits (emphasis in the original)[1140].

Yet it may be argued that Justice Breyer neglected to mention one additional element, which is often referred to by the law and economics literature, even if with particular focus on the area of sanctions: deterrence effects. As Richard Epstein explains[1141], the extent to which a rule will be comprehensive and exacting depends on the interplay between administrability, error costs and incentive effects. Thus, another function served by legal certainty, at least to the extent that a law provides for the infliction of sanctions, is to diffuse a clearer perception of what conduct is reprehensible: the clearer and more predictable the law is, the stronger will be the message of illegality that it sends. This is the so called "incentive effect" generated by a clear-cut, conclusive formulation of a rule, as opposed to the *ex post*, case-by-case determination of its content. Deterrence also depends on another factor, the severity of the sanctions, but that is outside of the scope of this analysis[1142].

Finally, the third objective which legislators and judges pursue in determining the content of the competition rules, and one that is often in tension with legal certainty, is the need to minimize error costs. That is, cases where a court imposes liability for a conduct that actually has pro-competitive effects on competition (type I errors) or declines to impose it for conduct which in fact has anticompetitive effects (type II errors). The existence of such errors is a consequence of the fact that the use of clearer and more administrable legal rules comes at the expense of their

[1140] *Leegin Creative Leather Products Inc., v. PSKS, Inc.*, 551 U.S. 877 (2007)
[1141] Richard Epstein, SIMPLE RULES FOR A COMPLEX WORLD (Cambridge, Harvad University Press 1995)
[1142] For a seminal article on this matter, see Gary Becker, Crime and Punishment: An Economic Approach, 76 (2) The Journal of Political Economy (1968), pp. 169-218

ability to fully capture the peculiarities of each situation, which might sometimes be necessary to identify a given conduct as pro-competitive or anticompetitive. In specific circumstances, however, the legal system undertakes to sacrifice the want for more exacting economic analysis in order to attain greater administrability and predictability, the risk otherwise being one of confusion and inconsistency across the board. Just how big of a sacrifice has been undertaken with respect to some presumptions in the EU competition rules, and to what extent they are compliant with the core principle of the right to be heard, is a central point of inquiry in this chapter.

3. Article 101 TFEU

a. Presumptions of fact

A broad group of presumptions is that concerning the assessment of evidence for the purpose of establishing the existence an infringement of article 101.
Such presumptions are, incidentally, merely "legal presumptions of fact" in the sense that was discussed above, as they legally entitle courts and competition authorities to draw inferences over the existence of "*contacts with competitors which eliminate in advance future uncertainty about their respective conduct in the market*"[1143].

The *raison d'etre* of this kind of presumptions is that proof of "*joint expression of intention to conduct themselves in the market in a specific way*"[1144] or "*concertation*"[1145] is extremely

[1143] This has been identified in *ICI* as the standard that triggers a violation of the prohibition of "agreement" or "concerted practice". See ECJ judgment of 14 July 1997, Case 48-69, *Imperial Chemical Industries Ltd. v Commission*, paras. 101 and 112

[1144] That has been held, since early cases, to be the requisite element for proof of an agreement: see ECJ judgment of 15 July 1970 in Case 41/69 *ACF Chemiefarma N.V. v Commission* [1970] ECR 661, para. 112, and ECJ judgment of 29 October 1980 in joined Cases 209 to 215 and 218/78 *Heintz van Landewyck Sàrl v Commission* [1980] ECR 3125, para. 86

[1145] In practice, the Court has held a conduct to fall within the definition of concerted practice "where [the factual elements found against the accused companies] either did not enable the conclusion to be drawn that the parties had reached agreement in advance on a common plan defining their action on the market but had adopted or adhered to collusive devices which facilitated the coordination of their commercial behaviour, or did not, owing to the complexity of the cartel, make it possible to establish that some producers had expressed their definite assent to a particular course of action agreed by the others, although they had indicated their general support for the scheme in question and conducted themselves accordingly […]coordination and cooperation must be understood in the light of the concept […] according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although this requirement of independence does not deprive economic

difficult. The General Court has noted that the difficulty of dealing with proof is a general problem of competition law:

"the Commission is often obliged to prove the existence of an infringement under conditions that are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated therein.[1146]"

This problem is even more pronounced in the area of cartels, in particular concerning the proof of an agreement or a concerted practice. In the *Suiker Unie* case, Advocate General Mayras recognized that:

[…] the evidence of a concerted will in most cases only consist of circumstantial evidence or presumptions which the investigations of the Commission have brought to light.It is the combination of these presumptions – provided that they are strong, precise and relevant- which more often than not alone enables the existence of a concerted action corroborated by the actual conduct of the undertaking concerned to be proved[1147].

This logic –perfectly transposable to the concept of agreements- seems to reflect even more accurately the picture of cartel enforcement today: as undertakings have become increasingly aware of the robustness of antitrust enforcement and the risk of self-reporting from the cartel members has grown, they tend to dispense of any written agreement and to dissimulate any possible evidence of a common understanding. Accordingly, the argument can be readily accepted that the enforcer of competition law needs to be able to rely on circumstantial evidence to infer the existence of facts that can hardly be object of direct proof[1148]. In fact, it appears

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operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market See Case T-7/89, *Hercules v Commission* [1991] ECR II-1711, at paras 255-258

[1146] CFI judgment of 8 July 2004 in Cases T67/00, T-68/00, T-71/00, T-78/00, *JFE Engineering and Others v Commission*, para. 203

[1147] ECJ Judgment of 16 December 1975 Joined Cases 40/73 to 48/73, 50/73 to 56/73, 11/73, 113/73 and 114/73, *Suiker Unie and Others v Commission* [1975] ECR 1663, para. 301

[1148] Circumstantial evidence can be classified into two types: 1) "communication" evidence, or evidence that the suspected cartel participants did communicate about the subject of their agreement, and 2) "economic" evidence. Economic evidence can be further classified as a) "conduct" evidence and b) "structural" evidence. Conduct

legitimate to infer the existence of an agreement or concerted practice from the observance of certain collateral facts, such as parallel behaviour, communication of certain type of incriminating information, and participation in a meeting where such information was communicated. These three presumptions will be analyzed hereafter.

At the outset, it is important to recall that in national civil and criminal legal systems, and consequently in the context of European Union law, the general rule is that such type of "circumstantial evidence" cannot be considered in isolation, but needs to be weighed with the rest of the evidential material and to be read in light of the circumstances of the case. For example, in the first case where proof of parallel behavior was relied upon as evidence to infer the existence of a concerted practice, the ECJ held that:

"Although parallel behaviour cannot be identified by itself as a concerted practice, it may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. […] Therefore, the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based and considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question."[1149]

Note that this does not necessarily imply that one of these factors, if it were the only piece of evidence available, would automatically be insufficient to stand an annulment proceeding. However, satisfying the evidential burden for a claim of annulment in such cases would be relatively easy, as the applicant would be only required to convincingly cast its behavior in a different light from the scenario of concertation depicted by the Commission. In fact, mere reliance by the Commission on proof of parallelism proved to be ineffective in the

evidence includes such things as parallel pricing or other parallel behaviour and practices that facilitate a cartel agreement (e.g., price signaling). Structural evidence includes such factors as high market concentration and homogeneous products. Of the two types of economic evidence, conduct evidence is the more important. See Report of the OECD Policy Roundtable 2006, Prosecuting Cartels without Direct Evidence, available at http://www.oecd.org/dataoecd/19/49/37391162.pdf

[1149] ECJ Judgment of 13 July 1989, Case 48/69, *ICI v Commission* [1972] ECR 619, para. 66-68

*Woodpulp*case, where the defendant companies submitted an economic report providing for alternative explanations for their behaviour in the market[1150].

However, in a later case of proven parallelism the ECJ, while repeating the rule that such proof may be strong evidence of a concerted practice, also added a clarification that led to infer, *a contrario*, the existence of a presumption:

"Parallel behavior may amount to *strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition*. However, concerted action of this kind cannot be *presumed* where the parallel behavior can be accounted for by reasons other than the existence of concerted action.[1151]"

The ECJ thus implicitly validated the use of a presumption of concerted practice, absent an alternative explanation, in case of parallel behavior in the market that is not driven by "normal" competition. Such presumption is rooted on two postulates: first, on the premise derived from the case-law that actual behavior of the parties can be used as an element of proof of the existence of an agreement or its exact meaning[1152]. Second, and this is where it tends to get more problematic, that the court will be able to aptly determine what the "normal" conditions of competition are, or would be as a counterfactual. While the former is a principle which appears to be justified by the above mentioned peculiar nature of anti-cartel enforcement, the exact formulation of the latter seems questionable. If on the one hand the proof of illicit concertation is alleviated through the use of a presumption, it seems contradictory to limit the benefitof the presumption by imposing on the defendant the duty to show the "normality" of the market conditions. This is because the Court appears not to be well situated for the evaluation of the plausibility of the economic reports by which such normality can be shown, particularly in the absence of rules of admissibility such as those developed by the US Supreme Court in *Daubert*.

A similar argument,concerning the unsuitability of the Court to make complex determinations regarding the exact conditions of the "but-for" competition, was put forward by the Court in a

[1150] ECJ Judgment of 31 March 1993, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85A, *Ahlström Osakeyhtiöand Others v EC Commission*, [1993] ECR I-01307

[1151] Case 395/87, *Ministere public v Jean Lous Tournier* [1989] ECR 2521, at 35-46 (emphasis added)

[1152] See e.g. Commission Decision (95/477/EC) of 12 July 1995 (Case IV/33.802 -*BASF Lacke, Farben AG, and Accinauto SA*), O.J. L 272 of 15.11.1995, p. 16, paragraph 71, upheld by the judgment of the CFI on 19 May 1999, Case T-176/95, *Accinauto SA v Commission*, [1999] ECR II-1635, paragraphs 63, 64 et seq, 83-93.

cartel case to justify dispensing, for the purpose of establishing a violation of article 101 , with the proof of the overcharge:

"[Making these determinations] would absorbe considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved[1153]"

This rationale would seem to beg the confinement of the Court's assessments of "but-for" competition to narrow circumstances, where the determinations can be based on objectively identifiable criteria. This would be the case if some specific criteria were established to identify the carachteristics of normal competition within a particular type of market setting, beyond the mere existence or absence of parallelism, for example considering the type and magnitude of barriers to entry and the number of potential competitors. Merely adopting a presumption of illegality focusing on parallelism of price or quantity risks being overly simplistic, and tends to lead to rather formalistic decisions that are detached from economic reality. By contrast, the determination of which alternative view is more reliable between those put forth by the parties' economic experts is a task that can be more easily squared within the court's purview. For this reason, it would appear preferable to let a court decide upon the applicable standard of proof, and avoid resorting to a presumption .Otherwise, the uneasiness of the Court in appraising economic reports could ultimately weigh against a defendant, and jeopardize its effective ability to exercise its right to be heard. Although it can be conceded that in the few occasions where enforcement was relying exclusively on parallel behavior, the Court readily accepted the defendants' explanations and annulled the decisions finding an infringement of article 101, the possibility remains that *in concreto*, the reviewing court violates a defendant's right to be heard by failing to give appropriate weight to the economic reports submitted to justify presumed illegal conduct.

Another permissive and somewhat speculative interpretation of the behavior of the parties has led to the establishment of a second presumption: one according to which communication of an

[1153] CFI Judgment of 14 December 2006, in Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiddeisen Zentralbank Osterreich and Others* [2006] ECR II-5169, para. 286; judgment of 8 July 2008, Case T-54/03, *Lafarge v Commission*, para. 589; judgment of 8 October 2008, Case T-69/04, *Schunk v Commission*, para. 167.

intention not only is liable to trigger the finding of a concerted practice, but also, if not followed by an explicit refusal implies the existence of tacit acceptance to an agreement[1154]. This has occurred, in particular, in the area of vertical restraints -where the conduct of operators at two different levels of the market typically follows different incentives, and accordingly, coordination is difficult to infer in the absence of an agreement. In this context, the ECJ has held that sales conditions systematically reproduced on the back of invoices, orders and price lists constitute a communication of information sufficient to trigger an "agreement between undertakings" within the meaning of article 101[1155]. Similarly, in *Dunlop Slazenger* unilateral statements by the supplier and subsequent renewal of orders by the customers on identical terms were considered indicative of the existence of an agreement[1156]. This situation appeared puzzling, if nothing else for the fact that mere adherence to a contract does not necessarily mean that the adhering party will actually respect all the clauses thereof. Only more recently, in*Bundesverband*, has the Court provided a clarification on the discerning line between conduct liable to fall under the notion of tacit acceptance of an agreement and behavior that simply results from unilateral actions of a manufacturer:

"[…] an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. […] The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists[1157].

