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**Evangelia Asimakopoulou**

*Special remarks on the Procedural Law tendencies for fact finding and evidence, under the right of access to justice*

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# Secção I

# Investigação Científica*

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# Special remarks on the Procedural Law tendencies for fact finding and evidence, under the right of access to justice

# Considerações especiais sobre as tendências do Direito Processual em matéria de apuramento de factos e provas, à luz do direito de acesso à justiça

Evangelia ASIMAKOPOULOU[1]

**ABSTRACT:** This paper outlines the modern methods and the recent developments in the field of procedural law that are related to fact finding (*claims and evidence*). Litigation claims and evidence procedure are strongly related due to the general rule "*I prove what I invoke*". The update character of this topic is confirmed by the fact that even in *ELI/UNIDROIT* provisions for *Building European Rules of Civil Procedure* there is special reference to the fact that the main purpose of each litigation procedure is determined by the parties' allegations and these allegations are strongly related to the object of evidence procedure[2]. The problem that may arise is the potential difficulty of the litigant's parts to have access to evidence and information, in order to present their rights before the court. This can lead further to a general difficulty of real access to justice, which is safeguarded by *Article 6 par. 1 of ECHR and Article 47 of Charter of Fundamental Rights*. The reference to these two articles is the basic method for approaching the crucial topics is the recourse to the scope of procedural rules, under the *interpretation light of access to justice and due process*. Under this light, procedural law becomes the means for the efficient implementation of substantive law.
**KEYWORDS:** Claims; Evidence; Information asymmetry; Efficiency; European law; Case management; Burden of proof.

**RESUMO:** Este trabalho descreve os métodos modernos e os recentes desenvolvimentos no domínio do direito processual que estão relacionados com a descoberta de factos (alegações e provas). As ações judiciais e o procedimento probatório estão fortemente relacionados devido à regra geral "Eu provo o que invoco".

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[1] *Lawyer, PhD of Procedural Law, Post Doc Researcher of International Procedural Law in Aristotle University of Thessaloniki*. Ms. Asimakopoulou holds PhD in procedural law. The title of her theris is "*The modern approach of fact finding and evidence methods in civil procedure*", prefaced by Prof. Dr. Kalliopi Makridou (Professor of Procedural Law in Aristotle University of Thessaloniki) Her specialization on this topic was completed by her second monograph with the title "*Claims for damages for the infringement of free competition law, procedural aspects of law 4529/2018, especially fact provoking and evidence (Dir. 2014/104/EU)*", prefaced by Deputy Minister of Finance in Greece, Mr. George Zavvos (*previously served as a Member of the European Parliament, Ambassador of the European Commission and Legal Adviser at the European Commission Legal Service*). The relationship between fact claiming and evidence with the fundamental right of access to justice is her academic specialty. Contact details: asimakopouloulaw@gmail.com.

[2] ELI/UNIROIT rules were fully presented in a ERA Conference in Trier, 26-29 November 2015. See also the UNIDROIT *website* https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules.

O carácter atualizado deste tópico é confirmado pelo facto de que mesmo nas disposições ELI/UNIDROIT para a Construção de Regras de Processo Civil Europeias existe uma referência especial ao facto de que o objetivo principal de cada procedimento litigioso é determinado pelas alegações das partes e estas alegações estão fortemente relacionadas com o objeto do procedimento probatório. O problema que pode surgir é a potencial dificuldade da parte litigante em ter acesso às provas e informações, a fim de apresentar os seus direitos perante o tribunal. Isto pode levar a uma maior dificuldade no efectivo acesso à justiça, que é salvaguardada pelo artigo 6.º, parágrafo 1.º da CEDH e pelo artigo 47.º da Carta dos Direitos Fundamentais. A referência a estes dois artigos é o método básico para abordar os temas cruciais e o recurso ao âmbito das regras processuais, à luz da interpretação do acesso à justiça e ao respetivo processo. A esta luz, o direito processual torna-se o meio para a implementação eficiente do direito substantivo.
**PALAVRAS-CHAVE:** Reclamações; Evidência; Assimetria de informação; Eficiência; Direito europeu; Gestão de casos; Ónus da prova.

