Vilnius University Press

Contents lists available at Vilnius University Press

Teisė
2024, Vol. 131, pp. 76–90

ISSN 1392-1274 eISSN 2424-6050
DOI: https://doi.org/10.15388/Teise.2024.131.5

Some Thoughts on Procedure and Evidence before the EU Courts in Competition Cases and Restrictive Measures relating to Ukraine*

Virgilijus Valančius

Dr. (HP), former Judge at the General Court of the European Union (2016–2023)
Email: v.valancius@gmail.com

Some Thoughts on Procedure and Evidence before the EU Courts in Competition Cases and Restrictive Measures relating to Ukraine

Virgilijus Valančius

(Judge at the General Court of the EU (2016–2023) (Luxembourg))

Summary. During the last twenty years, both jurisdictions of the European Union Court of Justice have laid down many general principles in competition matters as well as, to a lesser extent, in restrictive measures litigation, relating to essential issues concerning evidence and procedure.

In competition matters, it arises from the judicial control of the European Commission decisions regarding both infringements of the competition rules applicable to undertakings and fines of a non-criminal nature sanctioning undertakings,– that burden of proof lies with the European Commission; however, the principal issue remains the one of the unfettered evaluations of evidence. It is only the reliability of the evidence before the EU courts which is decisive when it comes to its evaluation. At the same time, undertakings may rely on principles of pure administrative nature, e.g., duty to state reasons, but also of a more criminal nature, e.g., the rights of the defence.

Restrictive measures, which are neither of a criminal nature, i.e. freezing of funds and restrictions on entry into the territory of the Member States, adopted by the Council under the European Common foreign and security policy (CFSP) raised very similar issues at EU Courts, who hear relevant cases.

On the basis of the analysis of the case law of the EU Courts, the article addresses the question whether some approaches and solutions in competition law cases should be transposed into restrictive measures litigation, especially in the context of the war in Ukraine.

Keywords: Court of Justice, General Court, procedure, competition cases, fines, Common Foreign and Security Policy (CFSP), restrictive measures, restrictive measures adopted in view of the situation in Ukraine.

* The author is a former Judge at the General Court of the European Union (2016–2023). All views expressed are personal. The case law taken into account is as it stands on 30 May 2023. The author expresses his gratitude to Assoc. Prof. Dr Deimilė Prapiestytė, a former Référendaire at the CJEU for adjusting an article to the formal requirements of *Teisė* (Eng. Law) legal journal.

Received: 19/04/2024. **Accepted:** 29/04/2024

Keletas minčių apie procedūrą ir įrodymus Europos Sąjungos teismuose nagrinėjant su Ukraina susijusias konkurencijos bylas ir ribojamąsias priemones

Virgilijus Valančius

(Buvęs Europos Sąjungos Bendrojo Teismo teisėjas (2016–2023) (Liuksemburgas)

Santrauka. Per pastaruosius dvidešimt metų Europos Sąjungos teismai nustatė daug bendrųjų principų, susijusių su įrodymais ir esminiais procedūriniais klausimais konkurencijos bylose, taip pat, mažesniu mastu, bylose dėl ribojamųjų priemonių.

Konkurencijos bylose teisminė Europos Komisijos sprendimų, susijusių tiek su įmonėms taikomų konkurencijos taisyklių pažeidimais, tiek su baudomis, kurios nėra baudžiamojo pobūdžio ir kuriomis įmonėms skiriamos sankcijos, kontrolė rodo, kad įrodinėjimo pareiga tenka Europos Komisijai, tačiau išlieka laisvo įrodymų vertinimo teisme principas. Tik Europos Sąjungos teismams pateiktų įrodymų patikimumas turi lemiamą reikšmę juos vertinant. Tarybos patvirtintos ribojamosios priemonės, kurios nėra baudžiamojo pobūdžio, t. y. lėšų įšaldymas ir atvykimo į valstybių narių teritoriją apribojimai, pagal Europos Sąjungos bendrąją užsienio ir saugumo politiką (BUSP), kėlė labai panašių klausimų nagrinėjant bylas Europos Sąjungos teismuose.

Remiantis Europos Sąjungos teismų jurisprudencijos analize, straipsnyje keliamas klausimas, ar kai kurie konkurencijos teisės bylose naudojami metodai ir sprendimai gali ar net turi būti perkelti į teisminius ginčus dėl ribojamųjų priemonių, ypač karo Ukrainoje kontekste.

Pagrindiniai žodžiai: Teisingumo Teismas, Bendrasis Teismas, konkurencijos bylos, baudos, Bendroji, užsienio ir saugumo politika (BUSP), ribojamosios priemonės, ribojamosios priemonės, taikomos atsižvelgiant į padėtį Ukrainoje.

Introduction

European Union (hereinafter referred to also as 'EU') competition law and EU restrictive measures in the Ukrainian context remain two very different areas: the internal market and the EU Foreign policy.

However, two different matters, in substance? The question has to be asked. Many legal common issues indeed. First, the fines imposed by the Commission are not of a criminal nature. Neither are restrictive measures adopted by the Council. However, both represent, in substance, sanctions.

This paper is the first to intend to describe and to question these two apparently very separate areas. On the one hand, what brought the EU Judges – i.e. the Court of Justice and the (now) General Court of the EU – into competition matters – *i.e.* on the judicial control of the implementation by the Commission of (now) Article 101 of the Treaty on the Functioning of the EU (hereinafter referred to as 'TFEU') and Article 102 TFUE applicable to undertakings?