[1154] ECJ judgment of 11 January 1990, case C-277/87, *Sandoz prodotti farmaceutici SpA v Commission* [1990], ECR I-45, para. 11 ; See also case C- 279/87, *Tipp-Ex v European Commission* [1990] ECR I-261

[1155] ECJ Judgment of 12 July 1979, in joined Cases 32/78, 36/78 to 82/78 *BMW Belgium v Commission* [1979] ECR 2435, paragraphs 28-30; ECJ Judgment 17 September 1985, Joined Cases 25 and 26/84, *Ford v. Commission*, [1985] ECR 2725, para. 21; ECJ Judgment of 22 October 1986, 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission Case* [1986] ECR 3021, para. 72-73; ECJ Judgment of 11 January 1990, Case C 277/87, *Sandoz v Commission*, paras 7-12; Case C-70/93 *BMW v ALD* [1995] ECR I-3439, paras 16-17.

[1156] CFI Judgment of 7 July 1994, Case T-43/92, *Dunlop Slazenger International Ltd v Commission* [1994] ECR II441, paras 54-55, 60-61.

[1157] ECJ Judgment of 6 January 2004, Joined cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel Importeure*, [2004] ECR I-23

Following *Bundesverband,* then, the key element to identify the possible existence of an agreement can be considered the ability of the contractual party that implements a certain policy (typically, the manufacturer) to attain the objective of its policy without the cooperation of its other parties (typically, the wholesalers).

At first sight, it would appear difficult to reconcile this with the case-law which considered dealer termination as evidence of an implicit understanding between manufacturer and dealers as to the circumstances that would trigger termination. However, such presumption needs to be read in the context of the continuing business relationship, and with the intuition that renewal of an existing deal with prior knowledge about the application of certain conditions (for example, the termination of dealers who have undercut a minimum resale price) may be a signal of the concurring will required for the existence of an agreement under article 101. Moreover, the Court specified in *AEG* that:

> Refusals to approve distributors who satisfy the qualitative criteria above mentioned [of a selective distribution system] therefore supply proof of an unlawful application of the system if their number is sufficient to preclude the possibility that they are isolated cases not forming part of systematic conduct"[1158].

Thus, the presumption of being part to an agreement simply for having entered a deal which includes clauses having an anticompetitive object or effect appears to be mitigated by two circumstances: first, it must be a renewal of an existing deal, so that one could not fail to have actual or constructive knowledge of the rules and policies in force by the contracts of that particular dealer. Second, there must be actual likelihood, based on prior experience, that those rules and policies be enforced. One can understand that the Court has tried, in formulating this presumption, to limit its incidence to a small number of cases. For the presumption to be upheld, however**,** the potential restriction of the right to be heard is to be assessed even in those hypotheses where, despite the strong evidence[1159] suggesting awareness of the systematic

[1158] ECJ Judgment of 25 October 1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunkenv Commission*, [1983] ECR 3151, paras 38-39

[1159] This wording suggests that, in fact, the more appropriate qualification for the inference made here is one of "piece of evidence", which needs to be complemented by additional pieces. As advocated by Advocate General Bot in *Austrian Banks*, and Advocate General Mengozzi in *Prym*, and endorsed by the ECJ in that same case, there must

enforcement of anticompetitive clauses, the defendant had a good explanation for not being aware or was simply not in the position to object to the use of such clauses for coercion[1160]. Given the "weak" articulation of the presumption and the numerous circumstantiations adopted for its operation, which prevent it from being applied mechanically, it appears on a cursory analysis thait the presumption leaves sufficient room room for rebuttal. Nonetheless, this conclusion can be taken only upon the application of the framework identified throughout chapters 2 and 3, which will be done in the concluding paragraph of this chapter.

The case-law has gone further than that, establishing that participation of an undertaking to an agreement or concerted practice may be inferred from the mere fact that, while attending a meeting where such agreement or concertation was arranged by other participants, the representatives of the undertaking did not publicly distance themselves from what was discussed. By consequence, in order to evade liability a company must without undue delay denounce the objectives of the cartel clearly and unequivocally to the other cartel members, refrain from attending any further meeting or discussing its own pricing or marketing strategy, and prove that its subsequent conduct on the market was determined independently[1161]. Such requirement has been considered not fulfilled, for example, where a company continued to attend the meetings but never specifically committed to implement a price increase[1162]. The Court reasoned that if

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always be '*concrete, credible and sufficient indicia*' of the link of causality between a certain conduct and an infringement, as well as of its actual impact. See Opinion of AG Bot in *Austrian Banks*, at 308; Opinion of AG Mengozzi in Case C-534/07 P, *William Prym v Commission*, at para. 140; ECJ judgment of 3 September 2009, *William Prym v Commission*, Case C- 534/07 P, paras 80-82

[1160] However, the scope of the "coercion" defense is quite limited, since at least with regard to cartels (but it is not clear whether this applies in the different context of vertical agreements) the CFI held that " it is sufficient to recall that, according to settled case-law, an undertaking which participates in anti-competitive activities under pressure from other participants cannot rely on that pressure, since it could have reported it rather than participating in the activities in question": see CFI Judgment of 20 March 2002, Case T-23/99, *LR AF 1998 A/S, formerly Løgstør Rør A/S v Commission* [2002] ECR II-01705.

[1161] ECJ Judgment of 28 June 2005, Joined Cases C-189/02 P, 202/02 P, 205/02 P, 208/02 P and 213/02 P, *Danks Rorindustri A/S vCommission*, June 28, 2005 ECJ, at 132-152; ECJ Judgment of 7 January 2004, Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P and 219/00 P, *Aalborg Portland A/S v Commission*, [2004] E.C.R. I-123, at 81-82; ECJ Judgment of 8 July 1999. Case C- 199/92 P, *Huls v Commission* [1999] E.C.R. I-4827, at 155; and ECJ judgment of 8 July 1999, Case C-49/92 P, *Commission v Anic* [1999] E.C.R. I-4125 at 96. See also D Bailey, Publicly Distancing Oneself From A Cartel, 31 (2) World Competition (2008), pp. 177-203

[1162] CFI Judgment of 5 December 2006, Case T-303/02, *Westfalen Gassen Nederlands v Commission*, [2006] ECR II-4567, paras 60-61

public distancing were not imposed, the representatives' conduct would give the impression that they subscribed to the results of the meetings and would act in conformity with them[1163].

From an equity perspective, criticism can be advanced that this standard does not comply with the general requirements that criminal law imposes for the attribution of liability. By analogy with criminal law, think of a situation where I assume your assistance –which I have never agreed nor intended to give- in committing a burglary, and then rely on your driving me home after I go rob the bank. Does that make you guilty by participation? The answer is no, unless there can be no doubt that you submitted to the plan, or you could not have reasonably failed to know that I was going to rob the bank thanks to the ride you were giving me. In cartel cases, the situation is different because there is no need for the Commission to prove the intention of any participant at a meeting, nor that its conduct on the market was dictated by the agreement; in fact, according to this presumption, divergence of conduct can only be admitted as a justification if there had been previously a denunciation of the anticompetitive objectives and an abandonment of the meeting(s). And while it may be acceptable to infer intent from objective factors, which is a standard practice in antitrust law, it should at least have been more thoroughly explained why the showing of diverging conduct in the market would not be sufficient. Not only, that, but from a more recent decision of the Court it is clear that the undertaking must show that the members of the cartel considered that it was ending its participation[1164]. As Scordamaglia-Tousis put it[1165], the Court seems to effectively impose on a hypothetical defendant company a duty of result, rather than a duty of means. In all honesty, to presume guilt and condition rebuttal not on proof of its absence, but rather on proof of a conduct that would otherwise appear irrational, seems to go too far. If the Commission is relieved on the need to prove a subjective state of mind such as intent, why would that principle not apply to a defendant that does not have access to the evidence of its co-defendants, and in addition, does not enjoy the powers that the public authority has to overcome that challenge?

[1163] GC judgment of 17 December 1991 in case T- 7/89, *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, para 232

[1164] See ECJ judgment of 15 May 2008 , case C- 510/06, *Archer Daniels Midland v Commission*, [2009] ECR I-1843, paras 116-119

[1165] A Scordamaglia-Tousis, Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees, (2010) 7(1) Competition Law Review 28

A similar stance has been taken with respect to the imputation to a party for multiple (so called "complex") infringements where they are part of a continuous conduct, characterized by a single purpose, "an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful contested practices[1166]". In such context, where the Commission is relieved of the obligation of proving the elements for every single infringement, the Court has held that

[a]n undertaking which has participated in a single infringement, such as in this case, by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk[1167].

Finally, and in part related to the issue just mentioned, a highly contested presumption exists according to which a company that has concerted with others on future conducts to be adopted in the market will take that information into account, so that there will be no need for the Commission or a private litigant to prove the two other elements required for concertation, namely the perpetration of such conduct and the relationship of cause and effect between the two[1168]. This presumption was articulated in *Hüls*, where the Court ruled that

"subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market".

According to the presumption, therefore, it would be then up to the incriminated company to prove either the complete absence of conduct, or that its actual conduct was totally independent from the knowledge it acquired during the concertation. Nevertheless, in *Polypropylene* the demonstration that the conduct was not determined by the concertation (i.e., that it would have

[1166] *Anic*, para. 197
[1167] Ibid., para. 203.
[1168] See ECJ judgment of 8 July 1999, Case C-199/92, *Hüls v Commission*, [1999] ECR I-4827, para 161

been the same in the absence of it) did not save a company who had adhered to a concertation scheme from falling foul of article 101[1169]. Likewise, the Court ruled in *Dansk Rorindustry* that the impossibility of implementing an agreement does not save from the prohibition of article 101; on other occasions, it maintained that the mere existence (without implementation) of an anticompetitive clause in an agreement implies an infringement until such clause is removed, as it could create a "visual and psychological" effect which contributed to a partitioning of the market[1170]. Further, the presumption in a case of a cartel is so strong that even a company having shown the resolution to withdraw from it communicated by the director to the management and explicitated via fax to the other members of the scheme was not able to escape the punishment for the time it had not participated, since it could not be excluded that it had taken into account of the information available through the cartel[1171].

In one occasion, the Court suggested that the anticompetitive agreement has to be a joint enterprise, and therefore the acquiescence might not be sufficient in particular where the interests of the parties are not aligned in undertaking a certain course of action supposedly agreed upon:

> […] For an agreement within the meaning of Article [81((1)) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is not necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfill that goal jointly, and that applies to all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesaler"[1172].

However, the issue of aligned interests seems to remain merely an *obiter dictum*[1173], as the Court then emphasized the importance of the "legal and economic context" more generally:

[1169] GC judgment of 10 March 1992, case T- 13/89, *ICI v Commission* [1992] ECR II-102, paras 273-294.

