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Art 4:201 PETL: Revisiting the Grey Areas between Fault-Based and Strict Liability

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In 2005, the European Group on Tort Law (EGTL) published the text and commentary of its Principles of European Tort Law (PETL).[1] With art 4:201,[2] the PETL include a rule on the reversal of the burden of proving fault, which is intended to cover the grey areas between fault-based and strict liability.[3] Almost 18 years after publication of the PETL, the current paper aims at revisiting these grey areas between strict and fault-based liability. When doing so, the paper first deals with questions of terminology and outlines what is meant by the notion of grey areas between strict and fault-based liability. In a second step, the way these grey areas are dealt with in the Principles is examined and, finally, some comments on art 4:201 PETL and the way forward are made.

I What do we mean by grey areas?

When looking at the so-called grey areas between fault-based and strict liability and trying to delimit the scope of application of these liabilities, it is necessary to first define liability based on fault, on the one hand, and strict liability, on the other. At first glance, this sounds relatively straightforward. Fault liability is liability which presupposes fault and therefore – as Pierre Widmer put it in his commentary on Chapter 4 of the PETL – some 'blame addressed to the author of a damaging event for not having observed due care in order to avoid damage'.[4] Strict liability, on the other hand, could be defined as liability where fault in the sense of a reproach for

1 *European Group on Tort Law*, Principles of European Tort Law. Text and Commentary (2005).

2 The text of the article is printed below in sec II after fn 25.

3 Cf *P Widmer*, Liability Based on Fault. Art 4:201, in: European Group on Tort Law (ed), Principles of European Tort Law (2005) no 2.

4 *Widmer* (fn 3) no 1.

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misbehaviour[5] is not required to hold the author of the damage liable. While the core meaning of the term fault seems to be quite commonly accepted, the term strict liability is more difficult to handle. It could be understood in a very broad sense as covering any kind of liability which does not presuppose blameworthy conduct on the part of the person liable and, in this sense, it would, for instance, also include vicarious liability.[6] It could, however, also be understood in a far narrower sense as absolute liability where no defences are possible.[7] In the sense the term is used in the PETL, it includes no-fault liability for damage caused by risks emanating from the defendant's sphere, particularly risks emanating from certain objects or from dangerous human activity, not however vicarious liability, which is addressed separately in the Principles.[8]

The theoretically clear dividing line – fault liability requires fault whereas there is no such requirement for strict liability – is blurred in practice, as comparative research has shown that, in most jurisdictions, the degree of strictness of liability varies:[9]

On the one hand, liabilities using fault as their starting point are often made stricter, in particular by increasing the standard of care or by reversing the burden of proof.[10] Typical examples are to be found in the field of liability for animals or structures.[11] Article 56 of the Swiss Code of Obligations, for instance, provides that

5 *BA Koch*/*H Koziol*, Comparative Conclusions, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) no 1.

6 In common law, for instance, vicarious liability is mainly considered to be strict. See *P Giliker*, Vicarious Liability or Liability for the Acts of Others in Tort, 2 Journal of European Tort Law (JETL) (2011) 31, 34. Under French law, strict liability is provided for the liability of the employer. See *J Knetsch*, Tort Law in France (2021) no 128.

7 See *BA Koch*, Strict Liablity, in: European Group on Tort Law (ed), Principles of European Tort Law (2005) no 4.

8 See *Koch* (fn 7) no 4. Cf also *Koch*/*Koziol* (fn 5) no 3.

9 See eg the replies to Question A1 in *BA Koch*/*H Koziol* (eds), Unification of Tort Law: Strict Liability (2002). See also *Koch*/*Koziol* (fn 5) no 2; *P Widmer*, Comparative Report on Fault as a Basis of Liability and Criterion for Imputation, in: P Widmer (ed), Unification of Tort Law: Fault (2005) no 66; *BC Steininger*, Verschärfung der Verschuldenshaftung (2007) 293ff. Cf also *C von Bar*, Verkehrspflichten (1980) 143f; *E Reid*, Liability for dangerous activities: a comparative analysis, International & Comparative Law Quarterly (ICLQ) 48 (1999) 731, 752.

