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**The Standard and the Burden of Proof in Competition Law Cases – Note by the
European Union**

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1. Introduction

1. The standard and burden of proof are core principles of competition enforcement, as they define the level of proof required to reach a particular finding and the role of each party in the establishment of such finding.
2. Given their importance in ensuring efficiency, legal certainty and due process of competition enforcement procedures competition enforcers strive to clearly enunciate and consistently apply these concepts.
3. At the same time, the emergence in recent years of complex competitive dynamics and market structures, as well as the increasing reliance on economic analyses, led competition cases to grow more and more sophisticated.¹
4. With competition enforcers facing similar constraints, it is insightful to consider how the notions of standard and burden of proof unfold across jurisdictions. In preparation for the discussions at the 144th meeting of the competition committee of the OECD, the present note provides an overview of the definition and application of standard and burden of proof in competition cases, under the EU law framework. After a definition of the concepts at stake and some general observations (section 2), the note considers how each notion is applied in merger control cases on the one hand (section 3), and antitrust cases on the other hand (section 4).

2. Definition and general observations

5. Before considering their application in practice, it is important to define the concepts at stake, namely the burden of proof (section 2.1) and the standard of proof (section 2.2), but also to distinguish them from other key notions.
6. Furthermore, while these two notions are general legal concepts of law, their implementation varies between merger and antitrust cases to adjust to the specificities and constraints of the various instruments (section 2.3).

2.1. The burden of proof

7. The burden of proof describes the duty which lies on one or other of the parties to put forward the facts when proving the relevant substantive legal test. The party with whom the burden of proof lies bears the risk that the facts remain unresolved, and thus that the relevant substantive test remains unsolved.²
8. In this regard, within the concept of burden of proof, a distinction should be made between the legal burden of proof, also referred to as objective/material burden of proof,

¹ OECD (2024), “The Standard and Burden of Proof in Competition Law Cases”, OECD Roundtables on Competition Policy Papers, section 4.

² Opinion of Advocate General Kokott in Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:110, paragraph 80, footnote 60.

and the evidentiary burden of proof, also referred to as evidential burden or subjective/formal standard of proof.³

9. While the **legal burden of proof** concerns the proof of a certain substantive element, the evidentiary burden of proof, on the other hand, refers to the actual process of producing evidence. The allocation of the legal burden of proof answers the question of who must persuade the decision maker of the existence of a certain fact, and this party bears the risk of non-persuasion.⁴ The **evidentiary burden of proof** determines which party has to produce the evidence at the various stages of the proceedings. 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.⁵

10. The burden of proof must be distinguished from the **substantive legal test**. While tightly related to each other, the burden of proof allocates the duty to prove that the substantive test has been met but does not define the specific elements that need to be proven for such test, nor the degree of conviction and/or probability such proof must attain to satisfy the test (standard of proof). The substantive legal test rather refers to the elements that need to be proven. The substantive 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.⁶

2.2. The standard of proof

11. The standard of proof defines the required degree of conviction and/or probability necessary for a body of evidence to meet a given substantive legal test. As such, the standard of proof sets the bar for the level of evidence to be attained and is distinct from the substantive legal test.⁷ Within the standard of proof, a distinction should also be made

³ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v. Commission* ('Aalborg'), EU:C:2002:337, paragraph 79: "Although according to those principles the **legal burden of proof** is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to **require the other party to provide an explanation or justification**, failing which it is permissible to conclude that the burden of proof has been discharged." (emphasis added). See also Opinion of Advocate General Kokott in Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:110, paragraph 80, footnote 60: "The **burden of proof** determines, first, which party must put forward the facts and, where necessary, adduce the related evidence (*subjektive or formelle Beweislast*, also known as the **evidential burden**); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (*objektive or materielle Beweislast*)." (emphasis added).

⁴ OECD (2024), "The Standard and Burden of Proof in Competition Law Cases", OECD Roundtables on Competition Policy Papers, paragraph 44.

⁵ *Ibid.*, paragraph 41.

⁶ *Ibid.*, paragraph 58.

⁷ OECD (2019), "The Standard of Review by Courts in Competition Cases", OECD Roundtables on Competition Policy Papers, No. 233, OECD Publishing, Paris, <https://doi.org/10.1787/69008bd2-en>, paragraph 20.

between the bar at which the standard is met in the legal assessment and the fact-finding exercise in itself which relates to the quality and strength of evidence.

2.3. The standard of judicial review

12. The standard of proof is also to be distinguished from the standard of review.⁸ The standard of judicial review refers to the level of intensity with which the Union courts review the legality of a challenged Commission decision in accordance with *inter alia* the standard of proof. 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.⁹ The standard of review is therefore only indirectly related to the standard of proof, i.e. in terms of the extent that the Commission's decision satisfies the standard of proof.¹⁰

2.4. Variations depending on the type of instrument

13. The implications of the burden and standard of proof concepts differs between merger and antitrust cases, in view of the specificities and constraints of each competition enforcement instrument.

2.4.1. Merger

14. In merger control cases, the Commission examines whether proposed mergers will have harmful effects on competition. Merger enforcement thus consists in investigating and assessing the impact of a transaction on competition, by anticipation, i.e. before the potential harm to competition has materialised.

15. This so-called ex-ante enforcement is carried out by means of a prospective analysis requiring the design of hypotheses: “*The prospective analysis called for in relation to the review of concentrations, which consists of an examination of how such a concentration might alter the parameters of competition on the affected markets in order to establish whether it would give rise to a significant impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.*”¹¹

16. The review of the impact of a proposed merger therefore commands a forward-looking approach, which includes a part of uncertainty and mechanically lowers the standard of proof in merger cases.

17. As noted by the Court of Justice: “*the prospective nature of the economic analysis which the Commission must carry out precludes a requirement for that institution to meet*

⁸ OECD (2019), “The Standard of Review by Courts in Competition Cases”, OECD Roundtables on Competition Policy Papers, No. 233, OECD Publishing, Paris, <https://doi.org/10.1787/69008bd2-en>, paragraphs 19 and 21.

⁹ OECD (2024), “The Standard and Burden of Proof in Competition Law Cases”, OECD Roundtables on Competition Policy Papers, paragraph 88.

¹⁰ OECD (2019), “The Standard of Review by Courts in Competition Cases”, OECD Roundtables on Competition Policy Papers, No. 233, OECD Publishing, Paris, <https://doi.org/10.1787/69008bd2-en>, paragraph 20.

¹¹ Case C-376/20 P, *European Commission v CK Telecoms UK Investments Ltd* (‘CK Telecoms’), ECLI:EU:C:2023:561, paragraph 84.