[1170] *Dansk Rorindustri A/s v Commission*, para 146. See also ECJ judgments of 1 February 1978, case 19/77, *Miller v Commission* [1978] ECR 131, para 7; GC judgments of of 14 July 1994, Case T-66/92, *Herlitz v Commission* [1992] ECR II-531, para 40; CFI Judgment of 19 May 1999, Case T-176/95, *Accinauto v Comission*, para 110; CFI judgment of 14 July 1994, Case T-77/92, *Parker Pen v Commission* [1994] ECR II-549, para 55

[1171] Case T-62/02, *Union Pigments v Commission* , [2005] ECR II-5057, para. 39; Case T-120/04, *Peroxidos Organicos v Commission* [2006] ECR II-4441, para. 64

[1172] *Bayer*, at 101-102

[1173] This does not mean that the commercial interests will be taken into account at the fining stage, rather than to determine the legality of the policy. In fact, it seems that it can be inferred from the case-law that the Commission would not impose fines on distributors under article 81 when (1) the anticompetitive clause is for the benefit of the seller, not the distributor; (2) the clauses operate against the interests of distributors; (3) distributors are put under some commercial pressure to accept the clause; (4) the distributors are economically weaker; (5) the distributor does nothing to draft or support the existence of the anticompetitive agreement. See Ekatrina Rousseva, p. 443, citing

The possibility that all which is contrary to competition rules may be regarded as being authorized by seemingly neutral clauses of a dealership agreement cannot be automatically excluded. […] In order to determine whether the calls at issue were part of the overall commercial relationship between [the manufacturer] and its dealers, the Court of First Instance should have considered whether they were provided for or authorized by the clauses of the dealership agreement, taking account of the aims pursued by that agreement per se, in the light of the economic and legal context in which the agreement was signed[1174].

In fact, the General Court has rejected the defense raised by an undertaking that, arguing that it was economically dependent from another which had forced it to join an illegal agreement[1175], as well as that of an undertaking alleged to be threatened by the fear of retaliation by more powerful undertakings[1176].

All these cases demonstrate that the practical possibility of rebutting the presumption of conduct in accordance with what appeared at first sight as an agreement or coordination with anticompetitive objective is in fact very slim. This seems to be in contrast with the general rule for proof of competition infringements, according to which the company is not necessarily required to disprove the Commission's assertions, but only to establish that such assertions are uncertain or inadequately supported[1177]. In fact, a recent article has strongly advocated in favor of the reconsideration of this presumption in light of the coming into force of the Charter of Fundamental rights[1178]. However, it is worth noting that Advocate General Kokott, in her Opinion in *T-Mobile*, rejected the idea that a presumption of link between concertation and market conduct would violate the presumption of innocence, in particular because it was based

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Giorgio Monti, Anticompetitive agreements: The innocent parties' right to damages (2002) 27 European Law Review 282, 293

[1174] *Bayer*, at 44 and 48.

[1175] Joined Cases T-71/03, T074/03, T-87/03 and T-91/03, *Tokai Carbon and others v Commission* [2005] ECR II-10, para. 76

[1176] *Dansk Rorindustri*, para. 150

[1177] Opinion of Advocate General Sir Gordon Slynn of 8 Feb. 1983, Case 103/80, *Musique French Diffusion v. Commission*, [1983] ECR 1825, para.17

[1178] Marco Bronckers and Anne Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law 34 World Competition (2011) 535. The authors also take issue with the parent liability presumption, which has not been considered in this thesis given its focus on evidential presumptions –i.e., those that concern the evidence instrumental for the case at issue (as opposed to the imputation of liability for an established infringement).

on common experience and companies were free to secure it. By doing so, it implicitly referred to the ECHR, and the idea that presumptions must be confined within reasonable limits and respect rights of defence.

On this point, it is useful to report the claim of a defendant alleged to have been a member of a cartel due to its attendance of the meeting. The counsel for the undertaking, Monte, complained before the ECJ about the treatment received by the Commission, not sanctioned by the GC, which consisted in assuming Monte's participation on the basis of information found in possession of the polypropylene producers describing several meetings with anticompetitive object occurred at Monte's presence, combined with their possession of information regarding Monte's prices:

[T]he [General Court] wrongly held that Monte had not denied taking part in the regular producers' meetings and that it had therefore to be considered to have participated in all the meetings. The [General Court] was also wrong in going on to hold that it was for Monte to produce another explanation of what was discussed at the meetings in which it had taken part. It It thus reversed the burden of proof and introduced a presumption of guilt, since participation in a meeting meant, as far as the [General Court] was concerned, adherence to all the initiatives which were supposed to have been adopted at the meetings. It was therefore for the party charged with the infringement to produce proof of its innocence. On this point Monte also observes that, in accordance with a principle common to all civilised legal orders, a court may not use a purported admission by taking from it only aspects that are favourable to the charge. It was unlawful for the [General Court] to seize on the acknowledgment of the existence of those meetings, lending them a tenor that Monte has always denied[1179]

In other words, what Monte was claiming was the breach of the principle of due process, and more specifically, the presumption of innocence- given that it had always denied having attended any meeting having anticompetitive object- and the equality of arms -since the Commission had not provided the Court with the complimentary observations submitted by Monte in relation to the notes which the Commission had relied upon. The Court dismissed the claim simply stating that the Court of First Instance (and consequently, the Commission) was "entitled" to consider that it was for Monte to provide another explanation of the tenor of those meetings. Hence, it is clear that the Court sees nothing wrong in the use of this presumption to reverse the burden

[1179] ECJ Judgment 8 July 1999, Case C-235/92 P, *Montecatini v Commission*, [1999] ECR I-4539 94), para. 173

which the Regulation imposed on any party alleging the infringement of the competition rules. And this is despite the fact that the Court recognized the applicability of the principle "*in dubio pro reo*" to competition proceedings.[1180] How can one then reconcile the two? We will return upon this question in paragraph 5.

b. Presumptions of law

Another kind of presumption concerns the factors that are considered relevant towards the determination of whether a certain conduct will be caught by one of the prohibitions of competition law. Amongst practitioners, academics, and mere followers of EU competition law, one can hardly fail to notice the widespread perception of a growing need for certainty on the scope and application of the concept of "restriction by object"[1181]. This perception raises criticism for the basic reasons of legal certainty, since where a clause can be fitted within the object "box", the authority or the complainant is essentially dispensed from engaging into an analysis of the effects of the conduct. The perception is alimented by the fact that the loss of legal certainty on the application of article 101 (the natural consequence of an unclear distinction between object and effect restrictions) is not recouped in the field of application of the exemption from the prohibitions of such article (i.e., article 101 (3)), where the number of decisions rendered remains to date very limited.

In the assessment of agreements or concerted practices, the first and possibly only question is whether they can be presumed to restrict competition. This determination is based on a cursory analysis, to some extent comparable to the contextual analysis of the American "quick look", focused on the details of the agreement or concerted practice and the previous experience of the courts with that type of coordination between market players. More specifically, the focus of this analysis is on two issues: the first is a jurisdictional question, namely whether the agreement is

[1180] ECJ judgment of 15 October 2002. , Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P. *Limburgse Vinyl Maatschappij* NV [2002] ECR I-08375, para. 770

[1181] See for example, the annual conference organized by the Global Competition Law Center in 2011, Seventh Annual Conference of the Global Competition Law Centre: Ten Years of the Effects-Based Approach in EU Competition Law: State of play and Perspectives, presentations available at http://www.coleurope.eu/website/research/global-competition-law-centre/conferences/archive/seventh-annual-conference

liable to affect trade between Member States; the second is a substantive one[1182], and turns on whether the agreement belongs to a category of particularly serious restraints, called "by object". In practice, this means that, if the agreement or practice is of a kind that experience has shown to have consistently and overwhelmingly pernicious effects on competition, it will be caught by the prohibition of article 101 (1). Subsequently, the defendant will have to show that the restriction of competition is indispensable for the pursuit of a legitimate aim (the so called "ancillarity doctrine) or otherwise escape liability by arguing that the agreement brings about specific and verifiable pro-competitive effects, subject to the strict test of article 101 (3). By contrast, if the agreement or practice passes muster at the threshold question of likelihood of pernicious effects on competition, i.e. escapes the categorization as restriction "by object", the defendant is entitled to demand the Commission or the plaintiff to show actual or likely negative effects on competition. To lead to a finding of infringements, effects need not be verified, but they will need to be significant[1183]. It is clear that the burden of proof will then be substantially higher, and thus conceivably, authorities will bring fewer cases under such circumstances. This is because the European "quick look" analysis (as much as its American counterpart) aimed at identifying potential restrictions by object affords the opportunity not to undergo through every step of traditional antitrust analysis. First, no market definition is required, as that has been deemed necessary only when it is otherwise impossible to determine whether an agreement is liable to affect trade between Member States and has at its object or effect the prevention, restriction or distortion of competition[1184]. Secondly, as the market is not defined, there is also no counterfactual price reference as benchmark to evaluate potential effects of that practice[1185] , nor an explanation is needed of the precise mechanism by which the restrictive object was sought[1186].

[1182] Although it has also a semi-jurisdictional part to it, the appreciability of the potential restriction of competition, which allows agreements with minimum impact on the market to escape the prohibition

[1183] See ECJ judgment of 28 May 1998, *John Deere Ltd v Commission of the European Communities*, Case C-7/95 P, ECR [1998] I-03111, para. 77: "*Article [101](1) does not restrict such an assessment to actual effects alone; it must also take account of the agreement's potential effects on competition within the common market[…] As the [General Court] correctly reiterated, an agreement will, however, fall outside the prohibition in Article [101] if it has only an insignificant effect on the market*"

[1184] F Castillo De La Torre, Evidence, Proof and Judicial Review in Cartel Cases (2009) 32 World Competition 505, footnote 20; see CFI judgment of 15 September 1998, Joined Cases T-374/94, T 375/94, T 384/94 and T 388/94, *European Night Services and Others v Commission* [1998] ECR II-3141, paras 93-95 and 105; *Volkswagen v Commission*, para. 230

[1185] *T Mobile Netherlands*, paras 36 and 39

[1186] CFI Judgment of of 8 July 2004, Joined Cases T-67/00, T-68/00, T 71/00 and T-78/00, *JFE Engineering and Others v Commission* [2004] ECR II-2501, para. 203

In short, the effects of the restrictions, both in terms of price (taken as a proxy for "output") and effectiveness of the agreement, are presumed.

Clearly, the special treatment mentioned above can be reserved only to a small set of categories, identifying restrictions that are particularly serious and normally harmful to competition. To guide the search for the concept of "normality", EU courts have indicated that in assessing the potential categorization of an agreement as by object.

"regard must be had *inter alia* to the content of its provisions, the objectives it seeks to attain and the legal and economic context of which it forms part"[1187]

It follows that the "European quick look" analysis cannot be confined to a formal assessment of the actual expression of the "meeting of minds". In lack of precise guidance as to what the analysis entails, one can find comfort in the empirical observation of what has been defined as restriction by object so far. Upon review of the relevant case law, Alison Jones identified 5 different types of restraints[1188]:

- agreements between competitors to fix prices, limit output or share markets
- agreements between competitors to reduce capacity.
- information exchanges designed to remove uncertainties concerning the intended conduct of the participating firms and facilitating, directly or indirectly the fixing of purchase or selling prices;
- vertical restraints conferring an exclusive sales territory and protection from sales by others within the territory (absolute territorial protection)or otherwise prohibiting or limiting parallel trade.
- vertical restraints imposing fixed or minimum resale prices on a dealer.

[1187] See ECJ judgment of 28 March 1974, joined cases 29-30/83, *Compagnie Asturienne des mines and Rheinzink v Commission* [1984] ECR 1679, para 26; ECJ judgment of 8 November 1983, in joint cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, IAZ *International Belgium v Commission* [1983] ECR 3369, para. 25; ECJ judgment of 6 April 2006, Case C-551/03, *General Motors v Commission*, [2006] ECR I-3173, paras 77-78; ECJ judgment of 20 November 2008, Case C-209/07, *Beef Industry Development Society and Barry Brothers* (*BIDS*), ECR 2008, p. I-8637, para. 21

[1188] Allison Jones, 'Left Behind by Modernization? Restrictions by object under article 101 (1)', European Competition Journal 649(2010)

This list is, however, only based on an empirical assessment; there is, by contrast, who believes that a predetermined conduct or type of agreement that always satisfies the object criterion cannot be found[1189]. The problem remains concerning the absence not so much of a categorical definition by legislation or case-law[1190], but instead, of an exhaustive clarification regarding the exact scope of the contextual analysis to be carried out under the "European quick look". In any case, the most fundamental issue remains the following: what can actually be done to rebut that presumption of restriction of competition once it has been determined after the contextual analysis that the agreement belongs to the "object" category?