## Access to justice and modern methods for submission of claims and evidence in civil procedure

### Introduction

The most common difficulties in the real implementation of substantive law are being posed by the procedural law, especially by the information asymmetry of the parties[3], that lead to severe obstacles to submit claims and evidence[4]. The most important parameter for the research of the new tendencies of civil trial is the investigation of the relationship between the litigant parties and the judge. This relationship is formed under the light of the *basic procedural right, which is the right for access to justice and fair trial*[5]*.* The concept of a fair trial is now defined by a clear reference to fundamental human rights[6], in an effort to have a common reference of what could be called "*procedural justice*". It is also inherent in a fair trial to ensure that the parties are able to provide the evidence necessary for a successful outcome to their dispute. The most recent and very important examples of the tendency of

[3] The real update character of the topic is underlined by *GARCIA*, Harmonising Access to Information and Evidence: The Directives on Intellectual Property and Competition Damages, in "*The future of European Law of Civil Procedure*", ed. by F. GASCON INCHAUSTI/B. HESS (Intersentia 2020), p. 127 ff.

[4] For the evidence profile in civil procedure see *C.H. VAN RHEE/UZELAC*, Evidence in Contemporary Civil Procedure, p. e et seq. (INTERSENTIA 2015).

[5] See analysis for the relationship between civil procedure and the right of fair trial *DUSTERHAUS,* Constitunalisation of European Civil Procedure as Starting Point for Harmonisation, in *The future of European Law of Civil Procedure*", ed. by F. GASCON INCHAUSTI/B. HESS (Intersentia 2020), p. 69 et seq.

[6] See *Dalcourt Case* ECHR.

European legislation to ensure the right of access to justice by enacting rules that facilitate allegations' claiming and evidence procedure were the *Direction 2004/48/EU for Intellectual Property Rights and Direction 2014/104/*EU *for Damages due to Competition Law Infringement*[7]*.*

The main goal of this paper is to present the main procedural tools that can be used for the safeguarding of access to justice and fair litigation procedure, especially in the field of the fact claiming and evidence. Furthermore, through the analysis of this paper a basic question may arise: The new tendency for protecting the real access to justice and the due process of law is following a *stricter or softer* model for *defined allegations claiming and evidence procedure?*[8] Is this question related to the general scopes of civil procedure or to the one particular scope of the substantive right that is protected in each process? What is the role of judges in the frame of these tendencies?[9]

The two most crucial elements that must be strengthen in a modern approach of procedural rules are the following: *a)* procedural cooperation between the litigant parties and the judge, especially in the means of evidence procedure, *b)* easiness of the claims substantiating, based on the access of each litigant party to information. Especially for the last one, it must be said that the obligation of the parties to adequately substantiate their allegations reflects the general tendency to set an equilibrium between the parties' monopoly in the procedure *(known as adversary system)* with the need to ensure a fair trial. At the same time, evidence procedure is strengthened through the cooperation between the parties and the reversal of burden of proof, when it is necessary to balance the information asymmetry between the parties. These two elements together form the basic future *"core"* development of procedural law. The basic goal is to safeguard the compliance of procedural rules to access to justice and

[7] See *GARCIA*, Harmonising Access to Information and Evidence: The Directives on Intellectual Property and Competition Damages, in "*The future of European Law of Civil Procedure*", ed. by F. GASCON INCHAUSTI/B. HESS (Intersentia 2020), p. 127 et seq.
[8] See the fundamental *Bell Atlantic Case* https://supreme.justia.com/cases/federal/us/550/544/
[9] Special reference to case management methods (See *SAENGER*, Case management in Germany, in "Litigation in England and in Germany", p. 15 et seq. (GIESEKING 2010) p. 15, *ISAACHAROF.*, Facts, Investigation and the role of discovery, in "Litigation in England and in Germany", p. 183 et seq. (GIESEKING 2010).

due process of law, with recourse to the substantive right that is protected in each litigation process, through a soft approach of strict procedural rules[10].

