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

**Executive Summary 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

5-6 December 2024

This Executive Summary by the OECD Secretariat contains the key findings from the roundtable on the Standard and Burden of Proof in Competition Law Cases held during the 144th meeting of the Competition Committee on 5-6 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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Executive Summary of the Roundtable on the Standard and Burden of Proof in Competition Law Cases

By the Secretariat¹

On 6 December 2024, the Competition Committee held a roundtable on the standard and burden of proof in competition law cases. Taking into account the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and the interventions by the expert panellists, the following key points emerged:

1. The standard and burden of proof are fundamental legal concepts which equally apply to competition law enforcement, but their application continues to evolve as authorities shift towards effects-based analysis and complex economic evidence.

Competition authorities reaffirmed that the standard and burden of proof are foundational concepts in competition law enforcement, shaping both the efficiency and fairness of proceedings. The background note distinguished clearly between the *burden of proof* — *i.e.* which party must establish the facts necessary to prove or refute an infringement — and the *standard of proof*, understood as the level of certainty required for a competition authority or court to conclude that the facts are proven. These concepts, though formally distinct, interact closely and influence the balance of enforcement and defence rights.

Across jurisdictions, differences persist in whether authorities or defendants bear the burden for specific aspects of cases, and in the evidentiary threshold applied (e.g. “balance of probabilities,” “clear and convincing evidence,” or “beyond reasonable doubt” in quasi-criminal contexts). Participants highlighted that recent decades have seen a shift from form-based approaches towards effects-based analysis, particularly in abuse of dominance and merger control. This evolution has increased the reliance on sophisticated economic evidence, including econometrics, simulations, and probabilistic assessments. It has also underscored the value of narrative consistency and the combined use of direct and circumstantial evidence. These developments were seen as positive in terms of analytical rigour, but they have also raised the evidentiary demands placed on authorities.

2. Competition authorities face growing challenges in meeting judicial expectations, particularly as courts apply divergent interpretations and higher evidentiary thresholds in dynamic and digital markets.

The discussion highlighted the challenges that competition authorities face in meeting judicial expectations. Divergent judicial interpretations of evidentiary standards across jurisdictions have created uncertainty, particularly in dynamic and digital markets where evidence is complex and multifaceted. Authorities reported rising evidentiary thresholds, increasing reliance on indirect indicators such as probabilistic analysis and market simulations, and varying judicial approaches to economic evidence.

The background note stressed that evidentiary requirements may inadvertently tilt the balance between type I and type II errors: overly high standards risk under-enforcement and deterrence failure, while too low standards risk over-enforcement and false positives. Several competition authorities noted that digitalisation has further complicated this balance: the sheer volume of digital evidence, the opacity of algorithms, and the

¹ This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion.

probabilistic nature of certain analytical techniques create difficulties in presenting evidence that meets courts' expectations. These factors can lengthen proceedings, raise costs, and in some cases deter authorities from pursuing complex cases despite potential harm.

3. Presumptions, proxies, and clearer legal tests may help streamline evidentiary requirements, but must be designed carefully to remain proportionate and respect defence rights.

Participants emphasised the need for innovative approaches to adapt evidentiary standards to modern enforcement challenges. These include developing presumptions or proxies to streamline the burden of proof, enhancing the clarity of legal tests, and refining analytical frameworks for market definition and harm assessment.

The background note recalled that presumptions (such as those related to information exchanges or certain forms of exclusivity) can play a valuable role in easing evidentiary requirements, provided they remain rebuttable and proportionate. In merger control, shifting evidentiary burdens once certain thresholds are met (e.g. high market shares or specific structural conditions) has been used in some jurisdictions to reconcile effective enforcement with procedural safeguards. Competition authorities also highlighted the benefits of combining direct and circumstantial evidence, ensuring that no single piece of evidence is viewed in isolation but as part of a coherent factual narrative.

Strengthening institutional capabilities was also seen as essential. Beyond expanding economic expertise, authorities need to adapt their investigative tools to manage digital evidence, develop clearer internal standards on the sufficiency of proof, and engage in proactive dialogue with courts. Such measures can help address rising evidentiary demands without compromising fairness.

4. Closer dialogue and co-operation between competition authorities and courts are needed to ensure consistency, predictability, and adaptability of evidentiary standards.

The roundtable concluded with a recognition of the need for closer dialogue and co-operation between competition authorities and courts to ensure consistency and predictability in evidentiary standards. The background note stressed that differences in judicial interpretation can undermine legal certainty for both authorities and businesses. Increased interaction — through judicial training, publication of decisions, and guidance on evidentiary thresholds — can help align expectations and practices.

This discussion provided valuable insights into how competition authorities and courts can adapt evidentiary standards to modern enforcement challenges while preserving fairness, consistency, and effectiveness. By clarifying the interaction between standards and burdens of proof, refining the role of presumptions, and reinforcing dialogue between institutions, jurisdictions can strengthen competition enforcement in a way that is both credible and adaptable.