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The standard and burden of proof in competition law cases

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1. Introduction

The increasing complexity of competition law enforcement has raised important questions about the challenges faced by competition agencies when proving their cases. One of the main questions is if the standard of proof required to prove antitrust violations or to block mergers has been set at a too high, making it significantly more demanding to meet.

This question arises from a variety of factors. The growing complexity of cases and the increasing reliance on complex economic analysis to explain market dynamics and potential harm has certainly made competition cases harder to prove.[1] The "more economics" or effects-based approach might have also impacted on the analysis that competition authorities have to go through when building their cases. In addition, economic theories are not always easy to translate into persuasive legal arguments, and yet judges are often asked to grapple with complex economic evidence and asked to turn economic theories into solid legal requirements.[2]

For a long time, competition authorities' approach to enforcement was considered formalistic and with the economic analysis taking a secondary role. The increasing role of economic analysis in the competition decision-making processes have made decisions more accurate, but at the same time it may have also added complexity, making violations harder to prove to the required legal standard.[3]

Competition cases are also subject to a robust judicial scrutiny, with courts often requiring a high level of evidentiary standard before finding (or confirming) a violation (see section 4, subsection 0) or blocking a merger. This means that even when having a solid case, authorities may still fall short of satisfying the court's evidentiary standards. Competition authorities are aware of this detailed judicial scrutiny and build their cases in a more thorough and careful way to withstand legal challenges.[4]

Given the increased sophistication of competition cases, it is worth analysing if this has had an impact on the burden of proof that rests on competition authorities and its relationship with the standard of proof. Although the specific rules on the standard and burden of proof vary across jurisdictions, competition authorities are grappling with the same fundamental issue: how to present compelling, legally and economically sound arguments that meet the required legal standards. This is particularly evident in abuse of dominance and merger cases.[5] If the standard of proof is set at a too high level, making overly demanding for competition authorities to meet it, this may lead to a less effective enforcement (Kalintiri, 2021[1]).

To address these questions, this paper is structured as follows: **Section 2** defines what is meant by the standard of proof and the burden of proof, distinguishing between its two aspects: the legal burden of proof and the evidential burden.[6] **Section 3** analyses the evidentiary requirements that competition authorities have to meet in order to establish an infringement, block a merger or impose remedies. This section provides a list of factors that, among others, interact in the process of persuasion and that influence decision makers when reaching a decision. This section also analyses the impact these factors may have on the evidentiary burden that rests on competition authorities and their relationship

with the standard of proof. **Section 4** discusses recent challenges faced by competition authorities in meeting the standard of proof and revisit the current policy debate, including some proposals such as shifting the burden of proof in certain cases by introducing new presumptions or implementing ex ante regulation. Finally, **section 5** concludes by emphasising the importance of understanding the relationship between the standard and the burden of proof in competition cases, along with the need to maintain effective enforcement while upholding the principles that underpin competition law.

While the OECD Competition Committee has not directly discussed this topic before, the issue of the standard and burden of proof has cut-across on previous discussions. In particular, discussions in the Use of Structural Presumptions in antitrust (OECD, 2024[2]), Standard of Review by Courts in Competition Cases (OECD, 2019[3]), Judicial Perspectives on Competition Law (OECD, 2018[4]), Safe Harbours and Legal Presumptions in Competition Law (OECD, 2017[5]), Agency Decision-Making in Merger Cases (OECD, 2016[6]) and Judicial Enforcement of Competition (OECD, 1997[7]).

2. Evidentiary principles and standards in competition cases

Competition law is a social construct that derives from the foundations and values of each jurisdiction and as such, it adapts to social reality, experience and logic, and will vary over time. Given these foundations and values, competition laws differ between jurisdictions, but they reflect large degrees of consensus on what competition law is set to achieve (Ezrachi, 2017[8]).

The rules of evidence and proof are embedded in the competition law framework and therefore, the specific provisions may vary between jurisdictions. Despite the differences that one may find, evidentiary rules aim to ensure the accuracy of fact-finding (Castillo de la Torre and Gippini, 2024[9]). These rules determine what and how evidence may be provided to a decision maker that must resolve a factual dispute (Posner, 1999[10]).

Evidentiary rules also reflect policy choices and take into account efficiency considerations – for example, considering that the duration of an investigation or procedure necessarily requires resources – and procedural fairness, such as determining the scope of admissible evidence and establishing fair and clear rights and obligations for the parties.[7]

These rules are also interpreted in light of the goals of competition (Jenny, 2023[11]). These goals are not often explicit and, therefore, the same set of provisions can be interpreted differently across jurisdictions and even within the same jurisdiction over time. According to (Jenny, 2023[11]), the effectiveness of competition law and the intensity of enforcement depend on how the legal tests are designed and on the standard of proof applied; the cost of enforcement, on the other hand, depends on the allocation of the burden of proof and the use of presumptions to simplify the burden of proof; and

the predictability of enforcement depends on how consistent the legal test and the standard of proof are applied.

This section provides an overview of some of the key concepts related to the rules of evidence in competition cases.

2.1 Standard of proof

The standard of proof indicates the degree to which a party must prove its case, therefore, it is the degree of necessary persuasion (Clermont and Sherwin, 2002[12]). This standard determines the threshold of evidence required to consider a hypothesis proven for the purposes of the decision to be taken (OECD, 2019[3]; Clermont and Sherwin, 2002[12]). In most jurisdictions, there will not be an explicit provision stating which is the standard of proof to be applied.

The presumption of innocence is a principle applied in competition proceedings and the standard of proof will determine the threshold needed to overcome this presumption.[8] Depending on the legal consequence of the decision, for example finding of an infringement of the law (i.e. civil, administrative or criminal), a different level of persuasion will be needed to establish the facts in question. The more severe the consequences for the concerned party, the higher the level of persuasion required to rebut the presumption of innocence. Thus, depending on whether the aim is, for example, to carry out a dawn raid or an inspection, to issue a request for information, to block a merger, or to impose a sanction for an infringement, a different standard of proof might be applied.

The need for setting a standard of proof is partly due to the fact that absolute certainty is not possible to achieve. Hence, a probabilistic reasoning has to be made to affirm that a certain fact can be considered as proven, given the available evidence (Castillo de la Torre and Gippini, 2024[9]).

Standards of proof are traditionally determined according to the degree of belief on the claim at stake or to the probability value attributed to the claim (Gippini, 2010[13]; Clermont and Sherwin, 2002[12]). This probabilistic scale moves across a theoretical range of possibility and probability levels, starting with the mere possibility, and following through plausibility, to more than mere plausibility, to being established on the balance of probabilities, up to the point of beyond reasonable doubt, which means proof to a virtual certainty.[9]

Within this sliding scale of probabilities,[10] the standards of proof used in different enforcement areas include:

- Beyond reasonable doubt.
- Clear and convincing evidence (i.e. “firm conviction”, or “much more likely than not”).[11]
- Balance of probabilities or preponderance of evidence (i.e. “more likely than not”).

The standard of proof differs if the consequences are civil, administrative or criminal. The same evidence may be considered sufficient to prove a fact in civil proceedings but insufficient in a criminal one (Lamadrid and Balcells, 2015[14]). In a proceeding that could lead to criminal sanctions, a

higher standard of proof is expected to compensate the imbalance of powers between the state and the individual involved, given the severity of the sanctions that could be imposed;[12] whereas in a civil procedure there is no reason to have a stricter standard or proof (Kalintiri, 2021[1]).

The standards of proof also vary between jurisdictions and legal systems. The differences arise from historical, institutional and procedural backgrounds (Castillo de la Torre and Gippini, 2024[9]).

Evidentiary rules differ significantly depending on the nature of the case in question and on the enforcement system in which the case is tried. According to (Clermont and Sherwin, 2002[12]), any legal system is not ideally suited to search the truth,[13] however the evidentiary rules will ensure the accuracy of fact-finding (Castillo de la Torre and Gippini, 2024[9]).

Another important distinction concerns the applicable standard of proof in antitrust/conduct cases and in merger control. Given the nature of the analysis involved and the consequences that each decision may entail the standard of proof is usually set on a different level of the sliding scale. The standard of proof that is usually applied for conduct cases is a less strict than the beyond reasonable doubt standard used in criminal cases, but higher than the balance of probabilities.[14] In contrast, merger control requires a prospective analysis and there are no sanctions imposed, therefore the standard of proof is usually set on a lower level of the sliding scale (i.e. the balance of probabilities), that is, that a merger to be prohibited needs to be more likely than not to lessen competition if implemented[15] (Kalintiri[15]; Clermont and Sherwin[12]; Gippini[13]; Gavil[16]).

2.1.1 Standards of proof applied in competition cases in different jurisdictions

The approach to evidence differs between common-law and civil-law systems (box 2.1**Error! Reference source not found.** for a description of the enforcement system applied in different jurisdictions). According to Clermont and Sherwin (2002[12]), in common-law systems, the approach to evidence is probabilistic, that is, something will be proved as a fact based on a matter of probabilities. Decision makers can find that a fact "probably" happened, "highly probably" happened, or "almost certainly" happened, as the truth – and therefore fact-finding – is considered as a matter of probability, falling short of absolute certainty. Whereas in civil-law jurisdictions the approach to evidence is a persuasive exercise, more than a probabilistic one. The approach to evidence is that the party must convince the decision maker that the assertions are true (Clermont and Sherwin, 2002[12]).

