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# The Allocation of the Legal Burden of Proof in Article 101 TFEU

## Cases: A ‘Clear’ Rule with Not-So-Clear Implications

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**Abstract:** This article evaluates the allocation of the legal burden of proof in cases concerning the application of Article 101 TFEU, as prescribed by Article 2 of Regulation 1/2003 which provides that the Commission is responsible for establishing that an agreement or concerted practice constitutes a restriction of competition by object or effect, whereas it is for the undertakings to demonstrate the ‘defence’ of Article 101(3) TFEU. The article investigates how this shared division of the legal burden instructs competition analysis under Article 101 TFEU and affects its enforcement; and secondly, whether such a bifurcated apportionment of the burden of persuasion respects the evidential prescriptions of the presumption of innocence. The analysis of these two questions yields the conclusion that shifting the legal burden of establishing the conditions Article 101(3) TFEU on the undertakings is prone to distort the substantive scope of Article 101 TFEU and increase the risk of over-enforcement, whilst it is also at odds with the presumption of innocence. On this basis, it is submitted that Article 2 of Regulation 1/2003 must be re-read as placing the whole legal burden on the Commission and imposing only an evidential burden on defendant undertakings.

**Keywords:** legal burden of proof; evidential burden; presumption of innocence; restriction of competition; risk allocation; enforcement

### I. Introduction

In theory the notion of the *burden of proof* is fairly simple: to conclude on whether an argument has been established, the judge must examine *who* has to prove it. Nevertheless, the simplicity of this question downplays the difficulty of the issue, that is, how to properly allocate the burden of proof. The latter is not just yet another evidence rule. On the contrary, how the burden of proof is distributed between the parties affects the enforcement of the substantive provisions and

reflects policy choices, efficiency considerations and fairness concerns, which are prone to critically affect the outcome of litigation.

Against this backdrop, this article investigates the allocation of the legal burden of proof in proceedings concerning the application of Article 101 TFEU at the EU level.<sup>1</sup> Driven by the need ‘to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence’, Regulation 1/2003 incorporated for the first time an explicit rule on the burden of proof.<sup>2</sup> In particular, pursuant to Article 2 thereof, the burden of proving an infringement of Article 101(1) TFEU falls on the person alleging its violation. Then, the undertaking claiming the benefit of Article 101(3) TFEU shall bear the burden of proving that the conditions prescribed therein are satisfied. Under this shared division of the legal burden the European Commission (hereafter ‘Commission’) is responsible for establishing that the agreement or concerted practice in question constitutes a restriction of competition by object or effect. Once a finding of violation has been sufficiently demonstrated, the parties are given a last chance to escape the prohibition of Article 101(1) TFEU by proving the existence of efficiencies that outweigh the restrictive effects found by the Commission.

At first sight, this balanced apportionment of the legal burden in the enforcement of Article 101 TFEU seems intuitively reasonable. Not only does it echo the bifurcated structure of

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<sup>1</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (TFEU). Article 101(1) TFEU reads as follows: ‘The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)’. However, according to Article 101(3) TFEU, ‘The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’. In the present article, the word ‘agreement’ must be understood as referring to decisions or concerted practices as well. Similarly the term ‘restriction of competition’ must be understood as also encompassing the distortion or prevention thereof.

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 (Regulation 1/2003).

the Treaty provision but it also fits well with the concept ‘prohibition-defence’, which is a familiar pair in adjudication and makes assenting to a matching two-fold burden of persuasion natural. As a result, the allocation of the legal burden in Article 2 of Regulation 1/2003 has been well-established and hardly ever questioned.

Nonetheless, competition analysis is far more sophisticated than what this balanced division of the legal burden appears to suggest. With this thought in mind, the present article aims to critically evaluate the current allocation of the legal burden of proof in proceedings concerning the application of Article 101 TFEU. To this end, the article examines how the division of the legal burden in Article 2 of Regulation 1/2003 affects the operation of the substantive legal test contained in Article 101 TFEU and scrutinises its compatibility with the evidential prescriptions of the presumption of innocence, which, according to settled case law, applies to competition infringement proceedings that may culminate in high financial sanctions for the undertakings involved. As will be demonstrated, the shared apportionment of the burden of persuasion between the Commission and the undertakings is at odds with both the legal test that outlines the scope of Article 101 TFEU and the presumption of innocence. More specifically, it is submitted that the current allocation of the legal burden is prone to confuse the enforcement of Article 101 TFEU, whereas it may also impair the effective judicial protection of the undertakings who find themselves involved in infringement proceedings, insofar as the presumption of innocence does apply thereto.

For the purposes of the analysis, the article is structured as follows. Firstly, section II offers a short account of the precise meaning and function of the burden of proof, highlighting its forms and significance in the decision-making process. Then, section III briefly reviews the case-law of the EU Courts<sup>3</sup> in order to verify that their understanding of the way the burden of

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<sup>3</sup> Unless otherwise stated, in this article references to the ‘EU Courts’ or the ‘Courts’ should be understood as reference to the General Court of the European Union (‘General Court’) and the Court of Justice of the European Union (‘ECJ’).

proof should be allocated in cases concerning the application of Article 101 TFEU is fully aligned with Article 2 of Regulation 1/2003. On this basis, section IV proceeds with critically assessing the implications of the shared apportionment of the burden of persuasion between the Commission and the defendant undertakings. More specifically, the article considers how the current distribution of the legal burden may shape the way in which competition analysis under Article 101 TFEU is to be conducted (section IV.A). As will be illustrated, placing the legal burden of proving the conditions of Article 101(3) TFEU upon the defendant undertakings is prone to confuse the operation of the legal test contained therein. Then, the analysis takes account of the evidential prescriptions of the presumption of innocence and demonstrates that in light of the standard of proof to which the defendant undertakings are expected to establish the conditions of Article 101(3) TFEU, the symmetrical division of the legal burden of proof takes issue with the principle of effective judicial protection (section IV.B). Considering the practical effect of these findings, section V submits that Article 2 of Regulation 1/2003 should be ‘read down’ to impose only an evidential burden on the undertakings, that is, an obligation to merely produce evidence of efficiencies, and reflects on the advantages and implications of placing the whole legal burden with respect to Article 101 TFEU upon the Commission. Section VI concludes.

## **II. The Concept of the Burden of Proof and its Significance**

Ascertaining the facts of the case is an essential precondition for applying the pertinent rules in adjudication. However, absolute factual certainty is hardly ever attainable. As a result, judges are often forced to make decisions under circumstances of incomplete information. Since they cannot simply refuse to adjudicate and are obliged to decide one way or the other,<sup>4</sup> the question that emerges is how to proceed when no conclusion on the facts of the case can be reached. In

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<sup>4</sup> A Stein, *Foundations of Evidence Law* (Oxford University Press 2005) 34, 56.

this scenario one of the litigants must inevitably bear the risk of an erroneous ruling.<sup>5</sup> Helpfully, evidence law comes to our rescue by providing mechanisms that allocate this risk between the parties and offer a way out of the deadlock.<sup>6</sup> Such an example is the burden of proof that indicates who will be forced by law to take the risk of a mistaken ruling in case of a fact-finding failure.

Nevertheless, the question remains how the burden of proof should be allocated.<sup>7</sup> The conventional answer to this is that *ei incumbit probatio qui dicit non qui negat*.<sup>8</sup> In other words, the starting point for the allocation of the burden of proof is that ‘he or she who asserts a fact must prove it’, irrespective of his or her procedural capacity as claimant or defendant.<sup>9</sup> However, fairness, proportionality and efficiency considerations may play a determinative role in adjusting the apportionment of the burden of proof. Indeed, from a fairness perspective the division of the burden of proof must be aligned with the presumption of innocence, where the latter applies. Moreover, the allocation of the burden of proof is subject to the general principle of proportionality, in the sense that none of the parties should be forced to prove ‘something that cannot be proved or something which can be proved only with the utmost difficulty’, as this would amount to a *probatio diabolica*.<sup>10</sup> Last but not least, it is often stressed that from an efficiency point of view the burden of proof should rest on the party who is better equipped to satisfy it, the idea being that the person with the better information should be forced to bring it forward.

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<sup>5</sup> *ibid*, p 122.

<sup>6</sup> *ibid*, p 107. Also see chapters 7 and 8.

<sup>7</sup> On this question, see generally H Bruce, ‘Allocating the Burden of Proof’ (1997) 72 *Indiana Law Journal* 651.

