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Sense and nonsense of rules on proof in cartel cases

How to reconcile a more economics-based approach to competition law with more attention for rules on proof.

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Abstract

EC competition law has undergone major changes in the last years. A so-called more economic approach has been introduced: for vertical restrictions safe harbours were created for undertakings with low market shares and only a limited number of hard-core restrictions are still considered detrimental for the economy. For horizontal agreements, the Commission adopted guidelines and new group exemptions allowing for more flexibility for certain types of agreements that can have pro-competitive effects. Where hard-core cartels are concerned, there is no question of introducing more flexibility at a policy level. On the contrary, due to procedural reforms, decentralisation and the successful introduction of leniency programs, the focus of the Commission and most national competition authorities is now on cartels and large fines are imposed.

Even in hard-core cases there is some pressure on the competition authorities to have sufficient consideration for economic reality and impact on the market. This pressure is coming from the insights of economic doctrine, but also from the courts upon review. It is the result of a growing attention for issues of proof and evidence that we can observe in the last years in several areas of competition law. Community courts are requiring the Commission to substantiate adequately its findings of infringement of competition law by demonstrating adverse effect on the market place. Similar requirements are imposed by national courts when it comes to justifying the sanctions that are imposed by national competition authorities. This stricter approach towards proof is, at least partly, inspired by the seriousness of the sanctions that are imposed on companies. Increasingly high sanctions bring more attention for rights of defence and rules on proof and evidence.

The impression could exist that there is a contradiction between on the one hand more economics and more flexibility, and on the other hand a stricter approach when it comes to the procedural framework in which specific competition cases are dealt with. The paper addresses *how to reconcile a more economics-based approach to competition law with procedural rules, in particular rules on proof and evidence*.

First, a short description is given of the general characteristics of rules on proof and their role in the legal system with special attention for general principles of law. Then the relevant specific characteristics of EC law and of cartel cases are described, as well as a number of

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recent developments that have their impact on proof. Thirdly, an attempt is made to define the practical features of workable rules on burden of proof and standard of proof and some proposals are made to develop a pragmatic approach that reconciles the different, seemingly contradictory trends in current competition law. This approach requires both economists and lawyers to deviate somewhat from their dogmas for the sake of efficient enforcement of competition law.

Keywords

Proof - Standard of proof – Cartels – Law and Economics

JEL Codes

K 21 – K 41

1 Rules on proof: overview and concepts

1.1 Proof

What is meant here with *proof*? There are several aspects that are relevant.

First is the subjective and active element, better expressed by "to prove" (in other languages, the words for "prove" and the "proof", are the same). A party undertakes an action to prove which has as its goal "to convince" (persuasion); proving and convincing being inextricably related. Is there proof enough to convict? Has the infringement been proven?

The second dimension is the objective element, proof then refers to the object or support that bears the proof (production). From this perspective the term proof is substitutable with the term *evidence*: for example a document of some kind or a witness statement.

It is generally presupposed that all proof or evidence is objective in that it cannot be disputed. However, this is not true in practice of course: both the truthfulness of evidence (especially but not only with non written evidence) as well as its value and interpretation shall be subject of debate in a given case. In fact, in most legal disputes, this debate is the crucial one.

Another misconception that might sometimes exists is that "proof" only relates to facts and that once these facts are established without doubt, the law can be applied. This not the reality of legal disputes: the distinction between facts and law is not so clear cut, and proof, certainly in the active sense of the term, shall also relate to the law: the legal argument that is made shall also have to convince and be corroborated by proof. A good example from competition law to show how difficult it is to distinguish facts from law is the definition of the relevant market. Determining what is the relevant market that shall be the basis for the competitive analysis in a cartel case, is not (merely) the observation of the facts (the market) but it is applying a legal definition of what a relevant market is, selecting certain facts and discarding others in view of applying the legal provisions.[2]

To complete the picture, one might consider that there is a third dimension to proof, namely the result of the two aspects mentioned before: the actions on behalf of a party, bringing certain elements of fact and law, thereby resulting in convincing the judge or authority.[3] The result is proof that the law has (or not) been infringed.

1.2 Rules on proof

Generally, rules on proof shall be considered being part of procedural law, rather than substantive law. However, competition law illustrates how procedural law and substantive law interact and how blurred the distinction between procedural law and substantive law can be. The rules on proof are perceived to be procedural but no one shall contest that the existence of sufficient proof or not of a cartel, touches on the merits of the case.

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[2] Again in some cases this can lead to results that the companies concerned might find peculiar: they might experience competitive restraints for example for competitors that are legally not considered to be in the same market.

[3] N. Verheyden-Jeanmart, *Droit de la preuve*, Larcier, 1991; P. Wéry, *La preuve*, Guide juridique de l'entreprise, Titre préliminaire, Livre 2, Kluwer, 2003. For an interesting view on procedural law from a more general theoretical viewpoint of principles of law and the main elements of litigation: M.D. Bayles, *Principles of law, A normative analysis*, D. Reidel Publishing company, 1987.

When reference is made to *rules on proof*, this covers a wide variety of issues and the different dimensions of the term proof mentioned above, are reflected. Only certain aspects shall be covered in this paper, but these are the most common subjects that are dealt with in rules on proof, or rules of evidence:[4]

- Who has to prove (therefore convince)? When does the burden shift?
- When is an infringement of the law considered proven, in other words, when does the conviction of the authority or court have legal consequences?
- How active or passive can or does the authority or court have to be when dealing with proof?
- If the court or authority can have an active role, which measures can be taken?
- Which types of proof can be accepted, what is their respective value (hierarchy)?
- Can all proof be used in all circumstances? What is the consequence of the use of illegitimately found proof? How is confidential material protected?
- How will a court in appeal deal with proof when reviewing a case?

The first subject is commonly referred to as the burden of proof and the second one the standard of proof, they shall be the main focus of this paper. The four other questions that are mentioned above are typically subjects where the legal tradition of the jurisdiction in question shall play an important role and where great differences can occur from one jurisdiction to the other.

For example, the role of the judge is very determined by the legal tradition and culture of a country. In some countries it is much more acceptable than in others that a judge plays an active role in terms of finding proof, at his own initiative and not bound by what the parties before him. Also, rules on proof shall often differ considerably depending on the area of law: typically private and contractual law shall be governed by other rules than criminal law. Finally the choice of the institutional "format" has an impact on the rules that govern procedure and also proof issues, including general principles of law. For example: if an authority is an administrative body, administrative law shall apply and certain guarantees for parties that apply only before courts[5], shall not.

In most legal systems a distinction can be made between a system of free proof and a system of regulated proof. The distinction relates mostly to the types of proof that can be used and which probative value is attributed to different forms of proof. In a system of free proof generally, the probative value is not regulated and there are no restrictions on the types of proof or evidence that can be used. The only limits would be the following principles that are generally the legal limits for the use of certain proof in all systems of proof:

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[4] In the U.S. legal terminology, the term "rules of evidence" is more common. For discussion of the principles of civil and criminal law that rule evidence as well as the rol of the judge in that process, S. Guinchard, *Droit et pratique de la procedure civile*, Dalloz Action, 2006; G. Stefani and G. Levasseur, *Procédure pénale*, