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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**Summary of Discussion of the Roundtable on the standard and burden of proof in
competition law cases**

Annex to the Summary Record of the 144th Meeting of the Competition Committee

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This document prepared by the OECD Secretariat is a detailed summary of the roundtable discussion on the standard and burden of proof in competition law cases, held by the Competition Committee on 5 December 2024.

More documents related to this roundtable can be found at
www.oecd.org/en/events/2024/12/the-standard-and-burden-of-proof-in-competition-law-cases.html

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Draft Summary of Discussion of the Roundtable on the standard and burden of proof in competition law cases

On 5 December 2024 the Competition Committee held a roundtable to discuss the standard and the burden of proof in competition law cases. The session was chaired by Frédéric Jenny.

1. Introduction

The Chair welcomed participants and noted that the volume of contributions underscores its relevance across jurisdictions. Despite distinct legal frameworks, all authorities share a core challenge: presenting evidence that is both legally rigorous and economically sound, capable of withstanding legal scrutiny. To address this, the session will be divided into three parts:

- First, it will clarify what is meant by the standard and burden of proof, why these concepts matter, and how they have evolved.
- Second, it will examine the practical hurdles that competition agencies encounter when attempting to meet high evidentiary threshold.
- Finally, it will consider how to balance enforcement effectiveness and procedural fairness, touching upon the role of presumptions and per-se rules.

The Chair noted that a diverse group of experts will offer initial observations before opening the floor. A background note prepared by the Secretariat underpins the discussion, which will guide the conversation. The Chair then gave the floor to the OECD secretariat.

2. Presentation of the Background Note

The Secretariat outlined the paper's structure on standards and burdens of proof, emphasising that competition authorities must meet a specified degree of persuasion to justify their findings. The paper first defines what is meant by standard of proof, noting how it applies across different enforcement scenarios—mergers, abuse of dominance, cartels—and clarifying distinctions such as what does it mean to adopt something up to a balance of probabilities. From there, it turns to evidentiary elements needed to discharge the burden of proof, exploring how authorities build a compelling factual record through direct and indirect evidence. The Secretariat stressed that it can be difficult to obtain direct evidence, which may require agencies to develop consistent narratives grounded in inference and indirect evidence. Factors such as market complexity, economic normality, and the type of conduct or harm being alleged—past versus prospective—add layers of difficulty to persuading a decision-maker. Finally, they highlighted this is all subject to judicial review, making it critical for agencies to build cases strong enough to survive this test.

The Chair thanked the Secretariat and then invited Dr Andriani Kalintiri to share their insights.

3. Standard and Burden of Proof

Dr Kalintiri began by highlighting the importance of evidence rules in competition law, explaining that the burden of proof determines which party must establish key elements of an infringement or defence, while the standard of proof sets how likely or certain those elements must be shown to be. These concepts differ from thresholds of harm (for example, whether conduct is “likely” to restrict competition), which lie in substantive law. Within the EU, authorities bear the legal burden of proving an infringement or merger violation, while undertakings bear the burden of proving efficiency claims; evidential burdens, however, can shift back and forth as parties introduce new evidence. Conduct cases typically apply a higher standard of proof aligned with the presumed innocence, whereas mergers rely on a balance of probabilities because of the absence of quasi-criminal penalties and the prospective nature of merger analysis. Dr Kalintiri attributed the perceived increase in difficulty for authorities chiefly to two trends: the move toward more economically complex cases and the heightened emphasis on due process and stronger judicial reviews on competition authorities follow the Tetra Laval and Menarini cases. While recent EU rulings in unilateral conduct cases contain language that may slightly relax some aspects of the Commission’s burden—such as allowing the use of multiple types of evidence in lieu of exhaustive counterfactual analysis—the overall framework still demands rigorous factual and economic substantiation.

The Chair thank Dr Kalintiri, then gave the floor to Dr Ibañez-Colomo.

Dr Ibañez-Colomo considered whether—and how—the standard and burden of proof have genuinely evolved over time, pointing out that when competition authorities and courts disagree, the root cause may stem more from unresolved substantive questions than from shifts in evidentiary thresholds. Many prominent cases that appear to deal with the standard of proof, such as CK-Telecoms, often turn on broader substantive disputes over the correct legal test for mergers. Friction between agencies and courts can also arise simply because a case presents novel issues, rather than indicating that authorities face a heightened burden.

Dr Ibañez-Colomo further observed that courts have become increasingly attentive to authorities’ adherence to established economic principles, thorough engagement with parties’ arguments and procedural rigor. Examples include cases where authorities failed to account adequately for the two-sided nature of a market or overlooked significant evidence presented by the parties. While these careful judicial reviews may reinforce the sense that the standard of proof has tightened, Dr Ibañez-Colomo noted that in many instances they serve primarily to ensure that agencies follow sound analytical and procedural methods.