On the other hand, what brought, so far, the EU Judges in restrictive measures litigation – *i.e.* on the judicial control of measures of freezing of funds and of restrictions on entry into the territory of the Member States adopted by the Council under the European foreign and security policy (hereinafter referred to as 'EFSP')?

This paper is based on a pure case law approach: the law in action. It intends to show how cases in these two areas raised legal issues of the very same nature. It tries to read what is different or specific, what is common so far, and what could be borrowed by transplanting from competition cases into restrictive measures litigation.

It is not necessary here to recall the legal framework of EU competition law, much better known than that of restrictive measures in general and concerning Ukraine in particular.

In the area of restrictive measures, litigation is exponentially growing: at the end of June 2023, as many as 150 cases were pending before the General Court on restrictive measures, mainly related to Ukraine, that is, twice the volume of cases in competition law.

Among more than thirty restrictive measures regimes, either on given topics and/or areas, under EU law, Ukraine regimes have, as such, generated plethoric litigation before EU courts: as of today,

not less than about twenty judgments and orders of the European Court of Justice and nearly 100 of the (now) General Court. Moreover, when controlling restrictive measures relating to Ukraine, EU courts have progressively developed a legal framework as to available remedies and as to the fundamental rights, which can be relied on.

As far as the Ukrainian restrictive measures regimes are concerned, it has to be recalled that in March 2014, the Russian Federation unlawfully annexed the Autonomous Republic of Crimea and the city of Sevastopol and has since engaged in continued destabilisation actions in eastern Ukraine. In retaliation, the EU has introduced restrictive measures because of the actions of the Russian Federation.

On 24 February 2022, the President of the Russian Federation announced a so-called special military operation in Ukraine, and on the same day, Russian armed forces attacked Ukraine at a number of places in the country.

On 25 February 2022, the Council adopted a second package of restrictive measures. These included, first, some individual measures against politicians and businesspersons involved in undermining the integrity of the Ukrainian territory; second, a number of restrictive measures applicable in the fields of finance, defence, energy, the aviation sector, and the space industry; and third, a number of measures suspending the application of certain provisions of the Agreement providing for facilitations for certain categories of citizens of the Russian Federation applying for short-stay visas.

In this context, at the end of June 2023, more than 120 cases were pending before the General Court.

This being recalled, this paper intends to draw a parallel between restrictive measures litigation and competition cases. It is here proposed to revisit the first big cartel, which was brought to the (now) General Court, in '*polypropylene*' (*Rhône-Poulenc v. Commission* [GC], 1991). This case raised important issues as to evidence and procedure.

In this case, heavy fines were imposed by the Commission on fifteen undertakings in the chemical industry for having, during several years, participated in an agreement and concerted practice whereby they formed a price cartel and introduced quota arrangements and other measures supporting the price cartel on the *polypropylene* market. Fourteen of the fifteen undertakings thereupon brought proceedings claiming that the decision should be annulled or in the alternative, the fines either cancelled or reduced.

As for the substance, important questions were raised, the most important being some procedure and evidence issues. Beyond the substance of the case, these issues gave the opportunity to the EU judges to formulate some general principles, which announced both case-law and legislative developments on evidence and procedure in EU competition law.

These developments cannot be ignored, even – and especially – in restrictive measures litigation, in particular as far as the Ukrainian war is concerned.

1. Procedure

The procedural framework of both competition and restrictive measures consists of an administrative procedure followed by a judicial review of legality, but, as to the substance, these cases broadly exhibit some characteristics of a criminal law case. This two-sided nature is indeed reflected in most cases brought before the EU courts in competition and restrictive measures matters.

1.1. Administrative Law Principles

In their action in the *polypropylene case* (*Rhône-Poulenc v. Commission* [GC], 1991), the plaintiffs were relying on many objections relating to the right of access to the file and to the obligation to state

reasons. This allowed formulation, in very general terms, of the contents of the rules governing the administrative procedure.

Substantially, these rules belong to the principle of the right to a fair legal process as soon as the administrative procedure is engaged in EU competition law. These rules imply the respect of the rights of defence, which includes the principle *audi alteram partem* and the right of access to the file as well as, indirectly, the duty to state reasons in decisions providing and sanctioning an infringement to Article 101 TFEU or to Article 102 TFEU.

These rules and principles are also relied on and implemented by EU judges in restrictive measures cases.

1.1.1. Access to the File

In EU competition law, the principle *audi alteram partem* is a fundamental principle in the administrative law of the Union, including its competition law. This principle, which results from the principles of the right to a fair legal process and to the respect of the rights of the defence, implies that the undertakings concerned must be allowed access to the files and be given an opportunity to comment on both the material on which the decision's Commission is based and the legal arguments on which the decision is founded.

Sound administration and sound administration of justice require undertakings liable to fines to be given full opportunity to defend themselves, which means that those concerned should be apprised of all the relevant material.

It is indeed settled case law that observance of the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of EU law, which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. Due observance of that general principle requires that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged by the Commission (*Hoffmann-La Roche v. Commission*, 1976, paragraphs 9 and 11).

Thus, the purpose of providing access to the file in competition cases is to enable the addressees of a statement of objections to examine evidence in the Commission's file so that they are in a position to effectively express their views on the conclusions reached by the Commission in its statement of objections based on that evidence (*Cimenteries CBR and Others v. Commission,* 1991, paragraph 38): access to the file is one of the procedural safeguards intended to protect the rights of the defence.