<sup>8</sup> In short, this maxim is further translated into the following sub-principles: firstly, that *actori incumbit probatio*, the underlying assumption being that the person who asks for a change in the status quo should be responsible for proving why such a change should take place; and secondly, that *reus in excipiendo fit actor*, which implies that with respect to defences, the burden is on the party claiming their benefit. See A-L Sibony and E Barbier de la Serre, ‘Charge de La Preuve et Theorie du Controle en Droit Communautaire de la Concurrence: Pour un Changement de Perspective’ (2007) 43 *Revue Trimestrielle de Droit Europeen* 205, 217-218.

<sup>9</sup> D Bailey, ‘Presumptions in EU Competition Law’ (2010) 31 *European Competition Law Review* 362, 363.

<sup>10</sup> *ibid*. On the principle of proportionality, see generally T Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 136ff.

That said, a few clarifications are in order. First of all, the burden of proof has a two-fold essence: the burden of persuasion (or legal burden) and the burden of adducing evidence (or evidential burden).<sup>11</sup> Usually, the legislature does not explicitly distinguish between the two dimensions of the burden of proof. Nevertheless, being aware of its two-fold nature is of crucial practical significance for the following reasons. Firstly, contrary to the burden of persuasion, which remains stable and rests upon a specific party throughout the proceedings, the evidential burden may shift to and fro the litigants several times.<sup>12</sup> Secondly, what truly matters at the end of litigation is who bears the legal burden of proof, as this party will essentially bear the risk of non-persuasion.<sup>13</sup> Equally important is not to mistake the legal burden of proof with the substantive legal test. While the latter delineates what type of conduct comes within the ambit of the substantive rules, the former indicates who should bear the burden of demonstrating so. Finally, the question of the *allocation* of the burden of proof should not be confused with the distinct matter of its *discharge*. Indeed, the distribution of the burden of proof addresses the issue of ‘who should bear it’, whereas the question of its discharge pertains to how the person carrying the burden of proof may satisfy it. The short answer to this is by providing evidence to the applicable standard of proof.<sup>14</sup> In practice, however, discharging the burden of proof will be

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<sup>11</sup> The burden of persuasion must not be confused with the burden of production. While the latter answers the question ‘who must produce evidence in relation to an issue’, the burden of persuasion solves the following problem: ‘if there is uncertainty as to whether the standard of proof has been satisfied, who will lose the case?’. J Thayer, ‘The Burden of Proof’ (1890) 4 Harvard Law Review 45, 48, was the first to distinguish the two meanings of the burden of proof. This distinction was then further analysed by J McNaughton, ‘Burden of Production of Evidence: A Function of a Burden of Persuasion’ (1955) 68 Harvard Law Review 1382. In the competition context, see Sibony and Barbier de la Serre (n 8) 209-212.

<sup>12</sup> Many authors refer to this shifting of the evidential burden as the ‘tactical burden of proof’. See, for instance, H Prakken and G Sartor, ‘Presumptions and Burdens of Proof’ in T van Engers (ed), *Legal Knowledge and Information Systems* (JURIX 2006) 24-26.

<sup>13</sup> M Brealey, ‘The Burden of Proof before the European Court’ (1985) 10 European Law Review 250, 257; M Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International 1995) 29.

<sup>14</sup> The standard of proof prescribes the minimum threshold that litigants need to surpass in terms of both quality and quantity of their evidence for the judge to be convinced and their arguments to be established. See D Bailey, ‘Standard of Proof in EC Merger Proceedings: A Common Law Perspective’ (2003) 40 Common Market Law Review 845, 847-848, 854. For other definitions, see: B Vesterdorf, ‘Standard of Proof in Merger Cases: Reflections in the Light of the Recent Case Law of the Community Courts’ (2005) 1 European Competition Journal 3, 5: ‘the amount of evidence which a plaintiff (or prosecuting attorney in a criminal case) must present in a trial in order to win’; E Paulis, ‘The Burden of Proof in Article 82 Cases’ in B Hawk (ed), *Fordham Competition Law Institute: International Antitrust Law and Policy* (Juris 2007) 469: ‘level of proof required to reach a certain finding’. See also Case C-8/08 *T-Mobile Netherlands ea* [2009] ECR I-4529, Opinion of AG Kokott, footnote 60: ‘the standard of proof

more or less difficult depending on how high the standard of proof is, what has to be proved, what evidence is available or used to this end, and what mechanisms, if any, there are in place for that purpose – such as for instance presumptions.

The present article is confined to investigating how the legal burden (rather than the burden of producing evidence) is allocated (rather than discharged) in proceedings concerning the application of article 101 TFEU.<sup>15</sup>

### **III. The Current Allocation of the Legal Burden of Proof in Proceedings Concerning the Application of Article 101 TFEU**

According to settled case-law, the question whether the rules relating to the burden of proof have been observed ‘constitutes a question of law which is amenable to judicial review on appeal’.<sup>16</sup> In this context, on numerous occasions the EU Courts have had the opportunity to elaborate on their operation. In so doing, they have entirely approved of the apportionment of the legal burden favoured in Article 2 of Regulation 1/2003. For instance, in *Aalborg Portland* the ECJ confirmed that:

it should be for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to

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determines the requirements which must be satisfied for facts to be regarded as proven’. On the proper conceptual understanding of the standard of proof see more generally S Haack, *Evidence Matters: Science, Proof and Truth in the Law* (Cambridge University Press 2014) 47-77.

<sup>14</sup> Stein (n 4) 122, 143.

<sup>15</sup> Accordingly, the article considers neither the impact of the ‘more economic’ approach to competition analysis on the discharge of the burden of proof nor the various presumptions that the EU Courts have developed nor the exact substantive legal test that the Commission must satisfy in order to prohibit a conduct under Article 101 TFEU.

<sup>16</sup> Joined Cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens AG, Mitsubishi Electric Corp and Toshiba Corp v Commission* [2013] (ECJ, 19 December 2013), para 130. Also Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries v Commission* [2007] ECR I-729, paras 39-40.

demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence.<sup>17</sup>

Therefore, the burden of persuasion under Article 101(1) TFEU rests on the Commission, while the burden of persuasion under Article 101(3) TFEU rests on the defendant undertakings.

This twofold division of the legal burden is not compromised by the fact that – as explained previously – the evidential burden may shift to and fro the Commission and the undertakings several times throughout the proceedings.<sup>18</sup> As Advocate General (‘AG’) Kokott observed in her Opinion in *T-Mobile Netherlands*, such shift constitutes ‘the normal operation of the respective burdens of adducing evidence’.<sup>19</sup> Indeed, the party who bears the burden of persuasion also bears the initial burden of adducing evidence.<sup>20</sup> However, the ECJ rightly explained in *Aalborg Portland* that irrespective of how the legal burden is distributed, ‘the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged’.<sup>21</sup> In practice, this means that an undertaking cannot simply contest the Commission’s findings but must produce counter-evidence capable of discrediting them.<sup>22</sup> As AG Kokott clarified in her Opinion in *FEG*, it falls on the undertaking ‘to show in detail why the information used by the Commission is inaccurate, why it has no probative value, if that is the case, or why the conclusions drawn by the Commission are unsound’.<sup>23</sup> Nevertheless, discharge of the burden of production by the party other than the one bearing the legal burden

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<sup>17</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S v Commission* [2004] ECR I-123, para 78.

<sup>18</sup> Sibony and Barbier de la Serre (n 8, 218) illustratively liken this to a tennis game.

<sup>19</sup> *T-Mobile Netherlands ea*, Opinion of AG Kokott (n 14) para 74. See also paras 60, 73.

<sup>20</sup> C-185/95 P *Baustahlgevebe v Commission* [1998] ECR I-8417, para 58. (emphasis added) Also Case T-141/08 *E.ON Energie AG v Commission* [2010] ECR II-5761, para 48.

<sup>21</sup> *Aalborg Portland v Commission* (n 17) para 79 and Case T-168/01 *GlaxoSmithKline Services v Commission* (GSK Services) [2006] ECR II-2969, para 236.

<sup>22</sup> See, for instance, Case T-290/94 *Kaysberg v Commission* [1997] ECR II-2137, paras 178-179.