The Chair invited Austria to elaborate on two features noted in its contribution: the principle of free evaluation of evidence and the “criminal” standard of proof, including exceptions for lower evidentiary thresholds.

Austria explained that its Federal Competition Authority investigates potential infringements and, upon finding evidence of a violation, submits an application to the Cartel Court. In non-contentious proceedings, the Cartel Court may issue a declaratory judgment or impose fines, with appeals limited to questions of law. Austrian law adopts an “unlimited nature of evidence,” meaning any type of proof can be used, provided it is relevant and truthful. Judges evaluate such evidence freely, requiring a high degree of probability—though not absolute certainty—to reach a finding. In special instances expressly provided for by law, a lower standard of proof (such as prima facie evidence) may apply. However, even in these scenarios, judges must form a “full personal conviction” regarding the facts of the case.

With respect to the burden of proof, it ordinarily rests on the party asserting a fact, and the court follows an inquisitorial principle while preserving the basic allocation of proof. Austria also noted that the Cartel Act contains explicit presumptions regarding market dominance. Any firm with a market share of at least 30% is presumed dominant and must submit evidence to overcome this presumption.

The Chair highlighted that several contributions address the use of indirect (or circumstantial) evidence—particularly relevant in merger cases, where authorities often rely on economic analyses and observed market changes.

Costa Rica noted that both COPROCOM and SUTEL view circumstantial evidence as key when direct proofs (e.g., formal agreements) are unavailable, especially in unreported mergers or informal anti-competitive practices. Such evidence can include market trends, operational overlaps, price or output coordination, and customer transfers, all of which help authorities piece together a coherent narrative of collusive or consolidation activity. Costa Rica offered the **Transdatelecom / Cable Arenal** case to illustrate how indirect evidence can uncover potentially unlawful mergers that have not been officially notified. Although investigators lacked a clear record of any formal agreement, they observed that Transdatelecom had begun using Cable Arenal’s infrastructure and taken over some of its customers—circumstances suggesting a functional acquisition. The Costa Rican authority, SUTEL, further noted its deployment of AI-based data-analysis systems (the “SMAC” platform) to track market behaviour, public procurement, and regulatory compliance, thereby facilitating efficient detection of suspicious transactions or market anomalies.

The Chair turned to France’s submission, which describes how its competition authority has shifted from a three-pronged evidentiary model to a more flexible approach—particularly in vertical agreement cases that rely heavily on documentary evidence.

France emphasised that the standard and burden of proof are central to balancing effective competition enforcement with robust procedural safeguards. Although cartel enforcement traditionally focuses on horizontal conduct, vertical pricing agreements, such as resale price maintenance, can also harm consumers by inflating retail prices. France referred to recent enforcement actions, including a EUR 470 million fine on suppliers and distributors of electrical equipment, to illustrate the authority’s focus on such matters. Historically, the French authority used a so-called “three-pronged test” to prove resale price maintenance, requiring evidence that suppliers communicated specific resale prices, a system to monitor or police those prices, and proof that distributors implemented them. However, parties increasingly contested these, especially given the rapid adaptability of retail prices online. In response the authority used a two-step framework drawn from established case law: evidence of an invitation by one party to engage in a potentially illegal practice, and evidence that the other party agreed to it. In this process, the Competition Authority has placed greater weight on documentary evidence—such as email exchanges or internal communications—that might indicate acceptance of a supplier’s resale price instructions. This has enhanced the authority’s ability to capture subtle or quickly changing pricing practices, especially in online markets.

The Chair observed that while one might assume courts dictate stricter proof requirements, France’s experience showed it was the authority itself that urged a revised method—one the courts ultimately endorsed. The Chair then noted that Dr Kalintiri suggested it may not necessarily be rising standards of proof that make enforcement more difficult, but other factors. However, Italy’s perspective differs somewhat, as its contribution indicates a progressively tougher review by its courts, particularly concerning methodological rigor. The Chair invited Italy to explain why it believes the standard of proof has grown more complex.

Italy explained that the standard of proof in its competition enforcement has become more demanding, not only because courts have set higher standards, but also because firms have become better at hiding collusion. In the past, finding so-called “smoking gun” evidence—like explicit meeting records—was simpler. Now, authorities commonly rely on a blend of direct and indirect evidence. To address this shift, Italian courts use the notion of “narrative consistency,” requiring the authority’s account of events to be the only plausible explanation of the facts or at least the most convincing one. Minor inconsistencies are permissible so long as they do not undermine the broader coherence of the evidence. As a result, the Italian competition authority must conduct a thorough, context-sensitive investigation that excludes alternative explanations, thereby meeting a stricter legal and evidentiary review.

The Chair underscored that Italy’s perspective highlights a dual development: more sophisticated corporate concealment strategies, and a stricter evidentiary framework applied by courts. Turning next to the European Commission, the Chair noted that its written contribution draws distinctions between the burden and standard of proof for merger reviews as compared to conduct investigations, suggesting a different degree of rigor in each.