10 See *Koch*/*Koziol* (fn 5) no 2; *Widmer* (fn 9) no 66; *E Karner*, The Function of the Burden of Proof in Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2008 (2009) 68, no 16ff.

11 Cf *E Karner* (fn 10) no 18; *E Karner*/*BA Koch*, Civil Liability for Artificial Intelligence, in: E Karner/BA Koch/M Geistfeld/C Wendehorst, Civil Liability for Artificial Intelligence and Software (2023) 49f.

the keeper of an animal is liable unless he proves that he took all due care in keeping and supervising the animal.[12]

On the other hand, strict liabilities can be made less strict by defences allowing the person in question to escape liability under certain circumstances,[13] in particular when they adhere to a – usually rather high – standard of care.[14] In this sense, under Austrian law, the keeper of a motor vehicle can escape liability according to § 9 of the *Eisenbahn- und Kraftfahrzeughaftpflichtgesetz* (Motor Vehicle and Railway Liability Act, EKHG) by proving that he and his auxiliaries took all care due according to the circumstances.[15]

This shows that liability based on fault and strict liability are not completely separate categories but, in their pure form, represent both ends of a continuous chain.[16] To cite the words of Horton Rogers:

> 'Strict liability and fault liability are alternatives in terms of convenient classification and exposition, but closer examination suggests that in terms of substance there is really a continuum rather than two categories'.[17]

Another factor hampering a clear delimitation of fault-based and strict liability is that the formal starting point for a liability regime does not necessarily allow a final conclusion as to the strictness of the relevant liability regime in substance.[18] What is meant by this? While a liability may formally be fault-based, it is possible that it is handled in such a way that liability is in fact strict, for instance if the level of care required is so high that it can hardly be fulfilled by anyone. This is, for example, the case for the Dutch liability of drivers of motor vehicles towards passengers. As the special regime of art 185 *Wegenverkeerswet* (Road Traffic Act) only applies to non-

12 See on this *P Widmer*, Fault under Swiss Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) nos 9f, 60. Cf also the liability for structures as provided for in art 58 of the Swiss Code of Obligations, § 1319 Austrian ABGB or § 836 German BGB.

13 On defences and exceptions to strict liability torts in common law, see *A Gray*, The evolution from strict liability to fault in the law of torts (2021). Quite contrary to what this paper assumes, namely that dangerousness and conduct combined can justify liability where neither of these elements alone could (see on this in more detail, *Steininger* [fn 9] 143ff, 293 ff), *Gray* argues that liability should be primarily fault-based – at least in the common law.

14 *Steininger* (fn 9) 293.

15 See *H Koziol*/*P Apathy*/*BA Koch*, Österreichisches Haftpflichtrecht III (3rd edn 2014) no A/2/68ff.

16 *H Koziol*, Bewegliches System und Gefährdungshaftung, in: F Bydlinski/H Krejci/B Schilcher/V Steininger (eds), Das Bewegliche System im geltenden und künftigen Recht (1986) 51f; *BA Koch*/*H Koziol*, Austria, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) no 14; *Steininger* (fn 9) 143ff, 293ff; *Koch*/*Koziol* (fn 5) no 156ff.

17 *WVH Rogers*, England, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) no 1.

18 *Steininger* (fn 9) 294.

motorised participants in traffic, such cases fall under the normal fault liability regime of art 6:162 of the Dutch Civil Code. However, almost super human abilities are required from drivers.[19] In such a case, the liability will in substance be strict, although it is formally based on blameworthy conduct. Such liability is therefore much stricter than a liability which formally uses a risk as its starting point but at the same time provides broad exemptions from liability if the person involved acted with due care. I have referred to this as a lack of honesty on the part of legal practice.[20] While it may be understandable that courts, not having a strict liability regime at their disposal, revert to such tactics, both legal certainty and the coherence of the tort system will suffer from such a dichotomy between wording and interpretation of the rules in question.[21]