1. **Analysis of modern approach for claims submission and evidence, through comparative law elements**. **The strengthening of judges' roles, cooperation of litigant parties**

The most influential way to deepen the analysis of the above topics is to have a comparative look at the models of *common law and continental system, especially specific elements of German and English civil procedural law*.

In German civil procedure special emphasis is placed on the leading role of the judge in civil proceedings (*materielle Prozessleitung, 139 ZPO*)[11]. The objectives served by this power of the judge are the effective application of substantive law and the due time conduct and termination of the trial. The court instructs the parties to complete their incomplete allegations in order to adequately bring to the trial all the relevant facts, so that even unfounded allegations are completed, as long as the basis of the lawsuit is not changed, no new applications are filed or completely new facts allegations are submitted. It has even been argued that judicial guidance can even be addressed to the party bearing the burden of submitting facts, since the parties are obliged to testify the truth (*138 I ZPO*)[12].

Furthermore, the *Woolfs' Reform (Civil Procedure Rules CPR)* of 1999 introduced procedural rules that strengthened the judge's position in the proceedings. Case management in civil procedure was introduced. The extreme version of the litigant's monopoly and the procedure as a fight between them was abandoned, but remains basically in force. At the same time, the judge is armed with powers to direct the proceedings. The ultimate responsibility for reviewing the proceedings is transferred from the parties and their legal

[10] See analysis of the topics in *ASIMAKOPOULOU*, *The modern approach of fact finding and evidence methods in civil procedure (2017, Sakkoulas Publications, in Greek).*

[11] See the analysis in *KLINCK.*, Clarification duties (Aufklärungspflichten) of the court-basis and limits, p. 32, in Relations between judges and parties in German and Greek civil trial (ed. by *MAKRIDOU/DIAMANTOPOULOS*, SAKKOULAS 2020, published also at IAPL website) .

[12] See for German Law *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht (BECK 2010) § 77 no. 5.

representatives to the judge. The *overriding object (main issue, central issue)*[13] of civil proceedings is characterized as an overriding object. This *fair trial includes the following main areas (CPR 1.1 (2))*: (a) encouraging the parties to cooperate with each other in the conduct of the proceedings; (b) identifying disputes at an early stage of the proceedings; (d) decide on the order in which disputes are to be settled; (e) encourage the parties to choose alternative dispute resolution if the court considers that this is the appropriate course of action; f) to assist the parties in establishing the main points of contention; (g) to set a timetable for the proceedings or to generally monitor the progress of the proceedings; as many issues as possible are considered together; (j) the case is heard without the parties necessarily being heard[14]. To be sure for the efficiency of the trial and the proper focus on the crucial matters, there are pre-trial hearings, the "*case management conference*" and "*the prehearing review*". In the case management hearings, the program of the litigation is being set[15]. Modern English litigation focuses on the delivery of judgments in a reasonable time, following a rational division of roles between judges and parties, so that the judgments rendered are as correct as possible in both the legal and the factual part. Thus, in judicial practice, the judge acquires the power to indicate to the parties the completion or clarification of their factual allegations. The parties must present a core set of facts on which their request for judicial protection is based. There is no increased requirement for some of the claims put forward by the parties, while at the same time the plaintiff may satisfy a specific right, even if this is not fully specified in the application (*CPR provisions 6.2 (1), 16.4, 16.5 (5* ))[16]. The parties remain domini litis. At the same time, the judge acquires an active role in the proceedings, but within the framework of procedural rules, which determine the manner and extent of his active participation in the trial[17].

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[13] See *VERKERK*, What is judicial case management? A transnational and European Perspective, p. 27 et seq., in: VAN RHEE, Judicial Case Management and Efficiency in Civil Litigation (INTERSENTIA 2008).

[14] *ASIMAKOPOULOU*, The modern approach of fact finding evidence in civil procedure, p. 57 et seq. (Sakkoulas 2017, in Greek).

[15] See analysis in *TSANTINIS,* Case Management in the Modern Civil Procedure, p. 97/98 et seq. in Relations between judges and parties in German and Greek civil trial (ed. by *MAKRIDOU/DIAMANTOPOULOS*, SAKKOULAS 2020).

[16] *ANDREWS*, The modern civil process (MOHR SIEBECK 2008) § 3.13 et seq.