It is noteworthy that the Court in the *T-Mobile* case explicitly rejected the possibility to rebut the presumption of unlawfulness by showing the absence of actual anticompetitive effect of the agreement, for this

> would be tantamount to an improper mingling of both independent alternatives provided for by article [101(1) TFEU]: the prohibition on collusion having an anti-competitive object and the prohibition on collusion having anti-competitive effects. In other words, the concerted practice must simply be capable in an individual case, that is, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can at most be of relevance for determining the amount of any fine and in relation to claims for damages.[1191]

The first impression is that there would be no way to rebut the presumption. In fact, the only argument that can be done along this line is one to prevent the operation of the presumption -as opposed to rebut it- and has to be advanced during the contextual or "quick look" analysis: showing that the agreement enjoys ambivalent effects on competition[1192]. That does not even require proof of ancillarity within the meaning of the case-law[1193].

[1189] Okeoghene Odudu, Interpreting Article 81 (1): the Object Requirement Revisited, 26 (4) European law Review 379, 389 (2001)

[1190] Any fixed list would need to be revised periodically in order to ensure that it adheres to reality even in case of important changes in the market and new insights of economic theory

[1191] *T-Mobile*, paras. 45-46

[1192] ECJ judgment of 25 October 1977, Case 26/76, *Metro SB-Grossmarket Gmbh & Co. HG v EC Commission*, [1977] ECR 1875; ECJ judgment of 13 January 1994, Case C-376/92, *Metro SB- Grossmarkte GmbH & Co. KG v Cartier SA*, [1994] ECR I-15

[1193] CFI Judgment of 18 September 2001, Case T-112/99, *Métropole télévision (M6) and Others v Commission*, [2001] ECR II-2459, paras 120-121

But there is a more nuanced view on the interpretation of article 101 (1), that would allow consideration of beneficial effects even in object cases: Nazzini, for example, argues that in light of the supreme goal of consumer welfare, the legitimate aim to be considered in article 81 must be welfare-enhancing, or at least, welfare-neutral[1194]. Accordingly, he fits within 101 (1) not only a counterfactual, but also a balancing of intra-brand and inter-brand competition. This interpretation would seem in contrast with the ruling of the ECJ in *Métropole télévision*, where the possibility for a balancing *à la* "rule of reason" within 101 (1) was explicitly excluded[1195]. However, the argument does not lose its validity if one considers that the Court in *Métropole télévision* only referred to the general balancing of pro-competitive and anti-competitive effects, and that this interpretation would limit the balancing to the effects on inter-brand and intra-brand competition.

What is, then, the ultimate effect of this structured reasoning on the actual exercise of rights of defense? For one thing, it is manifest that when the presumption of restriction by object operates, one is not entitled to rely on all sorts of arguments to rebut it. More precisely, a defendant can get away by demonstrating that the restriction has certain specific characteristics (the four conditions listed above), but according to the majoritarian view, will not be able to question the existence of a restriction unless it can show that such restriction is ancillary to the pursuit of a legitimate aim. Such legitimate aims are defined narrowly by the case-law and block exemptions, arguably confined to those necessary for compliance with requirements imposed by law[1196], and certainly do not include fostering or meeting competition on other variables or in other markets, as such values can only be assessed within the balancing of 101 (3). And even if we were to

[1194] Renato Nazzini, Article 81 between time present and time past: a normative critique of "restriction of competition" in EU law. Common Market Law Review, 43, (2), pp. 497-536

[1195] *Métropole*, *supra* note 1193, at 75-76

[1196] Although initially the Court showed willingness to accept restrictions necessary for the attainment of an objective recognized by the Treaty, such as "the high level of employment and social protection" of former article 3 (1) (g) and (j)(see ECJ Judgment of 21 September 1999, Case C-67/96, *Albany International BV and Textile Industry Pension Funds*, [1999] ECR I-5751) , this possibility appears to have been subsequently restricted to situations where it is the State either imposing the measure or authorizing self-regulatory mechanisms on which it retains control (see ECJ Judgment of 19 February 2002, Case C-309/99[2002] ECR I-1577, *Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap.;* and ECJ Judgment of 5 December 2006, Joined cases C-94/04 and C-202/04, [2006] ECR I-11421, *Federico Cipolla v Rosaria Fazari, née Portoleseand Stefano Macrinoand Claudia Capoparte v Roberto Meloni*).

accept a more optimistic interpretation of the scope of article 101 (1), the arguments in that context would be limited to the trade-offs between inter-brand and intra-brand competition.

The most acute problem is that undertakings don't know much about how much of contextual analysis is actually warranted for the purpose of determining the proper "reading" of an agreement, and how it is going to develop: the only criteria set forth in that respect are that a mere contextual reading of the agreement will suffice[1197], and that "*close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain*"[1198]. In practice, there is a risk that this provision will be used granting broad discretion to Commission or the competition authorities in their determination of what was relevant to decide between the "effects" and the "object" category. This will concretely be achieved by extending the reach of the "object" presumption at will, to suit the evidential needs of that particular Commission's case. Thus, one can be skeptical as to whether such a lack of clarity on the reach of the incriminating provision is consistent with the idea of the rule of law. The obvious implication for the exercise of the right to be heard is that a defendant will be at disadvantage for lacking the information regarding the elements on which he should center his pleadings, as he risks seeing his defenses downplayed by the stretching of the object category beyond the reach of previous case-law.

4. Article 102 TFEU

a. Presumptions of fact

Two opposite views can be taken regarding the role of presumptions of fact under article 102. The first is that the only type of presumptive reasoning having at object evidence under this article is the inference permitted by the Guidance paper regarding intent evidence.

[1197] GC Judgment, *Glaxo Smithkline*, para. 147: " it cannot be inferred merely from a reading of that agreement, in the context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement"

[1198] ECJ Judgment of 20 November 2008, Case C-209/07 *Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd*, [2008] ECR I-8637, para. 21

At the outset, it shall be made very clear that such inference is not able to operate (like presumptions) independently, but can only be used in conjunction with evidence which corroborates the theory of harm that the complainant aims to prove. Accordingly, the possibility conferred to complainants by paragraph 20 of the Guidance paper to use "direct evidence of exclusionary strategy" as a factor for the assessment of foreclosure amounts to a very weak form of presumptive reasoning which, moreover, a court is free to disregard: as a matter of fact, the Court may not adhere to the idea that such piece of evidence is in itself reliable. This is quite possible due to the fact that first of all, unless proof of statements to such an effect are available, it is very difficult to prove a subjective status of mind; second, because as recognized by Judge Posner, "*it is the essence of the competitive process that all firms, including dominant ones, seek to prevail over their competitors on – and force them off – the market*"[1199]. Therefore, even if such evidence was admitted, it would be simply incorrect to attribute to it equal or greater weight than objective and verifiable evidence to the contrary.

The minor importance of intent evidence in article 102 cases is confirmed also by the General Court's statement that "*Unlike Article 101 (1) EC, Article 102 contains no reference to the anticompetitive aim or anticompetitive effect of the practice referred to. However, in light of the context of Article 82 EC, conduct will be regarded as abusive only if it restricts competition*"[1200]. However, the GC circumstantiated that statement adding that notwithstanding the validity of this principle, and notwithstanding the right for dominant companies to protect their own commercial interests when attached and take reasonable steps to protect those interests, the same conduct cannot be allowed "*if its purpose is to strengthen that dominant position and thereby abuse it*[1201]**"** . The result of this combination is that the intent of the dominant company will be relevant only in very narrow circumstances, namely to demonstrate that the dominant company is not acting in reaction to or reasonably in anticipation of competitors' steps – which therefore is deemed to be aimed to strengthening the dominant position *and thereby* abuse it.

This statement by the Court constitutes in all effects a proper presumption –as opposed to a mere inference-, but it should be noted that it does not concern the assessment of evidence: rather, it

[1199] *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 373 (7th Cir. 1986)
[1200] T-203/301, *Michelin II* [2004] 4 CMLR 18 at 237;
[1201] Ibid., at 243

concerns the normative conclusion to be drawn from the ascertainment of certain fact. This is, arguably, a presumption of law –which we will deal with in a moment.

Thus, the intersection between the two presumptions takes us to the second possible view regarding presumptions of fact in article 102: that all the standards adopted by the ECJ and the Commission to define illegal conduct do not concern legal conclusions, but rather, the unfolding of economic events following the verification of a set of structural conditions. This view originates from the idea that competition law is aimed to protect consumers, and therefore, anything else that is considered sufficient to establish an infringement is merely a proxy for harm to consumers. Following this view, the presumption mentioned above could be seen as a *belief* that, whenever an undertaking has a dominant position and strengthens it, the harm to competitors that it will generate by the increase of share will eventually trigger down to harn to consumers, which will be faced with higher prices or reduced quality or variety of products. Whether such belief is factual or normative is not that easy to tell. One indication in favor of the classification of tests of legality as presumptions of fact, rather than presumptions of law, is their changing nature over time: in light of the advances of economic theory and the closer alignment of EU competition law to economics, the case-law has progressively refined standards, incorporating what it considered the best way to accommodate the prevailing economic thought, and at times even reversed the situation. Arguably, if the change of attitude were indicative of a change in the law, this would require an explanation of the inconsistency with previous holdings, similar to those provided by judges at common law when they set aside a precedent[1202]. However, with specific reference to the presumptions contained in the Guidelines, the Commission wisely included the warning that they do not constitute a statement of the law and are without prejudice of the interpretation of article 102 by the ECJ[1203].

b. Presumptions of law

[1202] Like, for instance, the US Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007). For the obligation for the Commission to explain any such change in the presence of legitimate expectations, see Judgment of the Court of First Instance of 18 Sept. 1992, Case T – 24/90, *Automec v Commission* ECR (1992) II-2223. and Judgment of the ECJ (GC) of 28 June 2005, *Dansk Rorindustri* [2005] 5 CMLR 17 at 209; see also Case T-116/04, *Wieland- Werke AG v Commission* judgment of 9 May 2009 paras 29–30

[1203] Guidance Paper, at para. 3

Continuing alongside the arguments of the previous subparagraph, it should be noted that the normative (as opposed to evidential) presumption of anticompetitive intent is reminiscent of the ordo-liberal approach, which required dominant companies to behave "as if" they were subject to competition[1204]. The traces of this approach are apparent in the definition of abuse given in *Hoffman La Roche*, as:

> an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition[1205]

The Court was even clearer in *Michelin*, where it held that:

> A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market[1206]

Thus, since the early cases it was clear that although a dominant company is not punished merely for operating in the market, it will be liable when it operates if it uses its position to behave differently from the "as-if" behavior, i.e. as if there had been competition in the market. The terminology of "as if" is not there in the case-law, but is a clear inheritance of EU competition

[1204] See Liza L. Gormsen, Article 82 EC: Where Are We Coming From and Where Are We Going To?, 2 (2) The Competition Law Review (2006) 10

[1205] ECJ Judgment of 13 February 1979, Case 85/76 *Hoffmann-La Roche &. Co. AG v Commission* [1979] ECR 461, para. 91; equally, see *Michelin v Commission*, ECJ 9 November 1983, Case 322/81 [1983] E.C.R. 3461 para. 70; ECJ Judgment of 3 July 1991, Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, ECR 1991 I-03359, para. 69; and ECJ judgment of 7 October 1999, *Irish Sugar v Commission*,[1999] ECR II-2969 para. 111; and for the same statement coupled with the recognition that article 102 is intended to protect the structure of the market, see the Opinion of AG Kokott in *British Airways Plc v Commission of the European Communities*, (C-95/04P) [2007] 4 CMLR 22 para. 69: " Article [102 TFEU]… is not designed only or primarily to protect the immediate interests of individual competitors or consumer, but to protect the structure of the market, and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking in the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared".