*a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition.*¹²

18. In addition, the legal framework for merger control enforcement at EU level provides for strict legal deadlines limiting the Commission’s review timeline.

19. Taken together, these specificities impact the burden and standard of proof which, in merger enforcement, is necessarily less strict than for ex-post analyses, where the perspective is backward-looking, focusing on an agreement or a practice that has already been implemented and that may have produced already its effects on the market.

2.4.2. Antitrust

20. Antitrust investigations concern either agreements between undertakings that restrict competition or practices by an undertaking holding a dominant position on the market that uses this position to stifle competition. While antitrust investigations typically examine an agreement or a conduct that has already been implemented, the substantive analysis is to be based on an ex-ante perspective.¹³

21. The impact of the burden and the standard of proof on antitrust investigations and enforcement depends on the type of agreement or conduct at issue.

22. As regards anticompetitive agreements under Article 101 TFEU, a distinction should be made between agreements that lead to so-called ‘by object’ restrictions, on the one hand, and ‘by effects’ restrictions, on the other.¹⁴ ‘By object’ restrictions are those produced by agreements that by their very nature involve a sufficient degree of harm to competition, such that it can be presumed that they can lead to anticompetitive effects.¹⁵ Accordingly, discharging the burden of proof for by object restrictions is, as a general matter, easier, since it is unnecessary to show that the agreement at issue can produce anticompetitive effects. ‘By object’ restrictions would be, for example, price-fixing and market sharing cartels or exchange of information between competitors that reduces uncertainty about their future behaviour on the market.

23. Conversely, as regards ‘by effects’ restrictions the Commission is required to show that the specific agreement at issue has the effect of restricting competition. This often involves a thorough analysis of the economic and legal context in which the agreement at issue was concluded and the specificities of the relevant market.¹⁶ Accordingly, to

¹² Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 86. See also Opinion of Advocate General Kokott in Case C-413/06 P, *Bertelsmann and Sony v. Impala*, ECLI:EU:C:2007:790, paragraph 205.

¹³ See to that effect, Opinion of AG Rantos in Case C-377/20, *Servizio Elettrico Nazionale SpA v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2021:998, paragraph 114: “Moreover, as a general rule, the anticompetitive nature of particular conduct must be assessed at the time that conduct took place, (102) which, furthermore, conforms to the general principle of legal certainty, since the dominant undertaking must be able to assess the lawfulness of its conduct on the basis of existing evidence.”

¹⁴ See Richard Wish, David Bailey, *Competition Law*, Ninth Edition, pp. 121 et seq.

¹⁵ *Ibid.* That said the Union courts have also considered necessary to assess in relation to by object agreements whether the by object characterisation of the agreement could be put into question in view of pro-competitive effects. See in this regard Case C-307/18, *Generics (UK) and Others*, EU:C:2020:52, paragraphs 103-111.

¹⁶ See Case C-345/14, *SIA „Maxima Latvija” v Konkurences padome*, EU:C:2015:784, paragraph 29. See also Richard Wish, David Bailey, *Competition Law*, Ninth Edition, pp. 132 et seq.

discharge its burden of proof in relation to ‘by effects’ restrictions, the Commission needs to carry out a deeper investigation and collect evidence in terms of the effects that the agreement at issue can produce.

24. Similarly, as regards abuses of dominance under Article 102 TFEU, the depth of the analysis that the Commission is required to carry out will depend on the type of conduct at issue. Notably, certain conducts are subject to a demonstration that the conduct at hand is capable of leading to exclusionary effects,¹⁷ while such effects can be presumed for other types of conduct.¹⁸

3. Burden and standard of proof in merger cases

25. At EU level, the relevant legal framework for merger control enforcement is the EU Merger Regulation¹⁹. Entered into force in 2004, the EU Merger Regulation is the result of an in-depth reform of preexisting merger control rules and procedures dating back to 1989.²⁰

26. The 2004 reform introduced a new legal test for the assessment of mergers. Going beyond the mere creation or strengthening of dominance previously in use, the Significant Impediment of Effective Competition (‘SIEC’) test aimed at capturing the effects of mergers in complex market structures, without having to rely on the requirement that one of the merging parties held a dominant position.

27. The 2004 reform of merger control and the introduction of this test sparked a legal debate on its implementation in practice and revived the discussion on the applicable burden and standard of proof in merger cases. For a period of close to twenty years there were no rulings by the Court of Justice on the interpretation of the SIEC test nor the application of these core principles to it.

28. Only in 2023, the Court of Justice finally issued in 2023 a landmark judgement clarifying the definition and application of the burden and standard of proof in merger cases under the EU Merger Regulation.²¹

29. The current state of play regarding the burden of proof (section 3.1), the standard of proof (section 3.2) and the judicial review over these concepts (section 3.3) is exposed in turn below.

¹⁷ See, e.g. Case C-48/22 P, *Google LLC and Alphabet Inc. v Commission*, ECLI:EU:C:2024:726, paragraph 171.

¹⁸ For instance, in the case of the so-called “naked restrictions”, see Commission decision of 22 September 2009 in case AT.37990 – *Intel*, paragraph 10, and Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, paragraph 96, readopting the finding made in Case T-286/09, *Intel v Commission*, EU:T:2014:547, paragraph 210. See also Case C-333/21, *European Superleague Company*, EU:C:2023:1011, paragraph 131, referring to conduct that has the “object” of impeding competition.

¹⁹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ‘EU Merger Regulation’), OJ L 24, 29.1.2004, p. 1–22.

²⁰ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1–12.

²¹ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561.

3.1. Burden of proof

30. As explained above in section 2.1, a distinction should be made between the legal and evidentiary burden of proof as they have different implications.

31. In relation to the burden of proof in merger cases, it should be noted from the outset that the EU Merger Regulation does not include any specific provisions about the burden of proof, legal nor evidentiary.

3.1.1. Legal burden

32. In relation first to the legal burden of proof, the EU Merger Regulation also does not put forward any positive or negative presumption that a merger will bring benefits to the market or harm competition. Only, the text of the Merger Regulation acknowledges that mergers and other forms of concentration are “in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.”²²

33. The Court of Justice confirmed such neutrality and found that “no general presumption that a concentration is compatible with, or incompatible with, the internal market can be inferred from th[e EU Merger Regulation].”²³

34. At the same time, the Court of Justice underlined that the Commission is “in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration.”²⁴

35. The Commission is therefore in charge of conducting the market investigation and reaching a conclusion on the potential existence of negative effects of a given transaction on competition.

36. In the absence of an express mention of the legal burden in the Merger Regulation, or a positive or negative presumption towards the impact of mergers,²⁵ the Commission thus bears the legal burden to prove that the factual evidence is such to conclude in favour of an unconditional clearance, a clearance with conditions or a prohibition.²⁶

37. In other words, the Commission will bear the legal consequences of not fulfilling such burden: the Commission’s final decisions on the compatibility of transactions with the internal market are subject to actions for annulment in front of the Court of Justice of

²² EU Merger Regulation, recital 4.