The European Commission highlighted in relation to mergers, the significance of the CK-Telecom judgment, which confirmed that the standard of proof in EU merger control rests on the “balance of probabilities,” regardless of the theory of harm. While the Commission must demonstrate that the merger’s harmful effects are more likely than not to occur, it retains a margin of discretion in its economic analysis, provided it thoroughly examines the evidence. In dynamic or oligopolistic markets, the Commission observed, increasingly sophisticated economic evaluations are required, but it sees no need to alter the standard of proof itself. Instead, qualitative indicators—such as internal documents and non-price competition factors—are used to supplement economic models.

Turning to antitrust, the EU representatives noted that legal and evidentiary burdens flow from Regulation 1/2003. The party alleging an infringement—generally the Commission—must initially prove a violation of Articles 101 or 102 of the Treaty, although certain presumptions, like high market share for dominance, can shift the burden to the undertakings. In situations such as object restrictions under Article 101, or straightforward conduct like predatory pricing under Article 102, effects may be presumed, easing the Commission’s evidentiary load. Overall, the Commission underscored that the judicial review applied by EU courts is essential to safeguarding procedural rights but also emphasised that an excessively stringent approach to complex economic assessments could risk undermining effective enforcement.

The Chair asked the European Commission to clarify how one determines whether enforcement becomes “excessively burdensome.”

The European Commission replied that enforcement crossing into “impossible” territory would be an indicator of going too far, although it admitted that setting a precise line is challenging.

The Chair then turned to Czechia, highlighting similarities between its reliance on circumstantial evidence—acceptable only when there is no other plausible explanation—and Italy’s “narrative consistency” criterion. Czechia’s contribution suggests that courts’ expectations for indirect evidence have evolved, and the Chair invited the Czech delegation to explain how they adapt to these changing standards.

Czechia explained that its competition authority often relies on indirect evidence—such as mathematical correlations between submitted bids—to prove anti-competitive conduct. While Czech law does not explicitly prescribe a standard of proof, court rulings indicate

that conduct can be established circumstantially, provided there is no alternative plausible explanation for the behaviour in question. In practice, this threshold comes close to “beyond reasonable doubt,” since courts are receptive to even unlikely alternative explanations; any lingering doubt typically leads to annulment of the authority’s decision.

A recent development in the Czech courts demands that the authority prove each instance of an alleged infringement individually, including evidence of an agreement and its elements between the imposing party and every relevant counterpart. The courts no longer accept a single, repeated infringement claim deduced from an overall strategy if specific agreements cannot be established for each separate counterparty. As a result, the Czech authority must adapt its approach by demonstrating not only a unilateral act of price-setting but a genuine “concert of wills” on both sides. The evolution in case law underscores the importance of constantly adjusting investigative techniques and evidentiary methods to meet heightened judicial expectations.

The Chair thanked Czechia for clarifying that their evidentiary standard is extremely high, nearly a criminal standard, and asked Italy whether establishing that there is no possible alternative explanation similarly amounts to proving an antitrust infringement beyond any doubt.

Italy noted that the principle requiring the absence of any alternative plausible explanation largely stems from European law—citing the CISA case—and that Italian courts, bound by EU jurisprudence, apply a similar standard to Czechia.

The Chair observed that this equates to a very high evidentiary threshold in Italy.

Italy agreed, explaining that this high standard applies throughout Europe.

The Chair then turned to BIAC, referencing its contribution on how evidentiary standards have evolved—discussing the shift from per se rules to the rule of reason in the United States, and from object- to effect-based approaches in the EU—and invited BIAC to elaborate on these developments and related cases.

BIAC thanked the Chair and Secretariat for organising the session and underscored business support for competition law enforcement aimed at stopping anti-competitive practices. However, BIAC cautioned against altering the burden of proof purely to ease the authorities’ litigation challenges, noting that courts have generally moved away from treating most conduct as presumptively unlawful. Citing the EU Court of Justice (*Budapest Bank*) and the U.S. Supreme Court (*Continental TV v. GTE Sylvania*), BIAC stressed that only conduct with unequivocal harm and minimal pro-competitive benefits merits should deviate from this. Faced with difficulties in proving anti-competitive conduct, authorities should pursue a more rigorous effects-based analysis rather than opting for presumptions. BIAC added that any increase in the burden of proof on parties should be balanced by enhanced discovery rights, ensuring that defendants have sufficient access to evidence to mount an effective defence.

The **Chair** thanked BIAC for their remarks and indicated that they would return to the discussion on presumptions. They then invited Ireland to comment on its parallel criminal and administrative enforcement powers, noting that the Irish authority can choose between a criminal or a civil route depending on the strength of its case. The Chair asked Ireland to explain how it decides which path to pursue.