<sup>23</sup> See Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG) v Commission* [2006] ECR I-8725, Opinion of AG Kokott, para 74.

of proof does not require establishing a positive case.<sup>24</sup> All it requires is that the undertaking ‘calls into question’ – rather than disproves – the Commission’s arguments.<sup>25</sup>

In any event, once the Commission has established the applicability of Article 101(1) TFEU, the ECJ confirmed as early as in *VBVB and VBBB* that ‘in the event of an exemption’s being applied for under Article 85(3) [now Article 101(3) TFEU] it is in the first place for the undertaking concerned to present to the Commission the evidence intended to establish the economic justification for an exemption, and if the Commission has objections to raise, to submit alternatives to it’.<sup>26</sup> Likewise, the General Court reiterated more recently in *GSK Services* that the only option for a defendant against whom a finding of an infringement of Article 101(1) TFEU has been reached is to rely on the defence provided for in Article 101(3) TFEU and ‘demonstrate that those conditions are satisfied, by means of convincing arguments and evidence’.<sup>27</sup> Thus, where Article 101(3) TFEU is invoked, both the burden of persuasion and the burden of production fall upon the defendant undertakings who seek to benefit from its application.

As the above brief account suggests, the EU Courts’ understanding of the allocation of the legal burden of proof in Article 101 TFEU cases accords with Article 2 of Regulation 1/2003. Furthermore, both the EU Courts’ jurisprudence and Article 2 align the burden of persuasion with the two-level structure of the Treaty provision. Indeed, at first level the responsibility for proving an infringement of Article 101(1) TFEU is bestowed on the Commission. Then, at a second level, where Article 101(3) TFEU is invoked, the legal burden of proof rests on the undertakings claiming its applicability.

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<sup>24</sup> See Case C-100/80 *Musique Diffusion française v Commission* [1983] ECR 1825, Opinion of AG Sir Gordon Slynn, at p 1931.

<sup>25</sup> See, for instance, Case T-133/07 *Mitsubishi Electric Corp v Commission* [2011] ECR II-4219, paras 82, 88, 92. Also M Guerrin and G Kyriazis, ‘Cartels: Proof and Procedural Issues’ in B Hawk (ed), *Fordham Corporate Law Institute: International Antitrust Law and Policy* (Juris 1993) 796.

<sup>26</sup> Joined Cases 43/82 & 63/82 *Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) and Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v Commission* [1984] ECR 19, para 52.

<sup>27</sup> *GSK Services* (n 21), para 235.

## **IV. The Not-So-Clear Implications of the Current Allocation of the Legal Burden of Proof in Article 101 TFEU Cases**

As explained previously, the crucial question for the purposes of adjudication is who bears the legal burden of proof, since it is the answer to this question that indicates who should carry the risk of an erroneous ruling in case of a fact-finding failure. For this reason, the remainder of this article will evaluate the shared allocation of the burden of persuasion between the Commission and the undertakings in cases concerning the application of Article 101 TFEU, as predicated on Article 2 of Regulation 1/2003 and the EU Courts' case-law. More specifically, the article will demonstrate that the bifurcated distribution of the legal burden of proof is at odds with both the substantive legal test of Article 101 TFEU and the presumption of innocence that according to settled case-law applies to proceedings that may result in the imposition of financial penalties for the persons concerned.

### **A. The Legal Burden of Proof and the Substantive Legal Test of Article 101 TFEU: An Underestimated Interplay**

Being an evidential rule, the burden of proof stands independent of the substantive legal test of Article 101 TFEU. Nevertheless, this does not invalidate the fact that there is a deeply complementary relationship between the two. On the one hand, how Article 101 TFEU is read instructs how the burden of persuasion should be shared between the parties.<sup>28</sup> Conversely, however, it should not be overlooked that how the legal burden of proof is allocated in the first place may modify how Article 101 TFEU is to be enforced. With this in mind, it is important to

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<sup>28</sup> See C Callery, 'Should the European Union Embrace or Exorcise Leegin's "Rule of Reason"?' (2011) 32 *European Competition Law Review* 42, 47, who remarked that 'how Article 101(1) is read, can completely change which party carries the burden of proof'.

investigate how the current bifurcated allocation of the legal burden of proof in Article 2 of Regulation 1/2003 may shape the methodology pursuant to which the compatibility of an agreement or concerted practice with Article 101 TFEU is to be verified, and may inform the interpretation of the concept ‘restriction of competition’.

To begin with, the shared division of the burden of persuasion between the Commission and the parties may support two different possible approaches to competition analysis under Article 101 TFEU.

Under the first possible option, the bifurcated legal burden endorsed in Article 2 of Regulation 1/2003 may be understood as replicating the intuitive splitting of the effects of a conduct into anticompetitive and procompetitive. In this context, the Commission bears the responsibility for proving that the agreement or concerted practice in question constitutes a ‘restriction of competition’ by object or effect and may discharge its burden merely by establishing its anti-competitive nature or its restrictive impact respectively. Once such a ‘restriction of competition’ has been established, the legal burden is shifted onto the defendant undertaking who must demonstrate the existence of efficiencies capable of outweighing its restrictive nature or effects as identified by the Commission. This understanding of the practical operation of the symmetrical legal burden contained in Article 2 of Regulation 1/2003 may find support in the recent reiteration in *Beef Industry Development Society* that legitimate objectives or similar considerations are relevant only in connection with Article 101(3) TFEU.<sup>29</sup>

At first sight, this approach to competition analysis under Article 101 TFEU as inspired by its two-fold structure and the shared division of the burden of persuasion between the Commission and the undertakings appears straightforward and appealing. A closer look, however, reveals a different picture.

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<sup>29</sup> Case C-209/07 *The Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd (BIDS)* [2008] ECR I-8637, para 21. See also Case T-112/99 *Metropole Television SA v Commission* [2001] ECR II-2459, paras 74-77; A Scordamaglia-Tousis, *Reconciling Effective Public Enforcement with Fundamental Rights* (Kluwer Law International 2013) 286-287.

First and foremost, although it cannot be denied that the examination of pro-competitive justifications under Article 101(1) TFEU remains a highly contentious issue, the EU Courts' jurisprudence abounds of examples where arguments drawing attention to the procompetitive nature of the agreement or concerted practice under examination have been accounted for under the first paragraph of Article 101 TFEU. From the early judgments handed down in *Société Technique Minière*,<sup>30</sup> *Gottrup-Klim*,<sup>31</sup> *Metro I*,<sup>32</sup> *Metro II*,<sup>33</sup> *Pronuptia*<sup>34</sup> or *Nungesser*<sup>35</sup> to more recent rulings in *Pierre Fabre*<sup>36</sup> and *Football Association Premier League*,<sup>37</sup> it is clear that arguments pointing at the procompetitive aspects of the agreement or concerted practice in the context of Article 101(1) TFEU analysis may lead to the conclusion either that the conduct in question falls outside the intended scope of the prohibition altogether, or that it is not a restriction of competition 'by object' and thus, a more detailed analysis of its effects is necessary.<sup>38</sup> However, if the assessment of an agreement or concerted practice under Article 101(1) TFEU already requires an at least partial examination of its procompetitive aspects,<sup>39</sup> then the merits of the airtight demarcation of the legal burden between the Commission and the undertakings in Article 2 of Regulation 1/2003 becomes challenged.

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<sup>30</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235.

<sup>31</sup> Case C-250/92 *Gottrup-Klim v DLG AmbA* [1994] ECR I-5641.

<sup>32</sup> Case 26/76 *Metro SB-Großmärkte GmbH & Co KG v Commission* (Metro I) [1977] ECR 1875.

<sup>33</sup> Case 75/84 *Metro SB-Großmärkte GmbH & Co KG v Commission* (Metro II) [1986] ECR 3021.

<sup>34</sup> Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

<sup>35</sup> Case 258/78 *Nungesser v Commission* [1982] ECR 2015.

<sup>36</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419.

<sup>37</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083.

<sup>38</sup> See R Nazzini, 'Article 81 EC between Time Present and Time Past: A Normative Critique of "Restriction of Competition" in EU Law' (2006) 43 *Common Market Law Review* 497, 526-527; also P Ibáñez Colomo, 'Market Failures, Transaction Costs and Article 101(1) TFEU' (2012) 37 *European Law Review* 541, 549, who remarks that in drawing the line between 'object' and 'effect' restrictions of competition, the EU Courts take account of whether the agreement or practice in question is a 'plausible source of efficiency gains'; R Whish and D Bailey, *Competition Law* (7<sup>th</sup> edn, Oxford University Press 2012) 129, who observe that in several instances the Courts have found contractual restrictions with anti-competitive potential as falling outside the scope of Article 101(1) TFEU on the ground that they were necessary 'to enable the parties to an agreement to achieve a legitimate commercial purpose', such as 'the penetration of a new market, the sale of a business and the successful establishment of a group purchasing association'. See further D Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49 *Common Market Law Review* 559, 579-581. cf Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, para 64.

<sup>39</sup> See also Nazzini (n 38) 504.