²³ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 71. See also Case C-413/06 P, *Bertelsmann and Sony v. Impala* (‘Bertelsmann and Sony’), ECLI:EU:C:2008:392, paragraph 48).

²⁴ Case C-413/06 P, *Bertelsmann and Sony*, ECLI:EU:C:2008:392, paragraph 52.

²⁵ The Remedies Notice confirms that the Commission’s legal burden impliedly results from the legal text: “*under the structure of the [EU] Merger Regulation, it is the responsibility of the Commission to show a concentration would significantly impede competition.*”

²⁶ See Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the ‘Remedies Notice’) OJ C 267, 22.10.2008, p. 1–27, which states accordingly that the “*burden of proof for a prohibition or authorisation of a concentration modified by commitments is therefore subject to the same criteria as an unmodified concentration*” (paragraph 8). See also Case T-464/04, *Impala v. Commission*, ECLI:EU:T:2006:216.

the European Union.²⁷ In practice, where the Court of Justice finds that the Commission has not fulfilled its burden to prove the absence or existence of competition concerns justifying its conclusion in the final decision, the Commission’s decision can be annulled.

3.1.2. Evidentiary burden

38. As to the evidentiary burden, it is shared between the Commission and the merging parties and may shift along the merger review procedure depending on the finding at stake and the ownership of the information.²⁸

39. The Commission carries the bulk of the burden as it is responsible for establishing and concluding on the presence or absence of competition concerns in each merger case reviewed. For example, the Commission must demonstrate the existence of potential effects directly linked to a transaction, and the materiality of the theory of harm to be able to conclude in favour of the existence of competition concerns.

40. Contrary to other jurisdictions, the EU Merger Regulation and its accompanying guidelines for the review of mergers do not foresee presumptions able to shift the burden of proof.

41. The only burden of proof reversing presumption relates to market shares which, above a certain level, are considered as indicative of dominance, and below a certain level create a presumption that competition concerns will not arise.²⁹ The Horizontal Mergers Guidelines provide: “[a]ccording to well-established case law, very large market shares—50% or more—may in themselves be evidence of the existence of a dominant market position.”³⁰ Conversely, the Horizontal Merger Guidelines indicate that “concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. [...] an indication to this effect exists, in particular, where the market share of the

²⁷ See Articles 263 and 264 of the Treaty on the Functioning of the European Union (‘TFEU’).

²⁸ As already explained above in section 2.1, the allocation of the burden of proof is particularly relevant where the evidence or the underlying facts are uncertain or doubtful. In such circumstances, the party to which the burden of proof is allocated bears the risk of not fulfilling its burden, and inconclusive or insufficient factual findings are to be construed against them. In that sense, the burden of proof thus typically serves as a mechanism for making findings even in the absence of conclusive evidence. The EU Merger Regulation however remains silent on this point and does not envisage the possibility that there may be cases of genuine doubt where the evidence is balanced or indicate how such cases should be resolved.

²⁹ For completeness, it is in the context of antitrust cases, that the Court of Justice has found that market shares in excess of 50% may evidence the existence of a dominant position, unless “exceptional circumstances” exist (see for example Case T-221/95, *Endemol v Commission*, ECLI:EU:T:1999:85, paragraph 134; and Case T-102/96, *Gencor v Commission*, ECLI:EU:T:1999:65, paragraph 205. This presumption has effectively been applied under the EU Merger Regulation, as confirmed by the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the ‘Horizontal Merger Guidelines’), OJ C 31, 5.2.2004. Note that there are other types of presumptions working in favour of the parties in EU merger control. On the use of structural presumptions in merger control and competition cases in general, please refer to the Commission’s contribution prepared in the context of the 144th meeting of the competition committee of the OECD.

³⁰ Horizontal Merger Guidelines, paragraph 17.

*undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.*³¹

42. At the same time, merging parties also bear the burden of providing the information that can reasonably be expected from them, and necessary for the Commission to carry out its competitive assessment. Under the EU Merger Regulation merging parties have to provide complete information.³² In the same vein, under the Merger Regulation it is for the merging parties to propose commitments sufficient to remove the competition concerns and submit the necessary information to assess them. Where the merging parties are not proposing remedies adequate to eliminate the competition concerns, this failure to fulfil the burden will be applied to their detriment and the Commission may adopt a prohibition decision.³³

43. Furthermore, merging parties may, if they so wish, bring to the Commission's attention the existence of exculpatory evidence and/or evidence which might invalidate the theory of harm. In this case, the burden is on the merging parties to establish the reality of such mitigating factors that may justify a clearance.

44. This is the case for example of efficiency gains directly resulting from a given merger and which are such that they balance out the anti-competitive effects of such mergers. The Horizontal Merger Guidelines indicate that, to be duly taken into account by the Commission, efficiencies must be substantiated by the merging parties that have to demonstrate that a number of cumulative conditions are fulfilled³⁴.

45. This burden shift has been confirmed by the General Court: "*The issue of the demonstration of anticompetitive effects, which is a matter for the Commission, differs from the issue of the demonstration of the fact that the efficiencies benefit consumers, are merger-specific and verifiable, which is a matter for those parties*"³⁵ and "*it is those parties which hold the relevant information in that regard and, secondly, the argument regarding efficiencies seeks to counteract the Commission's conclusions that the proposed merger would probably significantly impede effective competition by creating a dominant position.*"³⁶

46. Likewise, where one of the merging parties is a failing firm, the merging parties may present a failing firm defence observing that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger itself, so that such merger should be cleared without conditions. Here again the Horizontal Merger Guidelines specify that it is for the merging parties to provide all relevant information

³¹ Horizontal Merger Guidelines, paragraph 18.

³² EU Merger Regulation, Articles 11 and 14.

³³ See paragraph 6 of the Remedies Notice. See also Case M.2220 – *GE/Honeywell*, confirmed by Case T-210/01, *General Electric v Commission*, ECLI:EU:T:2005:456, paragraph 555 and following and paragraph 612 and following; Case M.3440 – *EDP/ENI/GDP*, confirmed by Case T-87/05, *EDP v. Commission*, ECLI:EU:T:2005:333, paragraphs 63 and following and paragraph 75 and following.

³⁴ Paragraph 78 of the Horizontal Merger Guidelines provides that "*the efficiencies have to benefit consumers, be merger-specific and be verifiable.*"

³⁵ Case T-175/12, *Deutsche Börse v. Commission* ('Deutsche Börse'), ECLI:EU:T:2015:148, paragraph 275.

