

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

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

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

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

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

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

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

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

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

#### 1. The boundaries between fact and law

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

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

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

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

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

<sup>15</sup> A. Kalintiri, 'The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A "Clear" Rule with not-so-clear Implications' (2015) 34(1) *Yearbook of European Law* 232–56.

<sup>16</sup> Sibony, n. 13, para. 1027.



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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

<sup>28</sup> *ICI v Commission*, n. 4.

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

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

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



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

32 See, to that effect, *HFB and Others v Commission*, n. 30, paras 151–157 and 206; T-186/06, *Solvay v Commission*, EU:T:2011:276, para. 86; T-240/07, *Heineken Nederland v Commission*, EU:T:2011:284, para. 45; T-83/08, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, EU:T:2012:48, para. 186.

33 Case T-133/07, *Mitsubishi Electric v Commission*, EU:T:2011:345, para. 231.

34 Case C-551/03 P, *General Motors v Commission*, EU:C:2006:229, paras 77–78; even if intention may be relevant, see T-472/13, *Lundbeck v Commission*, EU:T:2016:449, paras 334 and 523, with further references.

35 *Cimenteries CBR and Others v Commission*, n. 27, paras 1849, 1887. The exchange does not need to be reciprocal, in the sense of both sides exchanging the information, see T-54/03, *Lafarge v Commission*, EU:T:2008:255, para. 458; T-377/06, *Comap v Commission*, EU:T:2011:108, para. 70.

36 *T-Mobile Netherlands*, n. 17, paras 36, 39.

37 There is an obligation on the Commission to define the market in a decision applying Article 101(1) TFEU only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect intra-EU trade and has as its object or effect the prevention, restriction or distortion of competition within the common market (T-62/98, *Volkswagen v Commission*, EU:T:2000:180, para. 230; T-359/06, *Heijmans Infrastructuur v Commission*, EU:T:2012:489, paras 43–45, 53–57).

38 Case T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, EU:T:2004:221, para. 203; T-566/08, *Total Raffinage Marketing v Commission*, EU:T:2013:423, para. 225.

39 See, for a recent example, *Post Danmark (II)*, n. 22, on the relevance of the 'coverage' of a rebate scheme and the 'as-efficient-competitor' test (n. 23 above). These factual debates, which may ultimately turn out to be irrelevant depending on the applicable legal criteria, are as old as competition law. In *Commercial Solvents* the factual debate on the existence of processes of experimental nature was irrelevant, since only substitution 'without difficulty' was relevant (6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, EU:C:1974:18, paras 9–16, see also para. 22, rejecting the request for an expert report on market definition).

40 Case T-286/09, *Intel v Commission*, EU:T:2014:547, para. 597. Other points did not need to be proven: an exact quantification of the level of the part of those rebates which was provided in consideration for exclusivity (paras 453 and 973); that the parties had expressly agreed, or that Intel had expressly communicated to the customer that the rebates would, at least in part, be withdrawn if it failed to comply with the 95 per cent condition (para. 776); and that the applicant threatened a customer with a disproportionate loss of payments, as that threat is inherent in the existence of an unwritten exclusivity condition, regardless of whether or not it

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

## 2. The relevance for national courts

The distinction between law and fact is particularly important in the context of the decentralized enforcement of Articles 101 and 102 TFEU. In this respect, recital 5 of Regulation No. 1/2003 provides that this regulation affects 'neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law'. Therefore, even for 'defences', rules on the burden of proof do not substantially affect the duty of the authorities to

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

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

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

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

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

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



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

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

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

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

<sup>46</sup> *T-Mobile Netherlands*, n. 17.

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

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

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

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

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

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

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

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

<sup>49</sup> W. Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: the Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34(2) *World Competition* 189.

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

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



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

#### D. THE INTERACTION BETWEEN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

##### 1. Standard of proof v standard of judicial review

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

<sup>52</sup> Ibid., para. 34

<sup>53</sup> Ibid., para. 37

<sup>54</sup> Ibid., paras 38–39.

<sup>55</sup> Ibid., paras 40–41.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

- 1.031 The *Menarini Diagnostics* judgment of the ECtHR<sup>69</sup> has probably put an end to the debate.<sup>70</sup> It concerned a decision by the Italian NCA, the *Autorità Garante della Concorrenza e del Mercato* (AGCM) which follows the same system as the Commission, with the authority investigating and determining the matter, subject to review by a court. The ECtHR found that, in view of the amount of the fine (€6 million) the matter was to be classified as 'criminal' for the purposes of Article 6 ECHR. The ECtHR held that entrusting the prosecution and punishment of breaches of the competition rules to administrative authorities is not inconsistent with the ECHR insofar as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 ECHR. Decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) ECHR must be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it. However, the ECtHR rejected the applicant's argument that the judicial review of legality exercised by the competent court over the AGCM's decision was insufficient. Although the competent court's powers of review were classified under domestic law as limited to a review of legality, the

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

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

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

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

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

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

## E. THE ADMINISTRATIVE FACT-FINDING

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

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

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



**3.015** The holistic approach to evidence also applies to the proof of the existence of a single infringement. For examining whether there is a single infringement all the evidence must be examined together,<sup>24</sup> not in isolation. Also, once a single infringement is found, all pieces of evidence will have to be interpreted together as well for the rest of the analysis.<sup>25</sup>

### 3. The scope of the individual liability of each undertaking

**3.016** In a second stage, when the perimeter of the infringement or infringements has been duly defined, the presumption of innocence should fully apply when it comes to rendering the undertaking liable for the overall infringement, in particular for acts performed by other participants. The General Court now consistently considers that:

it is for the Commission to establish that that undertaking intended to contribute by its own conduct to the single objective pursued by all the participants and that it was aware of the unlawful conduct planned or put into effect by other undertakings in pursuit of that same objective or that it could reasonably have foreseen it and that it was prepared to take the risk.<sup>26</sup>

**3.017** The undertaking must not have known all the details. It must be aware of the general scope and the essential characteristics of the cartel as a whole.<sup>27</sup> Some judgments also separately verify<sup>28</sup> that the applicant intended to contribute by

infringement at all. In that case, the link between the different elements will be necessary in order to prove the constitutive factual elements of the infringement in the first place.

<sup>24</sup> T-53/03, *BPB v Commission*, EU:T:2008:254, paras 185, 249; *Masco v Commission*, n. 13, para. 58; *Samsung SDI and Others v Commission*, n. 22, para. 116; *Intel v Commission*, n. 22, para. 1525: 'proof of the existence of an overall strategy does not necessarily require direct evidence demonstrating the existence of a coherent anti-competitive plan. The Commission may rather demonstrate the existence of such a plan also by a body of evidence' and para. 1529: the Commission correctly relied on the comparable nature and complementarity of the practices at issue in the contested decision.

<sup>25</sup> See *Total Raffinage Marketing v Commission*, n. 13, para. 357.

<sup>26</sup> *Aalborg Portland and Others v Commission*, n. 1, para. 83; *Masco v Commission*, n. 13, para. 24; T-364/10, *Duravit v Commission*, EU:T:2013:477, paras 328–338; T-587/08, *Del Monte v Commission*, EU:T:2013:129, para. 639.

<sup>27</sup> See T-68/09, *Solviver v Commission*, EU:T:2014:867, para. 64; *Toshiba v Commission*, n. 13, para. 54; T-762/14, *Philips v Commission*, EU:T:2016:738, para. 178; T-82/13, *Panasonic and Others v Commission*, EU:T:2015:612, para. 103:

the case-law does not require that it be established that that undertaking was or should have been aware of the offending conduct of the initial participants in the infringement or that it adhered to that infringement from the outset. It also does not lay down that that condition of awareness can be established only if that undertaking contributed to the single and continuous infringement in a way identical to that initially put in place.

<sup>28</sup> *Toshiba v Commission*, *ibid.*, paras 69, 84. The judgment controversially rejected, at para. 70, the relevance of contemporaneous notes that showed that a letter was allegedly sent by the applicant requesting an individual not to participate in the glass meetings, as this did not prove 'that the applicant had made the specific choice not to participate in those meetings' and did not support the conclusion 'that it was aware of the existence of

its own conduct to the common objectives pursued by all the participants in that cartel. Moreover, since evidence needs to be examined as a whole in this context,<sup>29</sup> the General Court may rely on a document pre-dating the participation of the undertaking in the infringement in order to prove such participation as of a later date.<sup>30</sup>

On the legal standard applied as well as on the standard of proof applying here, we can see a gradual tightening of the language of the Court. The Court in *Sigma* used the test of 'firm conviction' when examining if the Commission had adduced sufficient evidence that the applicant knew or should have known that by participating in the agreement on the Italian market it was joining the European cartel.<sup>31</sup> In other cases the formula did not go as far, but it was also strong. In *Bolloré*, the General Court concluded that Divipa and Zicuñaga were 'necessarily' informed of the content of the European cartel.<sup>32</sup> In *Gyproc*, the Court referred to a 'bundle of objective and consistent indicia' ('un ensemble d'indices objectifs et concordants') demonstrating that the undertaking should have known about the wider scope of the cartel.<sup>33</sup>

Whereas these first cases appeared to focus on 'awareness', and to consider that there were enough indications that the applicants knew that 'something wider was going on' so to say, the General Court appears to have later become a bit more demanding. In *Solviver*, *Toshiba* and *Panasonic* the General Court referred explicitly to the principle of *in dubio pro reo* in the context of awareness of the single infringement.<sup>34</sup> In *Solviver* the fact of being aware of some collusive contacts among three other undertakings was not considered sufficient. The references to 'discussions' or to a 'cooperation' did not provide any indication of the nature and scope of the cartel between the big three carglass producers.

the CPT cartel and that it intended to contribute to the achievement of the objectives pursued by the participants in that cartel!'

<sup>29</sup> *Panasonic and Others v Commission*, n. 27, para. 78.

<sup>30</sup> T-418/10, *voestalpine v Commission*, EU:T:2015:516, para. 336. In *Toshiba v Commission*, n. 13, paras 50–87, in particular para. 59, the question was however left open.

<sup>31</sup> T-28/99, *Sigma Technologie v Commission*, EU:T:2002:76, para. 51.

<sup>32</sup> T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and Others v Commission*, EU:T:2007:115, para. 216.

<sup>33</sup> T-50/03, *Saint-Gobain Gyproc Belgium v Commission*, EU:T:2008:252, para. 63.

<sup>34</sup> *Solviver v Commission*, n. 27, para. 57; *Toshiba v Commission*, n. 13, paras 49–50; *Panasonic and Others v Commission*, n. 27, paras 69–71. See also, applying a high standard, and a meticulous analysis of the evidence *voestalpine v Commission*, n. 30, paras 290–398: on awareness of European club; T-398/10, *Fapricela v Commission*, EU:T:2015:498, paras 137–142; T-422/10, *Trafileries Meridionali v Commission*, EU:T:2015:512, paras 127–135, 194–198.



The documents produced by the Commission were incapable of demonstrating that that applicant was aware, or should have been aware, of the essential *modus operandi* of the cartel.<sup>35</sup>

**3.020** In *Toshiba*, even awareness, during a period when it was not yet involved in the cartel, was not enough, in the absence of evidence that the applicant intended to contribute by its own conduct to the common objectives pursued by all the participants in that cartel.<sup>36</sup> In *Panasonic*, regarding the same infringement, the General Court reached a different result as regards the applicant's participation, while applying the same high evidentiary standards.<sup>37</sup> In *Trame*, the mere fact that the expression 'club Europe' was to be found in notes of one meeting was not enough to find that the applicant was aware of the pan-European nature of the infringement, since at that time the European level of the cartel was also mentioned to be 'in crisis'.<sup>38</sup>

**3.021** One may wonder if it makes sense to make the 'intention to contribute' to the single infringement the subject of a separate, more demanding evidentiary test. If the different parts form a single infringement, and the undertaking is aware of the essential characteristics of the infringement as a whole,<sup>39</sup> is it not legitimate to infer that it intends to contribute to the overall infringement? Is it conceivable to consider that one undertaking, while being aware of the overall plan, does not have the intention to contribute to it when it implements parts of it?