Clermont and Sherwin (2002[12]) consider that the civil-law standard of proof of "intime conviction" is higher than the common-law "balance of probabilities" and that the difference between both systems derives mainly from historical reasons.[16]

For example, in the United Kingdom, the Court of Appeal considered that only two standards are applicable, that is the civil standard, or "preponderance of evidence", and the criminal standard, that is "beyond reasonable doubt" and that there is no "intermediate" standard. However, it stated that, within the civil standard, the more serious the allegation, the more cogent should be the evidence brought before the court concludes that the allegation is established on the preponderance of probability.[17]

The difference then lies in the conceptualisation of the standard of proof and on the approach each system adopts to establish a fact as proven. In common-law systems, these standards are sometimes defined *ex ante* in terms of probability, while in civil-law countries, identifying these standards is often an *ex post* construction (Gippini, 2010[13]).

The standard of proof is a rule of horizontal application (Kalintiri, 2021[1]). This means that the same standard is applicable to all merger decisions, irrespectively of whether they are authorising or prohibiting a concentration and it does not vary either according to the type of concentration examined or according to the inherent complexity of a theory of competitive harm put forward. Similarly, for conduct cases, the standard of proof is the same irrespectively of the type of conduct. Therefore, the standard of proof will not vary for a cartel case or for an abuse of dominance, and within each of the conducts.

Box 2.1 Enforcement systems in common-law and civil-law jurisdictions

Common law jurisdictions usually have a judicial or prosecutorial enforcement system, although it is not limited to them. In a judicial enforcement system, the competition authority is responsible for conducting the investigation and for identifying the anticompetitive behaviour. It is also responsible for bringing the case before a court, and for supporting its case with sufficient evidence to convince the court that the standard of proof has been met to find an infringement. This first instance decision can be appealed before a court of second instance and sometimes this judgement can be subject to a further review of third instance. The OECD Members that have a judicial enforcement system are Australia, Austria, Canada, Chile, Ireland, Israel, New Zealand and the United States.

Civil law jurisdictions usually have an administrative enforcement system, where the competition authority is responsible for conducting the investigation and issuing the final decision, which is subject to judicial review by the courts on, usually, two instances. The majority of OECD members have an administrative enforcement system in place, and some have a system that combines both judicial and administrative elements, such as New Zealand and Australia[1].

Note: [1] New Zealand has a legal system that combines both judicial and administrative elements, as some decisions are made by the Commerce Commission, while others need to be brought to New Zealand's High Court. Australia also has a legal system that combines both elements, as the Australian Competition and Consumer Commission conducts investigations concerning infringements of the Australian Competition and Consumer Act and makes final determinations on restrictive trade practices and merger clearances (appealable before the Australian Competition Tribunal), while other cases must be brought before the Federal Court of Australia at first instance.

Sources: OECD (2019), "The Standard of review by courts in competition cases", *OECD Roundtables on Competition Policy Papers,* No. 233, OECD Publishing, Paris. Available at https://doi.org/10.1787/69008bd2-en and OECD (2018), "Judicial Perspectives on Competition Law", *OECD Roundtables on Competition Policy Papers,* No. 212, OECD Publishing, Paris. Available at https://doi.org/10.1787/d04d49e8-en.

Balance of probabilities or preponderance of evidence

In common-law systems, the standard of proof for competition proceedings is, typically, the balance of probabilities according to which an infringement is established if a rule has "more likely than not" been breached.[18] Whereas in criminal enforcement, the standard is to prove the breach beyond a reasonable doubt.

Some examples of the use of this standard of proof in common-law countries are as follows:

- In Australia, "what is currently required is that the court must conclude that it is more probable than not that the conduct in issue involves a real chance of the proscribed effect" (Jagot, 2021[17]). This "real chance" is not evaluated on a numerical basis, as it is a qualitative assessment. A "real

chance" is necessarily something less than a "more probable than not chance" and that chance cannot be real if it is merely trivial or speculative (Australian Gas Light Company Case).[19]

- In New Zealand, the Commerce Act 1986 establishes that the standard of proof for any proceeding that imposes a pecuniary sanction "is the standard of proof applying in civil proceedings",[20] i.e. the balance of probabilities.
- In the United States, the preponderance of evidence is the one that governs civil matters, while for criminal matters, the Department of Justice bears the burden to prove the allegations "beyond a reasonable doubt".[21]
- In the United Kingdom, the balance of probabilities is also applied for competition cases, stating that "strong and convincing evidence will be required" before prohibitions can be found to be proved "even to the civil standard" (Napp Pharmaceutical Holdings Case).[22]

Clear and convincing evidence or "intime conviction"

In civil-law systems, usually decision makers discretionarily evaluate the evidence (under the principle of free evaluation of the evidence) and the parties must prove their facts in a sufficient convincing manner to satisfy their "intime conviction" (Castillo de la Torre and Gippini, 2024[9]; Jenny, 2023[11]).

The decision maker must be persuaded to the point of "intime conviction", which is an "inner, deep-seated, personal conviction of the judge" (Clermont and Sherwin, 2002[12]).

The standard of "intime conviction" or "firm conviction" entails that the establishment of an infringement must be to a threshold that of evidence sufficiency that is more demanding than the civil standard of proof, as it requires a higher degree of probability or belief for a factual allegation to be accepted as true (Kalintiri, 2023[15]). Accordingly, Clermont and Sherwin (2002[12]) mention that this is an intermediate standard of standards, often grouped under the banner of "clear and convincing evidence" and roughly translated as 'much more-likely-than-not'. Therefore, the "intime conviction" or "clear and convincing evidence" standard of proof can be interpreted as more demanding than the presumptive civil standard of "preponderance of the evidence" (Gavil, 2008[16]).

Some examples of the use of this standard of proof in civil-law countries are as follows:

- In the European Union, the standard of proof for conduct cases is "firm conviction". The EU courts have stated in several decisions that the European Commission must "show precise and consistent evidence to support the firm conviction that the alleged infringement was committed" [emphasis added] and that "it is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets the requirement".[23] In merger control, the standard of proof is the "balance of probabilities" (Hutchison 3G UK/Telefónica UK case, box 2.2).
- In the French system, the standard is one of "intime conviction",[24] and the judge may conduct a free evaluation of the evidence. "This means that the judge is actually not required to apply any standard of proof, as understood by lawyers trained in common law, since he or she decides only according to his or her personal conscience" (Castillo de la Torre and Gippini, 2024[9]).

- In Spanish law, the concept of "rules of sound criticism" *(reglas de la sana crítica)* is adopted to assess evidence. The level of proof required to conclude that a party has satisfied the evidentiary standard and discharged its burden of proof is what is necessary for the judge to reach a firm persuasion or "intime conviction" in each case (Lamadrid and Balcells, 2015[14]; Castillo de la Torre and Gippini, 2024[9]).
- In Chile, the same rules of sound criticism are used to determine if the body of evidence "form conviction of the Court",[25] i.e. to form a strong level of persuasion of the Court. The Court has stated that proving something beyond reasonable doubt would be "applying a higher standard of proof than the required for these proceedings".[26]
- In Mexico, the standard is less than beyond reasonable doubt but higher than a balance of probabilities as there must be "sufficient evidence" to consider that conduct or a fact has been proven.[27] The Court has stated that the Competition Commission has the duty to state the reasons why it has "sufficient elements of conviction" to determine an infringement based on the available evidence.[28]
- In Brazil, the system of free motivated conviction is adopted as a rule. The judge examines the evidence and forms his or her conviction regarding the facts being proven in the case.[29]

Box 2.2 The European Commission case in CK Telecoms

The case involves the European Commission's decision to block a proposed concentration between CK Hutchison Holdings Ltd and Telefónica Europe (O2) in the UK telecommunications market. CK Hutchison, through its subsidiary, sought to acquire sole control over O2, resulting in a market dominated by three major players: BT/EE, Vodafone, and the merged entity. The Commission argued that this concentration would significantly impede effective competition in both the retail and wholesale telecommunications markets. The decision was based on concerns about non-coordinated effects, the elimination of competitive constraints, and potential harm to consumers through price increases and reduced service quality.

CK Telecoms challenged this decision before the General Court. The General Court annulled the Commission's decision stating that a higher standard of proof should have been applied. In its judgement, the General Court stated that:

> *In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, the Commission is required to produce sufficient evidence to demonstrate with a* ***strong probability*** *the existence of significant impediments following the concentration. Thus,* ***the standard of proof applicable in the present case is therefore stricter*** *than that under which a significant impediment to effective competition is 'more likely than not', on the basis of a 'balance of probabilities', as the Commission maintains.* [emphasis added] *(para. 118, ECLI:EU:T:2020:217).*

The European Commission appealed the General Court's judgment before the Court of Justice of the European Union (CJEU). The Commission claimed that the General Court applied an

incorrect standard of proof as it demanded a stricter standard of proof than the law requires, stating that the Commission only needed to demonstrate that the concentration was "more likely than not" to impede competition effectively. In its judgement, the CJEU stated that:

> *It must be held that the Commission is* ***not required to comply with a higher standard of proof*** *in relation to decisions prohibiting concentrations than in relation to decisions approving concentrations.* (…)
>
> *It follows that the requirements concerning the taking of evidence, including the standard of proof, do not vary according to the type of decision adopted by the Commission in merger control.* (…)
>
> *It is sufficient for the Commission to demonstrate, by means of a sufficiently* ***cogent*** *and* ***consistent body of evidence,*** *that it is* ***more likely than not*** *that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it.* [emphasis added]

The CJEU ruled that the Commission is not subject to a higher standard of proof when prohibiting a concentration than when approving one. It clarified that the Commission must provide a **sufficiently cogent and consistent body of evidence** to show that a concentration is **more likely than not** to significantly impede competition. The CJEU found that the General Court had erred in law by applying an incorrect standard of proof and upheld the first ground of appeal raised by the Commission.

Source: Commission v CK Telecoms UK Investments, C-376/20 P (European Court of Justice 13 of July of 2023).