Returning to our problem of delimiting fault-based and strict liability, we can therefore not only conclude that there is a continuum and no clear delineation between fault-based and strict liability but also that the name tag on the liability is not necessarily decisive.[22] While core areas of fault-based and strict liability can be clearly identified as, on the one hand, areas where blameworthy conduct justifies liability and, on the other hand, areas where the idea of risk or danger are decisive, there is a wide area in between where both conduct and risk play a role.[23] Based on these observations, it becomes clear that there is indeed a grey area between fault-based and strict liability. Depending on which of the two aspects – conduct or risk – is more important, a certain liability regime will be closer to fault-based or closer to strict liability.[24]

II Grey areas in the PETL

The European Group on Tort Law acknowledged these grey areas in their preparatory work.[25] The Group did, however, not leave it at that but went considerably further in the Principles by way of explicitly addressing these grey areas. With arts 4:201 and 4:202, the Principles include two provisions clearly focusing on these

19 See *E Du Perron*/*W van Boom*, Netherlands, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) no 9; *WH van Boom*, Fault under Dutch Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) no 8.

20 *Steininger* (fn 9) 297.

21 Cf *Steininger* (fn 9) 296f.

22 Cf also *J Flume*, Strict Liability in Austrian and German Law, 12 JETL (2021) 205, 219.

23 *Koziol* (fn 16) 51ff; see also *Steininger* (fn 9).

24 *Koziol* (fn 16) 51.

25 See *Koch*/*Koziol* (fn 5) no 2.

areas where both blameworthy conduct and risk play a role. The current paper focuses on art 4:201 PETL. This article provides:

> **Art 4:201. Reversal of the burden of proving fault in general**
> (1) The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity.
> (2) The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur.

The central element in this grey area provision is the gravity of the danger of the activity in question. Article 4:201 PETL allows for a reversal of the burden of proving fault in light of the gravity of the danger presented by the activity. The Principles do not include a general rule on the burden of proof but, as outlined in the commentary, the Group assumed that each party has to prove the facts relevant for establishing liability.[26] The reversal of the burden of proof for fault in art 4:201 PETL therefore means that it will be on defendants to prove that they acted in accordance with the required standard of conduct.

The fact that the Principles include a reversal of the burden of proof without providing a general rule as a starting point has been criticised,[27] but I think one has to concede that the drafting of the PETL was, as such, quite challenging and it was therefore not only understandable but also quite sensible to limit the endeavour. Clearly it would be interesting to examine questions of proof in further detail: apart from the burden of proof, the standard of proof also plays an important role and it would, of course, also be interesting how structural problems of providing proof can be dealt with. However, that is, in my view, not what art 4:201 PETL is about.[28]

The heading of art 4:201 PETL refers to the reversal of the burden of proving fault in general. But it seems to me that this heading speaks of the reversal *in general* as opposed to the specific reversal for enterprise liability regulated in the second provision of this section, art 4:202 PETL. Moreover the provision is *general* in the sense that it does not use specific cases like harm caused by animals or by build-

26 *Widmer* (fn 3) no 1.

27 *I Giesen*, The Reversal of the Burden of Proof in the Principles of European Tort Law: A Comparison with Dutch Tort Law and Civil Procedure Rules, Utrecht Law Review 2010, 22, 24.

28 The factor of access to proof plays a role in the field of enterprise liability according to art 4:202 PETL. However, one has to take into account that this is not the sole ground for enterprise liability. Instead there are several reasons for this liability, like the likelihood of harm to third parties, possibilities for prevention and for taking out insurance and the idea that who has the benefits should also bear the loss (see *BA Koch*, Liability Based on Fault. Art 4:202, in: European Group on Tort Law (ed), Principles of European Tort Law [2005] no 21). Moreover, one has to keep in mind that a defect of the enterprise is required to trigger the reversal of the burden of proof for fault.

ings as its starting point, where such a reversal of the burden of proof can be found in various jurisdictions.[29] Generalising to all cases of increased danger certainly is a step further, which has rightly been called exceptional.[30]