## B. LINKING EVIDENCE IN TIME: PROVING DURATION

### 1. General principles

**3.022** In any infringement, it is important to determine its duration. The duration of the infringement is an intrinsic element of an infringement under Articles 101 and 102 TFEU, the burden of proof of which is borne by the Commission.<sup>40</sup> This is so even when an undertaking claims the benefit of a limitation period.<sup>41</sup> However, we will also examine in this context a point that is linked to

<sup>35</sup> *Solviver v Commission*, n. 27, paras 90–91.

<sup>36</sup> *Toshiba v Commission*, n. 13, paras 69, 84.

<sup>37</sup> *Panasonic and Others v Commission*, n. 27, paras 65–145.

<sup>38</sup> *Trafilerie Meridionali v Commission*, n. 34, paras 133–134.

<sup>39</sup> See *Solviver v Commission*, n. 27, para. 64; *Toshiba v Commission*, n. 13, para. 54; *Panasonic and Others v Commission*, n. 27, paras 83, 103.

<sup>40</sup> *Dunlop Slazenger v Commission*, n. 6, para. 79; T-110/07, *Siemens AG v Commission*, EU:T:2011:68, para. 174.

<sup>41</sup> T-120/04, *Peróxidos Orgánicos v Commission*, EU:T:2006:350, paras 50–52.

the prior section: the 'single and continuous' infringement also has a temporal aspect, i.e., whether or not events within separate periods are part of the same infringement.

Sometimes applicants raise questions whether evidence for two different periods really concerns the same infringement. In the sometimes long life of certain cartels it is likely that they will evolve and periods of activity will be coupled with period of less intense activity.<sup>42</sup> As one author puts it, 'cartels are not born full grown but develop organically as the members conceive ever more sophisticated ways to achieve their objectives'.<sup>43</sup> The analysis of the continuity of the infringement focuses on the objective of anticompetitive practices rather than their various manifestations or the methods of their implementation.<sup>44</sup> After disruptive events such as a 'crisis' in the cartel, or inspections, it is logical that its mechanisms may evolve. So in *Fittings* the General Court held that the fact that certain characteristics or the intensity of the practices had changed, after the Commission's inspections, was not conclusive, for it is conceivable that the cartel became less structured after the Commission's inspections and the intensity of its activities more variable.<sup>45</sup> The fact that the scope of the infringement may be enlarged over time, or that the mechanisms are enhanced or modified (sometimes to render them more effective, after a crisis in the cartel for example), does not negate as such the existence of a single infringement.<sup>46</sup> The treatment as a single and continuous infringement of a set of collusive acts, characterized by the fact that it pursues a single objective, 'is not contradicted by the fact that that infringement manifested itself progressively'.<sup>47</sup>

<sup>42</sup> *Westfälische Drahtindustrie and Others v Commission*, n. 13, para. 156: the cartel adopts more effective mechanisms after a crisis and 174; T-426/10–T-429/10 and T-438/12–T-441/12, *Moreda-Riviere Trefilerías and Others v Commission*, EU:T:2016:335, paras 391, 393; T-47/10, *Akzo Nobel and Others v Commission*, EU:T:2015:506, para. 244.

<sup>43</sup> J. Joshua, 'Single Continuous Infringement of Article 81 EC: Has the Commission Stretched the Concept Beyond the Limit of its Logic?' (2009) Eur. Comp. J. 451, 459.

<sup>44</sup> See, to that effect also, inter alia, T-25/95, T-26/95, T-30/95–T-32/95, T-34/95–T-39/95, T-42/95–T-46/95, T-48/95, T-50/95–T-65/95, T-68/95–T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v Commission*, EU:T:2000:77, para. 4127; *Dansk Rørindustri v Commission*, n. 8, paras 67–68: singleness of the infringement was not negated by the existence of what the Commission called 'abeyance' period; T-54/03, *Lafarge v Commission*, EU:T:2008:255, para. 482.

<sup>45</sup> T-385/06, *Aalberts v Commission*, EU:T:2011:114, para. 105. See also, on this point, opinion of Advocate-General in C-287/11 P, *Commission v Aalberts*, EU:C:2013:119, para. 77.

<sup>46</sup> *Dansk Rørindustri v Commission*, n. 8, paras 67–68: the cartel originally only covered the Danish market, but later extended to several countries in Europe; *Moreda-Riviere Trefilerías and Others v Commission*, n. 42, paras 391, 393.

<sup>47</sup> T-72/09, *Pilkington Group and Others v Commission*, EU:C:2014:1094, para. 126.



**3.024** The decision of the Commission to consider certain illegal acts as part of the same continuous infringement may have important implications for the fine,<sup>48</sup> not only in relation to the overall duration of the infringement but also because the Commission will be time-barred to impose a fine as regards behaviour which occurred more than five years before the Commission started its investigation,<sup>49</sup> if it were severable as an infringement from subsequent behaviour.<sup>50</sup> Independently of whether a temporal gap in an undertaking's participation in an infringement will remove some of the infringement to a time beyond the limitation period for the imposition of a fine, parties under investigation have a strong interest in claiming that their participation in the infringement was reduced due to an interruption, as this will reduce the fine commensurately.

**3.025** The analysis of the EU Courts in the context of infringements involving several undertakings (typically cartels) often differentiates between the proof of the duration of the cartel as a whole, and the proof of the participation of a given undertaking during that period. Since other types of infringements normally involve a single undertaking, controversies around such difference do not really exist there. The two aspects are not totally disconnected, as the mere fact that an infringement continues does not necessarily mean that all undertakings continue to participate in it, but quite logically a sufficient number of undertakings will have to participate in a multiparty infringement for the infringement to go on uninterrupted. The Commission still has to demonstrate specifically each undertaking's participation.

**3.026** In both levels of analysis, the examination of the Court may typically concern three areas: the beginning; the end; and possible interruptions. Lack of evidence for events which have no influence on any of these parameters will not lead to the annulment of the decision. It may lead, for example, to a finding that the Commission did not have evidence of the presence of an undertaking in a meeting, but if such absence does not mean an interruption of participation in the cartel, the findings of the Commission will remain. That is

<sup>48</sup> Under the 2006 Fining Guidelines, duration becomes particularly important in determining the magnitude of the fine (even a few months could make a difference of many millions), a point the Court is aware of. See T-208/08 and T-209/08, *Gosselin Group v Commission*, EU:T:2011:287, para. 154, where the General Court noted that the importance of the Commission bearing the burden of proof 'is especially so for evidence concerning the duration of the infringement, a criterion the weight of which was considerably increased in the 2006 Guidelines'.

<sup>49</sup> Or ten years if there is interruption of the prescription.

<sup>50</sup> The General Court has recently clarified that the notion of 'repeated infringement' in Article 25 implies that even if there is an interruption in the participation of one undertaking, if the undertaking rejoins the same infringement the Commission will not be time-barred to impose a fine as regards the first period of participation. See T-18/05, *IMI v Commission*, EU:T:2010:202, paras 96–97; *Gosselin Group v Commission*, n. 48, para. 169; *Trelleborg v Commission*, n. 7, paras 72–95.

why the General Court may refuse to examine if there is enough evidence to show participation in an anticompetitive meeting, if it can draw conclusions from the overall body of evidence (see also paras 2.109–2.112 above).<sup>51</sup>

In general terms, if there is no evidence 'directly establishing the duration of an infringement', it is sufficient for the Commission to adduce evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterrupted between two specific dates.<sup>52</sup> This general principle applies to all types of infringements, bearing in mind the specificities of each type of conduct. Some infringements involving several parties may involve frequent contacts, where other infringements require just a few, or just one, for example, when an agreement is signed. The number, frequency, and form of meetings between competitors needed to concert their market conduct depend both on the subject matter of that concerted action and on 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:

the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.<sup>53</sup>

The holistic approach to evidence examined in the previous chapter also applies in this context. The Court of Justice has stressed that the case law according to which the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules, served to reveal not just the existence of anticompetitive practices or agreements, but also the duration of a continuous anticompetitive practice or the period of application of an agreement concluded in breach of the competition rules.<sup>54</sup> This holistic approach allows the Commission, for example, to interpret certain events in the light of what happens in prior or later meetings (on the use of evidence

<sup>51</sup> T-195/06, *Solvay Solexis v Commission*, EU:T:2011:280, paras 95–96.

<sup>52</sup> *Dunlop Slazenger v Commission*, n. 6, para. 79; *Peróxidos Orgánicos v Commission*, n. 41, para. 51; T-377/06, *Comap v Commission*, EU:T:2011:108, para. 60; T-370/09, *GDF Suez v Commission*, EU:T:2012:333, para. 138.

<sup>53</sup> C-8/08, *T-Mobile Netherlands*, EU:C:2009:343, para. 60; T-439/07, *Coats Holding v Commission*, EU:T:2012:320, para. 152.

<sup>54</sup> *FEG v Commission*, n. 7, para. 95; see also *GDF Suez v Commission*, n. 52, paras 136–137.



relating to facts prior to or after the period of the infringement see paras 2.106–2.107 above). It is normal that the body of evidence may have different evidentiary strength when the infringement is a long one: it is quite common that for some distant periods evidence is more limited.<sup>55</sup>

**3.029** The case law has somehow alleviated the burden of proof of the Commission, shifting it under certain circumstances to the undertaking in application of the general approach towards evidence discussed in Chapter 2. Such alleviation does not appear to apply to proof of the beginning of the infringement, where the general principles tend to be applied.

## 2. Proving when the infringement starts

### (a) The criteria in general

**3.030** The determination of the beginning of the infringement may be simple when the infringement takes the form of a formal agreement. The date of conclusion will be the latest date when the infringement starts, if the preliminary contacts cannot already be characterized as a concerted practice. This is regardless of whether the agreement may only enter into force or apply at a later point in time. In cases where the infringement is not reflected in a written document, the starting date may be the subject of controversy.

**3.031** In the cartel area the starting point will normally be the first collusive contact, regardless of the effective date when it is to deploy effects.<sup>56</sup> However, a multiform cartel gives rise to contacts with different collusive intensity. The case law, by interpreting the prohibition widely, also allows for preparatory steps to be considered an infringement. The exchange of commercial information between competitors in preparation for an anticompetitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 101(1) TFEU.<sup>57</sup> An agreement on the principle may be enough even if

<sup>55</sup> The mere fact that the quality of evidence is higher for the most recent past does not mean that it is too low for the period before (T-423/10, *Redaelli Tecca v Commission*, EU:T:2015:511, paras 201–202).

<sup>56</sup> Discussing at length if the first anticompetitive meeting to which the applicants participated could be considered the starting point of their participation, see T-254/12, *Kühne & Nagel International and Others v Commission*, EU:T:2016:113, paras 155–204. See also T-264/12, *UTI Worldwide and Others v Commission*, EU:T:2016:112, as regards collusion on an element of the price that was to be applied by the US authorities several months later (paras 59–66): ‘collusive conduct caught by Article 101(1) TFEU also includes conduct which relates to practices to be adopted in the future, which is, moreover, generally the case where price-fixing cartels are concerned’ (para. 65). This also applies for abuses of dominant position, see *AstraZeneca v Commission*, n. 1, para. 380.