2.1.2 Conclusion

In competition cases, multiple jurisdictions use the "balance of probabilities" or "preponderance of evidence" standard of proof or an intermediate one that is higher than the "balance of probabilities" standard but less strict than "beyond reasonable doubt" ("intime conviction"), to establish the existence of an infringement, and a "balance of probabilities" standard to block a merger. For criminal enforcement, for example when cartels are enforced through a criminal procedure, the standard used is "beyond reasonable doubt" due to the severity of the consequences.

However, the standard of proof is not always explicitly stated, as adjectives such as "convincing", "relevant", "reliable" and "credible" can be found in the decisions of competition authorities and courts, but these generally refer to the characteristics of the evidence and not to the threshold to be met.

Ultimately, irrespective of the point on the sliding scale of probabilities at which the standard of proof is set, competition authorities and courts reach their decisions when they are **sufficiently persuaded**, based on **clear, convincing** and **consistent** evidence, that an infringement has been proven or that a merger should be blocked. In practice, achieving this level of persuasion depends on the specific characteristics of the case and in a combination of factors (see Section 3that influence whether the decision-making competition authority or court is persuaded of the merits of the case (Lamadrid and Balcells, 2015[14]).

However, this should not be regarded as a mere subjective assessment, as the decisions should be supported on express and clear justification. The principle of free evaluation of the evidence (discretionarily evaluate the evidence), in accordance with the principles of fairness and transparency, entails the obligation to duly state the reasons showing that the findings of the decision maker have firm basis in the evidence adduced. This should not be interpreted as stating the logical reasoning of the fact-finder, but only that the decision in duly justified (Castillo de la Torre and Gippini, 2024[9]).

2.2 Burden of proof

Under the rule of law, a fundamental principle is that the entity submitting a claim must prove the facts on which that claim is based (that is called, the burden of proof). Hence, the rules on the burden of proof determine who must prove a fact and adduce the related evidence. The party bearing the burden of proof is expected to put forward sufficient evidence to meet the appropriate legal standard (Gippini, 2010[13]).

The burden of proof has two different aspects: the **burden of persuasion,** also known as legal burden, and the burden of production or **evidentiary burden.** The legal burden of proof is stable or static and rests upon a specific party throughout the proceedings, while the evidentiary burden is dynamic and may shift between the parties (Kalintiri, 2015[18]).

Usually, decision makers reach a decision in light of incomplete information and therefore the risk of error cannot be excluded. The rules on the burden of proof reduce and distribute these errors (Kalintiri, 2023[15]).

2.2.1 Legal burden of proof

This aspect of the burden of proof can be interpreted as the *duty* of persuading the decision maker of the existence of a fact (Posner, 1999[10]). Therefore, the legal burden of proof, or burden of persuasion, determines who will suffer the consequences of not proving a fact to the requisite standard.

The allocation of the legal burden of proof answers the question of **who** has to persuade the decision maker of the existence of a certain fact, and this party bears the risk of non-persuasion. Consequently, the burden of proof has the function of determining for whom the unfavourable consequences must be produced when a fact has not been proven.

In competition proceedings, the allocation of the legal burden of proof indicates, on the one hand, which party to a case has to prove that the challenged restraint or transaction has, or is likely to have, an anticompetitive effect. On the other hand, it also determines who must show a procompetitive rationale to the conduct or merger under (OECD, 2017[5]).

2.2.2 Evidentiary burden of proof

The evidentiary burden of proof, or burden of production, indicates who must adduce the evidence in support of an allegation (Kalintiri, 2023[15]). This aspect of the burden of proof can be interpreted as the *duty* of submitting the relevant evidence to support the allegation of a fact (Posner, 1999[10]). While the legal burden of proof or persuasion does not shift from one party to the other, the burden or duty of producing evidence may shift between the parties.

The burden of production shifts from one party to the other as they produce the evidence to support their allegations and then, to refute the other party's allegations. Therefore, when the party bearing the initiation burden of proof has adduced sufficient evidence to support its allegation, the burden shifts to the other party to rebut that allegation by adducing evidence that support this 'refutation'. It is a "sort of procedural ping-pong in which the burden shifts each time a party has made a *prima facie* case".[30]

For example, the party that bears the initial burden of producing sufficient evidence of likely competitive harm (i.e. the competition authority) can satisfy this burden with direct or circumstantial evidence or by using applicable presumption, or both. When it satisfies this requirement, the burden of production shifts to the other party, in order to provide justifications or to rebut the presumptions. If this party satisfies this requirement, the burden of production then shifts back to the competition authority, who bears the ultimate burden of persuasion (Gavil and Salop, 2017[19]).

3. Evidentiary standard

The standard of proof is a static concept, however **how** easy or difficult it is to satisfy the standard is a dynamic concept related to the evidentiary burden of proof or **evidentiary standard.** Depending on where the standard of proof is set, it will be more or less difficult to discharge the burden of proof. As stated by Clermont and Sherwin (2002[12]), "any high standard of proof makes burdens of proof critical to outcome".

The evidentiary burden of proof on competition authorities to prove a case may increase depending on what needs to be proven. This evidentiary burden or evidentiary standard defines the quantity and quality of evidence needed to satisfy the relevant threshold to find a violation or prohibit a merger. Whether the standard of proof is met depends on the characteristics and complexity of what has to be proven, as well as of the interplay of other variables that interact when assessing a case.

There is extensive literature that has explored these variables and, at least, the following factors interact in the process of persuasion and impact on how easy or how difficult it is to discharge the burden of proof to meet the relevant threshold (i.e. they impact the evidentiary burden of proof) (Gippini, 2010[13]; Jenny, 2023[11]; Kalintiri, 2021[1]):

- Design of the legal test.
- Characteristics of the evidence.
- Applicable presumptions.
- Temporality of the facts to be proven.
- Complexity of the case and decision maker's perception of economic "normality".
- Risks of error.
- Standard of review.

These factors impact the evidentiary burden of proof and therefore are taken into account by the decision maker, whether it is the competition authority or the judges when exercising judicial review, as they impact on the ease or difficulty of proving a case.

The following subsections analyses how the variables that influence the process of persuasion interact with the standard of proof and the challenges on meeting the relevant threshold.

3.1 Design of the legal test and its conditions

The legal test defines the conditions under which practices are considered as allowed or prohibited. The legal test is different for each type of conduct and the particularities of the design will vary from each jurisdiction. The legal test answers the question of **what** factors needs to be proven by the authority, while the standard of proof is **whether** it has been proven to the relevant threshold (Ibáñez Colomo, 2023[20]).

The distinction between the legal test and the standard of proof can be clearly observed when considering that the legal test changes for every type of conduct, while the standard of proof remains constant, as it is a horizontal rule.

The legal test defines the conditions under which certain practices will be considered prima facie lawful or, on the contrary, prima facie unlawful (Ibáñez Colomo, Pablo, 2019[21]).

The legal test also determines the threshold of effects, that is, up to what level the competition authority needs to prove the actual or potential effects of certain conduct or merger. This threshold of effects must not be confused with the standard of proof, even though both are commonly expressed in probabilistic language.[31]

The legal test does not directly affect the standard of proof, but it does impact on how easier or more difficult it is to meet such standard, depending on how it is designed and the requirements that it demands. A stricter substantive test will increase the evidentiary burden on competition authorities, making more difficult to discharge the burden of proof because the substantive conditions are difficult to meet (Castillo de la Torre and Gippini, 2024[9]).

3.2 Characteristics of the evidence

The quality and quantity of the available information will impact on how easier it is to meet the standard of proof. While having more evidence is preferable, it is not always an easy task for competition authorities who face different challenges when gathering evidence to build their cases.

Competition authorities often rely on a combination of direct and indirect evidence. Direct evidence demonstrates directly the relevant fact, whereas indirect evidence proves a fact through logical reasoning, piecing together multiple elements to reach a conclusion. Common types of direct evidence include documents and oral or written statements, while circumstantial evidence include economic evidence, and other evidence, such as communications between parties (for cartel cases) that on *itself* may not prove directly the existence of an infringement (OECD, 2006[22]).

For horizontal cases, economic evidence can be *conduct evidence*, such as pricing behaviours, and *structural evidence*, such as market concentration (OECD, 2006[22]). For abuse of dominance cases, economic evidence can be *qualitative*, such as internal documents, and *quantitative*, such as descriptive evidence on firms and markets along with quantitative techniques including econometric analysis (OECD, 2021[23]).

The rules on the admissibility of each type of evidence depend on each jurisdiction and they determine how the evidence is introduced to the file. However, given that a competition authority cannot gather *all* possible evidence, it is expected to gather *sufficient* evidence to support its findings and to ensure that the decision withstand any potential challenge (Castillo de la Torre and Gippini, 2024[9]).

For example, obtaining direct evidence of a cartel agreement – evidence that identifies a meeting or communication between the subjects and describes the substance of their agreement – requires special investigative tools and techniques and might not always be possible. Thus, competition authorities may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence (OECD, 2006[22]), which increases the evidential burden on competition authorities.

Having more evidence will necessarily increase the weight of the argument and strengthen the conclusion of the case, making it easier to meet the standard of proof (Kalintiri, 2021[1]; Castillo de la Torre and Gippini, 2024[9]).

Consequently, the ease or difficulty with which a competition authority can prove a case or block a merger depends on the quality and quantity of the whole body of the evidence.

3.3 Applicable presumptions

The existence of presumptions may ease the burden of proof on competition agencies as presumptions and/or safe harbours (i.e. presumption of legality) create shortcuts[32] by limiting the need for detailed economic analysis (OECD, 2017[5]) (box 3.1).

Therefore, presumptions play a key role in setting evidentiary burdens. The recognition of a presumption is a question of law, and it would be rationally based on logic, experience, and economic evidence (Gavil and Salop, 2017[19]) and (OECD, 2017[5]).