Ireland explained that it now has two parallel regimes for competition-law breaches: a criminal system, where cases are tried before a jury and must be proven “beyond a reasonable doubt,” and an administrative system, where an adjudication officer can impose fines under a “balance of probabilities” standard. Both systems address cartel and dominance cases, although criminal prosecutions also require proving the accused’s intent

or recklessness. Citing the complexity of economic evidence in dominance matters, Ireland noted that these cases often do not lend themselves to jury trials due to the complexity of evidence, making the administrative route more practical.

Ireland also pointed to rebuttable presumptions in its statute designed to ease the enforcement agency's burden. For example, agreements among competitors to fix prices are presumed anti-competitive unless proven otherwise, and certain corporate executives are presumed responsible for infractions committed by their firms. Defendants must counter these presumptions under the civil standard. Some legal practitioners have questioned whether these provisions align with constitutional protections, including the presumption of innocence, but such concerns have not yet been resolved by the Irish courts.

The **Chair** observed that Ireland's dual system allows authorities to adjust their approach depending on case strength and complexity.

4. Challenges meeting the standard of proof

The Chair moved to the second part of the discussion, which focuses on challenges and the judicial perspective on meeting the standard of proof. They noted that while some cases present no major difficulties, others highlight inconsistencies in judicial expectations, making it harder for competition authorities to determine what is required. He then invited **Dr Kalintiri** to open the discussion.

Dr Kalintiri began by reiterating that evidence rules in competition law aim to ensure fact-finding is accurate, efficient, and fair. Nevertheless, competition authorities encounter multiple challenges while meeting the standard of proof. Three specific areas of difficulty were highlighted:

1. **Balancing a More Economic Approach with Efficient Enforcement**
The increased reliance on economic analysis and data—central to the “more economic approach”—enhances the legitimacy and thoroughness of competition decisions. However, it also makes investigations lengthier, more complex, and more prone to technical or methodological errors. Even accurate analyses may have limited probative value if the underlying assumptions or data inputs are questioned.
2. **Adapting to Economic Change: Markets in flux**—particularly with digital platforms—can introduce novel competition dynamics and harm theories. Authorities may struggle to demonstrate harm convincingly without a clear baseline of what is “norma”. Developing and proving new theories often requires more time and a richer understanding of complex, potentially indirect causal links.
3. **Transition from Physical to Digital Evidence:** As evidence increasingly takes digital forms (emails, large datasets, algorithms), authorities must sift through vast troves of information, demanding specialised tools and technical expertise. This evolution can complicate investigative processes, raise costs, slow down case handling, and prompt novel legal disputes—especially regarding privacy concerns or the scope of investigative powers. Although courts have tended to validate authorities' approaches (e.g., endorsing data rooms to protect sensitive material), these issues add another layer of complexity to proving competition law violations efficiently.

The Chair thanked Dr Kalintiri, then invited Dr María de la Luz Domper to share their perspective.

Dr Domper, an economist who served as a judge at the Chilean Competition Tribunal, outlined three main challenges in Chile’s competition law enforcement:

1. **Diverging Judicial Standards:** A collusion case involving tissue paper producers CMPC and PISA showed how the Supreme Court and the Tribunal diverged on defining “coercion.” Both firms cooperated under Chile’s leniency program, with CMPC acting as the cartel organiser. Under Tribunal criteria, coercion entailed imminent physical or psychological threats. However, the Supreme Court broadened “coercion” to include threats of market exclusion, thereby overturning CMPC’s leniency status. This discrepancy highlights the need for consistent evidentiary standards to enhance predictability and to balance efficient enforcement with economic rigor.
2. **Per Se vs. Effects-Based Analysis:** In a case involving bus operators in Temuco, five Tribunal judges imposed fines for collusion. Yet while three legal experts applied a per se standard, Dr Domper and another economist pushed for an effects-based analysis, emphasising the risk of false positives in categorising all agreements as automatically illegal. Although Chile’s 2016 legal reforms removed certain requirements to prove market power in cartel offenses, they did not fully clarify the role of effects-based evaluations. Dr Domper argued that some agreements are not inherently harmful and merit scrutiny of their actual market outcomes.
3. **Evidentiary Standards and Burden of Proof:** Chilean courts—both the Competition Tribunal and the Supreme Court—employ a “clear and convincing evidence” requirement for collusion and abuse of dominance cases, a standard Dr Domper likened to about a 75% level of certainty. Although the standard itself remains constant, the presentation of indirect evidence becomes more challenging in complex or data-intensive cases. She concluded that stronger data-gathering powers and investigative tools would better equip prosecutors to meet the demands of this high evidentiary threshold.

The Chair then invited Mr Nils Wahl to provide further insights from the judicial perspective.