<sup>57</sup> See C-455/11 P, *Solvay v Commission*, EU:C:2013:796, para. 40; *Lafarge v Commission*, n. 44, para. 391.

details are left for later.<sup>58</sup> When the infringement has several elements, implementation of one of them will be enough to consider that the infringement has started, since there is no requirement that all elements start at the same time.<sup>59</sup> The normal standard of proof applies, not a ‘higher’ one and, therefore, the content and participation in the first meeting can be proven without reference to contemporaneous notes.<sup>60</sup>

(b) *As of when is an undertaking liable for participation in an on-going single infringement?*

Complex infringements give rise to specific problems. Such is the case when an undertaking does not participate from the beginning in the infringement. Participation in one element of a complex infringement by one undertaking may not be enough to render it liable if it could not yet be aware of the other elements of the infringement (see paras 3.016–3.021 above). A case-by-case analysis needs to be carried out in order to ascertain if the undertaking can be liable from the beginning. For example, in *Bonar and Fapricela*, the General Court considered that the applicants were not aware or could reasonably foresee the overall scope from the beginning, as in both cases the applicants were only participating in certain meetings limited to certain countries, and the Commission had adduced insufficient evidence.<sup>61</sup> In *Guardian*, however, the General Court considered that the content of the first meeting in which *Guardian* participated was enough to render it liable for the overall infringement as of that date.<sup>62</sup> This was regardless of whether all countries covered by the infringement were discussed in that meeting,<sup>63</sup> and irrespective of whether or not the applicant had been informed of prior meetings.<sup>64</sup>

<sup>58</sup> See, to that effect, T-9/99, *HFB and Others v Commission*, EU:T:2002:70, paras 151–157, 206; T-186/06, *Solvay v Commission*, EU:T:2011:276, para. 86; T-240/07, *Heineken Nederland v Commission*, EU:T:2011:284, para. 45. Even if market shares are fixed at a later date, the mere fact of agreeing in principle on that method is enough (see T-83/08, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, EU:T:2012:48, para. 186).

<sup>59</sup> T-220/00, *Cheil Jedang v Commission*, EU:T:2003:193, paras 140–142.

<sup>60</sup> T-519/09, *Toshiba v Commission*, EU:T:2014:263, paras 175–182.

<sup>61</sup> T-59/06, *Low & Bonar and Bonar Technical Fabrics v Commission*, EU:T:2011:669, paras 64–71: but overall finding that there was a single infringement is upheld, paras 34–56. See also, for a very detailed analysis of the available evidence, *Fapricela v Commission*, n. 34, paras 137–142; *Trafilerie Meridionali v Commission*, n. 34, paras 127–135, 194–198.

<sup>62</sup> T-82/08, *Guardian Industries and Guardian Europe v Commission*, EU:T:2012:494, paras 47–50. See also, for the situation where an undertaking joins an on-going cartel, *Lafarge*, where the General Court concluded that the Commission had established to the requisite legal standard that BPB had informed Lafarge, at the latest at the end of August 1992, of the agreement between BPB and Knauf on the exchange of information and that, on that occasion, Lafarge had adhered to that agreement (*Lafarge v Commission*, n. 44).

<sup>63</sup> *Guardian Industries and Guardian Europe v Commission*, *ibid.*, paras 82–91.

<sup>64</sup> *Ibid.*, para. 51.



(c) *Abuses of dominant position*

- 3.033** In cases of abuse of dominance the issue of the beginning of the infringement has often been intertwined with legal issues as to what can be considered an infringement in the first place. Sometimes the abuse does not consist in an isolated act, but in a course of conduct (for example, an exclusionary strategy), and the case law is clear in considering that the starting point is the first event in the course of conduct even if such event, in isolation, may not achieve the desired result.
- 3.034** The starting date depends on the type of abuse which is effectively found. In *Microsoft*, the General Court considered that a letter containing a refusal to communicate to Sun the information which it had requested was properly considered by the Commission as the starting date of Microsoft's infringement.<sup>65</sup> To the contrary, in *Clearstream*, where the case was about exceeding a reasonable time in order to grant the access requested, the Commission set the starting date four months after the request for access.<sup>66</sup>
- 3.035** In *AstraZeneca*, a case concerning spurious statements and representations made to patent offices of several countries, there was a debate as to the starting date. Was it the date when instructions were sent to the patent agents? Or when the patent agents filed for Supplementary Protection Certificates (SPC)? Or when the SPC was to deploy its effects? The General Court slightly diminished the duration as it considered that the instructions sent to patent attorneys to file SPC applications could not be regarded as equivalent to the filing of SPC applications themselves before patent offices. The desired outcome of the alleged misleading nature of the representations, namely the grant of the SPC, could arise only from the time that the SPC applications were filed before the patent offices, and not when the patent attorneys, who in that case had only an intermediary role, received the instructions regarding those applications.<sup>67</sup> However, the General Court also rejected the applicants' argument that a finding of an abuse of a dominant position requires that an exclusive right obtained as a result of misleading representations has been *enforced*. The mere possession by an undertaking of an exclusive right normally results in keeping competitors away, since public regulations require them to respect that exclusive right.<sup>68</sup> It also considered that the fact that the effect on competition of the misleading representations and the resulting grant of the SPCs would be felt only several years later, when the basic patents expired, did

<sup>65</sup> T-201/04, *Microsoft v Commission*, EU:T:2007:289, paras 750–776, 1364.

<sup>66</sup> T-301/04, *Clearstream v Commission*, EU:T:2009:317, para. 209.

<sup>67</sup> *AstraZeneca v Commission*, n. 1, paras 369–373.

<sup>68</sup> *Ibid.*, para. 362.

not cause the behaviour in question – if established – to lose its abusive character, in view of the exclusionary effect on competitors that may be expected when those SPCs are granted and are not subsequently revoked.<sup>69</sup>

## 3. Termination of the infringement as a whole

The approach as regards termination depends considerably on the specific features of the infringement at issue. At the same time, we will see that the case law has resorted to shifting the evidential burden of proof in the manner examined in paras 2.069–2.078 and 2.088–2.093 above. This means that given a certain set of circumstances, the burden will be on the undertaking to prove certain things. **3.036**

Termination of an infringement which consists of a formal agreement will require formal termination of the agreement.<sup>70</sup> In *GDF*, the General Court, as regards an agreement which was not concluded for a fixed period, and did not contain a provision giving a date for its expiry, requested evidence that it had been cancelled prior to 1999, which it concluded the applicant had not provided. It concluded that the set of agreements in question should be regarded as having been in force between 1975 and 1999, 'so that there was no need for the Commission to produce additional evidence concerning their implementation during that period'. As regards the period after 1999, the General Court also found evidence that parties considered themselves bound by the agreement even after August 2000.<sup>71</sup> Therefore, while the termination of the agreement is the earliest possible date to consider that the infringement has ended, the Commission is entitled to find an infringement for a longer period, if the agreement, although terminated, has effects in the market.<sup>72</sup> **3.037**

Less formalized forms of infringement will require a closer examination. In the *Cimenteries* judgment, for example, in certain cases the General Court confirmed the Commission's findings regarding the termination of the infringement<sup>73</sup> whereas in other cases it did not.<sup>74</sup> The Court distinguished between the pursuit of a concerted practice, which did not require any special positive measures, and an agreement, which concerned the setting-up of a **3.038**

<sup>69</sup> *Ibid.*, para. 380.

<sup>70</sup> T-30/05, *Prym v Commission*, EU:T:2007:267, para. 133 and case law cited therein.

<sup>71</sup> *GDF Suez v Commission*, n. 52, paras 142–144, 203–208.

<sup>72</sup> '[T]he duration of an infringement must be appraised not by reference to the period during which an agreement is in force, but by reference to the period during which the undertakings concerned adopted conduct prohibited by [Article 101 TFEU]' (*GDF Suez v Commission*, *ibid.*, paras 326–328).

<sup>73</sup> *Cimenteries CBR and Others v Commission*, n. 44, paras 2126–2127, 3939.

<sup>74</sup> *Ibid.*, paras 2799–2806, 3090–3094.



working group to examine dissuasive and persuasive measures capable of eliminating imports into Western Europe.<sup>75</sup> The Commission had referred to the Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française*, according to which 'a conspiracy, once established, is presumed to continue until the contrary is shown'.<sup>76</sup> The General Court considered that the Opinion referred to the specificities of that case,<sup>77</sup> and did not amount to an assertion that, once the Commission has proved the existence of an agreement, decision, or concerted practice contrary to Article 101, it is automatically for the parties involved in that agreement, decision or concerted practice to prove that it has come to an end. Such a reversal of the burden of proof is possible only where the case in question possesses particular features.<sup>78</sup> A similar approach was followed in *Soda Ash*, as regards the application of an old agreement by the two undertakings concerned.<sup>79</sup>

- 3.039 Some infringements imply frequent contacts, whereas others do not, and therefore the evidentiary requirements are different. The EU Courts are more flexible in cases of market sharing agreements. In *Coats*, concerning a 20-year infringement, the decision was primarily based on a self-incriminating statement by Prym, the other side of the bilateral cartel, corroborated by a few pieces of evidence (but one of them very important, dating from the beginning of the infringement). The General Court found the body of evidence convincing, even if there was no contemporaneous evidence for each year.<sup>80</sup> The General Court explained why:

75 Ibid., paras 4270–4279, as regards termination of the Cembureau agreement. The participation by an applicant in that infringement is established at least for the entire period in respect of which the Commission lawfully established its participation in a measure implementing the Cembureau agreement (see paras 4281–4417).

76 Opinion of Advocate General Sir Gordon Slynn in 100–103/80, *Musique Diffusion Française*, EU:C:1983:29.

77 In his Opinion (at 1941), Sir Gordon Slynn stated:

... A concerted practice is capable of continuing in existence, even in the absence of active steps to implement it. Indeed, if the practice is sufficiently effective and widely known, it may require no action to secure its implementation. Cases may arise in which the absence of any evidence of measures taken to implement a concerted practice may suggest that the practice has come to an end. That, however, is a matter of evidence, which must depend upon the circumstances of the case ... It is perhaps of interest to observe the decision of the United States Court of Appeals in *US v Stromberg and Others*, 268 F 2d.256, in which it held that a conspiracy, once established, is presumed to continue until the contrary is shown.

78 *Cimenteries CBR and Others v Commission*, n. 44, para. 2802.

79 T-30/91, *Solvay v Commission*, EU:T:1995:115, para. 73.

80 The General Court considered as proven that the close relationship between the undertakings concerned continued to exist during the period following the 1975 and 1977 agreements, and that, occasionally, that relationship was adjusted by means of further agreements, such as the 1990 Supply Agreement and the 1997 Umbrella Agreement (*Coats Holding v Commission*, n. 53, paras 153–154). See also n. 84 below.

Unlike a price-fixing agreement, under which participants are required to meet regularly to take account of the market evaluation to be able to adapt their conduct on that market during the period of the agreement, a market-sharing agreement, by definition, must be respected by the parties to the agreement with effect from its conclusion and may occasionally be adjusted either by amending the existing agreement or by means of other agreements.<sup>81</sup>

If there are several elements in a complex infringement, it will be enough for some to continue for the EU Courts to consider that the infringement has continued.<sup>82</sup> The infringement will continue even if collusive contacts are inconclusive. When there is evidence of continuation of discussions, the mere fact that there is lack of agreement as regards concrete projects is not enough to consider that infringement has terminated, since the intention to continue the cartel existed, or at least there was no decision to put an end to it.<sup>83</sup> 3.040

Moreover, it is a well-established principle that in order for Article 101 or 102 TFEU to be applicable, it is sufficient that the infringement continues to produce effects even, in the case of agreements, after they have formally ceased to be in force.<sup>84</sup> Where a collusive meeting discusses future pricing arrangements, the Commission is entitled to take the view that the infringement was intended to have anti-competitive effects until a later point in time.<sup>85</sup> As the General Court clearly put it in *Arkema*: 3.041

[i]t is more than improbable that a cartel should come to an end on the day of the last meeting of its participants, because, particularly where the object of the cartel consists of the infringements at issue in this case, that cartel is capable of continuing to produce its effects after the date of that meeting.<sup>86</sup>

The General Court has added that there is no need to prove actual effects in the market, and that this approach is compatible with the presumption of innocence.<sup>87</sup>

81 Ibid., para. 152.

82 In *Aalborg*, a periodic exchange of information, which was an implementing measure of the basic agreement (Cembureau), was enough to conclude that infringement continued for as long as the exchange continued (*Aalborg Portland and Others v Commission*, n. 1, paras 295–296).

83 *Siemens AG v Commission*, n. 40, para. 262; T-122/07–T-124/07, *Siemens AG Österreich and VA Tech Transmission & Distribution v Commission*, EU:T:2011:70, paras 77–82.