Presumptions involve factual inferences and play a role in the process of proof by allowing the party with the burden of persuasion to meet the standard of proof for the presumed fact. This shifts the burden of proof to their opponent.

Given that presumptions allow to establish an unknown fact B, based on proof of preliminary fact A, they help the party with the legal burden of proof to discharge it. The use of presumptions serves to streamline enforcement, redistribute regulatory burdens, and provide operational criteria for decision-making while maintaining a balance between legal predictability and flexibility.

Box 3.1 Presumptions and safe harbours

There are different types of presumptions that can be adopted to alleviate the burden of proof:

- **Rebuttable Presumptions:** These allow a party to challenge and disprove the presumption by providing evidence to the contrary. For example, if a conduct is presumed to be anticompetitive, the defendant can provide evidence showing that it has pro-competitive effects.
- **Conclusive Presumptions:** These cannot be challenged or overturned, even with contrary evidence. Once established, they lead directly to a specific legal outcome.

The distinction between rebuttable and conclusive presumptions may be blurred depending on how difficult it is to rebut a presumption in practice. Some presumptions may be theoretically rebuttable but almost impossible to overturn in reality.

Additionally, presumptions can be categorised in procedural, evidentiary and substantive presumptions:

- **Procedural Presumptions:** These primarily serve the purpose of regulating how parties interact within a legal or administrative process. They can shift the burden of proof or make assumptions about the conduct of parties during investigations. An example is the presumption of innocence, where the burden of proof falls on the accusing party.
- **Evidentiary Presumptions:** Also known as "inferences" allow certain facts to be established based on the existence of other facts. They often shift the burden of proof from one party to another. For instance, in the context of cartels, if a company attends meetings where anti-competitive agreements are discussed, it is presumed to be part of the cartel unless it can prove otherwise. While in unilateral conduct cases, large and sustained market shares may create a presumption of dominance.
- **Substantive Presumptions:** These relate to the core substantive issues of competition law. They determine the legal effects or outcomes based on the presence of certain facts. Substantive presumptions can be either rebuttable or irrebuttable, and they often resemble legal rules. Substantive presumptions can also take the form of "safe harbours" where certain practices (e.g. above-cost pricing in predatory pricing cases) are presumed to be legal.

Source: OECD (2017), "Safe Harbours and Legal Presumptions in Competition Law", OECD Roundtables on Competition Policy Papers, No. 210, OECD Publishing, Paris. Available at https://doi.org/10.1787/e5ace536-en.

3.4 Temporality of the facts

Adjudicating causality requires the decision maker to draw conclusions from imprecise and often incomplete information, whether relating to future or past events.

Proving a future fact is more difficult and requires a higher effort than proving a past one. Therefore, the level of proof is usually higher for past events than for future events, as achieving certainty about future facts is an impossible task. However, even if it may seem intuitively easier to achieve higher certainty of past events, the decision maker will not either achieve total certainty of what occurred in the past and will only assess the degree of likelihood that something happened (Gippini, 2010[13]).

Evaluating the possible consequences of a given practice necessarily involves an assessment of future events. Consequently, the anticompetitive consequences of a practice may be subject to a lower standard of certainty than the existence of the practice itself. That is, there will be a strict scrutiny and high evidentiary requirements to the determination of a practice, but a more relaxed one in relation to the effects of such practice (Gippini, 2010[13]).

Therefore, the temporality of the fact to be proven will affect the evidentiary standard required to meet the standard of proof.

3.5 Complexity and decision makers' perception of economic normality

Decision theory provides a methodology for information gathering and decision making when outcomes are uncertain, information is inherently imperfect, or difficult to obtain. This methodology is a rational process in which a decision maker begins with initial beliefs based on prior knowledge and then gathers additional evidence to make a better, more accurate decision (Gavil and Salop, 2017[19]).

This prior knowledge of the decision maker is formed on "existing norms and beliefs, past experience, common sense, contemporary knowledge and rules of thumb" (Kalintiri, 2021[1]). This information is used by the decision maker to give sense to the evidence.

When assessing the evidence, decision makers make assumptions that are constructed on experience-based generalisations, i.e. general conceptions about *how the world works* (Kalintiri, 2021[1]; Castillo de la Torre and Gippini, 2024[9]). These generalisations form the conception of "economic normality", and it plays a crucial role in meeting the standard of proof, regardless of where it is set out: trying to prove a fact that is conceived by the decision maker as "not normal" or "unusual" will be more challenging and will require producing more evidence to persuade the decision maker.

A classic example of "economic normality" was put forward by Lord Hoffman in the decision of the Secretary State for the Home Department v. Rehman (2023): "some things are inherently more likely than others. It would need more cogent evidence to satisfy that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian".[33]

One should bear in mind that the perception of "normality" is not always explicit and can change over time as it is non-case specific conception on how the world works. These generalisations can be rebutted by the parties by providing evidence that shows that they are not applicable.

Similarly, the inherent complexity of a theory of harm increases the evidentiary standard for the competition authority in meeting the standard of proof, because proving a complex chain of causality demands a higher evidentiary standard.

For example, the digital economy has certain complex characteristics that increase the difficulty for competition authorities on meeting the standard of proof when proving conduct or blocking a merger, such as multi-sidedness, substantial economies of scale and scope, strong network effects, reliance on large amounts of user data, switching costs, disruptive innovations, vertically integrated and conglomerate business, among others (OECD, 2022[24]). This may increase the challenge on meeting the standard of proof, due to the increase in the evidentiary burden on competition authorities to prove potential effects on rapidly evolving markets (see Section 4

In consequence, the decision maker's perception of economic normality,[34] whether is the competition authority or the judge, as well as the complexity the case, may result in a heightened level of scrutiny, thus increasing the evidentiary standard to consider a fact as proven.

3.6 Risks of error

Given that it is not possible to achieve total certainty of the existence of a fact, decision theory recognises that some erroneous decisions are inevitable. In competition law enforcement, decision makers face the risk of two types of errors: Type I Error (false positive), when a competition authority incorrectly finds an infringement of competition law where none exists, which can result in the over-enforcement of competition law; and Type II Error (false negative), when a competition authority fails to identify and act against an actual anti-competitive behaviour or allows a merger that significantly harms competition. Type II errors result in under-enforcement, allowing anti-competitive practices to persist.

Decision makers will usually require a different degree of persuasion depending on interests at stake and on the incentives and disincentives that the decision would imply, for example, the possible "chilling" effect on competition (Gippini, 2010[13]). Therefore, decision makers might demand stronger proof when costs of error seem high.

This balance of error costs can explain why competition authorities face a higher level of evidentiary standard to prove certain cases, because the tradeoffs are different in each case and that influences the level of evidentiary demands. Borderline cases may increase the evidentiary standard and may require a higher degree of certainty to avoid high error costs (Gippini, 2010[13]).

Therefore, while maintaining the same standard of proof, the evidentiary standard may vary depending on the interests at stake, to avoid a "chilling effect" on desirable competition or, conversely, to prevent a detrimental conduct or merger from being allowed.

3.7 Standard of judicial review

Another element when determining if a competition authority has met the standard of proof is the standard of judicial review. In any competition enforcement system, whether court-based or administrative, and irrespective of its characteristics, the effectiveness and credibility of enforcement requires that there is access to ex post review of competition cases by an independent court.

Therefore, first-instance competition decisions are always subject to review by a court (OECD, 2019[3]).

The standard of judicial review will decide if whether the primary decision maker has met the standard of proof (Castillo de la Torre and Gippini, 2024[9]).

The intensity of review that courts may exercise when reviewing the lawfulness of a challenged act or, put it differently, the degree of deference accorded by courts to the bodies which adopted the challenged act, will impact on the difficulty of the competition authority on proving a case. The complex economic evaluations made by competition authorities, such as market definition, assessment of dominance and effects, are usually subject to a more deferential standard of review by courts (Kalintiri, 2021[1]).

3.8 Conclusion

When reaching a decision, competition authorities and courts apply the respective rules of evidence to address four fundamental questions:

- **What** needs to be proven, i.e. the substantive provision or **legal test.**
- **Who** needs to prove it, i.e. the legal **burden of proof.**
- **How** to prove it, i.e. the evidentiary burden of proof or **evidentiary standard.**
- **Whether** it has been proven to the relevant threshold, i.e. the **standard of proof.**

While maintaining the same standard of proof, the specific characteristics of a case may increase the evidentiary standard (or evidentiary burden) of competition authorities to meet the relevant threshold for establishing an infringement or for blocking a merger.

The interaction of, at least, all the elements mentioned will affect how difficult it is to meet the standard of proof, regardless of where the threshold is set out. Therefore, they play a crucial role on how the standard of proof can be met.

In practice, competition authorities and courts will establish an infringement or block a merger when they are sufficiently persuaded, with clear, convincing and consistent evidence, that a fact has been proven. Several variables interact in the process of persuasion, making it easier or more difficult to meet the standard of proof, leading to the decision makers conclusion on a case-to-case basis.

4. Current discussions on the standard and burden of proof

This section focuses on identifying some of the challenges competition authorities face in meeting the standard of proof in the evolving landscape and explores the options that experts are discussing. It does not aim at recommending a specific course of action, but to explore different possibilities that some competitions authorities and academics are discussing.

4.1 Challenges in meeting the standard of proof

Dynamic and complex markets require higher efforts by decision makers to accurately predict behaviour and competitive outcomes. For example, technology markets are known for their rapid shifts in competition, resources, data usage and other demand characteristics. This evolution is more challenging to assess and predict through traditional, static analysis methods (Ezrachi, 2017[8]).