Secondly, understood as signifying that the Commission is entitled to confine its analysis to a consideration of the restrictive aspects of the conduct only and that efficiencies are for the undertakings to demonstrate, the current bifurcated allocation of the legal burden of proof implies that the procompetitive aspects of the agreement or concerted practice may not be ever accounted for. In the same vein, reducing the Commission's legal burden to an obligation to merely establish the anticompetitive nature or effects of the conduct in question is prone to pave the way for an expansive construction of the scope of Article 101(1) TFEU and increase the risk of over-enforcement. This risk will not be as high where there is broad consensus in economic theory that the conduct at hand rarely generates efficiencies, such as is, for instance, the case with cartels.<sup>40</sup> Nevertheless, the danger of over-enforcement will be more than present in the case of agreements or concerted practices with a good deal of both anticompetitive and procompetitive aspects. Vertical agreements are such an example. Indeed, in its Guidelines on vertical restraints, the Commission itself recognises that 'if a vertical restraint falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for exemption under Article 101(3)'.<sup>41</sup> Nevertheless, if consideration of Article 101(3) TFEU is *necessary* in this case, placing the burden of proof thereof on the defendant undertakings becomes at least questionable.

Finally, it is important to underline that the shared allocation of the legal burden in Article 2 of Regulation 1/2003 is not compelled by the letter of Article 101 TFEU. Article 101(3) TFEU simply reads that 'paragraph (1) may be declared inapplicable', where the agreement or concerted practice in question (i) gives rise to quantitative or qualitative efficiencies; (ii) allows consumers a fair share of the resulting benefit; (iii) does not impose on the undertakings concerned restrictions which are not indispensable; and (iv) does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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<sup>40</sup> See, for instance, A Günster, M Carree and M van Dijk, "Do Cartels Undermine Economic Efficiency?!", (Working Paper, December 2011), available at <<https://www.aeaweb.org/aea/2012conference/program/retrieve.php?pdfid=510>> accessed 29/11/2014).

<sup>41</sup> Commission Notice – Guidelines on Vertical Restraints [2010] OJ C 291 (Vertical Restraints Guidelines), para 110.

Nothing in this formulation supports the conclusion that it should be for the defendant undertakings to prove any efficiencies flowing from their agreement or concerted practice.<sup>42</sup>

At any rate, the current allocation of the legal burden in Article 2 of Regulation 1/2003 may support a second approach to competition analysis in the context of Article 101 TFEU. Indeed, it has been suggested that Article 101(1) TFEU is concerned with some aspects of consumer welfare, whereas Article 101(3) TFEU is pertinent to all other types of efficiencies.<sup>43</sup> For instance, AG Trstenjak opined in *Beef Industry Development Society* that ‘different aspects of consumer welfare are taken into account under [Article 101(1) TFEU] and under [Article 101(3) TFEU]’ and that ‘factors which are not capable of casting doubt on the existence of a restriction of competition, in particular efficiencies in production as a result of economies of scale, may not be taken into account in the context of [Article 101(1) TFEU], but only in the context of [Article 101(3) TFEU] ...’.<sup>44</sup> Assuming that this proposition is correct, it may be argued that the Commission still bears the burden of proving that the agreement or concerted practice in question constitutes a restriction of competition by object or effect, but such finding entails consideration not only of its restrictive effects, but also of – at least some of – its procompetitive aspects. Then, once a ‘restriction of competition’ by object or effect has been established, the burden of persuasion is placed on the defendant undertaking to demonstrate that there are *further*

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<sup>42</sup> cf E Rousseva, ‘Reflections on the Relevance and Proof of Efficiency Defences in Modern EU Antitrust Law’ in J Bourgeois and D Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law: State of Play and Perspectives* (Bruylant 2012) 283-285.

<sup>43</sup> See, for example, O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006) 102-127, who argues that Article 101(1) TFEU is concerned with allocative inefficiency; also G Bruzzone and M Boccaccio, ‘Impact-Based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix’ (2009) 32 *World Competition* 465, 473-477, who suggest that ‘the assessment of the whole impact of the agreement on competition is made under Article 81(1) (...) and Article 81(3) is used only to balance the negative effect of an ascertained restriction of competition with other effects which satisfy the four conditions of Article 81(3)’. As per the authors’ examples, such other effects may include productive efficiencies or improvements in the quality of production to the advantage of consumers (at 476-477).

<sup>44</sup> *BIDS* (n 29), Opinion of AG Trstenjak, paras 50-58. Moreover, see Case C-382/12 P *MasterCard and Others v Commission* (Mastercard II) [2014] (ECJ, 11 September 2014) para 180: ‘As is evident from ... the very wording of Article 81 EC, where it is established that a measure is liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services, and is therefore covered by the prohibition rule laid down in Article 81(1) EC, such advantages can be considered only in the context of Article 81(3) EC.’ Also Case C-67/13 P *Groupement de Cartes Bancaires (CB) v Commission* (ECJ, 11 September 2014) para 51.

efficiencies that justify the exemption of the agreement or concerted practice from the prohibition of Article 101(1) TFEU.

Nonetheless, this approach is also inherently problematic.<sup>45</sup> First of all, it does not find strong support in the current judicial practice. Even in the instances where the EU Courts have allowed for objective justifications or other procompetitive arguments to be examined under Article 101(1) TFEU, at this stage of the analysis consideration thereof has been nonconcrete and quite abstract.<sup>46</sup> Consequently, it seems that the underlying intention behind the examination of such arguments in the context of Article 101(1) TFEU is not to undertake a full-blown weighing of the potentially procompetitive effects of the agreement or concerted practice under investigation, but rather to filter out commercial behaviour which should fall outside the prohibitive scope of Article 101(1) TFEU altogether or which is not restrictive of competition by object.

Secondly, coupled with the shared apportionment of the legal burden in Article 2 of Regulation 1/2003, this approach to competition analysis under Article 101 TFEU carries two important risks. On the one hand, correlating the legal test of ‘restriction of competition’ with only some aspects of consumer welfare might again result in over-enforcement, insofar as the Commission’s legal burden does not compel the authority to account for all the possible ways in which the agreement or concerted practice in question may in reality benefit consumers. On the other hand, by placing the legal burden of establishing the conditions of Article 101(3) TFEU on the defendant undertakings, Article 2 of Regulation 1/2003 may – albeit unintentionally – have

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<sup>45</sup> cf M Merola and D Waelbroeck (eds), *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* (Bruylant 2010) 35-46 where the bifurcation of article 101 TFEU is considered to be merely an evidence law issue. Although the authors accept that ‘article 81 EC should be interpreted following a global approach taking into account both anticompetitive and procompetitive effects before finding the existence of a competition law infringement’, they submit that what distinguishes the two paragraphs of the provision is ‘the methods of assessment of consumer harm’: under Article 101(1) TFEU an abstract intuitive analysis is necessary only, whereas under Article 101(3) TFEU a more detailed cost-benefit inquiry is necessary, the risk of which is ‘on the defendant that argues this possibility of justification’. (p 43)

<sup>46</sup> Case T-111/08 *MasterCard and Others v Commission* (MasterCard I) [2012] (General Court, 12 May 2012) para 80. Ibáñez Colomo (n 38) 559.

the effect of turning productive or dynamic efficiencies into procompetitive effects of a ‘lesser quality’. The reason for this lies in the fact that pursuant to the current two-fold division of the burden of persuasion between the Commission and the undertakings, Article 101(3) TFEU practically amounts to a ‘defence’. Technically speaking, it serves as an ultimate way for the parties to be absolved from their liability under Article 101(1) TFEU. Labelling, however, Article 101(3) TFEU as a ‘defence’ has a critical ramification: it hints at a narrow perception of ‘competition’ under Article 101(1) TFEU, under which productive and dynamic efficiencies have no place when deciding whether this has been ‘restricted’. In this respect, by turning Article 101(3) TFEU into a defence the current allocation of the burden of persuasion between the Commission and the undertakings appears to discriminate against productive and dynamic efficiencies by diminishing their importance in the competitive process.

More generally, it is important to note that Article 101(3) TFEU is articulated in terms of *inapplicability* of Article 101(1) TFEU, as opposed to *exemption* of the conduct in question. This wording may well suffice to question the nature of Article 101(3) TFEU as a ‘defence’, despite the prescription to the contrary which is inherent in the current allocation of the legal burden in Article 2 of Regulation 1/2003. In essence, this choice of words implies that where the conditions of Article 101(3) TFEU are satisfied, the motive for prohibiting an agreement or concerted practice under Article 101(1) TFEU becomes extinct.