[1206] *Michelin* (322/81) [1983] E.C.R. 3461 (paragraph 57).

law. For this reason, it came as no surprise when a number of US professor and scholars in law and economics submitted an *amicus curiae* brief to the US Supreme Court where they described the conception of anti-monopolization law embraced by the European system as the polar opposite of the American one, claiming that it specifically chose to protect competitors:

> The alternative to consumer-welfare maximization is the view that antitrust law is simply one more tool of industrial policy, and thus its application may permissibly compromise consumer welfare to advance the welfare of competitors. Other nations evidently consider this normative proposition to be appropriate, if recent developments in the European Union are a valid indication. More than ever before, the United States and Europe appear to be at a fork in the road over whether the law of monopolization exists to protect consumers or to ensure that a specified number of firms will profitably populate a market [1207]

Despite this criticism, it is fair to acknowledge that nothing *in principle* prevents the EU, or any other jurisdiction, from adopting this particular view of competition (that is, protecting competitors). However, it becomes problematic when the Commission adopts and promotes a certain (consumer-oriented) view of competition, and yet the courts remain anchored to the previous (formalistic) view. It is argued that *by repeatedly emphasizing the importance of consumer welfare* in public communications, including the Guidance paper, the Commission has created the expectation that any test it creates is to be interpreted favoring consumer welfare over any other possible benchmark[1208]. Moreover, this seems to be in contrast with some "object" abuses identified in the paper (this will be developed in the second part).

First, and in line with the idea that consumer welfare is the ultimate objective, mention should be made of the presumption (*rectius*, assumption) in the area of article 102 which is most frequently cited by critics of the European "structuralism" : the identification as danger of the mere interference with the competitive process, regardless of the actual effect on consumers. Advocate General Kokott gave an illustration of the concept as following:

[1207] Brief for the United States as Amicus Curiae Supporting Petitioners, *Pacific Bell Tel Co v linkLine Comms, Inc*, No 07-512, 2008 WL. 2155265 (22 May 2008)

[1208] This is confirmed by the by the adoption of the consumer harm test for all foreclosure-based abuses, Moreover, consumer harm is the explicit final criterion of the test developed for refusal to deal in the Guidance Paper,

Article [102 TFEU] […]] is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market, and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking in the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared[1209]

According to the tenor of this statement, it is not necessary to show harm to consumers, nor harm to competitors: it is the structure of the market that is protected. However, to this it can be objected that the only way by which one can measure any alteration in competition as such is to focus on the two aforementioned parameters of harm to consumers or harm to competitors. In effect, this inconsistency is avoided by allowing competition authorities to focus not on actual but instead on potential effects: harm to competition is simply a more idealized, yet-to-realize form of harm to consumers and harm to competitors. The Court has held that it is sufficient to show that the conduct tends to restrict competition, or in other words, is capable of having that effect[1210], and that the conduct must be liable to, or likely, to eliminate all effective competition[1211].

This preventive standard for intervention has been justified by former Commissioner Kroes as a necessary consequence of the fact that authorities to be useful need to intervene before any market exclusion[1212], and is fair in light of the information asymmetry *vis a vis* the alleged perpetrator of abuse. Yet this should not confuse the idea that the proposed benchmark for intervention is ultimately consumers, not competitors: paragraph 5 of the Guidance Paper states that "*the Commission will direct its enforcement to the practices that are most harmful to consumers*". Moreover, the Commission alludes at the prominent importance of consumers when it states, in the following paragraph 7:

[1209] See the Opinion of AG Kokott in *British Airways Plc v Commission of the European Communities,* (C-95/04P) [2007] 4 CMLR 22, para. 69.

[1210] T-301/04, *Clearstream v Commission*, para 144

[1211] at 148

[1212] Neelie Kroes, European Commissioner for Competition Policy, Exclusionary abuses of dominance - the European Commission's enforcement priorities , Fordham University Symposium, New York, 25 September 2008, SPEECH/08/457 : "We will not wait until actual effects have manifested themselves. If we wait until rivals are forced to leave the market then we have two serious problems. First, you cannot resuscitate a corpse. No matter how effective the regulatory intervention, if it only happens after exit has occurred, then the damage to the market may be permanent. Second, such intervention will completely miss many examples of consumer harm that weaken competitors, but do not kill them. Competitors may be wounded, confined to a small corner of the market, but not killed. Leaving these cases to one side is a recipe for serious under-enforcement".

Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common

In addition, the notion of consumer detriment is inherent in the very concept of anticompetitive foreclosure, that is used by the Guidance Paper as a default benchmark for all exclusionary conduct. In fact, paragraph 19 clarifies:

In this document the term "anti-competitive foreclosure" is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably *increase pricesto the detriment of consumers.* The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti-competitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels

However, the last sentence of this paragraph contributes to muddling the waters even more: by using the proposition of "consumers" in a broad and open-ended manner, the Commission might actually be able to treat as consumers companies engaged at other level of the distribution chain, perhaps even potential competitors of the dominant firm.

A different interpretation has been suggested as a possible solution to the contradictions of the consumer welfare standard, according to which what the European institutions mean for consumer welfare would not be limited to economic efficiency in terms of lower prices or better products; it would actually include "consumer choice" or "consumer sovereignty", which have been defined as the objective that customers can choose the products they consider as best to fit their needs[1213] and the ability for consumers to influence the competitive process acting

[1213] Paul Nihoul, The Emergence of a Powerful Concept in European Competition Law, available at SSRN: http://ssrn.com/abstract=2077694 or http://dx.doi.org/10.2139/ssrn.2077694, at 5

according to their preferences[1214]. As Nihoul convincingly explains, this line of reasoning can be found in a number of cases, starting from *Hoffman La Roche* where the Court expressed its concern for:

The objective of undistorted competition within the common market, because- unless there are exceptional circumstances which may make an agreement between undertakings in the context of article 85 and in particular of paragraph (3) of that article, permissible [these practices] are not based on an economic transaction which justifies this burden or benefit but *are designed to deprive the purchaser or restrict his possible choices of sources of supply* and to deny other producers access to the market[1215] .

Illustrative of how there may be different ways not only to protect competition, but also consumer choice, is a comment by the FTC Commissioner Roesch explaining how consumer choice is relevant in US antitrust:

"[a] way to expand consumer choice may be to eliminate rules of *per se* illegality that basically leave consumers with only one choice, as [the] Supreme Court did in *Leegin* by overturning *Dr. Miles*. By getting rid of *Dr. Miles*, the Court not only let consumers buy the lowest cost product, but also gave them the choice of doing that, or paying more and obtaining frills such as preor after-sale services[1216].

The stark difference of understanding the proper means to achieve the same concept suggests a different approach, arguably exceedingly paternalistic on the European part since it uses choice as a justification for interfering, rather than one for retrenching liability standards. In any case, the argument can be set aside for present purposes, since it is submitted that the problem for the right to be heard (as it will be detailed in paragraph 5) does not lie in the definition of what parameter of consumer welfare is relevant, but rather in how the defendant can rebut any of the allegations against him or her.

[1214] Ioannis Lianos, The Price/Non Price Exclusionary Abuses Dichotomy: A Critical Appraisal , Concurrences Review, No. 2, 2009 para 10, citing by way of comparison the different formulation by Neil Averitt and Robert Lande, Consumer Sovereignty: A unified theory of Antitrust And Consumer Protection law, 65 Antitrust Law Journal 713("the set of societal arrangements that causes that economy to act primarily in response to aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses").

[1215] ECJ judgment of 13 February 1979, Case 85/76 *Hoffmann-La Roche &. Co. AG v Commission* [1979] ECR 46, at 90

[1216] J.Thomas Rosch, Can Consumer Choice Promote Trans-Atlantic Convergence of Competition Law and Policy?, Concurrences Conference on "Consumer Choice": An Emerging Standard for Competition Law, Brussels, Belgium June 8, 2012

Reference should be made at this point to some of the other presumptions existing under article 102. We have already introduced the Guidance Paper in chapter IV[1217], explaining how it constitutes an attempt to bring the approach to unilateral conduct closer to economic thinking with mixed results. In that context, we already touched upon the presumption established by the Paper that "*If it appears that a conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred*"[1218]. The Paper provides examples to conduct which might fall under the presumption, such as "*when the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product*" . Although the examples are clear illustrations of cases that lack any efficiency, this rebuttable presumption unfortunately lacks precise boundaries, and may be subject to abuses.

Another famous presumption developed by the case-law is that of conduct aimed to prevent parallel imports: in Glaxo, the Court held that "*there can be no escape from the prohibition laid down in Article 82 EC for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports*"[1219]. This is in fact the typical example of restriction by object; the presumption is not absolute however, since a company must be "*in a position to take steps that are reasonable and in proportion to the need to protect its own commercial interests*"[1220]. The preceding paragraphs seemed to suggest that such reasonable steps cannot be taken except for the particular situation where State constitutes one of the factors liable to create opportunities for parallel trade and where the only possibility to escape liability would otherwise be not to place the medicines on the market at all. Thus, the presumption in this case is very strong, and with very limited potential for rebuttal. However, it is understood that such presumption is justified on the basis of the primary objective of market integration.

[1217] Paragraph (1)(e) (iv)
[1218] At para. 22
[1219] *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline*, para. 66
[1220] At 69

Finally, another important presumption in this context is the AKZO presumption, named after the case where the Court established it.[1221] This presumption refers to two different benchmarks for determining whether an undertaking has engaged in predatory pricing: first, prices below average variable costs (AVC) must always be considered abusive; and second, prices below average total costs (ATC) but above average variable costs are only to be considered abusive if determined as a plan to eliminate a competitor. Evidently, the *ratio* of the first test is that pricing below AVC is so economic irrational that it is highly unlikely to be pursuedfor reasons other than exclusionary strategy, whereas the conduct of the latter is more ambiguous. Thus, these are an irrebuttable and a rebuttable presumption, the compatibility of which with the right to be heard will be examined in the next paragraph. Two comments shall be added to account for the intervention of the Guidance paper on this particular presumption : on one hand, the effort of the Paper is praiseworthy for specifying a series of factors beyond intent that will be relevant towards the assessment of foreclosure in the second type of presumption (the rebuttable one), including the position in the market of the dominant company, customers and competitors, and whether the company has strategic advantages that allow it to distort market signals about profitability. The Paper also specifies which rates exactly are to be taken into account in multi-market firms (those of the downstream division of the integrated dominant company). However, on the other hand, the Guidance paper seems to have added to AVC the benchmark of ATC with Average Avoidable Costs (AAC) and Long Run Average Incremental Cost (LRAIC), not clarifying which is to be preferred. However, no further clarification was given on what this means.Moreover, it can be added that the Paper could have tackled the issue of how the the specific computation of costs is to be done for multi-products firms, over which there is a great deal of controversy and in relation to which the defendant was found at fault in *Wannadoo,* even though the Commission had explicitly recognized that it had used a reasonable ammortisation system (but had not proved that the Commission's one was unlawful)[1222]".

[1221] ECJ Judgment of 3 July 1991, Case C-62/86, *AKZO Chemie BV v Commission of the European Communities.* ECR 1991 I-03359. *AKZO* is in reality well known for at least three presumptions, so it is useful to distinguish this from the two often invoked presumptions that (1) market shares above 50% are evidence of the existence of dominance; and (2) the liability of a parent company for the conduct of its subsidiary under some defined circumstances. This last presumption refers to a different case, Case C-97/08, *Akzo Nobel NV v. Commission*, Judgment of the Court on 10 September 2009.

[1222] Commission's decision of 16 July 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/38.233 − *Wanadoo Interactive*), para. 263

In short, the Guidance Paper has confirmed, even with respect to these very clear presumptions, the impression that it achieves mixed results, combining greater economic sophistication with lack of clarity.

5. Are these presumptions confined within reasonable limits?

In order to assess the compatibility of the presumptions sketched above with the rules developed throughout this thesis, it is first necessary to clarify the situation concerning the defenses available under article 101 and 102 TFEU, and the extent to which the burden of proof for those defences contributes to the establishment of an infringement (or the lack thereof) of the competition rules.

While assessing the scope of the provisions under 101 (1) TFEU above in paragraph 3, no mention was made of the concrete possibility of escaping liability by application of paragraph (3) of the same provision. Surely, the possibility the possibility to invoke the application of an exemption ex art. 101 (3) is available even against the operation of a presumptions of the types seen above. However, the test under this paragraph is more stringent than a classic “rule of reason”, as the agreement does not merely need to have net welfare-enhancing effects, but rather must fulfill four cumulative requirements :

(a) lead to the improvement in production or distribution of goods, or the promotion of technological progress

(b) allow consumers a fair share of the benefits;

(c) be indispensable for the achievement of those benefits; and

(d) not afford parties the possibility of eliminating all competition.