If the Commission intends to use documentary evidence in the decision finding an infringement to Article 101 TFEU or to Article 102 TFEU, mention should be made of these documents in the statement of objections and they should be made available to the addressee of the statement of objections. In principle, only documents cited or mentioned in the statement of objections constitute valid evidence (*AKZO v. Commission,* 1991, paragraph 21). However, documents appended to the statement of objections, but not mentioned therein, can be reported in the decision against the undertaking involved, if this undertaking could have reasonably deduced from the statement of objections what conclusions the Commission intended to draw from the document in question (*Cimenteries CBR and Others v. Commission,* 1991, paragraphs 323 and 324).

In restrictive measures litigation, it follows from case law that, subject to exceptions, the safeguarding of the right to be heard comprises, in principle, two main parts. First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of

the evidence adduced'). Second, it must be afforded the opportunity effectively to make known his view on that evidence ('hearing') (*Organisation des Modjahedines du peuple d'Iran v. Council,* 2006, paragraph 93).

It is to be borne in mind that, in the case of an initial decision to freeze funds, the Council is not obliged to inform the person or entity concerned beforehand of the grounds on which that institution intends to rely to include that person or entity's name in the list at stake. So that its effectiveness may not be jeopardised, such a measure must be able to take advantage of a surprise effect and apply immediately. In such a case, it is as a rule enough if the institution notifies the person or entity concerned of the grounds and affords it the right to be heard at the same time as, or immediately after, the decision is adopted (*French Republic v. People's Mojahedin Organization of Iran,* 2011, paragraph 61).

In contrast, in the case of a subsequent decision to freeze funds by which the inclusion of the name of a person or entity already appearing in the list at stake is maintained, that surprise effect is no longer necessary to ensure that the measure is effective, with the result that the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by allowing the person or entity concerned an opportunity of being heard (*French Republic v. People's Mojahedin Organization of Iran,* 2011, paragraph 62).

As far as the consequences of an infringement of the right of access to the file are concerned, the current approach consists, in substance, of transplanting the rule applicable in competition cases: an infringement of the rights of the defence invalidates the challenged act only if it is established that, without this infringement, the procedure could have led to a different result (*Bank Melli Iran v. Council*, 2013, paragraph 100).

1.1.2. Duty to state reasons

Procedural safeguards under both EU competition law and restrictive measures cases also require, at the level of the administrative procedure, the respect of the obligation to state reasons.

In both areas, according to a consistent body of case law, the purpose of the obligation to state reasons is to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested and to enable the EU courts to review the legality of the decision (*Dansk Rørindustri and Others v. Commission*, 2005, paragraph 462).

The obligation to provide sufficient reasoning goes to an issue of infringement of essential procedural requirements. It constitutes one the fundamental principles of EU law and must be protected and raised by the EU judicature of its motion (*Commission v. Sytraval and Brink's France,* 1998, paragraph 67).

It must be remembered that judicial control of the reasoning requirement only consists in verifying if the decision at stake sufficiently specifies the relevant facts and points of law. It does not consist in verifying if the decision is well-founded or not. The obligation to state reasons relates indeed to the external validity of the decision.

In competition cases, the requirements to be satisfied by the statement of reasons depend, to a large extent, on the nature of the act in question and the circumstances of its enactment (*Commission v. Sytraval and Brink's France,* 1998, paragraph 63). Competition law is undoubtedly one of the areas of EU law where the obligation to state reasons in individual decisions is the most extended, because of the broad discretion in finding and fining of the Commission in this area.

As the EU judges consistently held, the Commission is not obliged to adopt a position, in stating the reasons for the decisions, which it is required to take to apply the competition rules, on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the

facts and legal considerations having decisive importance in the context of the decision (*La Cinq SA v. Commission,* 1990, paragraph 41).

The statement of reasons must in principle be notified to the persons concerned at the same time as the decision. It must therefore be ascertained whether, at the time of the adoption of the contested decision, the undertakings knew with sufficient certainty that the calculation of the amount of the fines had been made based on elements they knew about (*Dansk Rørindustri a.o. v. Commission*, 2005, paragraphs 463–465).

In restrictive measures litigation, similar requirements have to be respected, as far as initial and renewed individual measures are concerned.

Since the person concerned is not allowed to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the person concerned, at least after the adoption of that decision, to make effective use of the legal remedies available to him to challenge the lawfulness of that decision (*Council v. Bamba,* 2017, paragraph 51).

Therefore, the statement of reasons for an act of the Council, which imposes a measure freezing funds, must identify the actual and specific reasons why the Council considers, in the exercise of its discretion, that that measure must be adopted in respect of the person concerned (*Council v. Bamba,* 2017, paragraph 52).

In practice, it should be noted that, in addition to indicating the legal basis of the measure adopted, the obligation to state reasons by which the Council is bound, relates precisely to the circumstances which enable it to hold that one or other of the listing criteria is satisfied in the case of the parties concerned (*Central Bank of Iran v. Council,* 2015, paragraph 67).

1.2. Criminal Law Principles

Fines, which may be imposed on undertakings for the breach of EU competition law, do in fact have a criminal law character and, most of the time, parties' submissions can only be understood with the help of the terminology and concepts used in criminal law and procedure.

This paper tries to explain to a large extent the relevance of general principles of substantive criminal law as well as of the procedural safeguards specific to criminal procedure in the context of fines as sanction of infringements to EU competition rules. Some issues are developing before the EU courts in restrictive measures cases.

1.2.1. Legality in relation to crime and punishment

One of the essential principles of substantive criminal law is the principle of legality in relation to crime and punishment. Following this principle, no one can be blamed for a given conduct that is not forbidden, as an offence, by law and that, if it is the case, sanction or penalties taken must be defined by law: *nullum crimen, nulla pœna sine lege*.