Nevertheless, art 4:201 PETL has a very specific design – it is devised to allow a tightening of liability on the basis of a heightened danger of the activity from which the damage emanated. It is not, however, a general rule on how and under which circumstances the burden of proof for fault may be reversed or a provision aimed at helping plaintiffs who cannot prove their case. Problems of proof in individual cases are no reason to reverse the burden of proof[31] and it has even been argued that structural problems for plaintiffs to provide proof are, as such, no reason to change the burden of proof,[32] though exceptions may apply in these scenarios.[33] Some advocate a reversal of the burden of proof if and insofar as a liability regime would otherwise be rendered hollow.[34] This, however, is not what art 4:201 PETL does. Difficulties in providing evidence are not mentioned at all and the text only refers to the gravity of the danger of an activity. What we are therefore facing when looking at art 4:201 PETL is a substantial norm taking into account that liability may not only be justified by blameworthy conduct or a certain risk but also by a combination of both factors.[35]

This has to be outlined in some more detail: a claim for compensation is justified if the conditions set for compensation by the law are fulfilled. Whether this is the case depends on the facts. Unfortunately, it is often difficult in court to ascertain what really happened. To make sure the judge can decide a case even if the facts remain unclear, in a so-called *non liquet* situation to use a Latin term, there are

29 See *Widmer* (fn 3) no 8 with further references.

30 *Giesen*, Utrecht Law Review 2010, 25. However, see also art 2050 of the Italian CC (*FD Busnelli*/*G Comandé*, Italy, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability [2002] no 43 ff) or art 493 para 2 of the Portuguese Civil Code (*J Monteiro*/*M Veloso*, Fault under Portuguese Law, in: P Widmer (ed), Unification of Tort Law: Fault [2005] no 124 ff), which provide for a reversal of the burden of proof/a presumption of fault if the damage was caused by a dangerous activity.

31 *H Prütting*, Gegenwartsprobleme der Beweislast (1983) 260; *Karner* (fn 10) 68, no 9f; *I Giesen*, The Burden of Proof and other Procedural Devices in Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2008 (2009) 49, no 9; *H-W Laumen* in: G Baumgärtel/H-W Laumen/H Prütting (eds), Handbuch der Beweislast I (4th edn 2019) 160 no 26. Cf also *T Klicka*, Die Beweislastverteilung im Zivilverfahrensrecht (1995) 67.

32 *Prütting* (fn 31) 260; *H-J Ahrens*, Die Verteilung der Beweislast, in E Lorenz (ed), Karlsruher Forum 2008: Beweislast (2008) 32.

33 See *A Spickhoff*, Gesetzesverstoß und Haftung (1998) 295; *Ahrens* (fn 32) 32; *Laumen* (fn 31) 597 no 17.

34 *I Giesen*, Bewijs en Aansprakelijkeid (2001) 447ff; *Giesen* (fn 31) no 8. Compare also *Chester v Afshar* [2004] United Kingdom House of Lords (UKHL) 41 at 87.

35 *H Koziol* in: E Lorenz (ed), Karlsruher Forum 2008: Beweislast (2008) 162.

rules on the burden of proof. As indicated earlier, the burden of proof for the facts, on the basis of which fault can be assessed, will usually be on the plaintiff.[36] If these facts cannot be ascertained, the judge will decide as if there were no fault. Only if fault is proven by the plaintiff will the defendant be liable.

A reversal of the burden of proof for fault therefore means that the court will decide as if fault were established, even though there is no proof of such fault. A defendant can therefore be held liable without his fault being proven: he may either have been at fault, which was simply not proven, or he may not have been at fault at all, but was unable to prove this.[37]

In the case of a reversal of the burden of proof for fault, the risk of the facts not being ascertainable therefore falls on the defendant. Consequently, a reversal of the burden of proof for fault leads to a tightening of liability, as the defendant will be held liable if he was only potentially at fault.[38] If, however, liability is tightened, there has to be a substantial reason for doing so. In this sense, it has been argued that a tightening of liability through a reversal of the burden of proof can only be justified if there are additional factors justifying liability.[39]

The factor justifying a tightening of liability set out in art 4:201 PETL is dangerousness. The liability according to art 4:201 PETL is, therefore, based on a combination of blameworthy conduct and dangerousness: while liability in principle requires a violation, by the defendant, of the required standard of conduct, the presence of a danger of a certain gravity justifies a reversal of the burden of proof, ie a liability for merely assumed fault on the part of the defendant.[40]