[17] See in general for the topic of judges' power in trial *FROEB/KOBASHYI*, Adversarial versus inquisitorial judge, in "Procedural Law and Economics", EDWARD ELGAR 2012. For Greek Civil

The modern form of the adversary systems do not jeopardize the traditional value of parties' dominance in civil litigation. However, the tendency for a clearer distribution of the roles of parties and the court is strengthened, in order to satisfy the requirements of a fair trial. At the same time, *discovery and disclosure methods of common law procedural systems*[18] strengthen the procedural cooperation between the litigant parties and promote exchange of facts and evidence, in order to balance the possible information asymmetry between the parties[19].

## 2. European Law and ECJ Case Law. The reversal of the burden of proof and the limitation of standards for defining allegations

Two key elements from *European law and ECJ* Case *Law* must be used to define the procedural tendencies of modern procedural law era. Both of them are related with the effective application of Community law but affect the modern procedural notion by intervening in the internal procedural law of the Member States, under the light of principles of *efficiency and equivalence*[20]. The first one is *Directive 2014/104/EU* for damages claims due to infringement of free competition law[21]. The above law text contributes a lot to a synchronous concept of procedural needs that lead to a real implementation of substantive law and safeguarding of procedural rights. The second one is the ECJ Case law

Trial see *MAKRIDOU,* The vague lawsuit and the possibilities of its completion (2006, in Greek) p. 312 et seq., *DIAMANTOPOULOS*, The guidance power of the judge in civil proceedings according to art. 236 CCP, Hellenic Justice 2014 p. 680 et seq., *PODIMATA,* Judicial Duty for Guidance and the Adversarial System. The delicate balane between desirable and feasible after L. 3994/2011, Review of Civil Procedure 2013 p. r et seq., *APOSTOLAKIS*, The guidance intervention of the judge as per art. 236 CCP in first instance (new ordinary and particular proceedings), appeal and cassation trials, Review of Civil Procedure 2020 p. 105 et seq., *HADJIIOANNOU*, Judicial duty for guidance, p. 153 et seq. in Relations between judges and parties in German and Greek civil trial (ed. by *MAKRIDOU/ DIAMANTOPOULOS*, 2020).

[18] These procedures were the model law for the *Directive 2014/104/EU* for procedural laws in damages claims for infringement of free competition law. For English Law Evidence Methods see *ANDREWS*, Modern Civil Process (Mohr Siebeck, 2008).

[19] At the level of general principles and international law this was linked to the ability of the opposing party to prepare its defense. In particular, the explanatory notes to *Rule 5.5 of the General Principles ALI / UNIDROIT Principles of Transnational Civil Procedure state that the obligation of the parties to disclose to each other the facts on which their claims are based enables the opposing party to adequately prepare its participation.*

[20] See analysis for the influence of European law in domestic procedural systems *HESS,* Europäisches Zivilprozessrecht, p. 783 et seq. (De Gruyter, 2020).

[21] See analysis for private enforcement of competition law *LIANOS/DAVIS,* Damages Claims for the Infringement of EU Competition Law (Oxford, 2015).

about the *reversal of burden of proof in discrimination cases*[22], that has been also incorporated in secondary community law[23].

Beginning from the last one, the ECJ realized the need for specific principles for the allocation of the burden of proof in the cases of discrimination. In particular, ECJ ruled that despite the substantive protection of human rights, procedural tools need to be implemented in order to safeguard effective access to justice and real implementation of fundamental legal values[24]. ECJ case law identified the issue in labor law cases and addressed it through the adjustment of the burden of proof[25]. Recent ECJ case law, rendered after the legislative regulation of burden of proof[26], issue identified and extended the realm and the way of its application[27]. The important procedural issue that arises in the frame of all the above is to identify the role of procedural law in safeguarding implementation of substantive law, especially human rights. Procedural tools, adequately and broadly implemented, balance information asymmetry in discrimination cases and facilitate the claimant to justify and prove his/her allegations. Burden of proof adjustments to the capability to prove facts lead to ad hoc adjustments to the procedural responsibility to invoke facts.