In competition cases, it was mainly in the *citric acid* cartel case that the General Court had to deal with the very issue of the legality of the fines imposed by the Commission, since the plaintiffs were challenging, by way of exception, the substantive validity of Regulation No 17, which entitles the Commission to inflict fines[1], and were relying to this end on a violation of the principle of legality in relation to crime and punishment (*Jungbunzlauer v. Commission,* 2006, paragraphs 37–68).

[1] See Article 15(2) of Regulation No.17, as modified by Regulation (EC) No 1216/99 (OJ L 148, p. 5); see, now, the same provisions of Article 23(3) of Regulation No 1/2003.

In dealing with the question of the validity of Article 15 (2) of Regulation No 17 regarding the principle of legality, in the sense that it did not sufficiently define in advance the decision practice of the Commission, the General Court has first reminded that the principle of legality in relation to crime and punishment is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the ECHR (*Jungbunzlauer v. Commission,* 2006, paragraphs 69–81).

Then, the General Court considered that to avoid excessive regulatory rigidity and to facilitate the adaptation of the rules of law to the circumstances, a certain level of unpredictability should be allowed regarding the sanctions to be imposed for a given infringement, and that the Commission did not anyway enjoyed unlimited discretion for the setting of the amount of fines in case of infringement to competition rules because of the ceiling of 10% of the turnover of the undertaking and, moreover, of its Guidelines. Thus, the General Court concluded that a diligent businessman could adequately predict the method for setting the amount and the amplitude of the fines to be imposed for a given conduct and that it did not entail the fact that the undertakings are not in position to know exactly in advance the level of the fine the Commission shall impose in each case, that Article 15 (2) of Regulation No 17 violates the principle of legality (*Groupe Danone v. Commission,* 2007, paragraphs 26–30).

In the context of restrictive measures, the Court has been asked, in a preliminary ruling procedure, to ascertain whether the principles of legal certainty and *nulla poena sine lege certa* must be interpreted as precluding a Member State from imposing criminal penalties that are to apply in the event of an infringement of the provisions of a regulation providing for restrictive measures and sanctions in case of infringement of these measures (*Rosneft,* 2007, paragraph 152).

In this respect, the Court recalled, first, that the general principle of legal certainty is the fundamental principle of EU law which requires, in particular, that rules should be clear and precise so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (*Rosneft,* 2007, paragraph 161).

Concerning, second, the principle of *nulla poena sine lege certa*, the Court considered it clear that that principle, which falls within the scope of Article 49 of the Charter, headed 'Principles of legality and proportionality of criminal offences and penalties', and which, according to the Court's case-law, constitutes a specific expression of the general principle of legal certainty, implies, inter alia, that legislation must clearly define offences and the penalties which they attract. That condition is met where the individual concerned is in a position, based on the wording of the relevant provision and, if necessary, with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable (*Rosneft,* 2007, paragraph 162).

1.2.2. Non bis in idem

The quasi-criminal dimension of EU competition law and restrictive measures litigation calls not only for the application of essential general principles of criminal substantive law but also for the observance of procedural safeguards which characterise any criminal procedure. The principle of *non bis in idem* should be mentioned.

This principle constitutes indeed a fundamental principle of EU law, which is enshrined at Article 4(1) of Protocol No 7 of ECHR and which has been reaffirmed in Article 50 of the Charter of the Fundamental Rights of the European Union.

The principle of *non bis in idem*, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive

conduct in respect of which it has been penalised or declared not liable by a previous unappeasable decision (*Limburgse Vinyl Maatschappij and Others v. Commission,* 2002, paragraph 59).

In competition cases, this principle may be relied on in different ways. In the first range of cases, the issue was whether the principle of *non bis in idem* excluded the possibility of a sanction by the Commission after a sanction had been inflicted by a national authority of a Member State for the very same infringement. In the *Walt Wilhelm* case, the Court of Justice accepted that the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions but ruled that a general requirement of natural justice demanded that any previous punitive decision must be taken into account in determining any sanction which is to be imposed (*Walt Wilhelm,* 1995, paragraph 191). Anyway, the question is now different in the context of Regulation No. 1/2003, as both EU and national authorities apply the same rules for agreements and practices, which may affect trade between Member States.

In a second range of cases, the Court of Justice had to deal with the question whether the principle of *non bis in idem* was applicable to situations where the Commission had adopted a new decision finding an infringement whereas a prior decision based on the same facts had been annulled on procedural grounds. In this context, the Court of Justice ruled that, since the application of that principle presupposes that a ruling has been given on the question of whether an offence has been committed or that the legality of the assessment thereof has been reviewed, it does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged (*Limburgse Vinyl Maatschappij and Others v. Commission*, 2002, paragraphs 60 and 62).

Finally, in a third range of cases, the undertakings involved have relied on the principle of *non bis in idem* or, more precisely, on a corollary to the principle of *non bis in idem*, namely that concurrent penalties concerning the same facts should be taken into account (*Archer Daniels Midland v. Commission,* 2006, paragraph 46; *SGL Carbon v*. *Commission*, 2006, paragraph 27), to compensate a fine paid outside the EU with the fine imposed by the Commission or at least to get a reduction in this respect. These pleas have always been rejected. The EU courts have indeed considered that either the legal orders in question were different and protected different legal interests, (*Buchler v. Commission*, 1970, paragraphs 52 – 53 ; *SGL Carbon v. Commission*, 2006, paragraph 29) or that the plaintiff did not have established the identity of facts based on which the fines had been imposed (*Boehringer Mannheim v. Commission,* 1972, paragraph 5 ; *Archer Daniels Midland v. Commission,* 2006, paragraphs 53–66) or the unity of the offender (*FNCBV and Others v*. *Commission,* 2006, paragraph 344).