To better assess behaviour and its competitive outcomes, economics has gained a progressively prominent role in competition over the past decades (Nevo, 2022[25]). Initially focused on theoretical analysis, this role has expanded to include empirical, fact-specific analyses that reveal how broad economic principles apply within specific markets and to particular behaviours.[35] Thus, given the progress made along the years by economic science, including econometric models, the relations between law and economics have become more intricate (da Cruz, 2018[26]).

This shift towards a more economic approach has had a significant impact on the way in which authorities must analyse and construct their arguments.[36] The more economic or effects-based approach was adopted in the 1990's as a result of the general perception that competition authorities were taking a too formal approach to what is an infringement of the law, disregarding the economic context and the effects of the practice or merger analysed (Castillo de la Torre and Gippini, 2024[9]).

Competition law was considered "over-deterrent" and that it condemned conduct that could have been beneficial. This translated to "a call for higher evidentiary burden" on competition authorities to prove their cases, mainly in abuse of dominance domain, which included a requirement of more economic evidence to support competitive harm allegations[37] (Gavil and Salop, 2017[19]). An effects-based approach prevailed in the practice of most competition authorities and economic analysis play a central role in competition cases.

The use of economic analysis is useful for competition as it provides tools for better assessing potential effects, possible abuses of market power, merger assessments, and, in general, for understanding how the markets are structured and how participants behave; additionally, economics provides a theoretical framework against which to examine a case (Azad, 2024[27]). For example, in merger control, the economic framework provides the support to both quantitative and qualitative evidence and analysis of data, documents and witnesses, and helps understanding how competition and efficiency are likely to be affected by a merger (OECD, 2021[28]). Likewise, economic analysis and economic evidence have become increasingly important for assessing possible abuse of a dominant position (OECD, 2021[29]).

Having to conduct complex economic analysis[38] to assess the economic context and effects of a case has strengthen competition cases, but may have also increased the difficulty of meeting the applicable

standard of proof by competition authorities. This has been particularly prominent in merger control and abuse of dominance cases, where economic evidence plays a critical role in assessing potential harm or efficiency gains.

As a result, the burden of proof may seem more difficult to discharge for competition authorities,[39] and proving cases to the requisite legal standard may be more demanding than before (Ibáñez Colomo, 2023[20]). Jonathan Kanter states that it is unwieldy and difficult to calculate the potential effects of any conduct or transaction, and that "cases have become sprawling exercises where companies promise billions in efficiencies and armies of consultants argue over newly-invented and often-untested models that they claim show a transparently problematic merger will benefit consumers" (Kanter, 2022[30]).

As Gavil (2008[16]) argues, economics influence more today than just the analysis of allegedly anticompetitive conduct, because "economic models for decision making have been especially appealing in antitrust, which for more than a generation has been moving towards greater reliance on economic analysis. An economic analysis of legal rules focuses on two factors: (1) error costs; and (2) processing, information, and administrative costs, sometimes referred to as "direct" costs".

An example highlighting the complexity on proving an infringement to the requisite legal standard, as well as the evidentiary challenges faced by competition authorities in economic analysis, can be seen in the EU *Intel case* (box 4.1). In this case, the Court stated that dominant firms' loyalty rebates give rise to a mere presumption of abuse and not an abuse by object. In this situation, the dominant firm remains free to submit evidence that its conduct was not capable of producing anticompetitive effects, and the Commission must analyse such evidence. This judgement "confirms that companies can rely on economic analysis to assess the antitrust compliance of their rebate schemes, and that the Commission is obliged to carefully review the economic evidence that they submit with regard to the issue as to whether the conduct in question has the ability to exclude competitors that are as efficient as the dominant undertaking from the market, and is therefore capable of restricting competition" (La Pergola and Prete, 2023[31]). Likewise, the judgment shows the evidential challenges for the Commission in proving economic intangibles, such as 'contestable share'.[40]

Box 4.1 General Court judgment – Intel case

The Intel v. European Commission case involves Intel's appeal against a 2009 European Commission decision, which fined Intel EUR 1.06 billion for abuse of its dominant position. The Commission found that Intel gave conditional rebates to computer manufacturers (e.g., Dell, Lenovo) and payments to retailers to exclude rivals. The General Court initially upheld the fine in 2014. However, the European Court of Justice remanded the case in 2017, asking for further analysis of Intel's rebate practices, especially concerning the potential anti-competitive effects.

In 2022, the General Court annulled the fine stating that the European Commission's analysis failed to sufficiently prove that Intel's rebates had an exclusionary effect on competitors, particularly by not applying the "as-efficient competitor" test correctly. The Court stated that, in

any proceedings for the application of Article 102 TFEU, the burden of proving an infringement of that article rests on the party or the authority alleging the infringement. Furthermore, according to well-established case-law, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point.

The Court determined that, where the Commission finds that there has been an infringement of the competition rules based on the supposition that the facts established cannot be explained other than by the existence of anticompetitive behaviour, the Court will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and which thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law. Finally, it was stated that the Commission did not establish to the requisite legal standard its finding that the rebate was capable of having or was likely to have an anticompetitive foreclosure effect and that they therefore constituted an infringement of Article 102 TFEU.

The European Court of Justice, in the judgement of 24 of October of 2024, confirmed the General Court's decision and stated that the demonstration of the actual or potential effect of restricting competition must be assessed in the light of all the relevant factual circumstances. Therefore, the Commission is required to analyse, not only the extent of the undertaking's dominant position on the relevant market, the share of the market covered by the contested rebates, the conditions and arrangements for granting those rebates, their duration and their amount, but also the possible existence of a strategy aiming to exclude competitors that are at least as efficient as that undertaking from the market.

Source: Judgment of the General Court (Fourth Chamber, Extended Composition) of 26 January 2022, Case T-286/09 RENV, Intel Corporation Inc. v European Commission and Judgment of the Court (Fifth Chamber) of 24 October 2024, Case C-240/22 P.

In the United States, Eleanor Fox (2023[32]) has stated that "agreements" and "monopoly power" are now harder to prove, and that the burden of proof for antitrust cases has increased. Additionally, given the increasingly complex economic analysis of market effects that competition authorities have to carry-out has required them to invest significant resources in experts. This has led to a more complex decision-making to prove competition cases, or even to assess the potential effects of certain conduct,[41] therefore increasing the evidentiary burden on competition authorities.

For example, in the U.S. *Qualcomm case*,[42] the findings of the U.S. Federal Trade Commission regarding a violation of antitrust law were reversed by the Court arguing that there was no proof of actual or practical effect of substantially foreclosing competition.[43] Likewise, in the United States "the elevated standards developed to establish conspiracy to fix minimum resale prices and predatory pricing conspiracies in *Monsanto* and *Matsushita* may be examples of use of an elevated burden [of proof]" (Gavil, 2008[16]).

The rise of economic evidence, such as econometric models and market simulations, has become crucial in proving or disproving anti-competitive effects and this has resulted in a challenge to translate economic theories into solid legal arguments. As stated by José Luís da Cruz (2018, p. 188[26]): "Given the progress made along the years by economic science, including econometric models, the relations between law and economics have become, not only in the United States, but also in Europe, more intricate... In this context, the great challenge for the jurist, and in particular, for the judge, is to turn economic theories into solid legal criteria, capable of securing the clarity of the concepts and their adaptability to a complex reality, as well as to enhance legal certainty and predictability in the application of the law".

Presenting this evidence effectively requires both technical expertise and the ability to communicate complex findings to non-economist judges or decision makers, which increases the evidentiary standard and, thus, the difficulty on meeting the standard of proof. Additionally, there are costs related to producing complex economic evidence and potential asymmetries between competition authorities and private parties. In certain cases, it can be challenging for competition authorities to discharge their burden of proof when private parties present arguments that require significant resources to be rebutted.

Beyond the inherent complexity that certain cases have and their impact on the evidentiary standard of competition authorities, finding direct evidence of infringement has become increasingly challenging. As economic agents become more aware of that competition authorities will look for direct evidence, the likelihood of finding such evidence decreases. This has compelled competition authorities to rely more extensively on indirect evidence and sophisticated economic analysis. Such reliance may have heightened the evidentiary burden, as building robust cases based primarily or only on indirect evidence poses significant difficulties and requires more comprehensive, well-founded reasoning to meet the standard of proof.[44]

Additionally, arguments have been made that in recent years the intensity of the judicial review has intensified in some jurisdictions[45] (box 4.2). Likewise, the judiciary must assess and digest complex and evolving theories in competition cases (Ezrachi, 2017[8]). As stated by da Cruz (2018[26]), "the two EU courts have progressively strengthened the conditions of their review and developed a more intense scrutiny in competition cases".

Box 4.2 Intensity of judicial review

In the United Kingdom, in the decision of May 2024 on the Cérélia merger case, the Court of Appeal stated that "The CAT [Competition Appeal Tribunal] eschewed an approach based upon a **detailed scrutiny** of the evidence and applied a uniform (undifferentiated) approach as to the degree of deference it accorded the CMA…" (added emphasis), and that "It can be expected to **examine closely** the complaints made about a decision and its **evidential underpinning.** Such a deep dive into the evidence equips the CAT with the information necessary, *then*, to make an informed judgement as to whether the decision under challenge was properly justified by the evidence" (underline in original). Case No: CA-2023-001915, para 35, 38.

Additionally, Judge Giovanni Pitruzzella, from the Italian Constitutional Court, analysed decisions from the European Court of Justice from several years, and identified that "[t]his jurisprudential line has been progressively replaced by a **more intense scrutiny in competition cases**". Judge Pitruzzella attributes this evolution to three main factors: (1) the jurisprudence of the European Court of Human Rights which encompasses the provision of "full jurisdiction"; (2) the Charter of Fundamental Rights of the European Union which states that competition decisions should comply with the presumption of innocence, and (3) the more economic approach. As consequence of these three factors, he identifies that judicial review has become **high-intensive.**

In the United States, judges of the Courts "are indeed reluctant to replicate many of the tasks that the initial decision maker has already completed, but once the facts are established, they are not shy about elaborating on the law or applying those facts in the light of their understanding of the pertinent economic theory".