The interesting question clearly is what is to be understood as a danger justifying liability in the sense of this article? Article 4:201 PETL only refers to the gravity of the danger and para 2 defines the seriousness of possible damage and the likelihood of damage as decisive factors in determining the gravity of the danger. While these factors are commonly used to define dangerousness, they provide no guidance as to the degree of dangerousness required.[41] Although this is not expressly mentioned in the provision but only in the commentary,[42] it clearly must be a level of

36 See, however, the presumptions of fault provided for eg in Croatian (art 1045 Civil Obligations Act), Czech (§ 2911 ff Civil Code) and Hungarian (§ 6:519 Civil Code) law.

37 *Koch*/*Koziol* (fn 5) no 6.

38 A similar result can be reached on the basis of presumptions of fault, although technically a presumption works differently than a reversal of the burden of proof: see on this, *Steininger* (fn 9) 83 with further references; *Karner* (fn 10) no 9f; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no D/7/3.

39 *Steininger* (fn 9) 88; *Giesen* (fn 31) no 9; *Karner* (fn 10) no 9; *Koziol* (fn 38) no D/7/2.

40 *Koch* (fn 28) no 7.

41 See *Giesen* (fn 27) 26f.

42 *Widmer* (fn 3) no 3.

gravity greater than that inherent in any regular fault scenario. On the other hand, it will be lower than the abnormally dangerous activities regulated in art 5:101 PETL. Further guidance as to the gravity is, however, lacking. An earlier draft of the Principles had included a general clause for the grey areas, which had at least referred to examples of the danger in question, mentioning wild animals, dogs, buildings or activities such as cycling or downhill skiing.[43] But these examples were not taken over in the PETL. And even in the commentary, no examples are provided. Moreover, the text only provides that the burden of proof *may* be reversed,[44] which further adds to the uncertainty. This leaves the question of under which circumstances art 4:201 PETL will apply quite open.

The problem is aggravated by another feature which becomes apparent when placing the provision in the context of the rules on fault-based and strict liability of the Principles.

The PETL's starting point is fault-based liability with an objectivised standard. Fault liability as provided for in the PETL could, therefore, already be called stricter than fault-based liability in systems with a subjective concept of fault.[45] Moreover, when assessing the standard of care, art 4:102 (1) PETL provides that 'the dangerousness of the activity' is one of the factors that has to be taken into account when determining the required standard of conduct.[46] While we are clearly still in the core area of fault liability, dangerousness has a role to play even here.

On the other hand, the PETL also include a rule on strict liability. Originally, a general clause for strict liability for sources of high danger was planned, but the Group was not able to agree on that provision,[47] which in the end led to art 5:101 PETL, according to which, strict liability only applies to abnormally dangerous activities which are not a matter of common usage and combines this provision with a reference to strict liability provisions of national law.[48] In my view, this is the greatest weakness of the Principles, but as the focus of this paper is not on strict liability, the question will only be dealt with insofar as the limited scope of the PETL's strict liability provision has consequences for the grey areas.

43 A German version of the text of this draft has been published in *BA Koch*/*H Koziol*, Generalklausel für die Gefährdungshaftung, Haftung und Versicherung – HAVE 2002, 368, 379.

44 Critical on this, *Giesen* (fn 27) 26f.

45 See on this, *M Hinteregger*, Art 4:102 Principles of European Tort Law – An Objective or Subjective Standard of Fault – does the difference really matter? (in the present volume, 61).

46 See *Widmer* (fn 3) no 8.

47 A German version of the text of this draft general clause on strict liability has been published in *Koch*/*Koziol* (fn 43) 379.