The *non bis in idem* principle has also been alleged several times in restrictive measures litigation, but without success (*Afrasiabi and Others*., 2011, paragraph 44; *Commission and Others v. Kadi*, 2013, paragraph 132; *Ocean Capital Administration and Others v. Coucil*, 2020, paragraphs 110, 128-129), at least until the *Stavytskyi* v *Conseil* case (2019) in relation to Ukraine, where EU judge has annulled a restrictive measure.

In this case, the plaintiff, the previous Minister for Energy and Coal Industry of Ukraine, was sanctioned as soon as 2014, in so far as he was subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of the Ukrainian State funds and their illegal transfer outside Ukraine.

Inthe context of a third action before the General Court (*Stavytskyi v. Conseil*, 2016 and *Stavytskyi v. Conseil*, 2018), the plaintiff relied on the fact that he had suggested to the Council that it had been misled by allegedly false information provided by the Prosecutor General's Office of Ukraine (hereinafter referred to as 'PGO') and requested access to a number of documents. Indeed, he argued, in particu-

lar, that the PGO had interfered with the criminal proceedings at issue with the sole aim of keeping them open and that the conduct in question in those proceedings had already been examined by other authorities in Ukraine, including judicial authorities, which had found no evidence of unlawfulness. However, the Council renewed the restrictive measures (*Stavytskyi v. Conseil*, 2019, paragraphs 20–27).

In support of his action before the General Court, the applicant relied on several pleas, alleging, in particular, a manifest error of assessment in so far as the fact that he was subject to criminal proceedings before the Ukrainian authorities did not constitute a sufficient factual basis (*Stavytskyi v. Conseil*, 2019, paragraph 38).

In this respect, the General Court considered that, in the light of the matters raised by the applicant, the Council was required to re-contact the PGO and that, contrary to what the Council contends, the material in its possession did not enable it to rule out that the criminal proceedings on which it relied to maintain the restrictive measures concerning the applicant conflicted with the principle *ne bis in idem* (*Stavytskyi v. Conseil*, 2019, paragraphs 119–120 and 218–129). On this basis, the General Court annulled the challenged acts (*Stavytskyi v. Conseil*, 2019, paragraphs 130–133).

The General Court did though note "that the issue is not whether, in the light of the information provided to the Council, the Council was required to remove the applicant's name from the list, since the criminal proceedings concerning him infringed the principle *ne bis in idem*, but only whether it was required to take that evidence into account and to carry out additional verifications or seek clarification from the Ukrainian authorities" (*Stavytskyi v. Conseil*, 2019, paragraph 131).

2. Evidence

Evidence is difficult to deal with on a theoretical basis; nevertheless, it is possible to try to formulate some leading principles, as far as the autonomy and the unfettered evaluation of evidence is concerned as well as the evidence means and the burden of proof.

It is essential first to point out that, given that the activity of the Court of Justice and thus also that of the General Court is governed by the principle of the unfettered evaluation of evidence, unconstrained by the various rules laid down in the national legal systems. It is only the reliability of the evidence before the EU courts, which is decisive when it comes to its evaluation.

2.1. In Competition Cases

Two principles play a role in this respect. A principle of autonomy: evidence, in EU competition law and in restrictive measures litigation, is governed by EU law as such; and, since EU law recognizes the principle of the unfettered evaluation of evidence, there is logically a principle of the unfettered evaluation of evidence in EU competition law, the exception to this principle being only the evidence which cannot be used by the Commission against the undertakings because it was not communicated to them during the administrative procedure.

The principles of autonomy and the unfettered evaluation of evidence have now been confirmed by the General Court (*General Electric v. Commission,* 2005, paragraph 297). Since it is only the reliability of the evidence before the EU courts that is decisive when it comes to its evaluation, the General Court has been in a position to point out that there is no principle of EU law which precludes the Commission from relying on a single piece of evidence to conclude that Article 101 TFEU has been infringed, provided that its evidential value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question (*Cimenteries CBR and Others v. Commission*, 2000, paragraph 1838).

The Court of Justice has also ruled – in non-competition matters that, "given that there is no legislation at EU level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible" (*Met-Trans and Sagpol*, 2000, paragraph 29).

Obviously, the unfettered evaluation of evidence makes the task of the Commission easier – it is indeed for the Commission to establish the materiality of an infringement to competition rules. In this context, especially for cartels, the Commission is generally facing secret and complex practices, which by their very nature, are often difficult to detect and to investigate and the evidence of which is therefore not easy to establish (*Aalborg Portland and Others v. Commission*, 2004, paragraphs 55–57). It is one of the reasons, which explain the Commission's leniency policy as far as fines for infringement of Article 81 EC are concerned[2].

Since evidence evaluation should be unfettered in EU competition law, the Commission is entitled, in principle, to establish the existence of an infringement to Articles 101 TFEU and 102 TFEU by all means: an economic study, and oral statements. In the context of its leniency policy, the Commission may also collect statements from undertakings, which denounce a cartel for the purpose of enjoying immunity from fines or a reduction of its amount[3].

The questions of admissibility and evidential value – or reliability – of documents may be awkward when the Commission is relying on anonymous documents or on the documents where it refuses to disclose the identity of the author.