Thus, the burden of proof is formed in order to achieve procedural equality, starting from the principle of effective judicial protection. The court is not called upon, through the change of the burden of proof, to formulate rules of law that do not exist, which would be problematic as an object in the constitutional principle of separation of powers, but it is called to play the role of guardian of legally established human rights, which is legally legitimate and

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[22] *In general terms, the distribution of the burden of proof serves the security of the law. It is widely accepted that it meets, in principle, the requirements of justice. Many times, however, the distribution of the burden of proof based on the prerequisites of the substantive law can be ineffective and affect the substantive provision of legal protection. This is especially the case when the party is unable to fulfill his obligation to prove the facts which are relevant to him*. See for burden of proof in German Law *LAUMEN/PRUTTING*, Handbuch der Beweislast (2016, Carl Heymans Verlag), in English Law *WALTON*, Burden of Proof, Presumption and Argumentation, (2014, Cambridge University Press).

[23] Directives *97/80, 2000/43, 2000/78, 2006/54* on the application of the principle of equal treatment.

[24] San *Giorgio Case C-199/82* published at *curia.eu.*

[25] Cases *Bilka-Kaufhaus C-170/84*, *Enderby C-109/88, Danfoss C-127/92* published at *curia.eu (See also Royal Copenhagen Case C-400/93 published at curia.eu).*

[26] See fn. 17.

[27] Cases *Mino Ghannadan (C-274/18), Isabel Gonzalez Castro (C-41/17),* published at *curia.eu.* Recently, Directive *2019/1158/EU* introducing work life balance for men and women regulates again the allocation of burden of proof in a way that.

legally enforceable. Fundamental individual rights that have at the same time procedural expression are the right to be heard and the equality of the parties. Based on this finding and taking into account all the above, including the case law of the ECJ as analyzed immediately below, one can formulate the idea that the distribution of the burden of *proof should be treated as a "quantity", which, under certain conditions, may change, even without explicit legal provision. The criterion for this is the probative facility of proving facts, under the light of access to justice principle*[28].

Furthermore, *Directive 2014/104/EU* introduced procedural rules that strengthen the role of the judge in damages actions, in particular *as regards the issue of evidence and the specification of allegations*. The dogmatic basis of this active role of judges is that the correct application of competition law concerns not only the private but also the public interest[29]. *These are the legal instruments to enhance the functioning of internal market*[30]. Procedural law is adjusted, again, to the needs of the real implementation of substantive law. The relevant provisions (*articles 5 et seq.*) of the *Directive* codify the effort to balance the asymmetry of information between the parties[31]. At the same time, the need to protect the effectiveness of public enforcement of competition law, through the protection of confidentiality, is highlighted. At the same time, *European case law offers strong arguments on how to approach and analyze these provisions, in particular as regards the criteria for adjudicating the request for disclosure of evidence*[32].

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[28] See analysis *ASIMAKOPOULOU*, The modern approach of fact finding and evidence, p. 285 et seq. (Sakkoulas Publications, 2017, in Greek)

[29] *ASIMAKOPOULOU,* The modern approach of fact finding and evidence, p. 9 et seq. (Sakkoulas 2017, in Greek).

[30] See in detail for these legal instruments in the frame and from the perspective of harmonising European Procedural Law *GARCIA*, Harmonizing Access to Information and Evidence: The Directives on Intellectual Property and Competition Damages, in "*The future of European Law of Civil Procedure*", ed. by GASCON-INCHAUSTI/HESS (Intersentia 2020), p. 127 et seq.

[31] As already pointed out by *TROULI*, The White Paper on Compensation Claims for Violation of Antitrust Law, Digesta 2010, p. 176 et seq.: "*Victims of antitrust breaches often do not have access to the evidence necessary to substantiate their claim, and especially as to the amount of compensation ... exchange of evidence between the parties should be ordered only by national courts and under strict scrutiny, in particular as regards the proportionality of such access Before ordering the court to disclose certain evidence, the plaintiff must provide all available evidence that there is good reason to believe that he was actually harmed in breach of antitrust rules. The court must also be convinced that the plaintiff is not in a position to gather the required evidence on his own*".