84 51/75, *EMI Records*, EU:C:1976:85; 243/83, *Binon*, EU:C:1985:284; T-45/98 and T-47/98, *Krupp Thyssen Stainless v Commission*, EU:T:2001:288, paras 181–182; T-101/05 and T-111/05, *BASF and UCB v Commission*, EU:T:2007:380, para. 187 and the case-law cited.

85 T-14/89, *Montedipe v Commission*, EU:T:1992:36, para. 231; *Bolloré and Others v Commission*, n. 32, para. 186; last anticompetitive contact in October 1994, termination in January 1995; C-447/11P, *Caffaro v Commission*, EU:C:2013:797, paras 64–68; T-462/07, *Galp v Commission*, EU:T:2013:459, para. 454.

86 T-23/10 and T-24/10, *Arkema France and CECA v Commission*, EU:T:2014:62, para. 104.

87 *Solvay v Commission*, n. 58, paras 187–189.



- 3.042** The same is applicable for abuses of dominant position. Some practices may not be intended to deploy effects immediately, but within a foreseeable future, since it takes time to change the structure of the market (by excluding a competitor, for example). As we saw before, the infringement will start when the conduct starts even if effects are felt later, and will last as long as the effects are felt.<sup>88</sup>
- 3.043** In the *Telefónica* case a specific plea as regards termination was dismissed. The finding of abuse as regards the second half of 2006 was based on prices and costs at mid-2006. The Court of Justice rejected the allegation that the General Court had reversed the burden of proof by finding that Telefónica had not proved that there was no margin squeeze during the second half of 2006. Insofar as it was found, that both Telefónica's wholesale prices and its retail prices remained unchanged until 21 December 2006, the date on which the infringement ceased, without the appellants ever claiming that there should be any change in the costs taken into consideration by the Commission, there was no reversal of the burden of proof but a correct assessment of the evidence submitted to it.<sup>89</sup>
- 3.044** *Intel* discussed a specific problem related to the end point of the infringement in case of an unwritten condition of exclusivity. The General Court concluded that if such a condition is not respected and nothing happens, after a while one may consider that there is no infringement anymore. In the instant case it held that if in a period of three years NEC had systematically infringed the requirement by falling considerably below the agreed thresholds in a manner clearly visible for Intel, without that having had repercussions on the rebates, NEC would no longer have had to fear, after a given point in time, a disproportionate reduction in its rebates. In such a situation, the duration of the infringement would have been shorter. From the point at which the prospect of a disproportionate reduction in rebates would no longer have been credible for NEC, it would have had no incentive to use Intel for the vast majority of its supplies.<sup>90</sup> By contrast, where the obligation at issue has been infringed only occasionally, the fact that the undertaking in a dominant position does not reduce rebates disproportionately does not mean that the prospect of a future reduction was no longer credible for the customer. Similarly, if the attained market shares remain close to those agreed, the customer's incentive to use the dominant undertaking for the majority of its requirements remains. Flexibility regarding full compliance with objectives is

<sup>88</sup> *AstraZeneca v Commission*, n. 1, para. 380.

<sup>89</sup> C-295/12 P, *Telefónica v Commission*, EU:C:2014:2062, paras 220, 221.

<sup>90</sup> *Intel v Commission*, n. 22, para. 997.

not sufficient to rule out the existence of an abuse.<sup>91</sup> The Commission had proved to the requisite legal standard that Intel and NEC concluded an agreement with a certain requirement, that that agreement was in force until November 2005 and that, throughout that period, a proportion of the rebates granted by Intel to NEC was subject to the requirement. In those circumstances, the burden was on Intel to show that, exceptionally, that threat was no longer credible for NEC as of a certain point since that requirement remained permanently unenforced.<sup>92</sup>

#### 4. Termination of the participation of individual undertakings

##### (a) General criteria

The analysis of the termination of the participation of undertakings is inspired **3.045** by the same principles. In some cases the proof that such participation had terminated comes from contemporaneous documents.<sup>93</sup> In the absence of clear evidence of termination, in general the EU Courts will be inclined to accept that an infringement continues at least for a limited period of time after the last collusive contact, in application of the case law as regards the duration of the infringement itself. This is done mainly (but not exclusively) on the basis of two grounds: implementation or effects after the last collusive contact; and/or lack of public distancing from the cartel.<sup>94</sup> In certain cases the Commission, due to specific difficulties of the case, has chosen to set different dates for each undertaking, on the basis of the last collusive contacts.<sup>95</sup> In this section we will not focus on situations where interruption is alleged (on this, see following section below), even if the applicable principles are very similar as we will see.

The General Court recapitulated in *Siemens* on the allocation of the burden of **3.046** proof between Siemens and the Commission in cases where there was a dispute as to the end of the participation of an undertaking in a cartel.<sup>96</sup> Drawing on a prior judgment, *Peróxidos Orgánicos*,<sup>97</sup> the General Court

<sup>91</sup> *Ibid.*, para. 998.

<sup>92</sup> *Ibid.*, para. 999.

<sup>93</sup> *Trafilerie Meridionali v Commission*, n. 34, para. 199: document indicating that Trame was not perceived as part of the cartel; T-11/06, *Romana Tabacchi v Commission*, EU:T:2011:560, paras 134–135, 144–148: notes of a meeting tended to show that the applicant was, in November 199, 'external' to the cartel.

<sup>94</sup> The lack of participation of the undertaking in the meeting which puts an end to the cartel is irrelevant, and the Commission may hold the undertaking in question liable up to the date of that meeting (T-59/07, *Polimeri Europa v Commission*, EU:T:2011:361, para. 277).

<sup>95</sup> *Samsung SDI and Others v Commission*, n. 22, para. 158.

<sup>96</sup> *Siemens AG v Commission*, n. 40; *Siemens AG Österreich and VA Tech Transmission & Distribution v Commission*, n. 83, paras 52–55.

<sup>97</sup> *Peróxidos Orgánicos v Commission*, n. 41, paras 50–52.



rely on the inadmissibility of evidence of that cartel obtained by the Commission in disregard of the procedure laid down for gathering it, such as the inspection procedure provided for in Article 20 of Regulation No 1/2003, and it is not necessary to claim, much less prove, that non-compliance with that procedure has resulted in harm to that person.<sup>29</sup>

**4.015** By contrast, if the Commission has used the appropriate procedure laid down for gathering such evidence, any procedural irregularities may be invoked only by those directly concerned by them, i.e., in the case of an inspection, in principle, by the person who submitted to the inspection.<sup>30</sup> Therefore, where a party other than the party that submitted to an inspection conducted by the Commission under Article 20 of Regulation No 1/2003 invokes an infringement, during that inspection, of safeguards designed to ensure respect for fundamental rights, the Court must confine itself to checking that the Commission did in fact use the procedure laid down to that effect, without going into the details of the conduct of that procedure unless the party in question invokes a procedural irregularity likely to concern it directly. In addition, if the holder of evidence obtained by the Commission decides, in full knowledge of his rights, not to object to its use by the Commission even though he could have done so, he cannot take issue with the Commission for having used that evidence in its investigation.<sup>31</sup>

**4.016** It is less clear whether unlawfully obtained evidence must always be excluded. This is not an outright consequence of the ECHR,<sup>32</sup> and the case law of EU

<sup>29</sup> *Almamet v Commission*, n. 23, para. 40.

<sup>30</sup> *Ibid.*, para. 41.

<sup>31</sup> *Ibid.*, paras 42–43.

<sup>32</sup> While Article 6 ECHR guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (*Schenk v Switzerland*, 12 July 1988, Series A no. 140, paras 45–46; *Heglas v the Czech Republic*, no. 5935/02, 1 March 2007, § 84; *Popescu v Roumania*, 26 avril 2007, § 106). It is not, therefore, the role of the ECtHR to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the alleged unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (*Khan v United Kingdom*, no. 35394/97, ECHR 2000-V, § 34; *Allan v United Kingdom*, no. 48539/99, ECHR 2002-IX, § 42). In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (*Bykov v Russia* [GC], no. 4378/02, 10 March 2009, § 89; *Jalloh v Germany* [GC], no. 54810/00, ECHR 2006-IX, § 96). In this connection, the Court also attaches weight to whether the evidence in question was or was not decisive

Courts, although often appears to be premised on that assumption, has become more nuanced over time.<sup>33</sup> A particular problem has been the examination of secret audio or video recordings. In *Archer Daniels Midland and Archer Daniels Midland Ingredients*, the General Court recalled the general principle of protection against arbitrary public intervention in the private sphere. It mentioned that: ‘there is no provision in Regulation No 17 that addresses the question whether clandestine audio and video recordings may be made and used’, noted that the Commission ‘stated that it had not used the recordings to support its own inquiry and that it did not take them into account in adopting the Decision or in calculating the fines’, and therefore rejected the submission.<sup>34</sup> In its Decision on *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie*, the Commission mentioned that CEF had sent ‘some tape recordings and transcriptions of telephone conversations it had had with certain companies’. These tape recordings and transcriptions ‘were made secretly and without the agreement of the firms concerned’. The Commission acknowledged that it should have returned the tape recordings and transcriptions immediately, and made it clear that they were not used.<sup>35</sup> However, the judgment in *Goldfish BV and Others* exhaustively examines the use of secret recordings of telephone conversations as evidence, and considers them admissible, but in a very particular situation where the recordings were found in the premises of an inspected company.<sup>36</sup>

Inadmissibility of evidence in certain cases may not be absolute, or there can be ways to overcome the procedural obstacle to admissibility. In some cases it depends on the attitude of the undertaking: for example, legal professional privilege may be waived,<sup>37</sup> and the undertaking may decide to reply voluntarily

4.017

for the outcome of the criminal proceedings (*Gäfgen v Germany*, no. 22978/05, ECHR 2010). As to the examination of the nature of the Convention violation found, the question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, and in particular to the question of respect for the applicant's defence rights and the quality and importance of the evidence in question (*Gäfgen v Germany* [GC], § 165).

<sup>33</sup> See also, in EU law, C-276/01 *Steffensen*, EU:C:2003:228, para. 75; C-419/14, *WebMindLicenses*, EU:C:2015:832, paras 61–91; *Goldfish BV and Others v Commission*, n. 17, paras 50–87, specifically on competition law, also examining this question in the light of the case law of the ECtHR, with numerous references thereto.

<sup>34</sup> T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, EU:T:2003:195, paras 340–342.

<sup>35</sup> Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty (Case IV/33.884 – *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie*) (OJ 2000 L 39, p. 1) (recitals 32).

<sup>36</sup> *Goldfish BV and Others v Commission*, n. 17.

<sup>37</sup> *Akzo Nobel and Akros v Commission*, n. 20, para. 90.



to questions of a self-incriminating nature. Although in principle the Commission may not use documents in respect of which the undertaking under investigation has not had an opportunity to exercise its right to be heard during the course of that investigation, it is enough for the Commission to send a letter informing the company of the potential use of the document for evidence to be admissible. The lack of objection to the use of evidence obtained during an investigation may allow use of that evidence by the Commission.<sup>38</sup>

- 4.018** Moreover, the fact that the Commission may not rely on a specific piece of evidence obtained in the context of a different investigation in order to prove the infringement is no obstacle for the piece of evidence to be at the origin of the second investigation. To that extent, the Commission will be able to rely on it in order to carry out inspections, for example,<sup>39</sup> or the document can be freshly obtained in the context of a reply to a request for information.<sup>40</sup> This is so even in a case where the evidence in question, on the basis of which an inspection was carried out, was obtained in a prior inspection but was not covered by the prior inspection decision.<sup>41</sup>
- 4.019** Case law has also discussed the use of evidence obtained in the context of an investigation by another authority. Exchanges of information are now possible under the conditions set out in Regulation 1/2003, but the issue arose before such exchanges were provided for and may still be relevant as regards information of a different origin. There is no general prohibition in EU law on using information obtained in a proceeding conducted by other authorities as evidence in a proceeding conducted by the Commission. In *Dalmine* the Court of Justice held, confirming the General Court's findings, that it was permissible to use as evidence in a proceeding conducted by the Commission minutes of the questioning of former executives of a company involved in that proceeding – *Dalmine* – by the prosecuting authorities of a Member State in connection with a criminal investigation.<sup>42</sup> In *FSL*<sup>43</sup> the General Court

<sup>38</sup> *Almamet v Commission*, n. 23, paras 42–43.