In the *seamless steel tubes* case, the Court of Justice considered, in light of the principle of the unfettered evaluation of evidence, that the fact that the documents were anonymous did not preclude, as such, their admissibility (*Salzgitter Mannesmann v. Commission*, 2007, paragraphs 46–50). The Court of Justice allows only "an overall assessment of a document's probative value". The question of the probative value of certain of the evidence the Commission is relying on may be sensible to deal with when the existence of a cartel is supported by a unique document (*Cimenteries CBR and Others v. Commission*, 2000, paragraph 1838).

Evidence collected by the Commission must be conclusive and it is for the Commission to show the existence of an infringement to Articles 101 TFEU or 102 TFEU.

This being said, the principle of the unfettered evaluation of evidence under EU competition law cannot affect the respect of the rights of the defence: conclusions drawn from the evidence must never develop into ill-founded speculation, as there must be a sufficient basis for the decision, and any reasonable doubt must be for the benefit of the applicants according to the principle *in dubio pro reo*. This formulates a principle attached to the rule on the burden of proof in competition law and now provided in Regulation No 1/2003, *viz.* presumption of innocence.[4]

This principle is closely linked to the principle under which doubt must be for the benefit of the one who is prosecuted: *in dubio pro reo*[5]. Substantially, this principle echoes the duty of the Commission to act in conformity with the level of proof required by law when showing the reality of circumstances, which constitute an infringement.

---

[2] See Commission Notice on immunity from fines and reduction of fines in cartel cases (*OJ* 2006 C 298, p. 17, recital 3).

[3] See Commission notice on immunity from fines and reduction of fines in cartel cases.

[4] According to Article 2 of Regulation No 1/2003, "the burden of proving an infringement of Article 81(1) EC or of Article 82 EC shall rest on the party or the authority alleging the infringement".

[5] The principle *in dubio pro reo* is also enshrined at Article 6 of the ECHR and at Article 48 of the European Union Charter of Fundamental Rights.

It is now settled case law that it is for the Commission to show the existence of an infringement by reporting sufficiently precise and consistent evidence (*Volkswagen v. Commission*, 2000, paragraphs 43 and 72).

Accordingly, EU courts have annulled decisions of the Commission when the evidence reported was insufficient or could be interpreted equivocally (*Suiker Unie and Others v. Commission*, 1975).

The Commission must always report sufficient evidence supporting the existence of an infringement of EU competition rules. This burden may be difficult for the Commission, especially where it has to show that parallel conduct on a given market results from an illegal concerted practice. Such conducts may indeed derive from the oligopolistic structure of the market; undertakings involved may be in a position to prove that the facts that the Commission considers that they cannot be explained otherwise than by concertation, may on the contrary be explained in a satisfactory manner, which does not contemplate any concertation.

In the *polypropyène* case (*Rhône-Poulenc v. Commission* [GC], 1991), however, the General Court has considered that the fact that the plaintiffs took part in meetings the purpose of which was to fix price and sales volume targets, was sufficient for presuming their participation to the concertation and that the plaintiffs could not rely on the lack of effect of their individual behaviour on the market or pure ignorance. The General Court decided that, even if an undertaking had not participated in the meetings in an active manner, because of the obvious anti-competitive nature of these meetings, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it. Without formal objection from the undertaking involved, the mere participation in a meeting between competitors might suffice for presuming participation to the infringement (*Hercules Chemicals v. Commission*, 1991, paragraph 232; *Solvay v. Commission*, 1992, paragraphs 98–100).

Moreover, according to the Court of Justice, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors to determine their conduct on that market. In such circumstances, the Commission does not have to adduce evidence that their concerting together had manifested itself in conduct on the market or that it had had effects restrictive of competition (*Hüls v. Commission*, 1999, paragraphs 162 and 167).

Even though the burden of proof lies primarily with the Commission, the facts relied upon by the Commission may compel the undertaking involved to provide an explanation or justification. Without such a response, it can be concluded that the burden of proof has been satisfied (*Aalborg Portland and Others v. Commission*, 2004, paragraph 79).

2.2. In Restrictive Measures Litigation

In restrictive measures litigation too, it is the task of the competent EU authority, *i.e.*, the Council, to establish, in the event of a challenge, that the reasons relied on against the person concerned are well founded, and that it is not the task of that person to adduce evidence of the negative, that those reasons are not well founded (*European Commission v. Yassin Abdullah Kadi*, 2013, paragraph 121; *Council v. Fulmen and Mahmoudian*, 2013, paragraph 66). For that purpose, there is though no requirement that that authority produce before the Courts of the European Union all the information and evidence underlying the reasons alleged in the summary provided by the Sanctions Committee. It is, however, necessary that the information or evidence produced should support the reasons relied on against the

person concerned (*European Commission v. Yassin Abdullah Kadi*, 2013, paragraph 122; *Council v. Fulmen and Mahmoudian*, 2013, paragraph 67).

Like in other areas, such as competition law, as regards the evidence, which may be relied on, the prevailing principle of European Union, law is the unfettered evaluation of evidence (*Persia International Bank v. Council*, 2013, paragraph 95).

However, the peculiarities of restrictive measures litigation have an impact on evidence dialectic.

In this instance, in assessing the importance of what was at stake, which forms part of the review of the proportionality of the restrictive measures at issue, on the one hand, account may be taken of the context of those measures, of the fact that there was an urgent need to adopt such measures intended to put pressure on a given political regime for it to stop the violent repression against the population, and of the difficulty in obtaining more specific evidence in a State at civil war and having an authoritarian regime (*Anbouba v. Council*, 2015, paragraph 46).

On the other hand, to strike a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of the EU to assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence (*European Commission v. Yassin Abdullah Kadi*, 2013, paragraph 129).

The issue to use presumption has been raised, in particular concerning restrictive measures concerning persons linked to a third country: political leaders, family members, businesspersons.