[32] *C-360/09 Pfeiderer and C-536/11 Donau Chemie* published at *curia.eu.*

The second point that highlights the active role of the judge is the issue of quantification of damage. The provision of *article 17 of Directive 2014/104/EU.* The provision of the Directive states that the court has the power to assess the amount of the damage. It is worth mentioning that in the law text that was proposed and put into consultation, *article 14* stipulated that the court has the power to assess the amount of damage, if it is practically impossible or too difficult to determine the exact amount of damage caused by the plaintiff, without specifically specifying this possibility in reducing the proof measure through the introduction of *probability measure*. The provision of the Directive on the facilitation of quantification of injury and the possibility of recourse to national competition authorities for support in its calculation must be understood and interpreted in accordance with the provisions of *articles 12 par. 5 and 16 of the Directive*. *Article 12 par. 5* stipulates that Member States ensure that national courts have the power to assess, in accordance with national procedures, what share of the surcharge has been passed on to the indirect purchaser. In other words, the rule according to which the litigant must prove the claims that have already been filled is broken. The principle of effective application of Community law, with specific application to procedural issues, *the principles of equivalence and effectiveness, as specifically stated in competition law matters in the Courage / Crehan* case law[33], would probably be sufficient to alleviate the burden of invoking facts and proof of the plaintiff in case it is impossible or too difficult to determine and prove the amount of the damage. However, as stated[34], the '*added value*' of the express provision of *article 17 of the Directive* is that no action for damages for breach of competition law should be dismissed simply because the plaintiff does not accurately state the amount of damage.

The question that reasonably arises is how long the national court will consider it "*practically impossible or too difficult*" for the plaintiff to determine the amount of the damage in order to activate the power conferred on him by the provision of the *Directive*, and the provision of domestic law, proceed to the damage assessment itself? One possible answer could be that it suffices to

[33] *C-453/99* published at *curia.eu*

[34] *IACOVIDES,* The presumption and quantification of harm in Directive and the Practical Guide, p. 328 et seq., in Harmonizer EU Competition Litigation, The New Directive and Beyond (Hart, 2016)

assume that the damage assessment is based on a possible calculation of the actual data that would apply to the affected party if the breach had not occurred. In other words, as long as it can be apparent, through *the utilization of data from common experience*, that the defendant's conduct caused some harm to the plaintiff. This crisis will be different in each case and will arise only *ad hoc*. Furthermore, the *Directive* does not specify how the damage is calculated. The Member States, or more precisely the national courts themselves, are left regulatory free to determine the amount of damage awarded. At this point, it is particularly critical to have recourse to the national competition authorities for the to provide Guidelines on the amount of damage, if requested by the court and deemed appropriate by the competition authority[35].

The general procedural principles of the *ALI / UNIDROIT Principles of Transnational Civil Procedure have a similar vein, Rule 1 of the ELI / UNIDROIT Commission*, in particular that which deals with access to information and evidence, in the context of work on the adoption of common basic procedural rules for the *EU (Building European Rules of Civil Procedure)* states that the purpose, the main objective of the proceedings at issue, is determined by the facts contained in the parties' submissions. This rule is included in the chapter on the fundamental issues of proof. It could be said that there is a tendency to dogmatically and procedurally "*unify*" or "*not strictly separate*" the stages of claims submission through the lawsuit and the claims proof through the evidence procedure.

## Conclusions/Recommendations

[35] Useful for the quantification of the damage by the national courts is the *Practical Guide for the Quantification of the Damage in the Compensation Lawsuits for Violation of Articles 101 and 102 S.L.E.E. (Practical guide Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union), in conjunction with document 2013 / C 167/07,* by which the Commission directs, in a text of general principles, national courts on the issue of quantification of damage in actions for breach of competition law. The provision for the quantification of damage, in conjunction with all the above-mentioned quantification guidelines issued by the Commission, seems to lead to a change in the role of the judge. The probability of loss will no longer apply only to the lost profit but also to the positive loss. The requirements for determining the damage in the lawsuit are clearly reduced and the judge is asked not to calculate the damage claimed by the plaintiff on the basis of the information provided by the latter but to estimate the amount of the damage himself, based on reasonably available data (See monography: *ASIMAKOPOULOU*, *Claims for damages for the infringement of free competition law, procedural aspects of law 4529/2018, especially fact provoking and evidence (Dir. 2014/104/EU)*, Sakkoulas Publications 2017, in Greek)