In chapter IV, we touched upon the scope of the provision under Article 101 (3) and the related Guidelines. It was said that this is still an area of uncertainty, particularly regarding the type of benefits that can be validly claimed as efficiencies; but more importantly, it was recognized that the burden for the fulfillment of the four conditions is a demanding one, requiring a fair amount of data and predictions about the verifiability of efficiencies.

Nothing has been said regarding the possibility to invoke a defense similar to that of article 101 (3) in the context of article 102. The doctrine of objective justification is a defense to all unilateral conduct which falls under Article 102 -even when "by object"- which the case-law has developed around the concept of proportionality.[1223] The basic idea is that notwithstanding the dominant position, which as we have seen above creates a special responsibility not to extend or abuse that position which already weakened competition, undertakings should be allowed to protect their commercial interests in anticipation or in reaction to its competitors. As a result of the defense, the dominant firm will have to prove the efficiency gains only if the other party shows that there actually is a consumer reduction. The first case where its traces can be found is *United Brands*, where despite the recognition of the right "*to protect its commercial interests*", the dominant company was found to be in breach of the proportionality aspect of such defense, namely for having cut off supplies to a distributor who had placed orders " *in no way out of the ordinary*"[1224]. Lacking a legislative provision, the boundaries of this doctrine have not been immune from inconsistency, but it has evolved to comprise "*economic justifications other than the elimination of competition*", meeting competition defenses[1225], cost savings and payment for services rendered and also of public policy considerations where there is a need to provide efficient service to the public[1226].

Nevertheless, what has been clear since the rise of the defence is that it has a narrow and limited scope, when compared to the relative ease of establishing a violation of article 102 by resorting to "object" categories: for this reason, Advocate General Colomer opined that in such cases dominant undertakings would be deprived of their right to defend themselves[1227]. Similarly, a commentator has opined that compared to evidence of likely consumer harm, this is "closer to establishing whether or not the conduct is abusive[1228]".

[1223] Ekaterina Rousseva, The Concept of "Objective Justification" of an Abuse of Dominant Position: Can it Help to Modernize the Analysis under Article 82 EC?" 2 (2) Competition Law Review (2006) 27, 71; Paul Craig and Grainne De Burca, EU LAW (3rd ed, Oxford University Press, Oxford 2003) at 1030

[1224] Case 27/76, *United Brands v Commission* [1978] ECR, 207, para. 182

[1225] Eirik Osterud, IDENTIFYING EXCLUSIONARY ABUSES BY DOMINANT UNDERTAKINGS IN EU COMPETITION LAW (Wolters Kluwer,Alphen aan den Rijn and London 2011), 250-266

[1226] Rousseva, Ibid.

[1227] See Opinion of AG Colomer in *Sot Lelos*, joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia and others v GlaxoSmithKline AEVE*, [2008] ECR I-7139, para 69

[1228] See Pinar Akman, The European Commission's Guidance on Article 102TFEU: From Inferno to Paradiso? 73 (4) The Modern Law Review 605 (2010), at 621

The Guidance Paper is helpful with respect to the definition of the defence as it lays down neatly the requirements that a dominant company has to fulfill. First of all, the Paper embraces a distinction developed by the case-law between objective justification and efficiencies.
Paragraph 28 introduces the section concerning the two topics, clarifying that a successful claim of either one will have to pass a test of indispensability and proportionality.
Thereafter, paragraph 29 explains the concept of objective necessity as something that is independent from the initiative of the dominant company, and which would usually be imposed by law or regulation.
Paragraph 30 provides the criteria for efficiencies, states that the undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled:

- the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution,

- the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies,

- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets,

- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. *In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains*[1229].

As it is clear also from the reference in a footnote to the Guidelines on the application of article 81 (3), the first three conditions are similar to those of article 101 (3), with the difference that the condition of consumers receiving a fair share (b) is substituted by the outweighing by

[1229] Guidance Paper, para. 30 (citations omitted and emphasis added)

efficiencies of any likely negative effect. Therefore, there seems to be more belief in the passing-on of efficiencies in the context of unilateral conduct.[1230]

As regards the fourth condition, that too may appear at first sight easier to satisfy than the fourth condition in article 101 (3), which would be inapplicable even where the parties acquired the *mere possibility* of eliminating *all competition*. However, the reference in the conditions for objective justification to the removal of *all or most* existing sources of *actual or potential* competition seems to envision a situation of a comparable degree of likelihood; actually, the combination "most" sources and "potential" competition implies that a defendant might be unable to meet the requirements in conditions where harm to consumers is even more speculative than in a case of existing possibilities of eliminating all competition.
All in all, the Paper brought a great deal of clarity in this area, but seems to have imposed a considerably high burden on defendants for the successful invocation of efficiencies.

Having seen what the requirements for a defense are, it is pertinent now to address the issue of burden of proof, which is so important in the context of presumptive reasoning. According to Article 2 of Regulation 1/2003, the burden of proof in competition law proceedings follows the general principle of "*onus probandi*" explained in chapter III: it falls upon the claimant the duty of proving an infringement of article 101 or 102 to the requisite standard. The burden of proof described by this rule refers to both the burden of production and the burden of persuasion, the rule being that the dispute will be resolved in favor of the opponent when the party bearing such burden fails to produce sufficient evidence to persuade the decision-maker. The sufficiency of the evidence will depend on the context, requiring a greater amount of evidence when the opponent has produced valid evidence that counters that relied upon by the Commission. The rule was explained by Advocate General Kokott in *Nederlandse Federatieve Vereniging voor de Groothandel op lektrotechnisch Gebie*[1231]as follows:

[1230] As it can be inferred , *a contrario*, from the sentence in the fourth section: "In its absence [of competition] the dominant undertaking will lack adequate incentives *to continue to create and pass on efficiency gains*"
[1231]*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebie*, Case C-105/04 P, [2006] ECR I-8725, at 73-74

[…]the Commission naturally bears the burden of proving all the findings which it makes in its decision. However, before there is any need to allocate the burden of proof at all, each party bears the burden of adducing evidence in support of its respective assertions. A substantiated submission by the Commission can be overturned only by an at least equally substantiated submission by the parties. The rules governing the burden of proof are only applicable at all where both parties provide sound, conclusive arguments and reach different conclusions.

Therefore, if in its decision the Commission draws conclusions as to the conditions prevailing in a particular market on the basis of objectively verifiable evidence from stated sources, the undertakings concerned cannot refute the Commission's findings simply by unsubstantiatedly disputing them. Rather, it falls to them to show in detail why the information used by the Commission is inaccurate, why it has no probative value, if that is the case, or why the conclusions drawn by the Commission are unsound.

Thus, it could be said that defendants do bear a burden of production, although it is not clear in which standard, to the extent that the authority has sufficient evidence for a *prima facie* case regarding an infringement of the competition rules. By contrast, a defendant carries both the burden of production and the burden of persuasion regarding the invocation of article 101 (3): this is made clear in the second sentence of Article 2, which states the exception to the general rules concerning defenses: while normally the burden of persuasion remains on the claimant, it will shift to the defendant in the case of invocation of a defense based on article 101 (3). This rule differentiates denial defences, i.e. based on the negation of the occurrence of the imputed facts, from the affirmative defence recognized under article 101 (3). An undertaking is entitled to rely, even cumulatively, on both defences. In practice, the reliance on a denial defence requires a significantly smaller amount of persuasiveness. However, even where the party invoking an exemption does not adduce the factual assertions that prove the fulfillment of the requirements of article 101 (3), the exemption can still be successful due to the mixture of inquisitorial and adversarial model that characterizes EU antitrust adjudication: the Commission is under the duty to proceed to an appropriate examination of the excuses claimed, using the means available to it in ascertaining the relevant facts and circumstances[1232]. This conclusion is a natural consequence from the principle that the Commission has the duty to give reasons for its decisions, and will therefore be required to show the extent to which the assertions made by the undertakings were unsupported by the facts at its disposal.

[1232]*Costen & Grundig v Commission*, [1966] ECR 299, p. 347

The structure described above, whereby the Commission needs to prove the allegations and the company merely to provide the evidence to cast doubt on the Commission's theory, and the Commission investigate upon it, is appropriate because the Commission's position should be, as a defender of the public interest, not so much seeking to impose as many fines for infringement as possible, but rather to catch and penalize truly anticompetitive conduct.

Differently from the defence in article 101 (3), nothing is said in Article 2 of Regulation 1/2003 regarding the burden of proof of defenses raised by dominant companies. Thus, presumably, if this is to be taken as an indication, the burden of persuasion, i.e. the burden of demonstrating the lack of efficiencies under article 102, should be on the plaintiff. That this is the proper interpretation of article 2 Reg. 1/2003 was clearly stated in the *Microsoft* case, where the General Court held that

> […]though the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

This favor for the defendant is perfectly consistent with the history of the Treaty: according to historical studies of the *travaux preparatoires*, the absence of a provision like 101 (3) in article 102 is due to the intention to have the efficiencies directly accounted for in the initial assessment of unilateral conduct[1233]. This is explicable by the argument that interference with unilateral conduct is a more delicate and sensitive exercise, which affects a multitude of business practices and should therefore be handled with greater care.

The Guidance Paper recognizes such principle and incorporates it to the last article on the section on objective necessity and efficiencies; however, it changes its wording in a way that makes the balancing of pro-competitive and anticompetitive effect fundamentally uneven. Paragraph 31 states that:

[1233] Pinar Akman, In Search of the Long Lost Soul of Article 82 EC, 29 Oxford Journal of Legal Studies 267, at 298-299(2009)

It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any *apparent* anti-competitive effects against any *advanced and substantiated* efficiencies, is likely to result in consumer harm[1234].

At this point, it is useful to remind the doctrine of quick look described in paragraph 2 to illustrate the crucial difference in the assessment of potentially pro-competitive conduct: first, the doctrine merely requires the showing of a "facially valid", "countervailing" or "offsetting" procompetitive justification, instead of the fulfillment of four burdensome conditions. Secondly, this mode of antitrust analysis allows the defendants to maintain a position of equality with the plaintiffs, as they are both merely required to make a *prima facie* case at the first stage (the "quick look" or "contextual analysis"), and then will have to switch both to a more in-depth analysis if the defendant succeeds in making a *prima facie* case; at that point, the adversarial exchange will continue over the *actual evidence* of anticompetitive and procompetitive effects.
By contrast, under the EU competition rules, the adjudicator will balance with (presumably) the same weight the substantiated efficiencies with the apparent anticompetitive effects, thereby allowing the plaintiff to withstand the trial with roughly the same type of evidence required for a *prima facie* case.

Now that all the elements concerning the substance and the procedure of the selected presumptive rules have been illustrated alongside this chapter, we can endeavor to analyze each one to verify the compatibility with the minimum core of the right to be heard. Throughout the process, a distinction will be made between a scenario where merely non-criminal due process attaches, and the more likely scenario of a full application of criminal due process.