Mr Wahl described his experience reviewing European Commission decisions at the General Court, Court of Justice, and in his role as Advocate General. He explained that EU courts do not verify entire decisions, but only those parts challenged by applicants. In areas touching on the constituent elements of an infringement—for instance, whether a particular company attended a cartel meeting—review is typically extensive: judges examine all evidence invoked by the parties and assess whether they are personally “convinced” of a fact’s proof, without referencing a specific label like “beyond reasonable doubt.” In more complex matters, such as defining the relevant market or calculating fines, the Commission traditionally enjoys a margin of discretion—subject to a “manifest error” check. Mr Wahl recounted a case (KME Germany) in which the General Court underlined that the Commission’s margin of discretion is not a reason for judicial deference if the facts do not align with the authority’s conclusions. Ultimately, the court still conducts a thorough evaluation of the evidence to ensure legality, concluding that current “difficulties” in meeting proof standards often stem from an expanded scope of inquiry rather than a stricter standard of review per se.

The Chair raised a point of clarification by asking how the court’s approach in cases like *Hutchison* and *Marshall*—where the first-instance courts or tribunals reportedly applied an excessively high standard—fits with the idea that in merger cases the standard should be a

balance of probability rather than an anti-conviction threshold. He suggested that this might indicate a gradual shift toward a more Anglo-Saxon approach to the standard of proof.

Mr Wahl drew on the CK Telecoms case, noting that the General Court had stated that there must be a strong probability for the theories of harm to be correct before prohibiting a merger. They argued that mergers are inherently neutral decisions, meaning they are neither presumptively lawful nor unlawful. This neutrality requires a consistent standard for both approving and prohibiting a concentration, leaving only a balanced choice between the two outcomes. Mr Wahl contrasted this with infringement cases under Articles 101 or 102, where the situation differs because those cases are challenged only after a wrongdoing allegation. He explained that the fundamental issue in merger cases is not about being convinced beyond reasonable doubt but about weighing evidence in a balanced manner.

The Chair then sought clarification on the standard of proof in conduct cases under Articles 101 and 102. He questioned whether the Court of Justice requires that evidence be so strong as to eliminate all doubt, implying that without such unequivocal proof there cannot be a conviction.

Mr Wahl clarified his approach to evaluating evidence: either he found himself convinced by the authority's case, or he did not. While he recognised that assessing mergers can involve a "balance of probabilities," for establishing an infringement—be it administrative or criminal—he believes the judge should be unequivocally convinced of guilt, rather than "sufficiently" persuaded. Mr Wahl remarked that in his experience at the Court of Justice and General Court, he has not encountered rulings in which the court stated it was partially convinced.

The Chair observed that this perspective reflects what he himself found upon asking his fellow judges about their standards of proof: they also stated simply that they need to be "convinced", which is not necessarily reassuring for competition authorities. The Chair then referenced Romania, providing two examples of bid-rigging cases—one involving bread and milk, and another involving apples and milk—in which its competition authority employed probabilistic economic analysis to conclude there was a violation. The Chair invited Romania to discuss this further.

Romania explained that a primary challenge in detecting anti-competitive practices is the difficulty of obtaining unequivocal evidence, which has led the national authority to bolster traditional investigative tools with economic analysis. One illustrative case involved four dairy producers allegedly coordinating their bids in public tenders for school programs, a market segment benefiting over two million children. While each company formally submitted bids for every lot in the designated region, they never actually competed against one another during the electronic auction, each securing distinct lots without overlap.

To assess whether these bidding patterns could result purely from independent decision-making, Romania's authority conducted a probabilistic analysis, factoring in the companies' stated production-capacity constraints. It computed that, of approximately 14 000 possible ways the four bidders could have allocated themselves among the lots, only 48 outcomes would lead to the non-overlapping scenario actually observed—representing a probability of below 0.1%. This low likelihood, combined with the recurring nature of the arrangement over three years, persuaded the authority that the bidding pattern was collusive. The four undertakings eventually acknowledged their anti-competitive behaviour, and the competition authority's decision was upheld in court, including judicial acceptance of the economic analysis as credible evidence.

The Chair then turned to Israel, noting that the Ashdod Port Case appeared to benefit from a flexible approach to applying the standard of proof. The Chair highlighted that, according

to the discussion, the burden of proof on the director general was not particularly high and asked Israel how this favourable outcome was achieved.

Israel explained that Section 29A of its Economic Competition Law prohibits a monopoly from abusing its market position in a manner that diminishes competition or harms the public. Certain behaviours are explicitly presumed to be abusive, but other practices can still constitute abuse if they pose a demonstrable risk of harming competition.

The Ashdod Port Case illustrated the debate over the evidentiary requirements for proving potential harm. Ashdod Port, holding a monopoly in the vehicle-import market for certain shipping routes, offered substantial, individualised, retroactive discounts to large importers on handling and storage fees if they met certain unloading targets. This scheme—characterised by confidentiality, high volume thresholds, and retroactive application—was alleged to deter importers from switching to Haifa Port. Ashdod Port argued that harmful competition effects in rebate cases can only be proven via a complex economic “as-efficient competitor” analysis. However, both the Director General and the Competition Tribunal found that the discount structure operated as a significant barrier to entry for Haifa Port, noting its likely incentive effect on importers. The Israeli Supreme Court upheld the finding that Ashdod Port abused its dominant position. One justice even advocated a lower evidentiary threshold in markets with limited competition, particularly when exclusionary intent is evident, while the remaining justices urged caution against unduly relaxing the standard, emphasising that authorities must still prove a credible risk of harm to competition.