³⁶ Case T-175/12, *Deutsche Börse*, ECLI:EU:T:2015:148, paragraphs 361 and 362.

necessary to demonstrate that the three conditions constituting the failing firm defence are fulfilled.³⁷

47. In both instances, the Horizontal Merger Guidelines clearly state that it is for the Parties to provide the information necessary to demonstrate the reality of the mitigating factors. The rationale behind this is specified, in relation to efficiencies, in paragraph 87 of the Horizontal Merger Guidelines: “Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies [...] is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised.”³⁸

48. In a recent judgment, the Court of Justice confirmed this allocation of the burden of proof, stating that “it is for the notifying parties to demonstrate those efficiencies so that the Commission can take them into account in its review”.³⁹ In this same case, the Court of Justice rejected the argument according to which all mergers give rise to efficiencies, indicating that accepting this would amount to a presumption and a reversal of the burden of proof “capable of reducing the effectiveness of merger control and, therefore, of calling into question the practical effect of Article 2(2) and (3) of Regulation No 139/2004”.⁴⁰ The Court of Justice also underlined that such allocation of the burden of proof goes to the effectiveness of merger control.⁴¹

49. In conclusion, it is essential to distinguish the legal burden of proof solely borne by the Commission from the evidentiary burden, shared between the Commission and the merging parties. While the Commission will ultimately bear the legal risk of its final decision towards a merger, regardless of its nature (clearance with/without conditions or prohibition), and will need to be able to justify its findings based on the facts and evidence it gathered in the course of its investigation, the merging parties also have to provide the Commission with all the necessary information in their possession to take its decision.

3.2. Standard of proof

50. The standard of proof is a twofold concept encompassing both the level of probability required for a competition authority to reach a specific conclusion, and the quality and strength of evidence supporting such conclusion.

³⁷ The relevant conditions are listed in paragraph 90 of the Horizontal Merger Guidelines which provides that “*First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.*”

³⁸ See also, in relation to the failing firm defence, Horizontal Merger Guidelines, paragraph 91.

³⁹ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 242.

⁴⁰ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 244.

⁴¹ “*The objective of the effective control of concentrations which that regulation pursues, [...] in particular the objective of avoiding, first, the prohibition of concentrations which would not pose a risk of anticompetitive effects and, second, the authorisation of concentrations which would prejudice effective competition, is guaranteed, inter alia, by the allocation of the burden of proof in the field of merger control which has been established by the EU legislature.*” Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 244.

3.2.1. Level of probability

51. Similar to the burden of proof, the EU Merger Regulation remains silent on the applicable standard of proof so that the general principles for the implementations and practical implications of this concept have been coined by case law, after some fluctuations and several years of conflicting General Court and Court of Justice rulings.

52. In 2008, the *Bertelsmann and Sony* judgment seemed to settle this question. The Court held that the relevant standard of proof to be applied by the Commission is a balance of probabilities.⁴² As such, when reviewing the impact of a merger in a market, the Commission must be able to demonstrate that a merger is more likely than not capable of causing a significant impediment to effective competition.

53. The judgment largely followed Advocate General’s Kokott’s opinion who justified the need for a balance of probabilities standard relying notably on the ex-ante nature of merger control, indicating that it would be “*inappropriate to set the bar higher in the context of merger control and, for example, to require that the market developments envisaged by the Commission should be ‘very probable’ or ‘particularly likely’.*”⁴³

54. Accordingly, the Advocate General established that “*if the creation or strengthening of a dominant position is more likely than not, the concentration is to be prohibited; by contrast, if the creation or strengthening of such a position is less likely than not, the concentration is to be cleared.*”⁴⁴

55. However, reviewing the Commission’s decision to prohibit a merger in the telecoms sector in the UK, the General Court reopened this question by stating that the Commission was required to “*produce sufficient evidence to demonstrate with a strong probability*” that a concentration will significantly impede effective competition.⁴⁵

56. The Commission appealed the General Court’s judgment challenging the standard of proof set by the judgment.

57. Following Advocate General Kokott’s opinion,⁴⁶ the Court of Justice decided in 2023 to set aside the General Court’s judgment and confirmed the balance of probabilities standard, relying on (i) the wording of the EU Merger Regulation and (ii) the ex-ante nature of merger control assessment: “*In those circumstances, having regard, in particular, to the symmetrical structure of Article 2(2) and (3) of Regulation No 139/2004 and to the prospective nature of the Commission’s economic analyses when conducting the review of concentrations, it must be held that, in order to declare that a concentration is incompatible or compatible with the internal market, 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*

⁴² Case C-413/06 P, *Bertelsmann and Sony*, ECLI:EU:C:2008:392.

⁴³ Opinion of Advocate General Kokott in Case C-413/06 P, *Bertelsmann and Sony v. Impala*, ECLI:EU:C:2007:790, paragraph 210.

⁴⁴ Opinion of Advocate General Kokott in Case C-413/06 P, *Bertelsmann and Sony v. Impala*, ECLI:EU:C:2007:790, paragraph 218.

⁴⁵ Case T-399/16, *CK Telecoms UK Investments Ltd v. Commission* (‘Three/O2’), ECLI:EU:T:2020:217, paragraph 109.

⁴⁶ Opinion of Advocate General Kokott in Case C-376/20 P, *European Commission v CK Telecoms UK Investments Ltd*, ECLI:EU:C:2022:817.

*not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it.*⁴⁷

58. Drawing from the wording of the EU Merger Regulation, the Court of Justice clarified that the standard of proof remains the same irrespective of the type of decision taken by the Commission,⁴⁸ the type of case (dominance or gap cases)⁴⁹ and the theory of harm involved.⁵⁰

59. By clearly defining the balance of probabilities as the relevant standard of proof for merger control cases, linking it to the structure and wording of the EU Merger Regulation, thereby settling the debate initiated with the 2004 reform, the Court of Justice issued in the CK telecom case a landmark judgment able to ensure a consistent application of the standard in future cases.

60. In a case raising similar questions, the Court of Justice recently confirmed the standard of proof defined in the *CK telecom* judgement.⁵¹

3.2.2. *Quality and strength of evidence*

61. The quality and strength of evidence necessary to meet the balance of probabilities standard is tightly linked with the fact that the Commission's merger control assessment has traditionally been focussed on demonstrating the effects of a merger.

62. There is no typology of mergers that would be considered, per se, as incompatible with the internal market and the Commission has always had to demonstrate likely negative effects on competition.

63. Reasoning and findings of Commission decisions under the Merger Regulation must therefore be based on "convincing" evidence that is sufficiently clear, rigorous, and coherent. The Court of Justice's case law confirmed in this respect that the Commission must be supported by "*a sufficiently cogent and consistent body of evidence.*"⁵²

⁴⁷ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 87.