48 See *Koch* (fn 7) no 6f.

While it is still clear that, in the Principles, dangerousness is the central factor for both strict liability and for tightening liability in the grey areas, limiting the strict liability rule to the margin of abnormally dangerous activities clearly changed the scene. Originally, the provision on grey areas was surrounded by a liability for (objective) fault, on the one hand, and a general clause for liability for sources of high danger, on the other. The clause was able to neatly cover areas where the danger was increased but did not reach the level of *high danger* in the sense of the draft's general clause for strict liability.[49] Now, however, there only is a very limited rule on strict liability, which means that the gravity of a danger covered by the grey area clause is no longer specified as being not only higher than in the regular fault liability scenarios but also lower than the high danger required for strict liability. Another consequence of this limited strict liability clause is that the grey areas in the Principles now extend much further: The commentary[50] speaks of a loophole, which is caused by the restrictive strict liability regime that may be filled by arts 4:201 and 4:202 PETL. However, this is overcharging what art 4:201 PETL can do. A grey area – obviously with different shades of grey – not only exists due to the restrictive approach taken by the Principles but would even exist if the Principles included a more generous general clause for strict liability. A provision like art 4:201 PETL could bridge the gap between fault liability and a regular strict liability regime. But expecting it to bridge the area between fault liability, on the one hand, and strict liability for abnormally dangerous activities, on the other, stretches too far. The result is that it is expected to also cover areas where a high dangerousness of the activity in question would, as such, justify strict liability. In the end, legal practitioners would therefore again have to try and cover situations clearly meriting strict liability on the basis of a mere reversal of the burden of proof.

III Concluding observations

On this basis, a few observations on art 4:201 PETL and the way forward can be added. It is a great achievement of the Principles to embrace the idea of the continuum between fault-based and strict liability and try to build a bridge between these liabilities by way of introducing rules covering the grey areas. Moreover, the idea of doing so in a more general way than most jurisdictions do nowadays by

49 Combining three general clauses (one on liability for fault, a second one on grey areas and a third on strict liability) would therefore seem advisable. In this sense, *Steininger* (fn 9) 297f. Cf also §§ 1295, 1302 and 1303 of the Austrian Draft (*I Griss*/*G Kathrein*/*H Koziol* [eds], Entwurf eines neuen österreichischen Schadenersatzrechts [2006]) which is, however, no longer pursued.

50 *Widmer* (fn 3) no 2.

enumerating certain objects like buildings or animals has to be applauded. Openly acknowledging the continuum between fault-based and strict liability and providing a general provision for this can help to reach consistent and transparent solutions without the need for legal practice to corrupt either fault-based or strict liability.[51]

However, when looking at how art 4:201 PETL is formulated, considerable problems are discernible. First of all, the rule may be misunderstood as a general rule for reversing the burden of proof in cases of structural problems for plaintiffs to prove fault. This is, however, not something art 4:201 PETL can or should achieve and it would be useful to say so to make things clearer until the long awaited EGTL project on burden of proof provides guidance in this respect.

Moreover, and more importantly, a mere reference to the gravity of danger without any guidance as to the level of such danger justifying a reversal of the burden of proof is problematic. Any legal change is a challenge to legal certainty. While this cannot be an argument for rejecting change as such, it should encourage all concerned to try and be as precise as possible. The Principles should therefore at least make clearer what degree of dangerousness justifies a reversal of the burden of proof, in particular by mentioning examples.[52] As it stands, art 4:201 PETL does not provide any guidance at all.

This problem is intensified by the fact that the Principles only provide a strict liability provision for abnormally dangerous activities. This means that the provision designed to cover areas where a combination of conduct and dangerousness are required to justify liability would also have to apply to cases where danger alone should suffice. In his commentary on the Principles, Pierre Widmer once referred to the trick of the reversal of the burden of proof.[53] When being used to substitute a regular strict liability regime, it indeed becomes a trick. The advantage of a separate clause for the grey areas to allow clarity and openness as to the reasons for the liability in question would therefore be seriously undermined. A clause providing for a reversal of the burden of proof to cover grey areas is a good idea but it can only work when both fault-based and strict liability are also covered in their entirety by the system in question. While revisiting the grey area and art 4:201 PETL therefore certainly makes sense, it would be good to remedy the incompleteness of the Principles' strict liability rules first.

51 Cf *Steininger* (fn 9) 296 f.

52 This is all the more important as the assessment of the dangerousness justifying a reversal of the burden of proof varies considerably between European jurisdictions. See *Karner*/*Koch* (fn 11) 50 fn 121.

53 *Widmer* (fn 3) no 9.