The Chair thanked the panel for the previous contributions and noted that there were some reservations among the judges. Chinese Taipei was then invited to speak.

Chinese Taipei explained that its Fair Trade Act does not explicitly define the standard or rules of evidence in competition cases, leaving judges with broad discretion that can lead to inconsistent rulings—particularly in cartel cases reliant on indirect or circumstantial evidence. The courts often vary in how they weigh economic analysis, which is often crucial to linking indirect evidence to collusive behaviour. To address these issues, they amended the Fair Trade Act to codify certain economic factors and market characteristics that may be used as indirect evidence. Moreover, the competition authority held its first outreach workshop for judges in July, focusing on the appropriate application of economic analysis in establishing collusion. This program proved more popular than expected, and Chinese Taipei plans to continue it, hoping that ongoing dialogue between judges and the enforcement agency will improve clarity and consistency in evidentiary standards.

The Chair noted that judges in some jurisdictions tend to be wary of the competition authority's efforts to shape the standard of proof, and this dialogue varies widely between countries. Latvia was then asked to share their experience regarding challenges in defining relevant markets and assessing merger effects.

Latvia noted that its competition authority applies a “more likely than not” standard of proof in merger cases. However, in the *Maxima* matter outlined in Latvia's contribution, the first-instance court initially applied a stricter “high degree of probability” threshold and overturned the authority's decision. On appeal, the Supreme Administrative Court reaffirmed the “more likely than not” benchmark. Yet, throughout the proceedings, the case revealed gaps in judicial expertise regarding complex economic issues: the first-instance court appointed experts lacking a solid background in competition law, whose opinions were unsupported by rigorous analysis. Latvia emphasised the ongoing uncertainty in national case law over the degree of discretion competition authorities should have when employing economic analyses. The *Maxima* case itself remains active, reflecting ongoing debates about data and the choice of economic methods, and their interpretation, especially

in the definition of relevant markets. Latvia hopes to see greater consistency from national courts as market dynamics evolve and competition cases grow in complexity, underscoring the importance of clarifying the standard of proof and recognizing the authority’s specialised judgment in economic matters.

The Chair noted that many jurisdictions face inconsistent judicial positions between courts, leaving competition authorities uncertain about what exactly must be proven. They highlighted that Poland has raised challenges in assessing whether conduct qualifies as a restriction by object or by effect, particularly in resale price maintenance cases.

Poland noted that the distinction between “by object” and “by effect” infringements has sparked significant debate in the European Union, particularly regarding resale price maintenance (RPM). Historically, the Polish competition authority frequently pursued RPM cases under national law—sometimes in conjunction with EU law—leading to considerable court activity and diverging judicial interpretations. Lower-instance judges sometimes sought a more economic or effects-based analysis for vertical price-fixing but struggled to define the specific standard or evidence required. By contrast, the Polish Supreme Court has consistently classified RPM as a by-object violation, generating friction between courts of different levels. In recent years, Poland has increasingly applied national law with EU competition rules when prosecuting RPM. The country welcomed the *Super Bock Bebidas* preliminary ruling by the European Court of Justice, which clarified the criteria for identifying by-object restrictions in RPM cases. Nevertheless, Poland observed that its judicial system still lacks a clear, unified narrative on where enforcement should go, toggling between an older no economics antitrust approach and a more economic approach. Poland maintains that any standard of proof must be workable within the institutional framework yet worries that incremental or neutral shifts in case law can be interpreted as signalling a broader shift toward effects-based analysis without definitive guidance.

The Chair thanked Poland and then invited Hungary to speak.

Hungary provided an update on its courts’ evolving stance regarding the classification of infringements as “by object” versus “by effect,” referencing Hungarian cases that led to preliminary rulings by the Court of Justice of the European Union. The Hungarian Supreme Court generally adopts an approach aligned with EU case law, emphasising that any inquiry into whether conduct is a restriction “by object” must be distinguished from a full-blown market-effects analysis. Although in most cases the Hungarian courts upheld the authority’s conclusions of by-object infringements, there have been instances where courts found the evidence insufficient.

Hungary cited a recent development in which the Supreme Court broadened the by-object category to include “active no-poach agreements,” whereby undertakings explicitly agreed not to solicit or hire each other’s employees. In one case concerning an HR services association, the court deemed such an agreement a form of supply restriction and classified it as a restriction by object due to its built-in sanctions mechanism. However, different types of no-poach arrangements were treated differently: where parties merely agreed not to hire each other’s previously outsourced staff, the court found this did not automatically qualify as a restriction by object, requiring an actual or potential effects analysis.