In Australia, Courts give close attention to the facts in evidence.

In Spain, recent judgments from the Spanish Supreme Court (in Telefónica, Vodafone and Orange) for abuse of dominance, held that judicial review should extend not only to the accuracy of the evidence (including economic evidence) upon which the Competition Commission had relied, **but also to the relevance and suitability of such evidence for the purposes of supporting its conclusions.**

Sources:

Giovanni Pitruzzella, Judicial review, Global Dictionary of Competition Law, Concurrences, Art. N° 89092.

Wood, D. P. (2023). Judicial Review of Competition Decisions in the U.S. Courts. In G. H. Douglas, & T. Eicke, Judicial Review of Competition Cases. Concurrences.

Colafella, A., & Marquis, M. (2023). Competition in Australia: The Law and the Courts. In G. H. Douglas, & T. Eicke, *Judicial Review of Competition Cases.* Concurrences.

La Pergola, A., & Prete, L. (2023). Burden of proof in competition law: An overview of EU and national case law. Concurrences.

4.2 Current policy debates on evidentiary standards and burden of proof

Given the apparent increase on the evidentiary burden of proof, there is an ongoing policy debate on whether to alleviate the burden of proof that rest on competition authorities to address the possible challenges on meeting the standard of proof. Some of the options that are currently debated are: modifying the current standards or legal tests, for example, by expanding the *per se* (by object) rule or adopting new presumptions in competition proceedings.

The following subsections give an overview of the points of discussion surrounding these proposals and the possible implications of adopting these approaches. For the purposes of the discussion, we

assume that such a change may be helpful to ease the burden on competition authorities, although this is not necessarily the case, and that lowering the standard of proof would not be a viable solution to address the challenges previously described, given that the standard of proof is a rule of horizontal application and that it is intrinsically linked to the presumption of innocence (Kalintiri, 2021[1]).

4.2.1 Changing the balance towards more per se rules

One way of overcoming the challenges in meeting the standard of proof is reviewing if there is a need for adjusting the legal standards to the evolving circumstances, by, for example, changing the approach under which certain practices will be assessed, expanding the per se rules.

Ezrachi A. and Stucke M. (2016[33]) argue that in the digital economy, where network effects and data play a crucial role, the traditional evidentiary approach may be insufficient, as harm might not be immediately evident. On the other hand, Bishop S. and Walker M. (2010[34]) advocate for maintaining rigorous evidentiary standards to avoid false positives that could stifle innovation and competition. They argue that a high standard of proof protects companies from over-enforcement and ensures that only genuinely anti-competitive behaviour is sanctioned.

An example of a recalibration of the legal test would be adjusting the threshold of effects of a certain practice by defining it as presumptively unlawful (per se or by object). Establishing that a practice will be considered unlawful by object or per se, that is, implies that they are deemed illegal without needing to assess their effects on competition. The evidentiary burden of proof therefore is simplified for competition authorities as they do not require any further analysis of their reasonableness, economic justification, effects, or other factors. The competition authority only needs to prove that the conduct was implemented.

For the by object approach, this alleviates the burden on competition authorities of proving the actual anti-competitive effects, because the classification of a particular type of agreement as falling within the ‘by object box’ can be seen for what it is: a legal presumption, but a rebuttable one. The presumption shifts the burden of proof from the Commission to the parties and provides a structure within which to analyse agreements.[46]

In a similar sense, the per se rule relieves the evidentiary burden on competition authorities because it creates an irrebuttable presumption of unreasonableness (Gavil, 2008[16]). Where there is a per se infringement it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found to be restrictive of competition.

When assessing modifying the legal test to widen the by object box, competition authorities and policy makers should consider the risk of type 1 enforcement errors, and the possible consequences this can have on competition, such as a *chilling effect*.

On the other hand, establishing if a practice falls within the “by object box” is not an easy task. For example, in the EU case of Cartes Bancaires, the European Court of Justice considered that finding of

a restriction "by object" requires robust evidence showing a clear and inherent potential for anti-competitive effects, considering the agreement's content, objectives, and economic context (box **4.3**).

In the same sense, in the United States, in the case Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., the Court demanded a more sophisticated approach to consider a practice under the *per se* rule. The Court stated that "in characterizing this conduct under the per se rule, our inquiry must focus on whether the effect and, [if] the purpose of the practice are to threaten the proper operation of our predominantly free-market economy".[47] This represented a shift on the way that the per se rule had been understood.[48]

Box 4.3 Assessing conduct "by object" or "per se"

The EU Cartes Bancaires case

The case centres on whether the practices of Groupement des Cartes Bancaires (CB) amounted to a restriction of competition "by object" under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). The European Commission had found that certain fee measures implemented by CB were restrictive of competition by their very nature because they disadvantaged new entrants to the market. The General Court initially upheld the Commission's decision. However, CB appealed to the European Court of Justice (ECJ), arguing that the General Court had incorrectly assessed the standard of proof required to establish a "by object" restriction.

In its judgment, the ECJ provided important clarifications on the standard of proof required for determining whether an agreement or concerted practice constitutes a restriction of competition "by object":

- **Definition and scope of "by object" restriction:** The ECJ emphasized that for an agreement or practice to be classified as a restriction "by object" it must reveal a sufficient degree of harm to competition. The assessment should not be based merely on the abstract terms of the agreement but should consider its content, objectives, and economic context.
- **Requirement for a detailed analysis:** The Court criticised the General Court for not performing a sufficiently detailed analysis of the measures in question. The ECJ underscored that simply categorising an agreement as a "by object" restriction cannot be based on the general presumption of harm. Instead, there must be concrete evidence demonstrating that the agreement inherently has a high potential to harm competition.
- **Importance of economic context:** The judgment emphasised the necessity to consider the economic context of the practices. The Court highlighted that the mere potential to limit competition is not enough; there must be demonstrable negative effects within the specific economic and legal context of the practice.

Therefore, the ECJ concluded that the General Court had erred in law by upholding the Commission's decision without sufficient proof that the measures by CB had the inherent object of restricting competition. The ECJ annulled the General Court's judgment and remitted the case for further examination, requiring a more rigorous analysis of the actual and potential effects of the measures.

This decision underscores that a finding of a restriction "by object" requires robust evidence showing a clear and inherent potential for anti-competitive effects, considering the agreement's content, objectives, and economic context.

Source: C-67/13 P – Groupement des Cartes Bancaires (CB) v European Commission.

Additionally, any changes to the applicable legal tests would need to be carefully drafted to balance legal certainty and flexibility and to preserve the consistency and continuity. In the same sense, considering that enforcement errors cannot be eliminated, the design or redesign of legal standards could be crafted aiming to minimise enforcement errors, such as discouraging pro-competitive conduct.[49] The challenge therefore is to balance predictability and accuracy (Ibáñez Colomo, 2023[20]).

Another proposal being considered by some jurisdictions is the implementation of ex-ante regulation to address the new enforcement challenges posed by digital markets and their distinctive characteristics (box **4.4**).

Box 4.4 Implementing ex ante regulation

Competition authorities face new enforcement challenges due to the characteristic dynamics of digital markets, shaped by multi-sidedness, network effects and conglomerate business models, among others. These characteristics may increase the evidentiary burden on competition authorities and therefore, meeting the standard of proof may be more challenging.

Given this sophistication and the length of time it can take for competition authorities to build a robust case, some jurisdictions are considering adopting an ex ante regulatory approach because predicting the outcome of a conduct or a merger becomes a more difficult exercise "when the environment is so dynamic, and the strategies of firms and the market structure are evolving so rapidly"[a]. Therefore, some jurisdictions are considering implementing ex ante regulation to deal with the complexities that these cases present.

An example of these reforms (some enacted and some are proposals under discussion) are the following (OECD, 2024):

- In the United Kingdom, the Digital Markets, Competition and Consumers Act enacted in May 2024.
- In the EU, the Digital Markets Act enacted in September 2022.
- In Germany, the amendment to the German Act against Restraints of Competition "Section 19a: Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets" enacted in January 2021.
- In Japan, the Act on Improving Transparency and Fairness of Digital Platforms enacted in June 2020 and Mobile Software Competition Act enacted in June 2024.

- In the United States, the American Choice and Innovation Online Act S.2033, as reported by the Senate Judiciary Committee, and the Open App Markets Act S. 2710, as reported by the Senate Judiciary Committee, proposed.

Richard Whish mentions in Katsoulacos (2023), that the introduction of ex ante regulation and the establishment of gatekeepers eliminated complex processes that had to be done by competition authorities such as defining markets and establishing dominance.

For example, the DMA imposed new rules for gatekeepers and clear obligations on what they could and could not do in their daily operations. Under the DMA, prohibitions are designed as per se, and thus the gatekeeper cannot bring forward arguments and evidence to show that its conduct is objectively justified. Additionally, in Germany, the Competition Act was amended in 2021 to empower the Bundeskartellamt to prohibit ex ante certain conducts by designated firms fulfilling the conditions under the new Section 19a (OECD, 2023).

Nevertheless, jurisdictions and competition authorities should consider that the implementation of ex ante regulation will not cover all the challenges, as there will be cases that fall outside the scope of such regulation and will only apply to a sub-set of firms rather than to all firms in the market. Therefore, ex ante regulation and competition enforcement could work in parallel to address these challenges.