Thus, a presumption has been deemed inapplicable to business persons linked or associated with political leaders of third countries under certain circumstances in the Syrian context (*Anbouba v. Council*, 2015, paragraph 48).

Nevertheless, given the situation in Syria, the Court ruled that the Council discharges the burden of proof borne by it if it presents to the Courts of the European Union a set of indicia sufficiently specific, precise, and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated (*Anbouba v. Council*, 2015, paragraphs 51–52).

2.3. Transplantations from Competition Cases to Restrictive Measures Litigation

Obviously, in the area of restrictive measures, as well as in competition cases, the onus of the proof lies on the EU administrative authority, *i.e.*, respectively, the Council and the Commission. However, one must admit that, for restrictive measures, especially in the context of the Ukrainian war, the onus is rather heavy for the Council, for obvious practical reasons. Thus, the question should be asked whether, in this context, this burden of proof could be lightened ? Anyway, why apply, in certain cases, criminal law standards for evidence since restrictive measures are not at all in the criminal sphere? Therefore, why not apply more presumptions and transplant certain solutions adopted from competition cases into restrictive measures litigation?

Thus, first, should a sole and unique piece of direct evidence not suffice, if it is credible enough, especially if this evidence is strengthened by declarations of the person concerned?

Second, if there is no direct evidence at all, why the Council could not rely on different elements, none of which could justify the inscription, but fully substantiate the restrictive measures if taken altogether? The so-called set of indicia (in French *faisceau d'indices*) theory.

Third, why the Council could not rely more broadly on different presumptions?

Why a close member of the family, such as a son or father, brother or sister of a Russian key political leader, or important person in a strategic economic sector would not suffice, as such? It should,

but the person could be allowed to allege he or she adopted a public distancing with his or her family member. In other words, exoneration by public distancing, as in competition cases.

Significant Forbes ranking, as many Russian billionaires, who started cases before the General Court, would not suffice, as such? In the Byelorussian and Syrian contexts, the General Court has initiated this way (*Ternavsky v. Conseil*, 2015, paragraph 121; *Sharif v. Conseil*, 2019, paragraph 56; *Haswani v. Conseil*, 2020, paragraph 71).

Should it not be extended to the Ukrainian context? Especially when the businessperson at stake is invited by President Putin with other business Russian leaders to discuss the impact of restrictive measures… It should, but the person could be allowed to allege he or she adopted a public distancing with the political regime. In another words, once again, exoneration by public distancing, as in competition cases.

Positive answers to these questions would not lead to a reversal of the burden of the proof, but reveal the dialectic of the evidence in restrictive measures litigation. Indeed, such presumptions would not be *juris et de jure*, but *juris tantum*, which is rebuttable.

In final analysis, in many pending cases before the General Court, especially in the context of the war in Ukraine, the use of more presumptions would necessarily make easier the task of the Council and faster the one of the General Court, without infringing essential procedural safeguards.

Conclusions

1. In the context of Russia's war in Ukraine the above-mentioned restrictive measures regime is aimed at encouraging Russia to cease military and other actions which destabilise Ukraine, including actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine.
2. The latter objective inevitably touches natural and legal persons directly or indirectly involved in such actions. Inclusion of those persons in the list of sanctions in most cases raises various aspects of legality challenged before the EU General Court.
3. Due to an objective difficulty for the Council to obtain and provide evidence for "a set of indicia sufficiently specific, precise and consistent to establish that there was a support to the decision-makers" as required by the case law may raise and sometimes raises certain issues related to the burden of proof. In particular, when talking about important persons in strategic sectors.
4. To avoid similar difficulties in competition cases, the case law has elaborated several presumptions. It would be wise to consider whether some of them, for example, a public dissociation from a regime undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine could not be transposed into the sphere of restrictive measures litigation.

References

EU legal acts

Consolidated version of the Treaty on the Functioning of the European Union of 7 June 2016. *OJ* C 202, 1–388.

Jurisprudence

Judgements of the Court of Justice of the European Union

Walt Wilhelm [CJUE], No. 14/68, [13.02.1969]. ECLI:EU:C:1969:4.

Boehringer Mannheim v. Commission [CJUE], No. 7/72, [14.12.1972]. ECLI:EU:C:1972:125.

Suiker Unie and Others v. Commission [CJUE], No. 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, [16.12.1975]. ECLI:EU:C:1975:174.

Hoffmann-La Roche v. Commission [CJUE], No. 85/76, [13.02.1979]. ECLI:EU:C:1979:36.