⁴⁸ "*It therefore follows from the wording of both Article 2(2) and (3) of Regulation No 139/2004 and of Article 8(1) and (3) thereof that those provisions are symmetrical as regards the standards of proof imposed on the Commission in order to demonstrate that a notified concentration would or would not significantly impede effective competition and must therefore be declared incompatible or compatible with the internal market. [...] In those circumstances, 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.*"⁴⁸ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraphs 69 and 73. See also Case C-413/06 P, *Bertelsmann and Sony*, ECLI:EU:C:2008:392, paragraph 51.

⁴⁹ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 114.

⁵⁰ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 101 and following.

⁵¹ Case C-581/22 P, *thyssenkrupp v. Commission*, ECLI:EU:C:2024:821, where the Court of Justice upheld the Commission's decision prohibiting the proposed merger between thyssenkrupp and Tata Steel.

⁵² Case C-12/03 P, *Commission of the European Communities v. Tetra Laval BV*, ECLI:EU:C:2005:87, paragraphs 37-51; Case T-712-16, *Deutsche Lufthansa AG v. European Commission*, ECLI:EU:T:2018:269, paragraphs 32-45; Case C-413/06 P, *Bertelsmann and Sony*, ECLI:EU:C:2008:392, paragraph 50; Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 87.

64. This effects-based approach coupled with the 2004 reform of the EU Merger Regulation⁵³ gradually brought a more economic approach to the review of the effects of mergers. Such economic approach sometimes complexifies and challenges the quality and strength of evidence.⁵⁴

65. In this regard, however, the Court of Justice has consistently held that the Commission benefits from a margin of discretion, linked to uncertainty surrounding ex ante analyses: *“That prospective analysis falls within the margin of discretion with regard to economic matters which is available to the Commission for the purposes of applying the substantive rules of Regulation No 139/2004, in particular Article 2 thereof which justifies the review by the EU Courts of a Commission decision relating to concentrations being confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment.”*⁵⁵

66. This margin of discretion provides some flexibility to the Commission where several economic pieces of evidence and/or analyses point in different directions. In such case, the Commission often strives to reinforce economic findings with qualitative evidence, such as statements of third parties from the market investigation, or internal documents of the parties.

67. In the same objective of counterbalancing the increasing reliance on economic analyses, the Commission has been increasingly looking at competition parameters other than price in the context of its assessment. Indeed, as in recent years, other parameters of competition have played an increasingly important role, the Commission has also been giving more prominence in its merger reviews to non-price parameters of competition such as quality, innovation, data protection, sustainability and privacy.⁵⁶ The recently revised Market Definition Notice⁵⁷ reflects the Commission’s practice in this regard.

⁵³ See for example Professor Mario Monti’s speech “Merger control in the European Union: a radical reform”, at the European Commission/IBA Conference on EU Merger Control in Brussels, 7 November 2002 which pledges for merger investigations more firmly grounded in economic reasoning and announced the creation of a Chief Competition Economist position within the Directorate-General for Competition. Recital 28 of the EU Merger Regulation which provides that, in order to clarify and explain the Commission’s appraisal of concentrations under that regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the internal market.

⁵⁴ OECD (2024), “The Standard and Burden of Proof in Competition Law Cases”, OECD Roundtables on Competition Policy Papers, section 4.1.

⁵⁵ Case C-413/06 P, *Bertelsmann and Sony*, ECLI:EU:C:2008:392, paragraph 144; Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraphs 84 and 124.

⁵⁶ Horizontal Merger Guidelines, paragraph 8.

⁵⁷ Commission Notice on the definition of the relevant market for the purposes of Union competition law (the ‘Market Definition Notice’), C/2023/6789, OJ C, C/2024/1645, 22.2.2024, paragraph 15: *“when defining the relevant market, the Commission takes into account the various parameters of competition that customers consider relevant [...] Those parameters may include the product’s price, but also its degree of innovation and its quality in various aspects – such as its sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate the product with other products, the image conveyed or the security and privacy protection afforded, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs.”*

68. Similarly, to overcome the difficulties linked to assessing dynamic effects on competition in fast-evolving sectors, in its case practice the Commission has for example developed the concept of innovation spaces to review the impact of a given market on competition where innovation takes place at an early stage, before a relevant market can be identified.⁵⁸

69. To conclude, the standard of proof applicable to merger cases is directly linked to the prospective nature of merger control enforcement, a complex and uncertain exercise. As such, the relevant standard cannot be too high, and the Court set the bar at a balance of probabilities, requiring the Commission's conclusion on the expected effects of a given merger to be more likely than not. In this respect, the Commission relies on a mix of quantitative and qualitative evidence and developed some innovative concepts to overcome the challenges linked to the type of analysis presented.

3.3. Judicial scrutiny over the standard and burden of proof in merger cases

70. As noted in the previous sections, the concepts of burden and standard of proof primarily result from the European Court's case law. The Union courts are nevertheless also in charge of controlling the Commission's compliance with these concepts upon adoption of its decisions.

71. In this respect, while the grounds on which a Commission decision can be challenged are expressly listed in the Treaty (Article 263, second paragraph of the TFEU "*lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*") the nature and depth of judicial review has evolved over time.

72. In principle, the judicial scrutiny of Commission decisions in merger control is limited to the manifest error of assessment and consists in "*verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.*"⁵⁹

73. In practice however, the Union courts carry out a comprehensive review of the evidence and findings supporting the Commission's conclusions in favour (or not) of a significant impediment to effective competition.⁶⁰

74. This balancing exercise between a judicial review standard limited to manifest error and a thorough review conducted by the Court in practice was again recently well illustrated by the *CK Telecoms* case, where the Court of Justice confirmed the manifest error of assessment standard while stating "*[it] does not mean that the EU Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Indeed, the EU Courts, [...] must not only establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence*

⁵⁸ In *Dow/DuPont*, the Commission analysed innovation competition in the whole industry and in innovation spaces consisting of groupings of crop/pest combinations at the global or at least EEA-wide level to assess how agrochemical companies compete to discover and develop new active ingredients M.7932 – *Dow/DuPont*, paragraphs 362 and 361. See also Cases M.8084 – *Bayer/Monsanto*, paragraphs 80-88; and M.6166 – *Deutsche Börse/NYSE Euronext*, paragraph 923.

⁵⁹ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg*, ECLI:EU:C:2002:337, paragraph 279.

⁶⁰ Case C-413/06 P, *Bertelsmann and Sony*, ECLI:EU:C:2008:392, paragraph 145.

*contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*⁶¹

75. While effective judicial scrutiny is essential to a balanced enforcement, a thorough review risks inflating the standard of proof, thereby complexifying the assessments and increasing the length of decisions. It is thus crucial that the Commission and the Union courts find the right equilibrium when carrying out their respective missions.

4. Burden and standard of proof in antitrust cases

76. Under the legal framework governing the application of Article 101 TFEU and Article 102 TFEU, the allocation of the legal burden of proof at EU level is enshrined in law and in particular in Regulation 1/2003⁶². That is not the case for the evidentiary burden of proof or the standard of proof to which the Commission is subject, which is not explicitly determined in EU regulation but are specified in jurisprudence.

4.1. Burden of proof

77. As explained above, there are two types of burden of proof that should be distinguished: the legal burden of proof and the evidentiary burden of proof. While the former is static in nature, the latter is dynamic and may shift at different stages of proceedings.

4.1.1. Legal burden of proof

78. According to Article 2 of Regulation 1/2003, the burden of proof for showing an infringement under Article 101(1) or Article 102 TFEU lies with the party or the authority alleging the infringement.

79. This burden is reversed in relation to the defences that an undertaking may present to tackle any prima facie finding of infringement under Article 101 TFEU or Article 102 TFEU. Regulation 1/2003, explicitly provides that the undertaking(s) claiming, under Article 101(3) TFEU that the agreement at issue produces efficiencies that benefit consumers and that allow the agreement to escape the prohibition of Article 101(1) TFEU bear(s) the burden of proving that the legal conditions set out in that provision (Article 101(3) TFEU) are fulfilled.⁶³

80. While there is no equivalent provision under Article 102 TFEU, in light of the well-established jurisprudence of the Union courts, if a dominant undertaking puts forward as a

⁶¹ Case C-376/20 P, *CK Telecoms*, ECLI:EU:C:2023:561, paragraph 145.

⁶² Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25. For completeness, as stated in Recital 5 of Regulation 1/2003, EU law “*affects neither national rules on the standard of proof nor obligations of competition authorities and Courts of the Member States to ascertain the relevant facts of a case*”. Thus, while the substantive legal test is uniform and must be applied at both EU and national level, the standard of proof is determined by national law. Nevertheless, Recital 5 of Regulation 1/2003 requires also “*that such [national] rules and obligations are compatible with the general principles of Community law*”.

⁶³ See also Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others*, ECLI:EU:C:2009:610, paragraph 83; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg and Others*, ECLI:EU:C:2004:6, paragraph 78.

defence that its conduct is objectively justified, it bears the legal burden of showing that the conditions for such objective justification being valid are satisfied.⁶⁴

4.1.2. Evidentiary burden of proof

81. The evidentiary burden of proof falls predominantly and as a starting point on the Commission, since it is the Commission that bears the legal burden of proof in terms of showing a breach of Article 101(1) TFEU or Article 102 TFEU. However, as in the case of merger control, the evidentiary burden of proof may eventually be shared between the Commission and the investigated undertaking(s), because it may shift during the investigation.⁶⁵

82. The fact that, during the proceedings, the evidentiary burden of proof may shift to the investigated undertakings, once the Commission has produced sufficient evidence to support a claim, does not mean that the (legal) burden of proof is reversed to the detriment of the undertakings at issue. In *Lundbeck*, for example, the Commission presented evidence that there was a significant probability that Lundbeck's patents were not able to preclude the successful entry by Arrow to the market and thus potential competition from Arrow existed. The Court of Justice found that Lundbeck had not provided sufficient evidence to call into question the Commission's conclusion and thus dismissed Lundbeck's argument that the General Court had reversed the burden of proof to the detriment of Lundbeck.⁶⁶ While the legal burden of proof remained on the Commission, the Commission satisfied this legal burden of proof once it adduced sufficient evidence, to which Lundbeck was unable to provide another explanation and thus failed to meet its evidentiary burden of proof.⁶⁷

83. The evidentiary burden of proof is reversed to the investigated undertaking where there is a presumption in relation to a certain element of the assessment. A well-established example of such presumption under the legal framework for EU abuses of dominance relates to the level of **market share**, which if found to exceed 50% this would create a presumption of dominance.⁶⁸ It falls on the (allegedly) dominant undertaking to show that it is not dominant despite its high market share. In other words, it is for the dominant undertaking to rebut the presumption in the case at hand. Another example of evidentiary presumptions relates to **predatory pricing**: if a dominant undertaking imposes prices that are below Average Variable Costs or between Average Variable Costs and Average Total Costs in the presence of evidence of intent, then its conduct can be presumed to lead to exclusionary effects.⁶⁹

⁶⁴ See, for instance, Case C-209/10, *Post Danmark*, ECLI:EU:C:2012:172, paragraph 41 and following; Case T-604/18, *Google and Alphabet v Commission (Google Android)*, ECLI:EU:T:2022:541, paragraph 601.

⁶⁵ *Case C-591/16 P, Lundbeck*, ECLI:EU:C:2021:243, paragraph 79: “*the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged*”. See also Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others*, ECLI:EU:C:2009:610, paragraph 83.

⁶⁶ Case C-591/16 P, *Lundbeck*, ECLI:EU:C:2021:243, paragraph 79.

⁶⁷ Case T-472/13, *Lundbeck*, ECLI:EU:T:2016:449, paragraphs 254 and following, 145, 191.

⁶⁸ Case C-62/86, *AKZO Chemie BV v. Commission*, ECLI:EU:C:1991:286, paragraph 60.

⁶⁹ See Case T-671/19, *Qualcomm v. Commission*, ECLI:EU:T:2024:626, paragraph 521: “*It follows, first, that there is a presumption of abuse where an undertaking in a dominant position prices below AVC, there being no need for the Commission to undertake any analysis other than such a*

84. As discussed below in Section 4.3, rebuttable evidentiary presumptions based on experience and sound economic theory are a way to ensure that the effects-based approach remains administrable and can play a meaningful role in the EU competition law framework, as they do in other areas of law.

4.2. Standard of proof

85. As explained above in Section 2.2., the standard of proof generally defines the point at which the substantive legal test, and thus the infringement of competition law, has been proven under the requisite legal standard. The following section will therefore focus on the standard of proof from the perspective of the Union courts reviewing the legality of Commission decisions.