<sup>39</sup> See 85/87, *Dow Benelux v Commission*, EU:C:1989:379, para. 19; C-67/91, *Asociación Española de Banca Privada (AEB) and Others*, EU:C:1992:330, paras 39–42; *Limburgse Vinyl Maatschappij and Others v Commission*, n. 18, paras 294–308; T-655/11, *FSL and Others v Commission*, EU:T:2015:383, para. 54.

<sup>40</sup> *Groupe Danone v Commission*, n. 1, para. 39; *Almamet v Commission*, n. 23, para. 30; *FSL and Others v Commission*, *ibid.*, paras 55, 101–105.

<sup>41</sup> T-521/09, *Alstom Grid v Commission*, EU:T:2014:1000, paras 71–72.

<sup>42</sup> C-407/04 P, *Dalmine v Commission*, EU:C:2007:53.

<sup>43</sup> *FSL and Others v Commission*, n. 39. This judgment concerns the *Exotic Fruit* case that was split in 2007 from the earlier *Bananas* case. This split was triggered by the transfer to the Commission of certain cartel evidence by the Italian authorities (Guardia di Finanza). The applicants argued that the documents transferred by the Italian tax authorities were used by the Commission in violation of Article 12 of Regulation 1/2003 because they were not used 'for the subject-matter for which it was collected by the transmitting authority'. The

considered that Article 12 of Regulation 1/2003, on the exchange of information among competition authorities, does not prevent the Commission from relying on evidence transmitted by another national authority.<sup>44</sup>

However, in relation to evidence obtained from a third-country authority and the application of the right against self-incrimination as regards that evidence, the General Court has ruled that rights equivalent to those established under Union law do indeed need to be respected.<sup>45</sup> In *Citric Acid* the General Court was faced with a question concerning the use of a document produced in the US. The evidence at issue was an FBI report which had been obtained through the Grand Jury process in the US and which had been used as an exhibit in a trial in the US. The General Court stated that the Commission would be entitled to consider this information as reliable, especially since it had been declared before a court (Grand Jury). ADM claimed that the information had been collected without respecting the procedural safeguards of Union law, in this case the right against self-incrimination. The General Court confirmed that rights equivalent to those established under Union law should indeed be respected. In essence, the General Court took the view that there can be no infringement of an undertaking's procedural rights where the Commission uses as evidence statements taken in foreign proceedings where that undertaking, previously apprised of the Commission's intention to use those statements, has not raised objections in that regard and the Commission itself has no reason to entertain serious *prima facie* doubts as to the compatibility of such use with the observance of those rights.<sup>46</sup> Although the possibility of using certain pieces of evidence was still an issue on appeal, the General Court judgment was partly set aside<sup>47</sup> without the Court of Justice deciding whether use of evidence obtained by third-country authorities was as such problematic, or the conditions under which such evidence could be used.

### C. THE GENERAL CRITERIA: RELIABILITY

EU Courts have been rather reluctant in the past to develop general principles as to the intrinsic probative value to attach to given pieces of evidence. This

General Court confirms the line in *Dalmine* that the legality of the transfer of the documents to the Commission is governed by the national law (paras 44–46, 71–90).

<sup>44</sup> *FSL and Others v Commission*, n. 39, paras 76–78.

<sup>45</sup> T-59/02, *Archer Daniels Midland v Commission*, EU:T:2006:272, paras 229 *et seq.*

<sup>46</sup> In the instant case, the General Court considered that since ADM had itself relied on the document in the administrative procedure in support of its own argument, an argument based on self-incrimination could not succeed (*Archer Daniels Midland v Commission*, *ibid.*, para. 270).

<sup>47</sup> C-511/06 P, *Archer Daniels v Commission*, EU:C:2009:433.



lack of precise criteria can be explained by the fact that ultimately evidence needs to be assessed as a whole (see paras 2.102–2.112 above). The EU Courts have held on a number of occasions that the prevailing principle in Community law is the ‘unfettered evaluation of evidence [*libre administration de la preuve*’ in French], the only relevant criterion for such evaluation being the reliability of the evidence’.<sup>48</sup> The establishment of general rules is inimical to such a principle.<sup>49</sup> The principle of unfettered evaluation implies precisely the scarcity of such rules.<sup>50</sup>

- 4.022 Judge Vesterdorf, acting as Advocate-General in *Polypropylene*, made a first attempt to set out more specific guidelines. He provided a non-exhaustive checklist for the assessment of the reliability of a report from a meeting but his guidelines could apply equally to any potential piece of evidence. He stated that when assessing a document used in a Commission Decision, account should be taken of the ‘credibility of the account it contains; of the person from whom the evidence originates; of the circumstances in which it came into being; whether, on its face, the document appears sound and reliable; and the person to whom the evidence is addressed’.<sup>51</sup> Similar formulations were used later by the General Court in *Cement*,<sup>52</sup> *German Banks*,<sup>53</sup> and *Danone*<sup>54</sup> and have become common nowadays,<sup>55</sup> even in cases outside the area of cartels.<sup>56</sup> The General Court holds consistently that ‘as regards the probative value of the various items of evidence, the sole criterion relevant in evaluating the evidence adduced is its reliability’.<sup>57</sup> Accordingly, even a single piece of evidence can be sufficient to establish an infringement provided that the

48 C-411/04 P, *Salzgitter Mannesmann v Commission*, EU:C:2007:54, para. 45; C-239/11 P, C-489/11 P and C-498/11 P, *Siemens and Others v Commission*, EU:C:2013:866, para. 128. This principle applies to all areas, see, for example, 261 and 262/78, *Interquell Stärke-Chemie v Council and Commission*, EU:C:1982:329, para. 11.

49 T-286/09, *Intel v Commission*, EU:T:2014:547, para. 722.

50 *Siemens and Others v Commission*, n. 48, paras 190–191.

51 Opinion of judge Vesterdorf, acting as Advocate General, in T-1/89, *Rhône-Poulenc v Commission*, EU:T:1991:38, section I.E.4.

52 *Cimenteries CBR and Others v Commission*, n. 6, paras 1053, 1838, 3172.

53 *Dresdner Bank and Others v Commission*, n. 11, para. 121.

54 *Groupe Danone v Commission*, n. 1, para. 286.

55 See T-112/07, *Hitachi v Commission*, EU:T:2011:342, para. 70; T-44/00, *Mannesmannröhren-Werke v Commission*, EU:T:2004:218, para. 84; *Siemens AG v Commission*, n. 7, para. 54; *Aragonesas v Commission*, n. 12, para. 103; T-439/07, *Coats Holding v Commission*, EU:T:2012:320, para. 45; *GDF Suez v Commission*, n. 10, para. 161.

56 T-461/07, *Visa Europe and Others v Commission*, EU:T:2011:181, para. 182; T-111/08, *Mastercard and Others v Commission*, EU:T:2012:260, para. 154. In stated aid cases see T-198/09, *UOP v Commission*, EU:T:2013:105, para. 41. In trade mark cases, see T-454/11, *Luna International v OHIM*, EU:T:2013:206, para. 40; T-312/11, *Süd-Chemie v OHIM – Byk-Cera (CERATIX)*, EU:T:2012:296, para. 29 and the case law cited.

57 *Hitachi v Commission*, n. 55, para. 69; *Aragonesas v Commission*, n. 12, para. 102; *Coats Holding v Commission*, n. 55, para. 45; T-566/08, *Total Raffinage Marketing v Commission*, EU:T:2013:423, para. 43.

probative value is such that it attests definitively to the existence of the infraction.<sup>58</sup>

We saw before that over recent years the General Court has been more open 4.023 about qualifying certain pieces of evidence as having particularly high, high, moderate or low probative value (see para. 2.102 above). This intrinsic value is always based, as any evidentiary issue, on generalizations.<sup>59</sup> The piece of evidence is included in a given ‘category’, to which certain attributes are normally associated. For example, an *ex post* statement admitting guilt is normally reliable since nobody admits guilt unless he or she is guilty. The contemporaneous document is reliable since it is difficult to believe that somebody would have written on a piece of paper something which is not true, in the ‘hope’ of somebody using it in a future investigation.<sup>60</sup> These generalizations are sometimes explicitly stated in judgments. We will see a few examples below. The fact that the factual assessment is based on generalizations has several consequences. Generalizations are not rules of law, but are based on experience. They are compatible with the unfettered evaluation of the evidence, as they do not legally prescribe the value to be given to a specific piece of evidence. As for any generalization based on experience, parties may provide indicia that the assumption on which the generalization is made does not apply in the instant case. Using case-specific evidence, one party can challenge the existence of the background conditions under which a generalization becomes operative.<sup>61</sup> That is why even when relying on generalizations, the General Court often leaves open the door for the existence of specific circumstances.<sup>62</sup> The General Court, sometimes implicitly, sometimes

58 *Cimenteries CBR and Others v Commission*, n. 6, para. 1848; *Intel v Commission*, n. 49, para. 719.

59 A. Stein, *Foundations of Evidence Law*, OUP, 2005, 65–9. Because generalizations remain an unspoken part of the reasoning process, their influence cannot always be seen directly.

60 *Groupe Danone v Commission*, n. 1, para. 288.

61 So, for example, the generalization that witnesses testify in a disinterested way may be undermined by evidence showing friendship between the witness and the accused (see Stein, n. 59, 91–106). Of course, generalizations are acceptable as a basis for inferences only to the extent that they correspond to common human experience, but therein lies a danger. Generalizations change, or should change with time. They may provide pretext for reactionary or discriminatory reasoning.

62 So as regards the probative value attributed to evidence which goes against the interests of the person providing it, ‘it implies, a priori, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth’ (T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering and Others v Commission*, EU:T:2004:221, para. 211; T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and Others v Commission*, EU:T:2007:115, para. 166; *Siemens AG v Commission*, n. 7, para. 54; *FSL and Others v Commission*, n. 39, para. 151). In the same vein, as regards statements of a third-party undertaking such as a customer which is, in essence, a witness, the Court acknowledged that such an undertaking may, in certain cases, have an interest in not revealing the infringement, for fear of retaliatory measures that the undertaking in a dominant position might adopt against it. However, it is very unlikely that an undertaking, for which the undertaking in a dominant position is an unavoidable trading partner, will accuse that undertaking wrongly of conduct constituting an infringement of Article 102 TFEU, ‘in the absence of exceptional circumstances’ (*Intel v Commission*, n. 46, paras



explicitly, makes it clear that only a substantiated allegation shedding doubt on the value of the document in question will be considered.<sup>63</sup> Yet, the decision-maker must consider all case-specific evidence pertaining to the case.

**4.024** Therefore, even if case law provides some guidance as to the factors which will determine the probative value of certain types of documents, factors that will be explained in the following sections, the outcome of such an evaluative process may be a complex one, as the specific factual matrix of each case will be necessarily different. Precedents need to be relied upon with the outmost caution. However probative a document may appear to be on its face, it may ultimately be ignored if other documents contradict it.<sup>64</sup> Documents with low intrinsic probative value may become important if they match other documents. So the impact that each piece of evidence will have on the overall assessment crucially depends as well on factors external to it. The soundness and reliability of a piece of evidence is proportional to the extent to which that evidence is consistent with other known facts.

**4.025** The following sections will examine separately pieces of evidence drafted at the time of the infringement, that is to say, *in tempore non suspecto*, and pieces of evidence created during the course of the procedure (*in tempore suspecto*). Whereas the problems of probative value in the first category are normally related to the interpretation of the document, and eventually its origin and authorship, the probative value of the second category of evidence is normally subject to more principled criticism. It is rare for contemporaneous documents to suggest contradictory narratives, but it is quite common to see *ex post* accounts of facts which are in total contradiction. It is precisely in the weight to be given to *ex post* statements that one can see that there is a higher degree of subjective assessment involved.