AKZO v. Commission [CJUE], No. 62/86, [3.07.1991]. ECLI:EU:C:1991:286.
Hüls v. Commission [CJUE], No. C-199/92 P, [8.07.1999]. ECLI: EU:C:1999:358.
Commission v. Sytraval and Brink's France [CJUE], No. C-367/95 P, [2.04.1998]. ECLI:EU:C:1998:154.
Met-Trans and Sagpol [CJUE], No. C-310/98 and C-406/98, [23.03.2000]. ECLI:EU:C:2000:154.
Limburgse Vinyl Maatschappij and Others. v. Commission [CJUE], No. C-244/99 P, [15.10.2002]. ECLI:EU:C:2002:582.
Aalborg Portland and Others v. Commission [CJUE], No. 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, [7.01.2004]. ECLI:EU:C:2004:6.
Dansk Rørindustri and Others v. Commission [CJUE], No. C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P [28.06.2005]. ECLI:EU:C:2005:408.
Archer Daniels Midland v. Commission [CJUE], No. C-397/03 P, [18.05.2006]. ECLI:EU:C:2006:328.
SGL Carbon v. Commission [CJUE], No. C-308/04 P, [29.06.2006]. ECLI:EU:C:2006:433.
Salzgitter Mannesmann v. Commission [CJUE], No. C-411/04 P, [25.01.2007]. ECLI:EU:C:2007:54.
French Republic v. People's Mojahedin Organization of Iran [CJUE], No. C-27/09 P, [21.12.2011]. ECLI:EU:C:2011:853.
Groupe Danone v. Commission [CJUE], No. C-3/06 P, [8.02.2007]. ECLI:EU:C:2007:88.
Commission and Others v. Kadi [CJUE], No. C-584/10 P, C-593/10 P and C-595/10 P, [18.07.2013]. ECLI:EU:C:2013:518.
Afrasiabi and Others [CJUE], No. C-72/11, [21.12.2011]. ECLI:EU:C:2011:874.
Council v. Bamba [CJUE], No. C-417/11 P, [15.11.2012]. ECLI:EU:C:2012:718.
Council v. Fulmen and Mahmoudian [CJUE], No. C-280/12 P, [28.11.2013]. ECLI:EU:C:2013:775.
Anbouba v. Council [CJUE], No. C-605/13 P, [21.04.2015]. ECLI:EU:C:2015:248.
Rosneft [CJUE], No. C-72/15, [28.03.2017]. ECLI:EU:C:2017:236.
Haswani v. Conseil [CJUE], No. C-241/19, [9.07.2020]. ECLI:EU:C:2020:545.

Judgements of the General Court of the European Union

Rhône-Poulenc v. Commission [GC], No. T-1/89, [24.10.1991]. ECLI:EU:T:1991:56.
Hercules Chemicals v. Commission [GC], No. T-7/89, [17.12.1991]. ECLI:EU:T:1991:75.
Solvay v. Commission [GC], No. T-12/89, [10.03.1992]. ECLI:EU:T:1992:34.
Tréfileurope v. Commission [GC], No. T-141/89, [6.04.1995]. ECLI:EU:T:1995:62.
La Cinq SA v. Commission [GC], No. T-44/90, [24.01.1992]. ECLI:EU:T:1992:5.
Cimenteries CBR and Others v. Commission [GC], No. T-10/92, [18.12.1992]. ECLI:EU:T:1992:123.
Cimenteries CBR and Others v. Commission [GC], No. T-25/95, [15.03.2000]. ECLI:EU:T:2000:77.
Volkswagen v. Commission [GC], No. T-62/98, [6.07.2000]. ECLI:EU:T:2000:180.
General Electric v. Commission [GC], No. T-210/01, [14.12.2005]. ECLI:EU:T:2005:456.
Jungbunzlauer v. Commission [GC], No. T-43/02, [27.09.2006]. ECLI:EU:T:2006:270.
Organisation des Modjahedines du peuple d'Iran v. Council [GC], No. T-228/02, [12.12.2006]. ECLI:EU:T:2006:384.
FNCBV and Others v. Commission [GC], No. T-217/03 and T-245/03, [13.12.2006]. ECLI:EU:T:2006:391.
Bank Melli Iran v. Council [GC], No. T-35/10, [6.09.2013]. ECLI:EU:T:2013:397.
Persia International Bank v. Council [GC], No. T-493/10, [6.09.2013]. ECLI:EU:T:2013:398.
Ternavsky v. Conseil [GC], No. T-163/12, [12.05.2015]. ECLI:EU:T:2015:271.
Central Bank of Iran v. Council [GC], No. T-563/12, [25.03.2015]. ECLI:EU:T:2015:187.
Stavytskyi v. Conseil [GC], No. T-486/14, [22.03.2018]. ECLI:EU:T:2018:166.
Ocean Capital Administration and Others v. Coucil, [GC], No. T-332/15, [8.07.2020]. ECLI:EU:T:2020:308.
Sharif v. Conseil [GC], No. T-5/17, [4.04.2019]. ECLI:EU:T:2019:216.
Stavytskyi v. Conseil [GC], No. T-290/17, [30.01.2019]. ECLI: EU:T:2019:37.

Other

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 148, 5.
Commission Notice on immunity from fines and reduction of fines in cartel cases. *OJ* 2006 C 298, p. 17–22.

Virgilijus Valančius ėjo Europos Sąjungos Bendrojo Teismo teisėjo pareigas 2016–2023 metais. Baigęs teisės studijas Vilniaus universitete, dirbo Lietuvos teismuose, Europos ir tarptautinėse teisėjų organizacijose. Doktorantūros studijas baigė ir daktaro disertaciją apgynė bei habilitacijos procedūrą atliko Mykolo Romerio universitete. Stažavosi Nyderlandų, Didžiosios Britanijos, JAV teismuose. Mokslo pedagoginį darbą dirbo Vilniaus ir Mykolo Romerio universitetuose. Pagrindinės mokslinių interesų ir tyrimų sritys – Europos Sąjungos teisė, konstitucinė teisė, administracinė teisė ir civilinio proceso teisė.

Virgilijus Valančius is a former Judge at the General Court of the European Union (2016–2023). After graduating from Vilnius University, he worked in Lithuanian courts, European and international judicial organizations, and passed his traineeship in Dutch, Great Britain, and US courts. He has defended his doctoral thesis as well as the habilitation procedure at Mykolas Romeris University. He has been involved in scientific teaching work at Vilnius University and Mykolas Romeris University. His primary scientific interest and research areas include, among others, the European Union law, constitutional law, administrative law, and civil procedure law.