Sources:

OECD (2024). Competition Policy in Digital Markets: The Combined Effect of Ex Ante and Ex Post Instruments in G7 Jurisdictions. doi:https://doi.org/10.1787/80552a33-en.

Katsoulacos, Y. (2023). *Antitrust and the digital economy, Legal Standards, Presumptions and Key Challenges.* Concurrences.

OECD (2023). G7 inventory of new rules for digital markets: Analytical note. doi:https://www.oecd.org/competition/analytical-note-on-the-G7-inventory-of-new-rules-for-digital-markets-2023.pdf.

[a] Aviv Nevo, on Antitrust Academics 2022, Global Competition Review. Available at https://globalcompetitionreview.com/survey/antitrust-academics/2022/person-profile/aviv-nevo.

Note: The debate on how or if implement ex ante regulation is out of the scope of this paper. However, for a comparative analysis of the legislative reforms, proposed or enacted, that have been discussed to address digital competition issues in some jurisdictions, see the OECD Competition Policy in Digital Markets: The Combined Effect of Ex Ante and Ex Post Instruments in G7 Jurisdictions, and OECD Ex Ante Regulation and Competition in Digital Markets.

4.2.2 Adopting new presumptions

The potential benefits of adopting presumptions in facilitating competition enforcement have been the subject of considerable debate. One key advantage highlighted is the potential to alleviate the evidentiary burden on competition authorities, making enforcement more expedite while providing legal predictability.

In the digital economy, sufficient evidence might be more difficult to obtain, and timeliness of enforcement is a challenge. Introducing presumptions of anti-competitiveness can be a way of mitigating the risk of significant consumer harm (Castillo de la Torre and Gippini, 2024[9]).

An example of the view of introducing new presumptions can be seen in the report on Competition Policy for the Digital Era (Montoye, Schweitzer and Crémer, 2019[35]), which states that in highly concentrated markets, characterised by strong network effects and high barriers to entry, it is preferable to err on disallowing types of conduct that are potentially anticompetitive, therefore, it is desirable to shift the burden of proof and demand that the company show the pro-competitive effects of such conduct. There are also other reports on competition policy that have contemplated or recommended the adoption of "presumptions of anti-competitiveness' as a way of reducing a possible under-enforcement mainly in the digital economy (Kalintiri, 2020[36]).

Introducing presumptions may have advantages on the administrability of competition law, but it comes at a risk of increased errors.

For competition agencies, presumptions and safe harbours allow them to prioritise enforcement activities and save resources for the prosecution of the most harmful practices to competition (OECD, 2017[5]).

When thinking about developing new presumptions to ease the burden of proof for competition authorities, these should be carefully drafted based on (OECD, 2017[5]):

- **Experience:** A long history of enforcement experience can justify adopting presumptions, as it demonstrates that certain conduct usually leads to particular outcomes.
- **Economic theory:** Competition law relies on established economic theory to develop presumptions, especially when certain practices have predictable economic impacts.
- **Common sense:** In some cases, the adoption of presumptions is based on intuitive, common-sense conclusions about how certain facts relate to each other.

Additionally, there are three main elements to be taken into account when establishing an acceptable presumption: it should be proportionate to the legitimate aim pursued, there should be a possibility to adduce evidence to the contrary, and the rights of defence should be respected (Kalintiri, 2020[36]).

Any modification would take time to be implemented and to show its results and any change would have to be analysed under the rule of law, safeguarding legal certainty, transparency and predictability.

5. Key takeaways

This paper examined the rules regarding the standard and burden of proof in competition law cases, as well the challenges that decision makers are facing in meeting the standard or proof.

Competition authorities are increasingly confronted with more complex cases, in dynamic and fast-evolving sectors, requiring new theories of harm, and having to face the complexities of economic assessments to prove potential effects, with a growing need to rely on indirect evidence, all while facing a rigorous judicial scrutiny. As a result, the evidentiary burden on competition authorities may have increased, making more challenging to prove their cases up to the relevant standard of proof, requiring more sophisticated legal, economic, and evidentiary approaches.

Several factors influence the decision-maker's process of persuasion, and their interplay may impact the difficulty of meeting the standard of proof. Competition authorities, and in particular investigators, take these factors into account when building their cases and gathering evidence, and it may therefore be helpful to ask the following questions when doing so:

- **Standard of proof:** What is the standard of proof applicable to the case at hand? Is it balance of probabilities, clear and convincing evidence or beyond reasonable doubt?
- **Design of the legal test:** What are the specific conditions that the legal test requires to be proven? Is this practice prima facie lawful or prima facie unlawful? What is the applicable threshold of effects?
- **Presumptions:** Are there any presumptions applicable to this case, and how do they impact the evidentiary standard or the allocation of the burden of proof?
- **Temporality of the facts:** Is there sufficient evidence on the file to convincingly establish a past event? Is there sufficient evidence of the actual or potential consequences of the behaviour/transaction in question?
- **Characteristics of the evidence:** Does the case have direct evidence to prove the infringement? Is the evidence purely circumstantial or indirect? Is the evidence presented cohesively, including both legal and economic – if applicable – solid arguments, to support the conclusions?
- **Complexity of the case:** Does the case have particularities that make it more challenging to prove? Does it require complex economic analysis? Is the case considered "normal" or does it require additional evidence due to its "unusual" characteristics? What are the generalisations or assumptions related to this type of case?
- **Judicial review:** Have there been previous court decisions on similar cases? What standard of proof did the court apply in those cases? What was the level of the judicial review? Did the court require a higher or lower evidentiary standard and what lessons can be drawn from those precedents?

Answering these questions when preparing a case may help to understand the evidentiary requirements applicable to the given case and therefore identify which elements may need to be strengthened in order to better support the conclusions.

Additionally, competition authorities build their cases with judicial scrutiny in mind, drawing lessons from past judgments. This is a constant dynamic that not only refines enforcement but also contributes to the evolution and shaping of competition law, as competition authorities may

encourage judges to set precedents on previously unexplored issues, or where they may not be an obvious precedent, for example, to fit new theories of harm. To improve mutual understating between competition authorities and judges, it is beneficial that lawyers and judges strengthen their understanding of economics and for economists, their comprehension of judicial reasoning.[50]

Reviewing and assessing the accuracy of existing premises is a continuous task to ensure that competition laws remain effective, relevant, and capable of addressing both current and future challenges. However, any potential changes or adjustments to address the challenges on meeting the standard of proof must be grounded in the rule of law and must strike a balance between ensuring effective competition enforcement and maintaining legal certainty and predictability.

Finally, it is essential for competition authorities and courts to maintain consistency and transparency in the reasoning and assessment of evidence that supports their conclusions. It is crucial to provide clear explanations of the reasoning when adopting a decision. This will ensure legal predictability which is essential for an effective enforcement of competition law.

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Endnotes

1. Aviv Nevo on Global Competition Review, Antitrust Academics 2022. Available at https://globalcompetitionreview.com/survey/antitrust-academics/2022/person-profile/aviv-nevo. Also, see Lars-Hendrick Röller's analysis of the trend towards economics and the role of economics in competition in "Economic Analysis and Competition Policy Enforcement in Europe". Available at https://competition-policy.ec.europa.eu/system/files/2021-10/nma.pdf.
2. See the analysis made by former Judge José Luís da Cruz Vilaça of the judgments of the Court of Justice of the EU and highlights that "the great challenge for the jurist, and in particular, for the judge, is to turn economic theories into solid legal criteria, capable of securing the clarity of the concepts and their adaptability to a complex reality, as well as to enhance legal certainty and predictability in the application of the law" (da Cruz, 2018, p. 187[26]).
3. For a detailed analysis of the more economic approach and its implications, see Bourgeois and Waelbroeck, Ten Years of Effects Based Approach in EU Competition Law, Bruylant (2013); Sibony, Limits of Imports from Economics into Competition Law, The Global Limits of Competition Law, Stanford University Press (2012); Cruz Vilaça, The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU (2018); Lars-Hendrick Röller, "Economic Analysis and Competition Policy Enforcement in Europe". Available at https://competition-policy.ec.europa.eu/system/files/2021-10/nma.pdf.
4. See (Douglas and Eicke, 2023[42]), that has a compilation of the analysis of competition decisions from different jurisdictions, such as Australia, Japan, the European Union, the United States and others.
5. For example, in merger control, the prospective nature of the analysis of proving the actual or potential effects has become more challenging as the predictions about future market behaviour should be supported by concrete evidence, which can be difficult to produce in fast-evolving industries.
6. See Kalintiri (2023, p. 318[15]), who states that the burden of proof has two manifestations, the burden of persuasion or legal burden, and the burden of production, or evidentiary burden; Jenny (2023, p. 50[11]) also refers that a distinction should be made between the legal burden of proof and the evidentiary burden of proof.
7. See the OECD Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement, OECD/LEGAL/0465.
8. See the United Kingdom Competition Appeal Tribunal's decision where it stated that "the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking is entitled". JJB and Allsports v OFT [2004] CAT 17, para 204.
9. See Clermont K. and Sherwin E. (2002, pp. 251, 252[12]) on the levels of probability.
10. Similarities in the terminology used for the standard of proof and for analysing the potential effects of a conduct or merger can sometimes lead to a confusion between the two, though they clearly refer to different elements of the case.
11. Clermont K. refers that an intermediate standard, "often grouped under the banner of clear and convincing evidence and roughly translated as 'much more-likely-than-not'… apply to certain issues in special situations…" (Clermont and Sherwin, 2002, p. 251[12]).
12. The standard of beyond reasonable doubt is rarely applied outside criminal law (Clermont and Sherwin, 2002[12]).
13. See (Clermont and Sherwin, 2002, p. 249[12]) where they state that: "Clearly, the French system, like any legal system is not ideally suited for truth".
14. See Kalintiri (2023, p. 321[15]): "the requirement to establish a 'firm conviction' about the existence of a violation entails a high threshold of evidence sufficiency which is more demanding than the civil standard of proof, insofar it requires a heightened degree of probability or belief for a factual allegation to be accepted as 'true'" Gippini (2010, p. 3[13]), who mentions that "intime conviction" is usually perceived as a particularly high standard of proof; Clermont and Sherwin (2002, p. 251[12]): "the intermediate standard of standards, often grouped under the banner of clear and convincing evidence and roughly translated as 'much more-likely-than-not'… apply to certain issues in special

situations…"; and Andrew Gavil (2008, p. 128[16]): "the 'clear and convincing evidence' standard of proof … is more demanding than the presumptive civil standard of 'preponderance of the evidence'".