1) The presumption of concerted practice given the proof of parallel conduct: this presumption serves the purpose to overcome the evidential *empasse* with respect to a conduct (tacit collusion) which, in economic terms, is equivalent to cartels or other horizontal agreements. Ascertained this legitimate objective, it is not difficult to verify

[1234] Emphasis added

the *substantive rationality* of the presumption: the fact that proof of parallel conduct leading to abnormal market behavior raises an inference of collusion gathers widespread acceptance not only from competition law specialist, but arguably from any reasonable observer. As to its*procedural rationality*, it must be recognized that the right to be heard is given ample recognition since the defendant is entitled to show by any means that the cause for the abnormality is not in a concerted action, therefore affording the opportunity to distinguish the particular case from the class envisaged by the presumption. Analyzing the same presumption from a criminal due process perspective, the additional element that appears of relevance is the principle of equality, which would require the Commission to hand over all the information acquired over the undertakings accused; which in fact, is accomplished through the access to file procedure. Secondly, it is worth noting that the presumption of innocence is satisfied to the extent that the courts adopt a standard which attributes the benefit of (any reasonable) doubt in favor of the accused; however this is unlikely to be an issue here since the presumption is implemented through a "weak" formulation, having the judge no obligation to execute it. (NC=NP;Cr=NP[1235])

2) The presumption of agreement for mere communication of an intention not followed by refusal, provided that there was a continuing business relationship with the communicator and that the latter had shown to systematically terminate dealers not abiding with the anticompetitive clauses of his contracts: this presumption serves again the objective of effective enforcement of the competition rules, which is clearly a legitimate one, and is implemented based upon a reasonably common experience (the repetition of the same conduct over and over triggers an inference that such conduct will be undertaken again). As far as *procedural rationality* is concerned, there would appear no obstacle for the defendant to be heard and pinpoint the peculiarity of the situation on appeal, without thereby being denied non-criminal due process. As to the criminal context, however, the presumption of innocence seems to be at risk if there is in fact no concrete possibility to be heard before the determination is taken. This would depend from the facts of the case, but absent reforms that step up the role of the Hearing Officer and thereby the meaningfulness of any hearing before him, it is not to be excluded. (NC+NP; Cr=D)

[1235] For simplification, I've added the acronyms to represent the following: NC=Non-Criminal; Cr=Criminal; NP= Not Problematic; P= Problematic; D= Dubious

3) The presumption of participation to an agreement or concerted practice given attendance of a meeting where such agreement or concertation was arranged, unless public denunciation occurs without delay (and no further meetings or discussions, in addition to proving that the conduct on the market is independent): this presumption is arguably the most problematic.From a substantive perspective, since despite the legitimacy of the aim –again effectiveness of competition enforcement -, the reasonableness of the assumption on the basis of common knowledge raises at least a reasonable doubt; and from a procedural perspective, since the rebuttal could be achieved only through one specific mean (public denunciation) and no effective right to be heard appears being available(at least according to the existing case-law) to show that the situation at issue differed from attendance to a meeting. Conceivably, this presumption would be held to violate the presumption of innocence in the criminal adjudication context, and possibly also in the non-criminal context if the right to comment were to be completely abridged in this process. (NC= D; Cr=P)
4) The presumption of taking into account of the information obtained in a concerted action: this presumption is again for the effectiveness of antitrust enforcement, and based on a reasonable assumption (at least presumably so); with regard to the right to be heard, it is regrettable that the Court has not clarified exactly what type of proof the defendant would be required to bring, given that both the lack of influence of the agreement over conduct and the impossibility of implementation have been considered insufficient. Thus, in absence of clarity over such requirements there might be an issue of criminal due process as well. Furthermore, the handing over of the evidential material to the file would be not only convenient, but also required for the alleged cartelist lacking sufficient evidence for his case. (NC=D; Cr=P)
5) The presumption that certain agreements that on the basis of content, objectives and legal economic context have consistently and overwhelmingly pernicious effects on competition are actually anticompetitive: we have seen that this presumption is not technically defined as such, for any specific typology of conduct, although there are some that can be said to have fallen repeatedly under its scope: examples are hardcore restrictions, information exchanges aimed to remove uncertainty on price; exclusive

territory allocation and minimum RPM. Admitting the qualification of these as presumptions, it should be recognized that (1) they all pursue the same legitimate objective, i.e. the effectiveness of competition enforcement; (2) they are based on a repeated and consistent experience of the courts with those practices; (3) with regard to the right to be heard, the defendant is allowed to plead either ancillarity doctrine or the application of an exemption ex article 101 (3). There would seem to be no problem in case of non-criminal proceedings; but on the other hand, the mechanical use of such presumptions in the criminal context would be problematic, since it would frustrate the operation of the principle of proof beyond a reasonable doubt and the principle of equality of arms. Different would be the situation if, instead, the rule were based on a "quick look" analysis (NC=NP; Cr=P)

6) Presumption that if it appears that a unilateral conduct can only raise obstacles to competition and that it creates no efficiencies, its anticompetitive effect may be inferred. This presumption is aimed at administrative efficiency, and resonates with general common sense. However, in criminal cases, it might potentially create problems of compatibility with the presumption of innocence, to the extent that adjudicators of proceed to its automatic application. The weak formulation does not suggest so, but if the development of this presumption follows the pattern of the other instances of illegality "by object" in article 102, it is clearly problematic. (NCi=NP;Cr=D)
7) Presumption that a practice of an undertaking in a dominant position which is aimed at avoiding parallel imports is anticompetitive.The objective here is one recognized by the treaty: market integration. This is clearly a legitimate public policy objective, being of such importance in the treaty, that it may take priority over consumer welfare. This presumption admits only two narrow rebuttals : where the State constitutes one of the factors liable to create opportunities for parallel trade, and where the only possibility not to implement the restriction would be not placing the product in the market. Thus, in all other circumstances, it appears that the rights of defense (particularly, in criminal cases) are curtailed significantly; however, there are two factors that play in favor of the legitimacy of such presumption: first, possibilities of defense are not eliminated, as in *Salabiaku* (although arguably, a proper proportionality enquiry would have to evaluate

the incidence of such defenses in the whole number of cases to see whether such available defenses are meaningful); second, here the rule may be argued to operate outside the sphere of attraction of consumer welfare, as market integration may be (and probably is) promoting another set of ideals (NC=NP;Cr=D)

8) Presumption that prices below average variable costs are abusive. This presumption is once again in the name of administrative efficiency. It is based on the generally accepted economic theory of profit sacrifice, which is universally recognized and applied by economists all around the world. As to the restriction of the right to be heard, although it is observed that it is of such intensity that it deprives of any opportunity to defend, it could also be argued that that such restriction is proportionate, as there would no other way to make clarity than creating a similar bright-line test. (NC=NP; Cr=NP) Nonetheless, what in my view should remain available is the possibility for the defendant to contest the theory of profit sacrifizes whenever it makes a *prima facie* case concerning the existence of evidence weighing against it.

As it will be clear by now, this thesis has argued that the identification of a general principle international law, particularly regarding the essence of the right to be heard, and its application to the scrutiny of presumptions used in EU antitrust enforcement, leads to the conclusion that the system is at fault for failing to respect basic guarantees. In particular, and most forcefully, the qualification of the proceedings as criminal, if confirmed, would have wide-ranging implications on the possibility to rely on reverse burdens (presumptions) without allowing the defending party to defend himself under the same conditions of its accusation. In EU competition law jargon, this would prevent the possibility for the EU Commission to continue relying on the combination of presumptions and strict conditions for rebuttal according to article 101 (3) TFEU, or the objective justifications criteria in the context of article 102 TFEU. The crux of the matter is that, while in US antitrust analysis a defendant will be able through the “quick look” analysis to redeem the incriminated conduct by showing pro-competitive justifications that include any possible differentiation between the case at issue and the category outlawed, under the “European quick look” (i.e., the structured rule of reason described above) only a silimited array of justifications (and under stricter conditions) will be accepted to exonerate the defendant from

liability. In short, this structure precludes the possibility for defendants to illustrate why their case should be differentiated from the class of behavior targeted by the norm, and for the system to refine its categories through the process of adjudication.

PART FOUR: SUMMARY AND CONCLUSIONS

V. The way forward: towards a more consistent treatment of presumptions

1. Summary of the analysis

It is time to take stock of what we have discovered throughout the previous chapters, in order to situate the findings of the last chapter within the broader context of economic adjudication, and discuss the prospects of a literature on the use of presumptive reasoning. Before we move on to assess those broader implications, therefore, we shall review succinctly the key points of the entire thesis.

Chapter I provided an introduction to why the issue of due process, and more particularly respect for the right to be heard, is of prominent importance in economic adjudication. Paragraph 1 explained that there is a gap in the "law and economics" literature with regard to the incorporation of economics into law, and set out the conceptual framework for an enquiry into the peculiarities of incorporation via "economic adjudication" by referring to the need for legal systems to resort to presumptive reasoning. It was stressed that the existence of adjudication triggers a set of procedural rights which fall under the notion of due process, and which operate as constraints to the modalities of incorporation, including in particular the exercise of presumptive reasoning.

Paragraph 2 addressed the problem of complexity in adjudication. After having identified 4 types of complexity and of related expertise, it reasoned that only one of them -"vacuum-filling complexity"- requires deference to the administration in public law disputes. Paragraph 3 then provided more details on the significance of complexity in economic adjudication, by acknowledging the divergence of values and methodologies between scientific disciplines and the law, and the problems that this generates for legal frameworks which –like the US Supreme Court's *Daubert* decision- attempt to rationalize the scientific process so as to find in it a definite, ultimate answer of the scientific issues that the law needs to address. It was suggested that the best way out of the conflict between these two different views of the world (one of

systemic doubting, the other that requires definite answers) is for the legal system to seek closure of the scientific inquiry as soon as possible, and that one (although imperfect) means to accomplish that result is to make expert testimony more inquisitorial to subtract it to the biases and "dirty tricks" of litigation, but at the same time require the stipulation of some codes of practice enabling the experts to identify in each case the assumptions behind their reasoning and disclose them in the context of adjudication.

Paragraph 4 continued the description of such divergences focusing on the narrower field of economics, stressing how much of the imputed knowledge in this discipline is subjective, and that often lawyers called to interpret economic notions fall into the trap of translation referring to similar but different concepts in the law. This led to an intermediate conclusion, regarding the desirability of presumptions to minimize such problems. However, it was recognized there that presumptions should not be too dispositive of the issue, because that would be tantamount to a violation of due process.

Before closing, the Chapter included two important paragraphs specifying the methodology and the conceptual limits to the case-study adopted to verify the application of basic principles of presumptive reasoning in economic adjudication: first, paragraph 6 stressed the complications and controversies concerning the definition of general principles in accordance with article 38 (1) © of the Statute of the International Court of Justice, and set forth the normative context in which this search was to be conducted for purposes of this work, identifying three different areas of international adjudication involving the notion of "publicness"; thereafter, paragraph 7 endeavored to apply the principle identified in the aforementioned search to the specific area of competition law, more specifically antitrust enforcement, specifying why respect for the principle in this area is of particular importance for every branch of economic law.

Chapter II was devoted to an understanding of the key concept of presumptive reasoning, and started with a survey of the literature regarding presumptions, including the differences with similar concepts such as inferences and assumptions. Paragraph 2 proceeded then to make sense of the divergences in the literature by classifying presumptions on the basis of a set of different criteria, and proposed to focus on the important distinction regarding their object, i.e. between presumptions of fact and presumptions of law. Paragraph 3 presented the main debate regarding

the evidential force of presumptions, namely the extent to which they "vanish in the sunshine of actual facts", and noted that despite the serious differences of procedure in civil and common law, a common requirement of reason giving can be identified that facilitates the review of superior courts. Paragraph 4 introduced the limitations to presumptive reasoning already affirmed by the European Court of Human Rights and, more in detail, by the US Supreme Court. Finally, Paragraph 5 concluded demonstrating that the principles identified can be translated into a *sui generis* proportionality analysis by the reviewing courts, so as to ensure the full respect of the right to be heard without giving up the possibility of resorting to presumptive reasoning. In particular, the proportionality analysis proposed consists of the following questions: (1) is the objective that the presumption aims to achieve legitimate?; (2) is the presumption used reasonable, that is, consistent with general experience or common sense, and does it allow rebuttal on this point?; (3) does the presumption restrict the right to be heard more than necessary?