721–722). Statements given by an executive on behalf of an undertaking are considered in many judgments to have a higher probative value than that of an employee of the undertaking, acting as a private person, whatever this individual's experience or opinion. This is because a company executive is considered to be under a professional obligation to act in the interests of that company, and is therefore unlikely to confess lightly to the existence of an infringement without weighing the consequences of so doing. 'Where there is nothing in the evidence to support the view that an executive might have failed to fulfil that obligation', the evidence is of particular probative value (*JFE Engineering and Others v Commission*, *ibid.*, paras 205–206, 296–299).

<sup>63</sup> See, e.g., *Infineon v Commission*, n. 2, paras 182 and 256.

<sup>64</sup> In certain cases the probative value of contemporaneous documents mentioning the name of a person as having attended a meeting may exceptionally be put into doubt by other contemporaneous documents (*Cimenteries CBR and Others v Commission*, n. 6, paras 1347–1349; for the case of one undertaking providing a plausible alternative explanation of a document see also para. 3432). In *Plásticos Españoles* the General Court put in doubt the probative value of the (contemporaneous) attendance list of a meeting on the basis of an *ex post* statement (T-76/06, *Plásticos Españoles v Commission*, EU:T:2011:672, para. 47).

## D. CONTEMPORANEOUS DOCUMENTS

## 1. Documents written in close temporal connection with the events have high probative value

It is settled case law that the documents drawn up 'in close connection with the events', i.e., written during the facts or soon afterwards,<sup>65</sup> and clearly without any thought for the fact that they might fall into the hands of third parties and/or the authorities, must be regarded as having great probative value.<sup>66</sup> Whether the document belongs to that category may be subject to debate in certain cases.<sup>67</sup> **4.026**

Particularly reliable are documents created in the ordinary course of business. They carry more persuasive force than those that are not so prepared. Business records carry 'an aura of reliability' because the regularity of making the business records and the routine involvement of the record keepers suggest a regularity which reduces the risk of mistake.<sup>68</sup> Two categories of records are sometimes presented in competition cases: actual records (customer lists, sales and pricing information) that inform the court about market conditions, and analytical records (such as strategy documents, business and marketing plans, or projections), which tend to predict future behaviour, but also illustrate the player's perception of the market, and the reasons for its conduct. Internal documents may be particularly relevant in abuse cases, as they help to interpret the rationale of the conduct of the dominant undertaking (see para. 2.035 above).<sup>69</sup> **4.027**

<sup>65</sup> T-9/99, *HFB and Others v Commission*, EU:T:2002:70, para. 266: a note drafted several weeks after; *FSI and Others v Commission*, n. 39, para. 223: the note continues to be contemporaneous even if written not during the meeting, but after the meeting.

<sup>66</sup> T-157/94, *Ensidesa v Commission*, EU:T:1999:54, para. 312; T-68/89, T-77/89 and T-78/89, *SIV and Others v Commission*, EU:T:1992:38, para. 238; *Archer Daniels Midland v Commission*, n. 45, paras 277, 290; *Siemens AG v Commission*, n. 7, para. 54; T-191/06, *FMC Foret v Commission*, EU:T:2011:277, para. 188; *Total Raffinage Marketing v Commission*, n. 57, para. 80; T-762/14, *Philips v Commission*, EU:T:2016:738, para. 109.

<sup>67</sup> For example, in *Guardian* the General Court carefully examined a series of meeting notes and rejected the contention that the notes were not contemporaneous with that meeting since they were designated 'meeting minutes', had a high degree of precision, and were neat and well-structured (T-82/08, *Guardian Industries and Guardian Europe v Commission*, EU:T:2012:494, paras 39–40).

<sup>68</sup> V. Walter, 'Evidence in Competition Cases: An American Trial Judge's Perspective', in C-D. Ehlermann and M. Marquis, eds, *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2011, 653, 658.

<sup>69</sup> See T-321/05, *AstraZeneca v Commission*, EU:T:2010:266, para. 694; T-155/06, *Tomra Systems and Others v Commission*, EU:T:2010:370, para. 35. They were also very relevant in the analysis of the motives leading to a patent settlement which was found to infringe Article 101 TFEU. As regards the existence of potential competition at the time, contemporaneous documents reflecting the expectations of the parties to an agreement were more reliable than *ex post facto* evidence in T-472/13, *Lundbeck v Commission*, EU:T:2016:449, paras 138–141.



## 2. The evidence does not need to come from the undertaking accused

- 4.028 It does not matter where the evidence is found. Of course, documents drafted by the applicant's own employees or managers can be relied upon as evidence. In certain cases, such as price abuses, it is necessary to rely on internal documents of the undertaking under investigation.<sup>70</sup> It is extraordinary for the undertaking to contest the authenticity of its own documents, but it may contest their probative value.<sup>71</sup>
- 4.029 Evidence may also originate in other undertakings, and even third parties.<sup>72</sup> The fact that the inculpatory documents were not found at the applicant's premises or were not distributed to other undertakings does not diminish their probative value.<sup>73</sup> Case law on the value of documents which are not exchanged with the accused fluctuates. In *GDF*, the General Court stressed that 'the Commission cannot be required to rely on documents exchanged by or common to the undertakings in question. It may therefore rely on internal documents of those undertakings, as long as they make it possible to establish the existence of an infringement'.<sup>74</sup> However, in *Toshiba* the General Court considered that an internal document may have a slightly lower probative value than one exchanged with the counterpart in the cartel.<sup>75</sup> On the contrary, in *FSL* the fact that the written notes were personal in nature and not to be shared was seen as an element in favour of their reliability.<sup>76</sup>
- 4.030 This case law extends beyond cartel cases. In *Visa* the General Court stated that the fact that the document had been provided by the complainant did not affect as such its probative value.<sup>77</sup> In *Intel* the applicant contested the use of

70 See, abundantly using internal documents, 85/76, *Hoffman-La Roche v Commission*, EU:C:1979:36, para 69, 75; *Intel v Commission*, n. 49; T-336/07, *Telefónica v Commission*, EU:T:2012:172.

71 Ibid. See also T-131/99, *Shaw and Others v Commission*, EU:T:2002:83: concerning a rejection of a complaint, the applicant did contest the probative value of certain internal documents of the undertaking subject to the investigation. For the General Court the reliability of documents copied during inspections, upon which the Commission based its calculation, were not prima facie open to challenge: 'It would be otherwise only in the case of fraud, which is not alleged by the applicants and which is moreover unlikely in view of the number and complexity of the factors involved' (para. 101).

72 Evidence which does not originate with any of the participants, such as correspondence between third parties, can be used as evidence. See 40/73–48/73, 50/73, 54/73–56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others v Commission*, EU:C:1975:174, para. 164; *Cimenteries GBR and Others v Commission*, n. 6, para. 46.

73 See, to that effect, T-3/89, *Atocem v Commission*, EU:T:1991:58, paras 31–38; *PVC II*, n. 21, para. 667; T-56/99 *Marlines v Commission*, EU:T:2003:333, para. 57; *Cimenteries GBR and Others v Commission*, n. 6, paras 1397, 1546.

74 *GDF Suez v Commission*, n. 10, paras 224, 225.

75 T-519/09, *Toshiba v Commission*, EU:T:2014:263, para. 97.

76 *FSL and Others v Commission*, n. 39, paras 199–200: 'an honest reflection of the matters in question as perceived by their author'.

77 *Visa Europe and Others v Commission*, n. 56, paras 183–184.

customers' estimates, arguing that an infringement cannot be based on what the customer believes. The General Court noted that, in that case, in the absence of a formal exclusivity requirement, the Commission relied on Dell's internal estimates to establish that the applicant *de facto* had informed Dell, during the period in question, that the level of the rebates was subject to such a requirement. That approach, by which the Commission took account of the expectations of one of the applicant's customers solely to establish evidence of the applicant's own conduct, could not be criticized.<sup>78</sup>

The way the document finds its way into the file may have an impact on its probative value too. A document may reach the file in different ways. A contemporaneous document may be found during an inspection, or be given later by an undertaking in reply to a request for information or as part of its leniency application. Although it will be extraordinary for leniency applicants to provide 'fake' documents,<sup>79</sup> the General Court does sometimes stress that certain documents were copied during the inspection, in order to exclude any doubts as to their authenticity.<sup>80</sup>

## 3. Authorship, 'second hand' information, and documents which are unsigned or undated

The fact that the author and the date are known will reinforce the reliability of a document. However, a problem which frequently arises is that a document is not dated, or its authorship is unknown. As such, those are elements that do not render such pieces of evidence inadmissible, but they may have a bearing on their probative value.

In *Seamless steel tubes*, where this issue was central to the case, the Court of Justice held that anonymous evidence can be admissible, even if the fact that the origin is not disclosed needs to be taken into account in determining the probative value of such evidence.<sup>81</sup> After stating that in EU competition law

78 *Intel v Commission*, n. 49, paras 521–523, 1087. The General Court considered that the judgment in Case C-280/08 P, *Deutsche Telekom*, EU:C:2010:603 was irrelevant. That case law limited the legal criteria which may be taken into account when assessing the lawfulness of a pricing policy, but does not prevent the Commission from relying, as regards the facts, on the internal expectations of a customer in order to establish evidence of the dominant undertaking's own conduct. In the *Intel* case, the allegation of an abuse was based exclusively on the applicant's own conduct, of which it must have been aware. See also *Lundbeck v Commission*, n. 69, paras 138–141, where contemporaneous documents reflecting the expectations of the parties to an agreement were more reliable than *ex post facto* evidence.

79 But this does happen, see debate around the authenticity of several emails in *Infineon v Commission*, n. 2, paras 42, 72–86, 154, 177–186.

80 T-462/07, *Galp v Commission*, EU:T:2013:459, para. 484; *Groupe Danone v Commission*, n. 1, para. 288; *Philips v Commission*, n. 66, para. 110; *Infineon v Commission*, n. 2, para. 193.

81 *Salzgitter Mannesmann v Commission*, n. 48, paras 46–50.



cases, 'oral evidence plays only a minor role, whereas written documents play a central role',<sup>82</sup> the Court recalled that the taking of evidence in EU competition law cases 'is characterised by the fact that the documents examined often contain business secrets or other information that cannot be disclosed or the disclosure of which is subject to significant restrictions'. In such circumstances:

the principle that everyone has the right to a fair legal process cannot be interpreted as meaning that documents containing incriminating evidence must automatically be excluded as evidence when certain information must remain confidential. That confidentiality may also relate to the identity of the authors of the documents and also to persons who transmitted them to the Commission.<sup>83</sup>

- 4.034 The fact that a document is unsigned or undated does not impugn its evidentiary value if its origin, probable date and content can be determined with sufficient certainty.<sup>84</sup> In certain cases it may be possible to infer the approximate date on which the document was written on the basis of its content. For example, an unsigned (but dated) document was crucial in the *Coats (fasteners)* judgment. Even if not signed, 'it can be assumed from the date on that document (15 January 1977) that it was drawn up at the time of the facts' and the information contained corresponded to that contained in other documents.<sup>85</sup> Similar explanatory efforts were deployed in *Toshiba*.<sup>86</sup>
- 4.035 In some cases, even if the note is not signed, explanations by the undertaking whose employee drafted the note will be taken into account.<sup>87</sup> However, for a piece of evidence to be 'completed' by explanations it must contain a 'minimum' of evidentiary value, otherwise the only piece of evidence is in reality the *ex post* submission.<sup>88</sup> The fact that the undertaking concerned cannot provide

82 Ibid., point 42 (the Court means also written 'witness statement', as it is clear from the French expression used, 'preuve testimonial'). See also T-47/10, *Akzo Nobel and Others v Commission*, EU:T:2015:506, para. 316.

83 *Salzgitter Mannesmann v Commission*, n. 48, paras 43–44.

84 See, to that effect, T-11/89, *Shell v Commission*, EU:T:1992:33, para. 86; *Cimenteries CBR and Others v Commission*, n. 6, para. 901; *Groupe Danone v Commission*, n. 1, para. 288; not signed, not dated; *Total Raffinage Marketing v Commission*, n. 57, para. 81; *FSL and Others v Commission*, n. 39, para. 204.

85 *Coats Holding v Commission*, n. 55, paras 62–70.

86 *Toshiba v Commission*, n. 75, paras 94–95.