15. For merger control, Kalintiri (2021, p. 51[1]) mentions that "in the absence of criminal fines and in view of the prospective nature of merger analysis, the required evidential threshold has been identified as the 'balance of probabilities'". While according to Gippini (2010[13]), the assessment of evidence in terms of likelihood does not suggest the introduction of a specific standard of proof for merger cases, but only reflects the prospective analysis inherent in merger analysis, which implies an assessment of probabilities. Therefore, he argues that the only standard of proof is the persuasion of the judge.

16. For a detailed analysis of the differences on standards of proof between civil-law and common-law, see A Comparative View of Standards of Proof, by Kevin M. Clermont and Emily Sherwin (2002[12]). Additionally, the concept of *standard of proof* is less known for civil lawyers who acknowledge that the decision maker needs to be persuaded, whereas it is more common for lawyers educated in common-law systems (Gippini, 2010[13]).

17. Case No. 1001/1/1/01, Napp Pharmaceutical Holdings Limited and Subsidiaries *v*. Director General of Fair Trading, 2022, para. 108.

18. Case No. 1001/1/1/01, Napp Pharmaceutical Holdings Limited and Subsidiaries *v*. Director General of Fair Trading, 2022, para. 107.

19. Australian Gas Light Company v Australian Competition & Consumer Commission (No 3) [2003] FCA 1525; (2003) 137 FCR 317 (AGL) at [348].

20. See Section 79A (a) of the Commerce Act 1986 which states that: "In any proceedings under this Part for a pecuniary penalty- (a) the standard of proof is the standard of proof applying in civil proceedings (…)".

21. Information extracted from the written contribution presented by the United Stated for the 2019 OECD Roundtable of The Standard of Review by Courts in Competition Cases. Available at https://www.justice.gov/atr/page/file/1314171/dl?inline. Additionally, Andrew Gavil refers that the "*clear and convincing evidence*" standard of proof is generally applied in civil cases (2008[16]).

22. Case No. 1001/1/1/01, Napp Pharmaceutical Holdings Limited and Subsidiaries *v*. Director General of Fair Trading, 2022, para. 108.

23. EU Case c-405/04 P, Sumitomo Metal Industries v Commission [2007].

24. However, it has been discussed if the "intime conviction" is a standard of proof or is it a way of assessing the body of evidence. Regardless of the answer, the intime conviction is not a merely subjective standard, as it is needed to reach "*that state of mind on the basis of the evidence*". See Castillo de la Torre and Gippini Fournier (2024).

25. Decision adopted by the Chilean Tribunal (Tribunal de Defensa de la Libre Competencia) in the case, which literally states that: « *De concluirse esto último, se habría logrado acreditar más allá de toda duda razonable la existencia de la colusión denunciada, es decir, con un nivel de convicción propio de un estándar de prueba superior al que se exige en esta sede* » (added emphasis), and can be translated as "If the latter conclusion were reached, the existence of the alleged collusion would have been established beyond reasonable doubt, i.e. with a level of conviction that is appropriate to a higher standard of proof than that required in this case". Decision Nº 119/2012, p. 107.

26. *Idem*.

27. The wording is used in different decisions adopted by the Mexican Competition Authority (COFECE), where it is stated that there should be « *elementos de convicción suficientes que permitan acreditar la comisión de una conducta* », which can be translated as: "*sufficient evidence to establish the commission of a conduct"*. Decision adopted by COFECE in the case DE-022-2017 (2022).

28. Mexican Supreme Court of Justice decision A.R. 201/2017 (2018), pp. 29–31.

29. In Brazil, « *adota-se como regra o sistema do livre convencimento motivado. O julgador examina as provas e forma sua convicção sobre os fatos probando do proceso »* (Burnier da Silveira and Felipe Aranha Lacerda, 2023[43]).

30. Opinion of Advocate General Emiliou (2023), Case C-601/21.

31. For instance, it is possible to have a strict legal test that must be proven according to a "balance of probabilities" standard of proof. "The 'lower' the substantive legal threshold does not imply a 'lower' standard of proof and a 'higher' substantive legal test threshold … does not imply 'certainty' as a standard of proof" (Castillo de la Torre and Gippini, 2024[9]).

32. See Analytical Shortcuts in EU Competition Enforcement (Kalintiri, 2020[36]) for an extensive analysis of the analytical shortcuts applicable in competition enforcement, such as proxies, premises and presumptions applicable, their differences and its implications.

33. See Secretary of the Home Department v. Rehman [2003] 1 AC 153, Lord Hoffman at para. 55.

34. A clear example of economic normality and its impact on evidentiary standard is mentioned by Kalintiri (Kalintiri, 2021, p. 53[1]): "if the default premise is that non-horizontal mergers generate efficiencies and are generally innocuous, claims and evidence of harm will be examined in this light and greater effort will be required for the Commission to prove a SIEC".

35. Aviv Nevo on Global Competition Review, Antitrust Academics 2022. Available at https://globalcompetitionreview.com/survey/antitrust-academics/2022/person-profile/aviv-nevo. Also, see Lars-Hendrick Röller's analysis of the trend towards economics and the role of economics in competition in "Economic Analysis and Competition Policy Enforcement in Europe". Available at https://competition-policy.ec.europa.eu/system/files/2021-10/nma.pdf.

36. For a detailed analysis of the more economic approach and its implications, see Bourgeois and Waelbroeck, Ten Years of Effects Based Approach in EU Competition Law, Bruylant (2013); Sibony, Limits of Imports from Economics into Competition Law, The Global Limits of Competition Law, Stanford University Press (2012); Cruz Vilaça, The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU (da Cruz, 2018[26]); Lars-Hendrick Röller, "Economic Analysis and Competition Policy Enforcement in Europe". Available at https://competition-policy.ec.europa.eu/system/files/2021-10/nma.pdf.

37. See (Gavil and Salop, 2017, p. 2111[19]): "The goal of preventing false positives provided a focus for the comparative evaluation of alternative legal rules, and became a barometer for evaluating the scope of antitrust prohibitions. This translated into a call for a higher evidentiary burden on plaintiffs in cases alleging exclusionary conduct, which included a requirement of more economic evidence to support competitive harm allegations".

38. Economics, together with econometrics, provides a useful group of tools and techniques to analyse and assess data in competition cases (Azad, 2024[27]). Econometric evidence has also been used by Courts in competition cases (ABA Section of Antitrust Law, 2005[44]), as it "can play a vital role in legal proceedings. Used properly, it is an accurate and reliable method of determining the relationships between two or more variables, and it can be a valuable tool for resolving factual disputes" (U.S. District Court for the Northern District of Georgia – 996 F. Supp. 18, N.D. Ga. 1997).

39. See (Gavil and Salop, 2017, p. 2142[19]): "The evidentiary burdens courts now impose on plaintiffs are overly demanding and likely lead to under-deterrence. They are also handicapping the ability of antitrust enforcement to respond to the challenges of today's technology-driven economy".

40. Bill Batchelor, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre, Geraldine De Vasconcelos Lopes, Adriano Di Curzio, Vikram J. Pandit, The EU General Court annuls the Commission's decision which found that a semiconductor chip manufacturer had abused its dominant position and imposed a fine of €1.06B (Intel), 26 January 2022, e-Competitions January 2022, Art. N° 105133.

41. See the analysis made by Eleanor Fox, in Simple Rules for Antitrust (2023[39]), in which she mentions that the United States Supreme Court "began a decades-long crusade to reverse antitrust precedents of the Warren age and earlier…", and, from the analysis of the Matsushita case, the U.S. Facebook case, and others, she concludes that "agreement" and "monopoly power" became harder to prove and summary judgment for plaintiffs became very rare.

42. Case 969 F.3d 974, FTC V. Qualcomm, 9th Cir. [2020] (Clermont and Sherwin, 2002[12]).

43. United States Court of Appeals for the Ninth Circuit, No. 19-16122.

44. An example of this can be found in a recent case of the Mexican competition authority, COFECE, where economic analysis played a crucial role in proving that the only plausible explanation for the conduct was collusion. This case

shows that meeting the standard of proof is more challenging and requires a higher evidentiary burden of proof of competition authorities. COFECE's decision on the case DE-029-2019 (2024).

45. See Kalintiri, Has the standard of proof been raised in modern EU comptition enforcement? (2021, p. 54[1]).
46. See (Wish and Bailey, 2018[45]).
47. Broadcast Music, 441 U.S. at 19–20.
48. See Judicial Review of Competition Decisions in the U.S. Courts, by Diane P. Wood, in (Douglas and Eicke, 2023[42]).
49. See Kalintiri, A., "The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A 'Clear' Rule with Not-So-Clear Implications", 34 *Yearbook of European Law* (2015), and Castillo de la Torre, F., & Gippini Fournier, E. (2024). *Evidence, Proof and Judicial Review in EU Competition Law*. Cheltenham: Edward Elgar Monographs.
50. For a detailed analysis of the topic (Jenny, 2023[11]) and (Katsoulacos, 2023[39]).