



The European Commission's Approach to the Standard and Burden of Proof in Competition Enforcement

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Why Standards and Burdens of Proof Matter in EU Competition Enforcement

1

Why They Matter



Ensure lawful, **credible**, **robust**, and rights-respecting enforcement



Connects sound enforcement with legal clarity and effective judicial review

2

Peculiar administrative model



The EC holds **prosecutorial and adjudicative** functions



EC handles the **full case lifecycle**: initiation, investigation, and final decisions

3

Judicial oversight by EU Courts



Review of the **legality of the decision**, including if the **burden of proof** was properly discharged



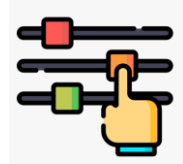
In **antitrust Fines**, under the Court's **unlimited** jurisdiction



Standards and Burdens of Proof: Shaped by Practice, Tailored by Instrument



Standards and Burden of Proof are Not Static and shaped by enforcement and review practice



Standards and Burden of Proof are Tailored to each enforcement tool instrument

(1) Antitrust

- ✓ Backward-looking, but predictive effect;
- ✓ Standard varies by type of conduct or agreement;
- ✓ Includes presumptions.

(2) Mergers

- ✓ Forward-looking, predictive;
- ✓ No legal presumptions;
- ✓ Command a less strict approach than for ex post review.

Standard of proof in Merger Control : EC Approach Before and after CK / Thyssen

Legal burden of proof

EC held the legal burden to prove that factual evidence support its decision, regardless of merger type or theory of harm

ECJ confirmed this approach. No higher legal burden applies in prohibition cases compared to clearances. The standard is symmetrical for all decisions.

Evidentiary burden

EC to build a coherent, fact-based case. Merging parties were expected to substantiate efficiencies and defences

ECJ reaffirmed this burden-sharing. Merging parties must prove efficiencies; there is no presumption that mergers generate them (Thyssenkrupp).



Standard of proof in Merger Control : EC Approach Before and after CK / Thyssen

Level of
Probability



In practice: “more likely than not” standard — a balance of probabilities — applied to all merger cases.

ECJ explicitly confirmed this standard. Rejected the “strong probability” test. Applies uniformly across all types of concentrations.

Quality &
strength of
evidence



Both quantitative & qualitative evidence. Emphasis on internal documents, customer views, market feedback. Models are not always central.

ECJ endorsed the EC approach:

- ✓ Not bound to use sophisticated economic models
- ✓ Strong weight to internal docs, customer views
- ✓ Less weight to parties' claims vs 3rd Parties
- ✓ Isolated evidence doesn't outweigh consistent file



Judicial scrutiny over the standard & burden of proof in merger cases



Judicial scrutiny

Standard of proof is not standard of judicial review




EC discretion upheld, if factually substantiated.


Scope of the review

- ☐ Review of **legality** or reassessment of substance ?
- 
- ☐ ECJ reaffirmed no **substitution** of Commission's assessment.

Logical coherence review

- ☐ Is the evidence well-structured and non-contradictory?
- 
- ☐ Courts assess **cogency & consistency** of the body of evidence.

Substance & sufficiency review

- ☐ Is the evidence accurate, reliable, complete, and capable of supporting the conclusion?
- 
- ☐ Courts assess **factual accuracy, reliability and completeness**

ECJ reaffirms Commission's margin if supported by facts



Burden & standard of proof in Antitrust: EC Approach



Burden of proof in unilateral conduct cases

Standard of proof in unilateral conduct cases

Legal burden

- ✓ Legal burden lies with the Commission in all Article 101 and 102 cases
- ✓ Parties bear burden for defences (e.g., Art. 101(3) TFEU or objective justifications under Art. 102).

Level of probabilities

- ✓ “firm conviction of the judge” required, sometimes with probabilistic language (e.g., “likely”, “probable”)

Quality of evidence

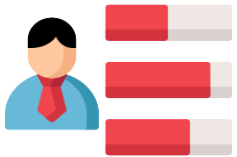
- ✓ Courts require evidence to be tangible, serious, and consistent
- ✓ Increasing Court emphasis on robust economic tools and precise documentation

Evidentiary Burden

- ✓ On the EC, but can shift dynamically during proceedings (e.g., rebuttals, presumptions)



Judicial scrutiny over the standard & burden of proof in antitrust cases



EC **prepares** for
close judicial scrutiny



Scope of review
has **intensified**
over time



Comprehensive
Court **review** of
facts, qualifications
& reasoning



Any **doubts benefit**
the undertaking
(presumption of
innocence)



Rising Evidentiary Demands: Challenges for Enforcers



1. Judicial review deepens

Does scrutiny go beyond legality into full reassessment of economic reasoning and evidentiary design?



2. Evidentiary inflation

Standard stays “more likely than not” — but do EU courts implicitly expect closer to certainty in complex cases?



3. Growing procedural asymmetry

Once a merger is cleared, it's irreversible; but the EC must anticipate full litigation when prohibiting



4. Risk of enforcement chill

Novel or high-uncertainty theories may be dropped to avoid judicial defeat — particularly in innovation and digital markets.



Adapting to the evidentiary demands



Strengthened internal case testing: *Close integration between case teams, Chief Economist and policy teams + Early-stage stress-test evidentiary coherence and legal risk*



Deep engagement with party evidence: *EC increasingly mirrors the technical level of submissions using in-house expertise to assess models, simulations, and efficiency claims*



Strategic use of qualitative evidence: *Reliance on internal documents, 3rd party input, and market tests as key evidence - consistently recognized by courts as highly probative*



Improved guidance and clarity: *Modernization of Horizontal Merger Guidelines to reflect evolving legal and economic standards*



Thank you



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