87 T-54/03, *Lafarge v Commission*, EU:T:2008:255, paras 369, 373: note without known author and with no addressee, where the General Court took note of the explanations given by Gyproc about the authorship and the conditions under which the note had been drafted; T-558/08, *Eni v Commission*, EU:T:2014:1080, para. 63.

88 For example, in *Kone*, the General Court considered that a lists of projects annexed to a leniency submission which were 'in any event undated', had 'no intrinsic value in establishing that there was a cartel in Germany without the explanations provided by Kone in its submission, since they contain nothing to indicate that the projects mentioned were unlawfully allocated between competitors'. The same was true 'of the hotel bills accompanying the submission ... , which establish only that Kone's managers were at a hotel at a given time

explanations on the document (because employees have left, for example), despite requests by the Commission, will not necessarily diminish the probative value of the document.<sup>89</sup>

In *Siemens Austria*, however, a note by an individual was held to have 'low probative value when it does not contain any reference to the date on which they were taken or the date of the facts referred to therein'.<sup>90</sup> In the same vein, the temporal distance between the facts and the creation of the document may also have an impact on the probative value, even if the document predates the enquiry, as it was found during the inspections. So, in *Siemens*, the General Court gave only 'moderate probative value' to a document of unknown author containing 'comments on facts going back about four years before the date on which the document was created, which he heard from another unknown individual'.<sup>91</sup>

Great importance is often attached to the fact that a document has been drawn up 'by a direct witness of those events',<sup>92</sup> but it has been held in other cases that 'the exact identity of the author' of a contemporaneous document is not crucial.<sup>93</sup> The fact that the person who wrote contemporaneous notes may not have final responsibility for setting prices (in the context of a cartel) is irrelevant, if the person is a direct witness of the events.<sup>94</sup> In certain cases the General Court will examine in detail aspects of the position and personality of the person having written the notes in question.<sup>95</sup> In order to examine if the person was reliable, it may compare the relevant notes with other notes drafted by the same person.<sup>96</sup>

and that a meeting room was reserved but contain nothing indicative of anti-competitive conduct in the elevator and escalator sector' (*Kone v Commission*, n. 6, para. 100).

89 *Almamet v Commission*, n. 23, paras 100–104.

90 T-122/07–T-124/07, *Siemens AG Österreich and VA Tech Transmission & Distribution v Commission*, EU:T:2011:70, para. 67.

91 *Siemens AG v Commission*, n. 7, para. 151.

92 *JFE Engineering and Others v Commission*, n. 62, para. 207; *Siemens AG v Commission*, n. 7, paras 54, 75; T-154/09, *Manuli Rubber Industries v Commission*, EU:T:2013:260, para. 104; *Coats Holding v Commission*, n. 55, para. 45; *FMC Foret v Commission*, n. 66, para. 186, where the General Court observed that 'given that the documents were drawn up by a direct witness at the time of the facts, and in view of their precise and detailed content, they must be recognised as having clear probative value'; *FSL and Others v Commission*, n. 39, para. 222, giving importance to the fact that the person was an 'active participant' in the meeting, which conferred on his notes 'high probative value'; T-398/10, *Fapricela v Commission*, EU:T:2015:498, para. 90.

93 *PVC II*, n. 21, paras 605, 665.

94 *FSL and Others v Commission*, n. 39, para. 304: the person attended the anticompetitive meetings.

95 Ibid., paras 205–208.

96 Ibid. paras 210, 223: when examining the reliability of contemporaneous notes, the General Court compares them with other contemporaneous notes of other meetings before the period in which infringement is found, in order to find if the employee was reliable when writing those notes.



**4.038** Some recent cases show that judges will give less probative value to information which is reported 'second hand', although case law is rather fluctuating, and the assessment will very much depend on the exact position and responsibility of the person in question. In *Shell*, the General Court held that, '[t]he fact that the information is reported second hand is immaterial since the Commission expressly uses the note as written, contemporaneous evidence of the facts, and as evidence that producers other than the author of the note had concluded an agreement'.<sup>97</sup> Other judgments show that the General Court is not likely to deny probative value to a piece of evidence just because it is alleged that its author, while being an employee or a manager of the company, may not have sufficient knowledge of the facts or circumstances to be proven.<sup>98</sup> In *Groupe Danone*, a crucial document found in the premises of Heineken was not denied value just because 'the information in question may have been furnished to Heineken by Interbrew'.<sup>99</sup> The Court found it:

impossible to accept the only argument which could support such a challenge to the accuracy of the information contained in the document, namely that Interbrew might have intentionally passed on false information to Heineken for the sole purpose of providing a basis, in view of the possibility that the Commission might decide to impose a fine, for an argument that pressure had been put on it, thereby enabling it to minimise its role in the cartel.

In *Intel* the General Court gave probative value to emails which were drafted by employees which were, according to Intel, not sufficiently close to the facts.<sup>100</sup>

<sup>97</sup> *Shell v Commission*, n. 84, para. 86. In T-343/06, *Shell Petroleum and others v Commission*, EU:T:2012:478, para. 207, the General Court held:

the fact that information is reported second hand has no influence on its probative value ... In the present case, that employee was responsible for purchasing bitumen for HBG and worked closely with the employee who participated directly in the consultations with the W5, and then in the cartel meetings. Accordingly, the Court takes the view that the notes drafted by HBG's head of procurement at the time of the facts have significant probative value.

<sup>98</sup> *Cimenteries CBR and Others v Commission*, n. 6, para. 907: 'As regards the argument that Mr Kalogeropoulos was not familiar with the reality of the cement industry, it is not credible that he should make a statement to the board of his undertaking without being informed of the industrial and commercial environment in which that undertaking operated'; in the same sense, *PVC II*, n. 21:

the objection ... that those documents were not reliable because their author was not from the PVC sector cannot be accepted. Both those documents contain precise indications, especially as to dates, percentages and the number of participants in the PVC system, which lead to the conclusion that the authors had an exact knowledge of the mechanism which they were referring to, and from which they intended to draw lessons in the light of 'experience gained'

(para. 593); *Shell Petroleum and others v Commission*, n. 97, para. 207.

<sup>99</sup> *Groupe Danone v Commission*, n. 1, para. 288.

<sup>100</sup> *Intel v Commission*, n. 49, paras 1165, 1181; see also para. 1254, on the probative value of a 'low level employee', who was however informing his superiors.

Yet, the 'second-hand' character is considered a relevant element in other cases. **4.039** In *Aragonesas*, the General Court held that the note of a telephone conversation has more value if it is based on a conversation directly with the competitor concerned, rather than a situation where somebody in the telephone conversation claims to have talked to the competitor concerned. The multiplication of the number of intermediaries involved results in a reduction in the credibility of the item of evidence relating to the contacts at issue.<sup>101</sup> This type of document was qualified as 'indirect' evidence.<sup>102</sup> This is considered to constitute 'contemporaneous evidence of the infringement in that they relate to events capable of proving that infringement', but the notes do not, however, 'constitute contemporaneous evidence of events directly involving the applicant'. Accordingly, 'in spite of the fact that those three references refer to evidence which came into being during the period of the infringement, to be able to regard it as probative it is necessary to assess whether it is confirmed to a sufficient degree by other evidence'.<sup>103</sup> In *Siemens*, the General Court gave only 'moderate probative value' to a document of unknown authorship containing 'comments on facts ... heard from another unknown individual'.<sup>104</sup>

#### 4. The degree of precision of the document

The greater the level of detail provided in the evidence, the more its credibility **4.040** is enhanced.<sup>105</sup> This consideration, which is particularly relevant to *ex post* statements provided to the Commission (see paras 4.079–4.082 below), also applies to documents, such as minutes of meetings, or handwritten notes, where the level of precision is a key determinant of their evidentiary value.<sup>106</sup> Yet, poorly written documents are not deprived of probative value, in view of the difficulty of obtaining direct evidence of clandestine conduct. The General Court has rejected arguments contesting the probative value of handwritten

<sup>101</sup> *Aragonesas v Commission*, n. 12, para. 182. The degree of credibility of the typed notes would have been greater if the employee had actually had that telephone conversation with the applicant than if it were the employee of the third company who had that conversation with the applicant.

<sup>102</sup> *Ibid.*, paras 186–188.

<sup>103</sup> *Ibid.*, para. 189. The General Court gives weight to the fact that contacts between one company and the applicant were mentioned in a telephone conversation with a third competitor, but the company did not have a transcript of the telephone conversation with the applicant (paras 190–191). For the rest these pieces of evidence were not confirmed by other pieces of evidence (paras 193–203). The fact that information is 'second hand' is also relevant in case of *ex post* statements (T-104/13, *Toshiba v Commission*, EU:T:2015:610, para. 76).

<sup>104</sup> *Siemens AG v Commission*, n. 7, para. 151.

<sup>105</sup> What counts is the original version (which is normally quoted in footnote of decisions) (T-59/07, *Polimeri Europa v Commission*, EU:T:2011:361, para. 186).

<sup>106</sup> '[T]he precise, detailed nature of that information makes it wholly unlikely that it simply reflected market gossip, was completely wrong or invented' (*Shell v Commission*, n. 84, para. 86). See also *PVC II*, n. 21, para. 593.



notes because they were 'summary in form',<sup>107</sup> accompanied by asterisks and question marks or with the comment 'to be verified',<sup>108</sup> used 'key words' or abbreviations,<sup>109</sup> or in general because they had to be examined in the context of other information in the Commission's possession.<sup>110</sup> People may be interested in different aspects of the same meeting, so differences between notes relating to the same meeting are not enough to exclude their probative value. The author of the note may not have intended the note to be exhaustive.<sup>111</sup>

- 4.041 The more precise the document the less likely it will be that the undertaking accused will convince the Court that the document will have another plausible explanation,<sup>112</sup> but in any event the plausibility of the interpretation of a document will depend on the existence of other pieces of evidence: a plausible interpretation of a document in isolation may become implausible when the overall evidence is considered (see, on the importance of plausible explanations and the holistic approach, paras 2.032–2.037). Even if the contemporaneous piece of evidence may not be direct proof of anticompetitive contacts, its content may be indicative that the relationship between undertakings goes beyond the limits of 'normal competitive conduct', which may be very relevant when there are some evidentiary gaps (see Chapter 3, on duration).<sup>113</sup> The Court may also read by implication certain things into a document, even if the topic is not explicitly addressed in the document.<sup>114</sup> The degree of precision is quite relevant when the anticompetitive conduct is to be inferred from data or tables in possession of the undertakings at the time of the infringement, as it can be inferred that that precise information cannot have been obtained from customers (see also paras 2.069–2.093 above, on inferences).

107 T-303/02, *Westfalen Gassen Nederland v Commission*, EU:T:2006:374, paras 105–108

108 *FMC Foret v Commission*, n. 66, para. 188.

109 *FSL and Others v Commission*, n. 39, paras 202–203.

110 T-186/06, *Solvay v Commission*, EU:T:2011:276, paras 405–406; *FSL and Others v Commission*, *ibid.*

111 *Cimenteries CBR and Others v Commission*, n. 6, para. 1130.

112 For analysis of plausibility of alternative interpretations of a document see, for example, *Groupe Danone v Commission*, n. 1, paras 226–227: whether handwritten notes reflected information obtained from customers; *Intel v Commission*, n. 49, paras 1258–1259; *Shell Petroleum and others v Commission*, n. 97, para. 206; *Fapricela v Commission*, n. 92, para. 119; T-389/10 and T-419/10, *SLM v Commission*, EU:T:2015:513, paras 235–237; *Hitachi v Commission*, n. 55, para. 85; *Total Raffinage Marketing v Commission*, n. 57, paras 123, 153; T-482/07, *Nynäs Petroleum and Nynäs Petróleo v Commission*, EU:T:2013:437, para. 218.

113 *Siemens and Others v Commission*, n. 48, para. 253.

114 *Ibid.*, paras 90–91: 'there is nothing preventing the subject concerned, even if it is not expressly addressed in the documents at issue, from emerging implicitly from them and, consequently, through their interpretation'.