4.2.1. Level of probability

86. The standard of proof is usually defined in terms of probability (e.g. balance of probabilities standard or beyond reasonable doubt standard), particularly in common law jurisdictions.⁷⁰ However, in civil law jurisdictions, the standard of proof is not generally specified through expressions of probability but focuses on the notion of the conviction of the judge as to the overall merits of a case.⁷¹

87. Accordingly, it comes as no surprise that the Union courts have in principle avoided to make explicit statements on the standard of proof that should be taken as the threshold for proving a case in the sense of common law. Of course, the Union courts do make references to the “requisite legal standard”, but they generally do not systematically link such standard to a common law term reflecting the level of probability required.⁷² Instead, the Union courts generally require a ‘firm conviction’ of the Commission regarding the overall finding of an infringement of competition law.⁷³

comparison of the prices charged by the dominant undertaking and of some of its costs.” For a more comprehensive discussion on presumptions of exclusionary effects, see in particular paragraphs 60 (b) and (c), 82, 95, 111-112, and 128 of the *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*, published on 1 August 2024, available at: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

⁷⁰ See OECD (2024), “The Standard and Burden of Proof in Competition Law Cases”, OECD Roundtables on Competition Policy Papers, paragraph 20.

⁷¹ See, for instance, Case C-176/19 P, *Servier and Others*, ECLI:EU:C:2024:549, paragraph 272; Joined Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries and Nippon Steel*, ECLI:EU:C:2007:52, paragraph 42 and 45 as well as Jenny, *Proving Competition Violations under EU Law*, in: Katsoulacos (ed.), *Antitrust and the Digital Economy, 2023*, p. 52 and following. See also Gippini-Fournier, *The Elusive Standard of Proof in EU Competition Cases* (2010) 33(2) *World Competition* 187, 188.

⁷² Gippini-Fournier, *The Elusive Standard of Proof in EU Competition Cases* (2010) 33(2) *World Competition* 187, 190.

⁷³ Case C-176/19 P, *Servier and Others*, ECLI:EU:C:2024:549, paragraph 272; Joined Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries and Nippon Steel*, ECLI:EU:C:2007:52, paragraph 42 and 45. See also Gippini-Fournier, *The Elusive Standard of Proof in EU Competition Cases* (2010) 33(2) *World Competition* 187, 189.

88. The standard of ‘firm conviction’ can be understood as the sufficiency of evidence on the basis of which a judge can be persuaded of the facts and the merits of a case. There are no rules that stipulate how strong the “personal conviction” of the judge should be.⁷⁴

89. That said, within the framework of the standard of the ‘firm conviction’, the Union courts have also often referred to “probabilistic terms” which echo the language more commonly used in common law systems⁷⁵.

90. As regards abuse of dominance cases, in *TeliaSonera*, the Court of Justice refers to ‘potential effects’ that are ‘probable’.⁷⁶ In *Post Danmark II*, the Court of Justice uses the expressions of ‘capable’ of having an (exclusionary) effect in some paragraphs (paragraphs 38, 50, 68), whereas in other paragraphs it qualifies the relevant effect as ‘likely’ (paragraphs 67, 69) or as ‘probable’ (paragraph 74).⁷⁷ The references to these thresholds of probability are to some extent confusing, as they seem to conflate the legal standard of proof (e.g. probable or likely) with the substantive legal standard (capability to have effects).

91. Similarly, in relation to Article 101(1) TFEU and questions concerning the anticompetitive effects of the conduct, the Union courts have applied a standard of “reasonable probability”⁷⁸ or have referred to the standard under Article 101(1) being that the agreement at issue is “liable to have an appreciable adverse impact on the parameters of competition”.⁷⁹ Moreover, in the context of the examination under Article 101(3) TFEU, the Union courts, while reiterating the overarching “conviction” standard, specified that the appreciable objective advantage under Article 101(3) TFEU must be “sufficiently likely” in the sense of more likely than not.⁸⁰

92. In sum, the absence of a clearly spelled-out threshold of probability in combination with the occasional use of probability language by the Union courts creates a level of uncertainty as to the applicable standard of proof in antitrust cases. The threshold of the “firm conviction” of the judge may be seen as difficult to be operationalised and translated into a more practical measure of required probability.

⁷⁴ Gippini-Fournier, *The Elusive Standard of Proof in EU Competition Cases* (2010) 33(2) *World Competition* 187, 190.

⁷⁵ Castillo de la Torre/Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law: Second edition*, 2024, paragraph 1.070.

⁷⁶ Case C-52/09, *TeliaSonera Sverige*, ECLI:EU:C:2011:83, paragraphs 71-73.

⁷⁷ Case C-23/14, *Post Danmark II*, ECLI:EU:C:2015:651. See Castillo, de la Torre, Fernando, and Fournier, Eric Gippini. *Evidence, Proof and Judicial Review in EU Competition Law: Second Edition*, Edward Elgar Publishing Limited, 2024, paragraph 1.071.

⁷⁸ Case T-322/01, *Roquette Frères*, ECLI:EU:T:2006:267, paragraph 75; Jenny, *Proving Competition Violations under EU Law*, in: Katsoulacos (ed.), *Antitrust and the Digital Economy, 2023*, p. 54.

⁷⁹ See Case C-382/12 P, *MasterCard Inc. and Others v Commission*, ECLI:EU:C:2014:2201, paragraph 93.

⁸⁰ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline and Others*, ECLI:EU:C:2009:610, paragraphs 93 and following. In this context, the Court recalled that Article 101(3) TFEU requires a prospective analysis (paragraph 95).

4.2.2. *Quality and strength of evidence (evidential standard of proof)*

93. The Union courts have consistently found that to discharge its burden of proof the Commission must gather ‘*sufficiently serious, precise and consistent evidence*’ which, taken as a whole, support the firm conviction of the court that the alleged infringement took place.⁸¹ In more recent cases in the area of abuse of dominance, the Union courts have referred to the need to showing anticompetitive effects “*must, in principle, be based on tangible evidence*”⁸² or that it requires “*specific, tangible points of analysis and evidence*”.⁸³

94. It could be argued that the Union courts have become increasingly prescriptive as to the assessment of evidence and the types of evidence that are relevant in each case. For instance, in *Unilever* and *Intel II*, the Court of Justice referred to the specific types of evidence that would be relevant to sufficiently prove a case, with an emphasis on quantitative tools, notably the price-cost “as-efficient competitor” test.⁸⁴

95. While reliance on the insight from economic theory is key in order to gain a proper understanding of competitive dynamics and the effects of business practices on markets, an expansive interpretation of the role of quantitative evidence is likely to have implications on the complexity and duration of competition proceedings.⁸⁵

4.3. **Judicial scrutiny over the standard and burden of proof in antitrust cases**

96. The judicial review of competition decisions covers the legality of the Commission decision and, if a fine has been imposed by way of that decision, also the amount of fine imposed by the Commission. As regards the fine, the Union courts have unlimited jurisdiction that goes beyond legality and allows the courts to annul or amend the fine. For the remainder of the Commission decision, the control of legality, including as to whether

⁸¹ Case C-176/19 P, *Servier and Others*, ECLI:EU:C:2024:549, paragraph 272 and following; see as well; Case C-613/13 P, *Keramag and Others*, ECLI:EU:C:2017:49, paragraph 52: ‘firm, precise and consistent evidence [...] viewed as a whole’; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline and Others*, ECLI:EU:C:2009:610, paragraph 82: ‘convincing arguments and evidence’; Joined Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries and Nippon Steel*, ECLI:EU:C:2007:52, paragraph 42 and 45: ‘sufficiently precise and consistent evidence [...] viewed as a whole’; Joined Cases 29/83 and 30/83, *CRAM and Rheinzink*, ECLI:EU:C:1984:130, paragraph 20: ‘sufficiently precise and coherent proof’; Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström and Others*, ECLI:EU:C:1993:120, paragraph 70 and 127: ‘firm, precise and consistent body of evidence’.