Turning to the requirement to show an effect on trade between EU Member States, Hungary explained that a recent court ruling compels the national authority to prove market definition and market share with nearly the same rigor as is required to establish the underlying infringement itself—essentially approaching the beyond reasonable doubt threshold. The speaker acknowledged this raises the bar for demonstrating cross-border impact but emphasised that Hungary is prepared to adapt accordingly.

The Chair thanked Hungary then invited to Greece to speak.

Greece explained that its legal framework does not formally set a specific standard of proof for competition cases, so such standards have evolved through judicial practice. Greek courts accept both direct and indirect evidence, including presumptions, to accommodate the inherent difficulties in establishing complex, often covert anti-competitive conduct. On the other hand, parties—particularly in abuse of dominance investigations—frequently insist on detailed economic analysis, claiming that the Hellenic Competition Commission (HCC) should adopt a rigorous effects-based approach.

Two recent abuse of dominance cases illustrated how courts view economic evidence. In the first, involving the salty snack sector, the main dispute revolved around whether packaged nuts should be part of the product market alongside savory snacks. The defendant submitted multiple quantitative studies—such as the SSNIP test, price correlation, and co-integration analyses—to argue for a broader market. However, the HCC found that the data and assumptions underlying these analyses were flawed or unreliable. The Commission ultimately excluded nuts from the relevant market; the Court of Appeals upheld its decision, which was not further appealed. A similar scenario arose in a beer-market investigation, where the incumbent submitted extensive economic models (including a critical loss analysis and the Almost Ideal Demand System) to challenge the HCC’s conclusion of dominance. Once again, the HCC deemed these studies inadequately substantiated. The courts affirmed the Commission’s finding of dominance, endorsing the authority’s discretionary evaluation of the quality and reliability of economic evidence.

The Chair noted that some participants expressed scepticism toward the economic analyses offered, suggesting that trust in economists is not always high. He then introduced the final part of the roundtable, focusing on potential changes to address the challenges discussed so far. The Chair also highlighted the ongoing debate on whether a violation should be classified as by-object or by-effect. He pointed out that while some jurisdictions embed a presumption of a by-object violation in law, in others it emerges through case law. Recalling Mr Wahl’s engaging dialogue on the conditions and legitimacy of creating a presumption, The Chair emphasised that this discussion should be revisited as part of the forward-looking agenda. The Chair then gave Dr Kalintiri the floor to discuss potential changes on the use of economic analysis in competition enforcement.

Dr Kalintiri recapped the challenges competition authorities face in meeting the standard of proof—particularly under a more economics-focused approach—and offered three proposals for improvement:

1. Make the “more economic” approach more workable: Rather than discarding it, clarifying and operationalising the substantive legal tests, including precisely identifying the required threshold of harm and the relevant analytical factors. In addition, authorities could use “analytical shortcuts”—namely proxies, premises, and presumptions—where appropriate. Proxies refer to indirect measures that help gauge factors not easily quantified (e.g., app downloads to approximate market power). Premises are generalised propositions about what typically occurs in a market (e.g., assuming cartels harm competition), providing benchmarks for normal conduct. Presumptions shift or satisfy part of the burden of proof once certain conditions are met (e.g., attending a collusive meeting implies consent unless evidence to the contrary is provided). These measures can boost efficiency in enforcement without undermining fairness, so long as they rest on solid reasoning and are clearly defined to enable effective rebuttal by firms.
2. Respond to market changes and disruptions quickly: strategic foresight is crucial—actively anticipating shifts in technologies, business models, and economic

environments. Such preparation often begins well before any formal investigation, for instance, through ongoing market intelligence and updated soft-law guidelines.

3. Equip authorities with strong investigative powers and institutional capabilities: there is a need for the tools, skills, and expertise for processing evidence, as well as ensuring authorities can gather and analyse large, complex datasets. Streamlining these processes helps agencies to meet the standard of proof more effectively and defend their decisions under judicial review.

5. Enforcement effectiveness and procedural fairness

The Chair then turned then gave the floor to Dr Pablo Ibañez-Colomo to present.

Dr Ibañez-Colomo underscored the priority of ensuring effective competition enforcement, while emphasising the need to distinguish between two strategies. On one hand, authorities might seek to change the law by introducing per se prohibitions or presumptions, which can be both difficult and potentially undesirable because such amendments can tilt the delicate balance between accuracy, predictability, and efficiency. On the other hand, enforcement can be improved within existing legal frameworks by refining how an effects-based (or “more economics”) approach is applied.