## 5. Preparatory documents

In certain cases internal documents may be seen as preparatory, and the issue of their probative value may arise, since the fact of preparing a discussion does not mean that the discussion actually took place. In fact, such documents will rarely be the only ones to prove the infringement, and they will be considered as relevant insofar as they disclose the existence of an on-going infringement (as regards taking into account documents pre-dating the beginning of the infringement found, see paras 2.106–2.107 above). In *Groupe Danone*, a contemporaneous document was considered an 'aide-mémoire' rather than the notes of the actual meeting, and therefore had less probative value.<sup>115</sup>

Undertakings rarely plan to have anticompetitive discussions with competitors unless there is a certain understanding between them. So, in *GDF* the General Court held as regards 'preparatory briefing notes', where there was nothing to prove that the content was exchanged during the meetings to which they relate, that 'although that fact may result in the probative value of those documents being qualified, it cannot prevent the Commission from relying on them by way of inculpatory evidence' and that 'the fact that the undertakings in question intended to deal with certain subjects relating to the market sharing between them in itself constitutes an indication that such sharing actually existed'. It concluded that '[t]hese documents are not therefore without probative value and thus ... are relevant'.<sup>116</sup> Comparable reasoning was applied in *Intel*, where the General Court held that documents predating the conclusion of an agreement were not deprived of probative value.<sup>117</sup>

## E. INFORMATION DRAFTED *EX POST*

### 1. Introduction

Nowadays, much of the evidence in the file is created *ex post*, and its creation is due precisely to the existence of the procedure. This evidence *in tempore suspecto* will normally have lesser probative value than contemporaneous evidence, but it will be important when the body of evidence does not contain a sufficient number of contemporaneous documents.<sup>118</sup>

115 *Groupe Danone v Commission*, n. 1, para. 242: the existence of the meeting as such was not contested by the applicant.

116 *GDF Suez v Commission*, n. 10, para. 226.

117 *Intel v Commission*, n. 49, paras 734–745, 806.

118 As regards infringements during inspections, the General Court also tends to give more weight to documents drafted during the inspections than afterwards. In *E.on* the General Court considered,



**4.045** In some cases *ex post* statements are produced in response to a measure of enquiry adopted by the Commission or by another authority. In other cases they are spontaneously provided by the undertaking, often in order to try to benefit from a reduction for co-operation under the applicable Leniency Notice. These leniency statements may be provided as statements made by individuals, often witnesses of the events, normally as part of the leniency application, or as corporate statements, i.e., as statements made on behalf of the company, normally by a person who duly represents it. Nowadays it may also take the form of interviews in the sense of Article 19 of Regulation 1/2003.<sup>119</sup>

**4.046** Case law has often not clearly differentiated the probative value of information provided in reply to a request for information and of information contained in a leniency statement, since after all in both cases the undertaking is providing an *ex post* account of facts. However, the different types of *ex post* evidence cannot be treated in the same way.<sup>120</sup> Indeed, some of the principles applied must be the same, but some caution will be needed as regards leniency statements in certain circumstances.

**4.047** The General Court held in *PVC II* that 'no provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings'. Were it otherwise, 'the burden of proving conduct contrary to Article [101] and Article [102], which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions'.<sup>121</sup> Yet, many judgments convey the principle that documentary evidence is (and should be) still the main way to prove infringements. In *Salzgitter Mannesmann* the Court of Justice held that in Union competition

regarding a breach of seal during an inspection, that statements of six inspectors present on the spot and the signature by the applicant of the record of sealing and of the 'breach-of-seal report' constituted 'direct' evidence (*E.ON Energie v Commission*, n. 13, paras 56, 60). That judgment shows that documents drafted and signed during the inspections will be given high probative value, and that later accounts by employees of the undertaking a lower one, so that undertakings have an interest in registering their complaints in written documents as soon as possible in order to be able to prove their point in court. For the value *ex post* statements in the area of merger control, see S. Noë, *Directory of EU Case Law on Merger Control*, Wolters Kluwer, 2012, 157–64.

<sup>119</sup> See, for examples of such interviews, T-404/08, *Fluorsid v Commission*, EU:T:2013:321, para. 5; *FSL and Others v Commission*, n. 39, para. 345.

<sup>120</sup> See, for example, *Nynäs Petroleum and Nynäs Petróleo v Commission*, n. 112, where the General Court explicitly mentions when the piece of evidence is a leniency statement or a reply to a request for information.

<sup>121</sup> *PVC II*, n. 21, para. 512; *Limburgse Vinyl Maatschappij and Others v Commission*, n. 19, para. 280; *JFE Engineering and Others v Commission*, n. 62, para. 192; *Hitachi v Commission*, n. 55, para. 104: since by definition such evidence cannot date back to the material time, this would imply that infringements could only be proven by way of contemporaneous notes.

law cases, 'oral evidence plays only a minor role, whereas written documents play a central role'.<sup>122</sup>

Several elements have an influence on the probative value of *ex post* statements, and will be examined in the following sections. One such element is whether there are sanctions of some kind associated with providing incorrect information. A second element is, of course, the content of the document. The more precise it is, the more probative value it will have. However precise a document may be, its reliability will crucially depend on who is its author, and the interest it may have in disclosing or hiding the truth. Recapitulating on the criteria the General Court held, in *Hitachi*, that:

particularly great probative value may be attached to [statements] which, first, are reliable, second, are made on behalf of an undertaking, third, are made by a person under a professional obligation to act in the interests of that undertaking, fourth, go against the interests of the person making the statement, fifth, are made by a direct witness of the circumstances to which they relate and, sixth, were provided in writing deliberately and after mature reflection.<sup>123</sup>

The judges are sometimes quite explicit about the considerations which lead them to grant high (or modest) probative value to such statements, especially in cases where their probative value is thoroughly contested. In certain cases, as we will see, the reasoning of different judgments is not fully consistent, reflecting that the assessment of this type of evidence is particularly prone to divergent appraisals, and will crucially depend on the evidentiary mix in each case. This also shows that the considerations stated in the judgments are not rules of law, but simply try to rationalize what is to a large extent a subjective process.

It is because these variables will influence the probative value of the document that the General Court shows mistrust as regards documents whose authorship and the circumstances under which they were drawn up are unclear. Indeed, the absence of information on the circumstances under which the document is drawn up will not allow the judge to assess the different factors which will increase or decrease its probative value.<sup>124</sup>

<sup>122</sup> *Salzgitter Mannesmann v Commission*, n.48, para. 42; the Court means also written 'witness statements', as it is clear from the French expression used, '*preuve testimoniale*'; *Akzo Nobel and Others v Commission*, n. 82, para. 316.

<sup>123</sup> *Hitachi v Commission*, n. 55, para. 71; see also *Aragonesas v Commission*, n. 12, para. 104; *Total Raffinage Marketing v Commission*, n. 57, para. 66; T-562/08, *Repsol Lubricantes y Especialidades and Others v Commission*, EU:T:2014:1078, para. 165; *Toshiba v Commission*, n. 75, para. 47.

<sup>124</sup> *Intel v Commission*, n. 49, para. 1312.



**4.050** In addition, these different elements cannot be applied mechanically. Very often some factors will indicate a higher probative value, whereas other factors would tend to diminish it. In certain cases the Commission is faced with contradictory accounts of past events, an occurrence which is by definition more common for *ex post* evidence, since parties may have an incentive to provide a biased account. When confronted with contradictory narratives, it will be crucial to assess which narrative is more reliable,<sup>125</sup> and some judgments explain at length why one version is preferred to another one.<sup>126</sup> Obviously, since the authority must make an overall assessment, one crucial element is the extent to which the *ex post* narrative matches the contemporaneous pieces of evidence, which have more intrinsic value.

## 2. The author (or the source) of the information

**4.051** The first element to bear in mind is the identity of the person making the statement. Documents do not need to come from individuals personally involved in the infringement (by attending cartel meetings, for example). Interestingly, case law appears to give weight both to statements by individuals with direct knowledge, and to statements made in the name of the company, even if the person does not have direct knowledge. In principle, evidence would be of a higher probative value if the person giving the account had attended the relevant meeting,<sup>127</sup> and is direct witness to the anticompetitive contacts.<sup>128</sup> However, case law clearly stresses that the value of evidence is not necessarily diminished if the person making the statement does not have direct knowledge. The General Court in *JFE Engineering*, the first judgment where there was a very detailed and principled examination of these issues, rejected the argument that evidence of which a witness does not have direct knowledge is *necessarily* of lower probative value.<sup>129</sup>

**4.052** In other words, the 'hearsay' rule applicable in common law is not applied as such. Certainly, the probative value of a statement by an individual (or company) which consists of what another person (or company) stated may

<sup>125</sup> *Ibid.*, para. 1326.

<sup>126</sup> See, for example, *Toshiba v Commission*, n. 75, paras 103–105, where the General Court, which had several different statements saying diverging things, examines which one is more credible and matches other pieces of evidence.

<sup>127</sup> *JFE Engineering and Others v Commission*, n. 62, para. 207.

<sup>128</sup> *Lafarge v Commission*, n. 87, para. 382; *Siemens AG v Commission*, n. 7, para. 75; *FMC Foret v Commission*, n. 66, para. 177.

<sup>129</sup> *JFE Engineering and Others v Commission*, n. 62, para. 299.

have lower intrinsic value,<sup>130</sup> but it will not be excluded as evidence. It may be taken into account if it is consistent with other evidence. A strict 'hearsay' rule would be particularly inadequate as regards matters where the representative of the companies will be making statements relying, necessarily, on information provided by employees or other individuals.<sup>131</sup>

Statements given by an executive on behalf of an undertaking are considered in many judgments to have a higher probative value than those of an employee of the undertaking, acting as a private person, whatever this individual's experience or opinion.<sup>132</sup> This is because a company executive is considered to be under a professional obligation to act in the interests of that company, and is therefore unlikely to confess lightly to the existence of an infringement without weighing the consequences of so doing. Where there is nothing in the evidence to support the view that an executive might have failed to fulfil that obligation, the evidence is of particular probative value.<sup>133</sup> In particular, where a person not having direct knowledge of the relevant circumstances makes a statement as a representative of a company, admitting the existence of an infringement by it and by other undertakings, 'that person thoroughly relies on information provided by his company and, in particular, by employees thereof with direct knowledge of the practices in question'.<sup>134</sup>

The EU Courts generally give greater value to such company statements if there is evidence that they are based on an internal investigation where the individuals having direct knowledge of the conduct were involved. This avoids any argument about 'hearsay evidence'. However, this does not mean that a corporate statement and statements by the employees of the company represent two distinct sources of evidence. The statement of the employee cannot be considered another piece of evidence corroborating the statement by the undertaking with regard to the same facts.<sup>135</sup> The same applies to a situation

<sup>130</sup> *Toshiba v Commission*, n. 75, para. 76. An *ex post* statement by Samsung was dismissed because it was not corroborated, and because it was 'indirect': it intended to prove that the applicant was generally kept informed of the cartel, but came from an undertaking other than the one which allegedly informed the applicant.

<sup>131</sup> Arguments to the effect that a statement would be 'hearsay evidence' are normally rejected for different reasons, either because the individual is a direct witness of the facts he disclosed (T-113/07, *Toshiba v Commission*, EU:T:2011:343, para. 121), or because the evidence is corroborated (T-240/07, *Heineken Nederland v Commission*, EU:T:2011:284, para. 88).

<sup>132</sup> T-23/99, *LR AF 1998 v Commission*, EU:T:2002:75, para. 45; *JFE Engineering and Others v Commission*, n. 62, para. 205; *Heineken Nederland v Commission*, *ibid.*, para. 90; *Polimeri Europa v Commission*, n. 105, paras 179–180; *Intel v Commission*, n. 49, paras 555–558, 691.

<sup>133</sup> *JFE Engineering and Others v Commission*, n. 62, paras 205–206, 296–299.

<sup>134</sup> *Ibid.*, para. 297.

<sup>135</sup> *Siemens AG v Commission*, n. 7, paras 69–70; *Hitachi v Commission*, n. 55, para. 129; *FSL and Others v Commission*, n. 39, para. 343.