In this respect, the Commission’s perception of the operation of Article 101 TFEU is particularly illustrative as well. As the authority has itself explained, Article 101(1) and Article 101(3) TFEU constitute the two sides of the *same* analytical framework on the basis of which the Commission must conclude whether the agreement or concerted practice in question should be prohibited. Indeed, at the end of the day, the question that is to be answered is whether a given agreement or concerted practice must be prohibited because it harms, or is likely to harm, competition and consumers. To this question, a ‘yes, but...’ type of answer is not conceivable: a

given conduct may be either harmful for competition and consumers or not. In the cases where competition analysis does not evolve beyond Article 101(1) TFEU, a finding of a ‘restriction of competition’ marks the end of the Commission’s inquiry. However, where Article 101(3) TFEU becomes engaged, an additional step is necessary. In particular, it is necessary to examine whether consumers receive a ‘fair share’ of the resulting benefit. To this end, ‘the positive effects of an agreement must be balanced against and compensate for its negative effects on consumers’, in which case ‘consumers are not harmed’ and the agreement is ‘on balance pro-competitive and compatible with the objectives of the Community competition rules’.<sup>47</sup>

Since under the current allocation of the legal burden in Article 2 of Regulation 1/2003 it is for the undertakings to establish the conditions of Article 101(3) TFEU, their burden of persuasion effectively amounts to an obligation to demonstrate that their conduct is eventually procompetitive. However, this obligation is in direct conflict with the Commission’s legal burden to establish that the conduct in question violates the competition rules. The root of this conflict lies in the fact that the allocation of the burden of proof endorsed in Article 2 of Regulation 1/2003 fails to appreciate that segregating the effects – actual or presumed – of a conduct into anticompetitive and procompetitive is, in a sense, artificial.<sup>48</sup> Despite its practical value for the purposes of structuring competition analysis under Article 101 TFEU, to the extent that such segregation extends to a matching splitting of the burden of persuasion it results in an unjustified shift of the legal burden from the Commission onto the undertakings. This is particularly so considering that, as the Court explained in *GSK Services*, it is ultimately the Commission that must weigh up ‘the advantages expected from the implementation of the agreement and the disadvantages which the agreement entails for the final consumer, owing to its impact on

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<sup>47</sup> Commission Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3)] [2004] OJ C 101/97 (Article 101(3) TFEU Guidelines), paras 85 and 33.

<sup>48</sup> See, in the context of Article 102 TFEU, Case C-53/03 *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait) and Others v Glaxosmithkline AEVE* [2005] ECR I-4609, Opinion of AG Jacobs, para 72.

competition’ and that in conducting this balancing exercise, the authority enjoys a margin of discretion.<sup>49</sup>

For these reasons, allocating the burden of persuasion with respect to Article 101(3) TFEU upon the defendant undertakings is at best confusing and at worst prone to distort the enforcement of Article 101 TFEU. By the same token, it is submitted that the legal burden should remain with the Commission throughout all the stages of the analysis of whether an agreement or concerted practice should be prohibited.

### **B. Placing the Legal Burden of Proving Article 101(3) TFEU on the Undertakings Is At Odds with the Presumption of Innocence**

In any event, even on the assumption that the allocation of the burden of persuasion envisaged in Article 2 of Regulation 1/2003 does not interfere with the enforcement of Article 101 TFEU, it is still necessary to examine whether it conforms to the presumption of innocence. Indeed, the application of the presumption of innocence to proceedings that may culminate in the imposition of high financial penalties for the persons involved has been consistently confirmed by the EU Courts ever since *Hüls* and *Montecatini*.<sup>50</sup> To some extent, this line of case-law has been intended to mitigate the persisting criticisms that antitrust fines amount to ‘criminal charges’ in the meaning of Article 6(1) ECHR and thus call for criminal safeguards of procedural

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<sup>49</sup> *GSK Services* (n 21) para 244. See also para 248; Case 42/84 *Remia v Commission* [1985] ECR 2545, Opinion of AG Lenz, at pp 2563-2564 where he took the view that ‘Here the Commission has imported into the proceedings elements of the burden of proof where they do not belong. A proceeding for an exemption under Article 85(3), unlike a proceeding for the grant of negative clearance, is governed by the principle of official determination of the facts. The Commission must examine whether the information set out in the notification is true and complete and, where necessary, undertake further investigations. It is true that the undertakings concerned are under a duty to provide information but *the Commission is not entitled to place upon them the burden of proving that the conditions for an exemption are met.*’ (emphasis added)

<sup>50</sup>Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paras 149-150; also Case C-265/92 P *Montecatini v Commission* [1999] ECR I-4539, paras 175-176.

protection.<sup>51</sup> Unsurprisingly, the question whether competition enforcement has become ‘criminal’ in nature has generated much debate in the wake of the Commission’s practice to impose higher and higher penalties for violations of the competition rules. For the purposes of the present article, however, the applicability of the presumption of innocence to infringement proceedings will be taken for granted and will not be challenged. On this basis, the following paragraphs will consider whether a shared division of the legal burden to the effect that the Commission must demonstrate the existence of an infringement under Article 101(1) TFEU, whereas the undertakings must prove the elements of Article 101(3) TFEU, adheres to the principle that ‘every person should be considered to be innocent, unless proven guilty’.<sup>52</sup>

To answer this question, it is necessary to recall the evidential implications of the presumption of innocence as traditionally understood. Indeed, three fundamental prescriptions stem from it: firstly, no-one can be forced to prove his innocence; secondly, any doubt as to the guilt of the defendant must operate in his benefit; and thirdly, the defendant may be exceptionally burdened with proving the elements of a defence only if the standard of proof that he must satisfy is the lowest one, that is, the balance of probabilities.<sup>53</sup> Applying these thoughts in the context of Article 101 TFEU, the following conclusions can be drawn. First of all, insofar

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<sup>51</sup> On the fairness implications of the criminal nature of antitrust proceedings, see indicatively A Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing 2008); I Forrester, ‘Due process in EC Competition Cases: A Distinguished Institution with Flawed Procedures’ (2009) 34 *European Law Review* 817-843; R Nazzini, ‘Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective’ (2012) 49 *Common Market Law Review* 971-1006. cf 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 *World Competition* 189-213.

<sup>52</sup> Note that the exact nature of the presumption of innocence has been the subject of much speculation. See, for instance, H L Ho, ‘The Presumption of Innocence as a Human Right’ in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing 2012) 259-281.

<sup>53</sup> B Underwood, ‘The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases’ (1977) 86 *Yale Law Journal* 1299, 1331-1338; A Stein, ‘Criminal Defences and the Burden of Proof’ (1991) 28 *Coexistence* 133, 140. Also Stein, *Foundations of Evidence Law* (n 4) pp 181-182. In fact, even the proposition that a defendant may be legally burdened with establishing the elements of a defence on a mere preponderance of the evidence has been fiercely criticised as incompatible with the presumption of innocence and there are still raging debates on this issue. (For more on this, see A Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 123 *South African Law Journal* 63-97; P Roberts and A Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010) 265-290; J Levy, ‘A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials’ (2013) 40 *American Journal of Criminal Law* 281-299). Nevertheless, given the purposes of this article, the analysis will proceed on the assumption that placing a legal burden on a defendant to demonstrate the elements of a defence to the civil standard is not incompatible with the presumption of innocence.

as the legal burden of proving an infringement of Article 101(1) TFEU falls on the Commission, the first clause of Article 2 of Regulation 1/2003 is fully aligned with the presumption of innocence.<sup>54</sup> Secondly, the EU Courts have consistently reiterated that if there is any doubt as to whether the Commission has sufficiently established the elements of Article 101(1) TFEU, ‘the benefit of that doubt must be given to the undertakings accused of the infringement’.<sup>55</sup> Therefore, insofar as the discharge of the burden of proof in infringement proceedings is indeed governed by the principle *in dubio pro reo*, the second prescription of the presumption of innocence appears to be satisfied as well.<sup>56</sup> By contrast, the compatibility of the current bifurcated distribution of the burden of persuasion with the requirement that defendants may not be compelled to prove a defence to a standard of proof higher than the balance of probabilities is not as straightforward. In principle, this implies that undertakings may be legally burdened with proving the elements of Article 101(3) TFEU only if their burden is confined to an obligation to demonstrate that their conduct is ‘more likely than not’ procompetitive. This begs the question what is the standard of proof to which defendant undertakings are subject when they seek to establish the defence of Article 101(3) TFEU.