After all the above analysis, it may be concluded that sometimes there is a need for softer litigation rules, concerning the presentation of allegations before the court and the submission of evidence. The procedural law that complies with the fundamental rights of access to justice is the cooperation between the litigant parties, *under the statutory role of an active judge which functions as case manager*, based on *impartiality*. This "*soft*" approach can be justified from the nature and the needs of the substantive rights that must be protected. The significant role of European union law for this new tendency must be underlined. Procedural law is turning to servant and guardian of substantive law and not an obstacle for the effective implementation of it.

## REFERENCES

*Andrews*, The modern civil process (Mohr Siebeck, 2008).

*Asimakopoulou*, The modern approach of fact finding evidence in civil procedure, p. 57 et seq. (Sakkoulas 2017, in Greek).

*Asimakopoulou*, *Claims for damages for the infringement of free competition law, procedural aspects of law 4529/2018, especially fact provoking and evidence (Dir. 2014/104/EU)* (Sakkoulas Publications 2017, in Greek).

*Düsterhaus,* Constitunalisation of European Civil Procedure as Starting Point for Harmonisation, in *The future of European Law of Civil Procedure*", ed. by F. GASCON INCHAUSTI/B. HESS (Intersentia 2020), p. 69 et seq.

*Gaier*, Der modern liberalle Zivilprozess, NJW 2013.871.

*Garcia*, Harmonising Access to Information and Evidence: The Directives on Intellectual Property and Competition Damages, in "*The future of European Law of Civil Procedure*", ed. by F. Gascon Inchausti/B. Hess (Intersentia, 2020).

*Hess,* Europäisches Zivilprozessrecht (De Gruyter, 2020).

*Laumen/Prütting*, Handbuch der Beweislast (2016, Carl Heymans Verlag).

*Lianos/Davis,* Damages Claims for the infringement of EU Competition Law (Oxford, 2015).

*Makridou/Diamantopoulos (editors) "The law of evidence in Spanish and Greek Civil Procedural Law". Volume of International Conference which took place in Thessaloniki, Greece (April 2018), in collaboration* with Prof. *Fernando Gascon Inchautsi και Prof. Enrique Vallines Garcia* (ed. by Sakkoulas Publications 2018, published on IAPL website: https://www.iaplaw.org/images/PDF/Greek-and-foreign_Vol.-4.pdf

*Makridou/Diamantopoulos (editors)* Relations between judges and parties in German and Greek Civil Trial (Sakkoulas Publications 2020, published on IAPL website https://www.iaplaw.org/images/PDF/Greek-and-foreign_Vol.-5.pdf.

*Rosenberg/Schwab/Gottwald,* Zivilprozessrecht (Beck 2010).

*Trouli*, The White Paper on Compensation Claims for Violation of Antitrust Law, Digesta 2010, p. 176 et seq. (in Greek).

*Uzelac and Van Rhee,* The European union and the national civil procedure (2016).

*Van Rhee and Uzelac*, Revisiting procedural human rights (Intersentia, 2017).

*Van Rhee and Uzelac*, Evidence in Contemporary Civil Procedure, Fundamental issues in a comparative perspective (Intersentia, 2015).

*Van Rhee and Uzelac,* Civil Justice between Efficiency and Quality: From Ius Commune to CEPEJ (Intersentia, 2008).

*Van Rhee and Uzelac,* Access to justice and the judiciary. Towards new European standards of Affordability, Quality and Efficiency in Civil Adjudication (Intersentia, 2009).

*Verkerk,* Fact Finding in Civil Litigation (Intersentia, 2010).

*Walton* Burden of Proof, Presumption and Argumentation, Carl Heymans Verlag, 2016.

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**Universidade Portucalense Cooperativa de Ensino Superior, CRL**

Rua Dr. António Bernardino de Almeida, 541 - 4200-072 Porto

Email: upt@upt.pt