Chapter III consists of the application of the methodology explained in paragraph 6 of chapter I, i.e. the identification of general principles of law, on the specific issue of the right to be heard. It started with the acknowledgment of the ramification of this right into a set of procedural guarantees, and explored the philosophical rationale underlying the existence of such guarantees. In doing so, paragraph I accounted for a substantive aspect of due process, reflecting its dignitarian value, and endeavored to ascertain its weight in the modern understanding of the right to be heard. However, it warned that the importance of procedures despite the substantive outcome means that such procedures should be respected, requiring any decision-maker that identifies different classes of cases through the formulation of a presumption to hear on this particular point the party affected by the classification in the dispute at issue. Paragraph 2, 3 and 4 proceeded to identify what the scope of such right to be heard is in a variety of different systems, comparing the various procedural guarantees existing in non-criminal, inter-State and criminal adjudication. Finally, paragraph 5 wrapped up the findings in each of these sub-systems, and defined a minimum core for public adjudication through a two-step approach: first, extrapolating the common principles amongst these three fields; second, identifying further guarantees on the basis of the need to respect the dignity of individuals, translating into a "right

to consideration". The paragraph then concludes sketching an application of those principles to the use of presumptive reasoning, explaining that the explication of the right to notice and comment procedures in this context refers to being put on notice and have the view taken into account for the decision of whether and if so in what terms a particular presumption is appropriate: in other words, the individual sees diminished the scope of his right to be heard on the particular facts of the case (which are subject to the presumption) but receives the additional capacity of representative of the class of individuals affected by the presumption, which is granted the right to be heard on the definition of the class. Moreover, two additional and integral parts of the right to be heard which affects economic adjudication are the right to a reasoned decision, which enables individuals to monitor the right to consideration towards the adoption of the final decision, and the presumption of innocence- which makes problematic extensive recourse to reverse burdens.

Chapter IV marked the beginning of the third part of the thesis, where presumptive reasoning is put at test in the specific area of antitrust enforcement.

The concrete verification of the scope of presumptive reasoning in this area, however, presupposed an understanding of the context and the basic procedures of this normative framework. For this reason, paragraph I provided an overview of the key provisions of EU antitrust enforcement, starting with the rules of the Treaty and continuing with Regulation and soft-law instruments, emphasizing in particular the growing role of the latter and its giving rise to legitimate expectations. Paragraph 2 introduced the figure of the Hearing Officer, describing its origin, its powers and their deficiencies in ensuring the full respect for the right to be heard in the Commission's antitrust proceedings. Paragraph 3 proceeded with the scrutiny of the next level of guarantee, judicial review, emphasizing its limits in terms of timing, scope and (instrumental) consideration given to procedural violations. Adding up to these shortcomings, the recent qualification by the European Court of Human Rights in *Menarini* of competition proceedings in Italy (which follows the same model of the EU) as "criminal" has rung the bell of alertness triggering the adoption of a more extensive review of Commission's decisions by the EU Courts in article 101 cases, thereby minimizing the incidence of the self-imposed restraint of the "manifest error of assessment" standard. Although appreciating the novelty, it was pointed out

here that the power of intensive scrutiny over the assessment of facts had always been available, and thus this may not be more of a seachange than a message sent to Strasbourg showing an effort to adapt the existing procedures to the need to comply with article 6 ECHR. Finally, paragraph 4 concluded elaborating on the challenges that they system faces with regard to the protection of the right to be heard, and proposing two solutions to enhance the scope of judicial review, and a number of suggestions that would empower the Hearing Officer to be not only a toothless guardian of procedures, but an effective control on the Commission with a role more akin to that of a judge than of a referee. In absence of the suggested reforms, it is inevitable that the effective role of the right to be heard remains limited, and particularly so with regard to the review of presumptive reasoning.

With Chapter V, the thesis eventually approached some concrete notions of presumptions, with the ultimate objective of assessing the potential outcome of a challenge brought against any of these in the context of an adjudicatory proceeding. Before starting the analysis, however, the Chapter began in paragraph 1 by explaining the gist of the argument being used for the definition of "presumptions of law" in this area, namely that although there is great divergence of views on the meaning of competition both within the EU and across different antitrust jurisdictions, the Commission has through its guidelines and communications given rise to the expectation that it will pursue the objective of consumer welfare. Therefore, any use of intermediate standards that are thought to deliver consumer welfare in the long term constitutes a presumption. After this clarification of substantive standards, the chapter proceeded with paragraph 2 to another important clarification, namely regarding the type of procedural standards that antitrust jurisdictions resort to: *per se* illegality, rule of reason and quick look analysis. It was illustrated that quick look analysis is the best way to enable a system to evolve quickly without sustaining the burden of a rule of reason applied to all cases; and that by contrast, the EU version of "quick look", by making the rebuttal for defendants more difficult than the case for plaintiffs, obtains the effect of chilling potentially pro-competitive business conduct. Upon all those premises, paragraph 3 approached the subject of presumptions in article 101 by commencing with presumptions of fact, i.e. regarding the assessment o evidence, and identified (1) the presumption of concerted practice given the proof of parallel conduct; (2) the presumption of agreement for

mere communication of an intention not followed by refusal, provided that there was a continuing business relationship with the communicator and that he had shown to systematically terminate dealers who did not agree to the anticompetitive clauses of his contracts; (3) the presumption of participation to an agreement or concerted practice given participation at a meeting where such agreement or concertation was arranged; (4) the presumption of taking into account the information obtained in a concerted action. Further, the paragraph turned to presumptions of law and took issue wit the concept of infringement "by object", i.e. the (5) presumption that certain agreements that on the basis of content, objectives and legal economic context have consistently and overwhelmingly pernicious effects on competition are anticompetitive. Analogous analysis followed in paragraph 4 with regard to article 102, identifying no true presumptions of fact and instead (1) a default provision for the system affording the possibility to resort to "infringements by object", in addition to (2) a presumption of anticompetitiveness for conduct aimed at avoiding parallel imports and (3) a presumption of anticompetitive intent in case of prices below average variable costs. Finally, paragraph 5 engaged in an analysis of the compatibility of those presumptions with the principles identified in the previous chapters, posing particular attention on the crucial issue of burden of proof for rebuttal, and concluded advocating for a change of approach with respect to "object infringements" to secure the respect for the rights to be heard.

2. Competition law as a starting point. Towards a proportionality analysis of presumptions and beyond

The conclusions we have reached from an international and comparative law perspective regarding the permissibility of the current system of presumptions in EU competition law are not the end of the project started with this work. First, the methodology can be expanded to include the area of mergers or to venture a comparative analysis with other relevant antitrust jurisdictions. Second, and more importantly, it suggests a whole new area of comparative procedural law, which may be called "comparative presumptive law", concerned with the study of presumptions and the verification of their compliance with the principles identified here. Admittedly, there may be differences and limits to the importation of principles across different

contexts, as well as across the different institutional figures engaged in the formulation of presumptions (one of the most compelling areas of study being what differences exist between presumptions crafted by judges and presumptions devised by the public administration). Moreover, there appear to be areas that beg further research for the identification of a proper theoretical understanding of the limits and characteristics of presumptive reasoning: some of those were mentioned in chapter I, such as drawing a list of acceptable public objectives that can be legitimately pursued through presumptions or identifying a common "standard of rigor" for the reliance on expertise in law (relevant for the rebuttal of presumptions). Similarly, the related prospect of devising rules for the situation of the standard of proof by an acting judge within permissible ranges of probabilities for specific classes of cases, would contribute to the creation of a system which is less arbitrary in treating "like cases" alike.

The unifying trait of all these challenges is to devise *reasonable* criteria for the settlement of disputes. This is in line with the principles that we have discovered being part of the scrutiny of presumptions, and is vividly reflected in the structure of the proportionality analysis conducted in this context. As it was claimed in chapter II, this analysis consists of two prongs: one designed to ensure the *substantive rationality* (or reasonableness) of the presumption, by monitoring its observance of general common sense or specialized knowledge in the field; and the second to ensure the *procedural rationality* of the presumption, by verifying that the restriction of the right to be heard was reasonable in light of the aim sought to be achieved. Finally, and as additional step of this second prong, the reviewing court should check whether the presumption is consistent with the peremptory carachter of the minimum core of the right to be heard, enabling any defendant to show that his case can be distinguished from the class of cases falling within the scope of the presumption.

The reasons why the system of competition law was chosen to deal with the issue of presumptive reasoning are multiple: first, as suggested in chapter I, it has a prominent importance in the whole area of economic law, as competition is often a pre-condition to the effectiveness of the rules regulating the market. Second, this domain is particularly attractive for such an inquiry because it is based on open-ended rules to address myriads of potential business behaviors, and therefore needs further specification. What is more, the specification is often accomplished (or

sanctioned) via adjudication, thereby triggering the set of procedural concerns that were pivotal to the identification of the concept of minimum core in the present work.

But the most important factor that makes this law central to the work on presumptive reasoning is that the whole history and evolution of competition law is driven by the understanding and the development of economic theory, which ultimately serves as a lodestar for the interpretation and enforcement of antitrust. Despite this illuminating role of economics, however, it must be recognized that the reasons for a limitation of its incidence in competition law remain strong and practical. The first reason is that some extent of discretion is desirable, and in fact authorities are unlikely to be willing to define, either *ex ante* or via adjudication, all metes and bounds within which they are required to operate. Therefore, even if it were possible to identify objective rules for achieving the best possible outcome for consumers in a particular setting, it is not to be taken for granted that the authorities will want to endorse such rule for their future cases. To some extent, this is also a desirable stance, as it allows considerations other than mere economic thinking, such as humanity and other social values, to inform the actions of the administration. On the other hand, however, this attitude should clearly be maintained within limits, as the public authorities in the economic sphere have as their main goal that of ensuring the existence of the conditions that allow the proper functioning of the market mechanism.

The second reason is that a clear limitation to the importation of economics into law is the significant burden that a full-blown economic analysis entails. As Justice Breyer stressed in his opinion for a case before the US Supreme Court:

> "While technical economic discussion helps to inform the antitrust law, these laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve[1236]".

All that said, it is sensible to predict that the exposure of competition law to economics will continue to increase, at least so long as the accounting for all possible factors to be taken in

[1236] See *Barry Wright Corp v ITTY Grinnel Corp*., 724 F.2d 227 (1st Cir. 1983), at 234

consideration for decision-making will not be an excessive burden for the public resources. To that end, it is to be hoped also that procedures do not make the process of adjudication more complicated than what it already is. In this respect, the development of "negotiated procedures" in EU antitrust may be a telling sign of the likely increase of "informal" and "negotiated" dispute settlement in the face of stiff and burdensome rules. For this reason, it is suggested that presumptive reasoning should be increasingly resorted to, in order to maintain a minimum standard of efficiency and predictability without at the same time completely giving up the possibility for individuals to be heard. The "quick look" analysis may be a wise and elegant solution to deal with complex economic disputes, but it cannot be the panacea of the problems of the interaction of law and economics: in fact, "quick look" only simplifies and alleviates the administrative process for non-controversial cases, and therefore a significant number of disputes will remain where the adjudicators will need to engage in full-blown economic analysis. Accordingly, the use of irrebuttable presumptions, which provide for a definite closure and eliminate further controversies, should be considered for specific classes of cases. As noted throughout the thesis, the existence of irrebuttable presumptions does not mean that the defendants will be precluded from arguing that their case does not fall within the sphere of a presumption: in fact, the only way to escape illegality will be for them to plead the distinction of between the class described by the presumption and the particular case at issue. However, the crucial feature of such presumption is that if the adjudicator considers such distinction not compelling, the conduct at issue will be deemed illegal irrespective of its specific effects.

After all, this is precisely the way law develops –in a procedural or conceptual sense rules may be somewhat arbitrary, but they are the result of a democratic process that we have accepted, and therefore are respected as just. Little will matter that the rule is not a perfect means to accomplish the end that it was supposed to achieve, or that it deliberately disregards considerations that may be of value to specific individuals that are affected by the norm. We may even go as far as to argue that this is intrinsic in the nature of human being when facing complex tasks: due to the fact that we have imperfect knowledge, in complex environments we need to be guided by rules that relieve us from the need to consider every detail and focus on selected criteria for decisions.

Accordingly, it has been argued that the essence of rules is that they require us to systematically disregard certain facts which we know[1237].

[1237] Friedrich A. Von Hayek, THE CONSTITUTION OF LIBERTY (Chicago, University of Chicago Press 1960) ("[i]t may sound paradoxical that rationality should thus require that we deliberately disregard knowledge which we possess; but this is part of the necessity of coming to terms with our unalterable ignorance of much that would be relevant if we knew it")

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