Rather surprisingly, this question has troubled the EU Courts only exceptionally.<sup>57</sup> Indeed, the closest that the EU Courts have come to articulating an explicit standard of proof for the defence of Article 101(3) TFEU has been the statement in *GSK Services* that ‘a person

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<sup>54</sup> K Lenaerts, ‘Some Thoughts on Evidence and Procedure in European Community Competition Law’ (2006) 30 *Fordham International Law Journal* 1463, 1471-1472. cf J Schwartz, R Bechtold and W Bosch, *Deficiencies in European Community Competition Law: Critical analysis of the current practice and proposals for change* (2008), available at <[http://ec.europa.eu/competition/consultations/2008\\_regulation\\_1\\_2003/gleiss\\_lutz\\_en.pdf](http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf)> p 31, who argue that the Leniency Notice contravenes the presumption of innocence because it results ‘in the burden of proof being reversed to the effect that it is not the authorities which must provide evidence of an infringement, but rather the accused undertaking itself which must exonerate itself from the accusation’.

<sup>55</sup> Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para 177. For a recent reiteration, see Case T-154/09 *Manuli Rubber Industries SpA (MRI) v Commission* [2013] (General Court, 17 May 2013) para 106.

<sup>56</sup> Note, however, that this operation of doubt is difficult to disassociate from the typical operation of the burden of proof. In this regard, see C de la Torre, ‘Evidence, Proof and Judicial Review in Cartel Cases’ in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2010) who observes at p 328 that the presumption of innocence in essence reflects the main rationale for allocating the burden of proof.

<sup>57</sup> Case T-86/95 *Compagnie Générale Maritime and Others v Commission* [2002] ECR II-1011, para 365; Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4662, para 143.

who relies on Article 81(3) EC [now Article 101(3) TFEU] must demonstrate that those conditions are satisfied by means of convincing arguments and evidence'.<sup>58</sup> Considered, however, in conjunction with the ECJ's clarification in *Tetra Laval* that the term 'convincing evidence' merely draws 'attention to the essential function of evidence, which is to establish convincingly the merits of an argument', this statement proves to be of limited value in identifying the applicable standard of proof under Article 101(3) TFEU.<sup>59</sup>

The issue came up again more recently in *MasterCard*.<sup>60</sup> Complaining to the General Court that the Commission had imposed an excessive standard of proof on them, the defendant undertakings argued that it was the 'balance of probabilities' threshold that should apply in the context of Article 101(3) TFEU and that the operation of the latter provision should be subject to the *in dubio pro reo* principle.<sup>61</sup> Regrettably, however, the General Court did not grasp the opportunity to clarify the matter. On the contrary, it simply repeated that if an undertaking wishes to benefit from the application of Article 101(3) TFEU, it must demonstrate its conditions 'by means of convincing arguments and evidence'.<sup>62</sup> Examining then the circumstances of the case, it rejected the complaint on the ground that the Commission had been properly able to conclude that the defendants had failed to establish the elements of the defence.<sup>63</sup>

Not giving up, the undertakings challenged the judgment before the ECJ alleging that the General Court committed an error of law in dismissing their claims concerning the standard of proof and the principle *in dubio pro reo*. Albeit not binding, the Opinion of AG Mengozzi presents great interest. Proposing that the appellants' plea be rejected as inadmissible or unfounded, AG Mengozzi repeated that 'it is settled case law ... the person relying on [Article 101(3) TFEU]

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<sup>58</sup> *GSK Services* (n 21), para 235.

<sup>59</sup> Case C-12/03 P *Commission v Tetra Laval BV* (*Tetra Laval II*) [2005] ECR I-987, para 41.

<sup>60</sup> See *Mastercard II* (n 44) and *Mastercard I* (n 46).

<sup>61</sup> *Mastercard I* (n 46), para 195.

<sup>62</sup> *ibid*, para 196.

<sup>63</sup> *ibid*, para 237.

must demonstrate, by means of convincing arguments and evidence that the conditions for benefiting from an exemption are satisfied'.<sup>64</sup> More specifically, the AG contemplated the undertakings' allegation that *GSK Services* points towards a 'more-likely-than-not' threshold of persuasion under Article 101(3) TFEU and thus, a balance of probabilities standard. However, he considered that the context of that case was substantially different, since a system of prior approval was in force at that time and 'the analysis which the Commission was required to carry out was a prospective and forward-looking analysis of the likely advantages that the agreement notified to it would entail'.<sup>65</sup> Furthermore, although he affirmed the applicability of the *in dubio pro reo* principle under Article 101(1) TFEU, AG Mengozzi opined that this may not be invoked 'in an attempt to reduce the standard of proof required for the application of the exemption provided for in Article 81(3) EC [now Article 101(3) TFEU]'. On this basis, he concluded that 'it is therefore not sufficient ... to adduce evidence that merely gives rise to uncertainty' as to the application of that provision.<sup>66</sup> Evaluating these issues on appeal, the ECJ took the view that the complaint was essentially a repetition of the arguments put before the General Court seeking re-examination of its assessment and ultimately dismissed the plea as inadmissible.<sup>67</sup>

Regrettably, the *MasterCard* judgments leave us none the wiser about the standard of proof that defendant undertakings must satisfy in order to discharge their burden of persuasion under Article 101(3) TFEU. The General Court's judgment could be interpreted to suggest that this is higher than the balance of probabilities. In this case the current bifurcated allocation of the legal burden of proof would be incompatible with the presumption of innocence. Even so, however, one should not rush to conclusions. In theory, such incompatibility could be rectified simply by reducing the undertakings' legal burden under Article 101(3) TFEU to an obligation to demonstrate the conditions of this provision to a balance of probabilities threshold only.

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<sup>64</sup> *MasterCard II* (n 44), Opinion of AG Mengozzi, para 141.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*, paras 146-147.

<sup>67</sup> *MasterCard II* (n 44), paras 215-219.

Therefore, it is necessary to inquire whether a civil standard of proof is feasible in the first place. This presupposes deliberating over the conditions of Article 101(3) TFEU and the standard of proof that the Commission must satisfy in order to discharge its burden of proof under Article 101(1) TFEU.

As described earlier in passing, Article 2 of Regulation 1/2003 prescribes that when seeking to benefit from Article 101(3) TFEU the defendant undertakings bear the legal burden of demonstrating all the four requirements of this provision. Accordingly, it falls upon them to establish not only that the conduct in question gives rise to efficiencies, but also that it allows consumers a fair share of the resulting benefits. As the Commission has elaborated in its Guidelines on the application of Article 101(3) TFEU, the latter condition ‘implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market’.<sup>68</sup> In other words, the alleged efficiencies must *offset* the anticompetitive effects that have been proved by the Commission, so that ‘the net effect of the agreement’ remains ‘neutral’.<sup>69</sup>

On several occasions, however, the EU Courts have stressed that in order to discharge its burden of persuasion the Commission must establish the anticompetitive nature or effects of the agreement to a ‘firm conviction’ standard of proof. Specifically, according to settled case-law the Commission must ‘produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place’.<sup>70</sup> Some commentators have criticised this standard of proof as falling short of the stricter ‘beyond any reasonable doubt’ threshold that in their view the ECHR-criminal nature of antitrust fines dictates.<sup>71</sup> Notwithstanding, there is no

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<sup>68</sup> Article 101(3) TFEU Guidelines, para 43.

<sup>69</sup> *ibid*, para 85.

<sup>70</sup> *JFE Engineering and Others v Commission* (n 55), paras 177-179.

<sup>71</sup> In Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, para 64, the General Court explicitly rejected the assertion that ‘the Commission must adduce proof “beyond any reasonable doubt” of the existence of the infringement in cases where it imposes heavy fines’. Schweitzer commented that the rejection of the criminal

dispute that ‘firm conviction’ is a considerably higher standard of proof than the mere preponderance of the evidence.<sup>72</sup> The implications of this should not be underestimated. Indeed, if the Commission has discharged its burden of proof by producing evidence which supports the *firm conviction* that the agreement or concerted practice gives rise to anticompetitive effects, then defendant undertakings entertain no real prospect of having their defence upheld, unless they establish an *at least equally strong* conviction that their conduct gives rise to efficiencies that offset these anticompetitive effects.

To some extent, this point was incidentally made by AG Trstenjak in her Opinion in *GSK Services*. Pondering on the standard of proof that must be satisfied for an appreciable objective advantage to be found, she remarked that ‘a high degree of probability must be set here. That is because, with infringements of Article 81(1) EC [now Article 101(1) TFEU], the existence of losses in efficiency in the form of a restriction of competition must already be postulated’.<sup>73</sup> The consequence of this is that insofar as the Commission is subject to a threshold of persuasion which is higher than the balance of probabilities, satisfying the civil standard of proof will never suffice for undertakings to successfully invoke the defence of Article 101(3) TFEU. In fact, the undertakings’ standard of proof will always mirror the threshold of persuasion that the Commission itself must surpass. Because the latter is (rightly) higher than a mere preponderance of the evidence, the bifurcated allocation of the legal burden of proof as contained in Article 2 of Regulation 1/2003 will always take issue with the presumption of

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standard in cases concerning the application of Article 101 and 102 TFEU and involving large amounts of fines reflects the failure of the EU Courts to ‘systematically integrate the fundamental rights dimension’ in such proceedings (H Schweitzer, ‘The European Competition Law Enforcement System and the Evolution of Judicial Review’ in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2010) 107).