⁸² Case C-680/20, *Unilever Italia Mkt Operations*, ECLI:EU:C:2023:120, paragraph 42; Case C-240/22 P, *Commission v Intel Corp.*, ECLI:EU:C:2024:915, paragraph 181.

⁸³ Case C-333/21, *European Superleague Company*, ECLI:EU:C:2023:1011, paragraph 130.

⁸⁴ Case C-680/20, *Unilever Italia Mkt Operations*, ECLI:EU:C:2023:120, paragraphs 44-45 and 59;

⁸⁵ Schweitzer, Heike and De Ridder, Simon, ‘How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission’s Future Guidelines on Exclusionary Abuses’, in *Journal of European Competition Law and Practice*, 2024, 15(4), p. 228: “*Almost by necessity, such an approach will tend to prolong proceedings in all settings where dominant undertakings may benefit from such prolongations. Large amounts of complex evidence will then be produced that enforcers will feel compelled to engage with in order not to risk losing the case in Court. Based on this sort of an effects-based approach, competition authorities will be able to handle less and less cases. Economic complexity and the cost of enforcement are maximised. Legal certainty—a major building block of an effective protection against distortions of competition—is reduced.*”

the Commission has properly discharged its burden of proof, is within the limits of Article 263 TFEU (set out above at point 71).

97. There is no legal text setting out what the scope and intensity of judicial review should be, but these principles are based on how the Union courts interpret the scope of their jurisdiction.⁸⁶ As a general rule, the Union courts carry out a comprehensive review of factual findings, their legal qualification and the conclusions drawn therefrom.

98. While initially in the context of Article 101 and Article 102 TFEU cases the Union courts would only carry out a “limited review” of complex economic matters to identify “*manifest errors*” by the Commission, later judgments seem to generally depart from this approach, at least in relation to the application of Article 102 TFEU.⁸⁷ Similarly, in recent Articles 101 TFEU and 102 TFEU cases, the Union Courts have referred to the application of the presumption of innocence and stressed that 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, particularly in the context of the application of quantitative tests.⁸⁸

99. A well-functioning system of judicial review is an essential feature of any enforcement framework based on the rule of law and is key to ensure that competition rules are applied in an effective fashion.

100. At the same time, in an economy where the intensity of competition appears to be declining⁸⁹ and where false negatives and delayed enforcement progressively become more likely and costly for society, it is important to bear in mind that an increase in the evidentiary requirements to prove an infringement may carry a risk of under-enforcement. This risk is compounded by the fact that markets and conducts in themselves have become more multifaceted and complex to be analysed, with clear repercussions on the resources that need to be deployed to carry out investigations and the duration of such investigations, particularly in the case of Article 102 TFEU cases.⁹⁰

⁸⁶ Castillo, de la Torre, Fernando, and Fournier, Eric Gippini. Evidence, Proof and Judicial Review in EU Competition Law: Second Edition, Edward Elgar Publishing Limited, 2024, paragraph 6.007.

⁸⁷ *Ibid.*, paragraphs 6.005, 6.048 and following. Note, however, that, as explained by the authors at paragraph 6.057, in the *Alrosa* judgment (Case C-441/07 P, *Commission v. Alrosa*, ECLI:EU:C:2010:377), the Court of Justice annulled the judgment of the General Court because “*the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment.*”

⁸⁸ Castillo, de la Torre, Fernando, and Fournier, Eric Gippini. Evidence, Proof and Judicial Review in EU Competition Law: Second Edition, Edward Elgar Publishing Limited, 2024, paragraph 2.054.

⁸⁹ See ‘Protecting Competition in a Changing World’, 2024, available at [KD0924494enn Protecting competition in a changing world staff report 2024.pdf](#): ‘*Research presented in the first part of the present report suggests that, on average and in a wide range of sectors in the EU over the past 25 years, (i) concentration at both industry and market level has increased, (ii) markups and profits in particular at the top of the distribution have increased, (iii) the gap between industry leaders and followers as regards markups, profits and productivity has increased, and (iv) business dynamism as measured by indicators such as market share volatility between leading firms or entry and exit rates has declined.*’

⁹⁰ Schweitzer, Heike and De Ridder, Simon, ‘How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission’s Future Guidelines on Exclusionary Abuses’, in *Journal of European Competition Law and Practice*, 2024, 15(4), pp. 223-225, 235 and 242.

101. A broader reliance on the rebuttable presumptions that have been established in the case law could be a means to address the risk of under-enforcement and promote a workable approach to Article 102 TFEU.⁹¹ The draft Guidelines on exclusionary abuses of dominance that have been published for public consultation on 1 August 2024 contain a detailed explanation of the Commission's interpretation of these presumptions.⁹² At the time of writing, the public consultation has closed and the Commission is in the process of reviewing the comments that have been received before deciding on the next steps.

5. Conclusion

102. In light of the above considerations, a clear and workable allocation of the burden of proof and well-defined standard of proof is key to effective competition enforcement and to enhancing legal certainty.

103. In the case of mergers, the neutrality of the EU Merger Regulation on the compatibility of mergers with the internal market coupled with the inherent uncertainty and complexity of ex-ante analysis generated some discussions as to the appropriate and applicable standard for these concepts. With its landmark judgment, the Court of Justice recently settled this question and clearly established the boundaries and legal implications of each concept.

104. As regards antitrust, certain types of cases do not require an assessment of effects, such as horizontal price-fixing or market sharing agreements. For this type of cases, it is in relative terms easier for the Commission to discharge its burden of proof and to show an infringement, since the legal substantive test and evidentiary burden are more contained. On the other hand, where an assessment of effects is required, holding the Commission to a very high evidentiary standard, including in relation to complex economic assessments, carries a risk of rendering enforcement excessively burdensome and ineffective.

⁹¹ Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association, 6 September 2024.

⁹² See *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*, published on 1 August 2024, available at: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.