In this regard, the speaker suggested placing greater reliance on “proxies”, which are simpler, indirect measures that signal anti-competitive harm without imposing the same evidentiary or analytical burdens that full-blown economic modelling entails. By way of illustration, the speaker cited the Intel judgment of the EU Court of Justice, where the Court enumerated factors like the coverage of a rebate scheme and the extent of a firm’s dominance. These factors could be operationalised as practical thresholds—rather than formal presumptions—thereby guiding authorities to demonstrate likely harm more efficiently while preserving the essence of an effects-based approach. Over time, ongoing dialogue between competition agencies and courts may further clarify and refine these proxies, rendering the analysis more predictable and manageable without resorting to per se rules or shifting fundamental legal standards.

The Chair thanked Dr Ibañez-Colomo, noting its complements to Dr Kalintiri’s points and then gave the floor to Mr Wahl.

Mr Wahl reflected on the nature and utility of presumptions in competition law, particularly as they relate to the distinction between by-object and by-effect infringements. He noted that some presumptions can be rebutted—a principle tied to the presumption of innocence—while others need not be, provided the practice in question is sufficiently established as inherently harmful. Citing the Alliance Hungary case, they expressed concern that certain agreements have been categorised as restrictions by object despite limited explanation of their supposedly clear negative impact on competition. The effectiveness of presumptions lies in balancing enforcement efficiency with legal certainty. A practice for which ample historical data or consistent experience shows harm can legitimately be treated as a per se or by-object restriction, saving investigative resources. However, novel or less understood behaviours should not be automatically classified as by-object violations without a robust foundation, such as a well-documented track record of anti-competitive outcomes. Mr Wahl also noted that other legal regimes, like consumer law or the Digital Markets Act (DMA), sometimes prohibit conduct outright without requiring detailed effects analysis, further illustrating how legislatures and courts strike different balances between administrative simplicity and the need for rigorous economic evidence.

The Chair thanked Mr Wahl and raised a further question on whether economic analysis alone can justify enforcement outcomes.

Mr Wahl replied that that aligned with their personal experience.

Dr Domper interjected with a strong dissent, arguing that each case is unique and should be assessed individually. As an economist, they expressed their dislike for presumptions, insisting that the risk of a false positive (error type one) outweighs that of a false negative.

Mr Wahl countered by noting that even if, out of 100 cartel cases, a couple might be beneficial, it is still worthwhile to investigate all cases?

Dr Domper retorted by emphasising that the heavy penalties in cartel cases justify a cautious approach.

Mr Wahl emphasised that any presumption will inevitably create some injustice, since it generalises from experience rather than examining each case individually. Yet, such a trade-off is often considered necessary for effective enforcement, given authorities' limited resources. Absent presumptions, competition agencies would be compelled to launch in-depth investigations for every suspected infringement—a prohibitively costly undertaking. Instead, presumptions help agencies focus on conduct that raises the most serious concerns, with economic analysis then determining whether a practice truly restricts competition. Citing cartels as a clear example, Mr Wahl argued that the well-established harm justifies treating cartel behaviour as a by-object restriction without exhaustive individualised inquiry.

The Chair noted that the panel had clearly agreed to disagree and announced that, due to time constraints, not all contributions could be discussed. Nonetheless, he briefly highlighted Indonesia, where a stakeholder debate is underway over the most suitable standard of proof—an effort to reconcile democratic input with the growing intricacy of modern markets. Turning to Sweden, they noted that the Swedish Competition Authority had commissioned independent researchers to assess its litigation work from 2016 to 2021, inviting Sweden to share the key takeaways from that external review.

Sweden explained that, after a specialised appellate court for competition matters was established in 2016, the Swedish Competition Authority encountered significant challenges in winning appeals. Between 2016 to 2021, eight authority-initiated cases went before the appellate court, most did not result in favourable rulings. In the same period, private damages claims struggled to succeed on appeal. In response, the authority commissioned independent researchers to analyse its litigation performance and propose improvements.

These external recommendations included refining case-prioritisation methods, instituting internal time limits to streamline investigations, and enhancing quality control through additional checks and balances. Although early signs—such as a recent first-instance ruling upholding an authority decision—appear encouraging, Sweden noted that it is too soon to draw definitive conclusions about a shift in outcomes. The researchers also raised the potential for Sweden's high standard of proof in competition cases to be tested via preliminary reference to the EU Court of Justice, given that national evidentiary rules must not unduly compromise the effectiveness of EU competition law. However, this option has not yet been pursued. Sweden also mentioned that the researchers observed that, while the standard of proof remains a national competence, it must not render the effective application of EU competition law impossible. One proposal suggested is to seek a preliminary ruling from the Court of Justice of the EU to verify whether the national standard of proof conflicts with this principle—an approach not yet tested in the Swedish context.

The Chair thanked Sweden. They also briefly mentioned Japan’s contribution, introducing legislative prohibitions in the mobile market, illustrating how legal changes can streamline enforcement. As well as Chile’s observation that having economists on its Competition Tribunal often adds complexity for the competition authority—an unexpected challenge compared to standard judicial panels. The Chair then closed the session for the day.