<sup>72</sup> cf M Collins, ‘The Burden and Standard of Proof in Competition Litigation and Problems of Judicial Evaluation’ (2004) 1 ERA-Forum 66, 70-71.

<sup>73</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, Opinion of AG Trstenjak, para 196.

innocence.<sup>74</sup> On this ground, it is submitted that the whole legal burden should be placed on the Commission.

## **V. The Way Forward: Re-Reading Article 2 of Regulation 1/2003**

As the analysis so far demonstrated, despite its intuitive appeal, the shared allocation of the legal burden of proof has significant repercussions both for the application of the substantive legal test of Article 101 TFEU and the effective judicial protection of the undertakings concerned. For these repercussions to be effectively addressed, the legal burden must be borne by the Commission under both paragraph (1) and paragraph (3) of Article 101 TFEU. This finding, however, forces the question what will become of Article 2 of Regulation 1/2003. Taken to extremes, the requirement that the burden of persuasion should always remain with the authority might imply that a legislative reform of this provision is inevitable. Yet, such a pervasive solution seems unnecessary. Indeed, a careful re-reading of Article 2 of Regulation 1/2003 can be equally effective in reversing the complications stemming from the current shared distribution of the burden of persuasion. With this in mind, it is proposed that the second clause of Article 2 be ‘read down’ to impose only a burden of pleading and production on the undertakings concerned, that is, an obligation to claim and furnish evidence of any efficiencies in their possession. Under such a refined approach, the burden of persuasion will remain with the Commission at all times.<sup>75</sup>

The herein advocated re-reading of Article 2 of Regulation 1/2003 has multiple advantages.

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<sup>74</sup> This is especially so, if one recalls that it is the Commission that weighs up the advantages and disadvantages that entail from the investigated agreement or concerted practice and that in so doing it enjoys a margin of appreciation. On the contrary, the defendant undertakings obviously enjoy no discretion in attempting to discharge their legal burden under Article 101(3) TFEU.

<sup>75</sup> See also A Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 123 South African Law Journal 63, 89-90.

First of all, the approach proposed in the present article may effectively accommodate the concerns that defendants are in a better position than the Commission to draw attention to the procompetitive aspects of their agreement and provide evidence thereof. Indeed, the efficiencies referred to in Article 101(3) TFEU typically flow from the integration of the undertakings' economic activities. However, the existence of information asymmetries between the authority and the undertakings does not inevitably point towards a bifurcated apportionment of the legal burden of proof. Under the proposed re-reading of Article 2 of Regulation 1/2003, a finding of a restriction of competition by object or effect under Article 101(1) TFEU may no longer shift the burden of persuasion upon the defendants. Notwithstanding, it will still place upon them an evidential burden. In this way, undertakings will retain the primary responsibility for bringing forward evidence of any efficiencies in their possession. Such an approach is fully aligned with what Volpin has called the principle of 'proof proximity'<sup>76</sup> which dictates that the party in whose possession the evidence is should bear the burden of producing it.<sup>77</sup> At the same time, it ensures that information asymmetries will not undermine the Commission's ability to exercise its enforcement duties.

Secondly, the proposed re-reading of Article 2 of Regulation 1/2003 guarantees that any doubt will indeed benefit the undertakings in accordance with the presumption of innocence. As explained previously, the EU Courts have been quick to recognise that any uncertainty as to whether the Commission has demonstrated the test of Article 101(1) TFEU to the standard of proof must operate in favour of the defendant. By contrast, the situation under Article 101(3) TFEU is different. Because the legal burden thereof is currently borne by the undertakings, any

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<sup>76</sup>C Volpin, 'The Ball Is In Your Court: Evidential Burden of Proof and the Proof-Proximity Principle in EU Competition Law' (2014) 51 Common Market Law Review 1159-1186.

<sup>77</sup> Albeit in the context of Article 102 TFEU, see Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para 686, where the General Court clarified that placing the burden of pleading and of production on the dominant undertakings is necessary 'where the undertaking concerned is alone aware of that objective justification or is naturally better placed than the Commission to disclose its existence and demonstrate its relevance'. In the context of Article 101 TFEU, see *Van den Bergh Foods* (n 57), para 136: 'it is for the undertakings concerned in the first place to present to the Commission the evidence intended to establish that the agreement fulfils the conditions' of Article 101(3) TFEU (emphasis added). Also Case T-54/03 *Lafarge v Commission* [2008] ECR II-120, para 510.

doubt as to whether the agreement or concerted practice in question is overall beneficial for competition and consumers turns against the defendants and operates in their disfavour. However, the current bifurcated distribution of the burden of persuasion disregards the fact that the anticompetitive and the procompetitive aspects of the agreement constitute effectively the two sides of the same coin and cannot be entirely detached. As a result, a doubt about the overall positive contribution of a conduct in competition is simultaneously a doubt about its overall harmful impact. By placing the whole legal burden on the Commission, the proposed re-reading of Article 2 of Regulation 1/2003 remedies the paradox in the current twofold allocation and ensures that the benefit of doubt will operate under both levels of Article 101 TFEU rather than under Article 101(1) TFEU only.

Thirdly, the herein advocated re-reading of Article 2 of Regulation 1/2003 falls squarely with the Commission's obligation to make an informed assessment under Article 101(3) TFEU having regard to all the relevant information, whereas it also streamlines the burden of persuasion with the marginal standard of review of complex economic assessments. Indeed, according to settled case-law the application of Article 101(3) TFEU entails difficult economic evaluations with respect to which the Commission enjoys a margin of appreciation.<sup>78</sup> This does not extend to a free rein for the authority, though. On the contrary, the EU Courts have insisted on scrutinising 'not only ... whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information that must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.<sup>79</sup> Seen, however, through the prism of this jurisprudence, a bifurcated distribution of the legal burden is hardly reconcilable with the requirement for the Commission to assess all the relevant information when enforcing Article 101(3) TFEU in at least two respects. In practice, the current understanding of Article 2 of Regulation 1/2003 not

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<sup>78</sup> *GSK Services* (n 21), para 244; Marco Bronckers and Anne Valery, 'Business As Usual After *Menarini*?' (2012) 3 *MLexMagazine* 44, 45.

<sup>79</sup> See, for instance, Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR I-12789, para 94.

only transfers a significant part of the Commission's responsibility to perform an overall and comprehensive assessment under Article 101(3) TFEU on the investigated undertakings, but it also implies that the authority is not compelled to further investigate or take into account indications of efficiencies which have not originated with the defendant. The proposed re-reading of Article 2 rectifies these problems in two ways. On the one hand, it prompts the Commission to play an active role in enforcing Article 101(3) TFEU by complementing – where necessary – the undertakings' evidentiary efforts. On the other hand, it prevents the authority from shutting its eyes to information relating to the procompetitive aspects of the agreement where it has been contributed by third parties rather than the defendant.

Finally, projected in the longer term the proposed re-reading of Article 2 of Regulation 1/2003 may help address existing concerns about the Commission's inclination to interpret and apply Article 101(1) TFEU in an expansive manner, compared to its narrow construction of Article 101(3) TFEU. Indeed, as explained earlier, the bifurcated division of the burden of persuasion is prone to increase the risk of over-enforcement. At the same time, it has probably contributed to the generalised impression that Article 101(3) TFEU may have been 'slowly dying' in view of the very slim chances of it being successfully invoked and applied.<sup>80</sup> Placing the overall legal burden in respect of Article 101 TFEU on the Commission is a suitable response to these concerns for at least two reasons. Firstly, if its burden of persuasion is extended to Article 101(3) TFEU, the Commission will be less likely to make haste to declare an agreement or concerted practice unlawful as a restriction of competition under Article 101(1) TFEU, given that it would still carry the legal burden with respect to Article 101(3) TFEU. Secondly, by favouring a more cautious approach, the proposed allocation of the legal burden is also keen to minimise

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<sup>80</sup> See A Lamadrid, 'The Slow Death of Article 101(3) TFEU' (28 October 2011), <<http://chillingcompetition.com/2011/10/28/the-slow-death-of-article-1013/>> accessed 14 July 2015. More generally, see P van Cleynebreugel, 'Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernisation?' (2014) 51 Common Market Law Review 1381, 1430-1433.

erroneous findings that Article 101(1) TFEU has been violated, thereby achieving a better balance between Type I and Type II errors.<sup>81</sup>

The above-described advantages further reinforce the case for shifting from a bifurcated to a single burden of persuasion placed upon the Commission. It should be acknowledged, however, that the proposed re-reading of Article 2 of Regulation 1/2003 may have significant implications for the decentralised enforcement of Article 101 TFEU as well. Indeed, following the modernisation of EU competition enforcement, the application of Article 101(3) TFEU is no longer the exclusive privilege of the Commission. National competition authorities (NCAs) and national courts now share fully the responsibility for the implementation of the EU competition provisions under the conditions stipulated in Regulation 1/2003.<sup>82</sup> In line with the principle of national procedural autonomy,<sup>83</sup> Regulation 1/2003 is largely silent on the procedural rules pursuant to which NCAs and national courts may enforce Articles 101 and 102 TFEU.<sup>84</sup> The burden of proof, however, constitutes a notable exception, insofar as Article 2 of Regulation 1/2003 applies to EU and national competition proceedings alike. The harmonisation of the apportionment of the burden of persuasion in EU competition enforcement through Article 2 implies that a modified approach to its interpretation – as proposed herein – would have an

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<sup>81</sup> Type I errors (or false positives) are erroneous findings that the conduct in question violates the competition rules, whereas it is in fact procompetitive. Conversely, Type II errors (or false negatives) are erroneous findings that the conduct in question is compatible with the competition provisions, while in reality it is anticompetitive.

<sup>82</sup> Recitals 6-9 and articles 5 and 6 of Regulation 1/2003.

<sup>83</sup> According to this principle, unless procedural rules are provided for in primary or secondary EU law, Member States are free to adopt their own, as long as their application does not violate the principle of equivalence and does not undermine the effectiveness of EU law. (Case 33/76 *Rene v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5 and Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, para 13) The exact scope of the principle of national procedural autonomy has given rise to extensive debates. Inevitably, the enforcement of EU law at national level requires recourse to national procedures, since for its greatest part it comprises substantive rather than procedural provisions. However, as Judge Kakouris remarked, ‘the Court has tended to regard national procedural law as an ancillary body of law the function of which is to ensure the effective application of substantive Community law’. (C Kakouris, ‘Do the Member States Possess Judicial Procedural “Autonomy”?’ (1997) 34 *Common Market Law Review* 1389, 1390) On this ground, W van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501, 502, first questioned the accuracy of the concept ‘procedural autonomy’ and proposed the use of the more accurate term ‘procedural *competence*’. Further building upon this thought, J Delicostopoulos, ‘Towards European Procedural Primacy in National Legal Systems’ (2003) 9 *European Law Journal* 599, 600, asserted that ‘the starting point is national procedural competence’ but ‘the end result is European procedural primacy’.

<sup>84</sup> With the exception of a few articles (see Articles 5, 11 and 12 of Regulation 1/2003), matters of procedure have been left for the Member States to determine.

immediate impact on the application of Article 101 TFEU at the national level. The magnitude of that impact will depend on the premise underpinning the proposed re-reading.

Indeed, if one accepts that a shared distribution of the burden of persuasion is prone to distort the scope of the substantive legal test of Article 101 TFEU, allocating the whole legal burden on the national competition authority or the person alleging its violation is the inevitable solution to the problem. In principle, such an approach would be prone to complicate individuals' efforts to establish a violation of Article 101 TFEU in national courts. It should be noted, however, that at the national level the bulk of competition litigation comprises standalone or follow-on actions for damages suffered from the operation of a cartel. In this context, it is usually the anticompetitive effects of the cartel and the exact amount of the caused harm that are disputed, rather than the existence of efficiencies and the overall procompetitive nature of the conduct. Therefore, it is realistic to speculate that private parties will not be as adversely affected by the proposed re-reading of Article 2 of Regulation 1/2003. Any future problems could be addressed through the introduction of appropriate presumptions that would enable private parties to discharge their legal burden more easily.<sup>85</sup>

By contrast, if one takes the incompatibility of the current bifurcated allocation of the legal burden with the presumption of innocence as the foundation for the proposed re-reading of Article 2 of Regulation 1/2003, its impact on national competition enforcement must be carefully considered. Indeed, the presumption of innocence is not relevant in civil proceedings.

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<sup>85</sup> The use of presumptions as a means of facilitating the discharge of the burden of persuasion for private claimants is exemplified in the recent Damages Actions Directive, which introduced the rebuttable presumptions that cartel infringements result in harm and that passing-on has occurred in the case of indirect purchasers. (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, articles 13 and 17(2)). In this regard, it is also worth recalling *T-Mobile Netherlands ea* (n 14), where the ECJ held that the presumption of a causal connection according to which undertakings who remain active on the market are presumed to take into account the information exchanged with their competitors forms an integral part of applicable Community law and the national court was required to apply it in disregard of the national rules on the burden of proof. See also I Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing 2010) 187, who has interestingly suggested that the presumptions that the EU Courts have established in their competition jurisprudence could be understood as 'interpretations of the concept of "burden of proof", now regulated in Article 2'.

Individuals bringing a damages action for harm that they have suffered from a breach of Article 101 TFEU or applying for an injunction for an anticompetitive agreement or concerted practice to stop do not dispose of investigative and decision-making powers similar to those enjoyed by the Commission or NCAs nor can they impose a fine upon the perpetrator of the alleged violation. Since the balance of powers between parties in civil proceedings is fundamentally different from that in administrative or criminal settings, the proposed re-reading of Article 2 of Regulation 1/2003 would affect the public enforcement of Article 101 TFEU only.<sup>86</sup>

## **VI. Conclusion**

Undeniably, the distribution of the legal burden of proof is a particularly intricate exercise. In the context of Article 101 TFEU, however, the ostensible clarity of Article 2 of Regulation 1/2003 has distracted attention away from both the difficulty and the significance of the task. The present article critically analysed the current bifurcated apportionment of the burden of persuasion in cases concerning the application of Article 101 TFEU at the EU level. Specifically, it investigated the implications of the balanced division of the legal burden between the Commission and the defendant undertakings for the substantive scope of Article 101 TFEU and questioned its compatibility with the evidential prescriptions of the presumption of innocence that according to settled case-law applies to infringement competition proceedings.

The analysis revealed that in practice Article 2 of Regulation 1/2003 has certain not-so-clear ramifications. Firstly, to the extent that it informs the way in which competition analysis is conducted under Article 101 TFEU, the bifurcated allocation of the burden of persuasion unnecessarily confuses its enforcement by failing to appreciate that the segregation of the various aspects of an agreement or concerted practice into anticompetitive and procompetitive is useful,

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<sup>86</sup> On the assumption that the presumption of innocence should apply to EU infringement proceedings and that a shared division of the legal burden of proof is not prone to distort the substantive scope of Article 101 TFEU.

yet artificial. In consequence, by placing the legal burden with respect to Article 101(3) TFEU on the undertakings, Article 2 of Regulation 1/2003 is prone to increase the risk of over-enforcement and unjustifiably curtail the notion of ‘competition’. Secondly, it was demonstrated that insofar as the standard of proof that defendant undertakings are expected to satisfy under Article 101(3) TFEU is not, and can never be, the balance of probabilities – given the Commission’s obligation to establish a ‘firm conviction’ about the applicability of Article 101(1) TFEU, Article 2 of Regulation 1/2003 is also at odds with the presumption of innocence, which dictates that defences are to be proved only on a preponderance of the evidence.

On these grounds, the article concluded that the whole legal burden should remain with the Commission throughout the enforcement of Article 101 TFEU. Pondering on what this entails for the future of Article 2 of Regulation 1/2003, it was submitted that no legislative reform is necessary. In contrast, the not-so-clear implications of the currently split apportionment of the burden of persuasion can be effectively addressed through a mere re-reading of this provision to the effect that only an evidential burden is placed upon the defendant undertakings, that is, an obligation to claim any known efficiencies and produce all relevant evidence in their possession. As elaborated, this refined approach has multiple advantages. Not only does it ensure that any doubt will actually operate in the undertakings’ favour in alignment with the presumption of innocence, but it also avoids the complications of the current allocation for the substantive reach of Article 101(1) TFEU and overall reduces the risk of over-enforcement, whilst effectively tackling the information asymmetries between the Commission and the undertakings.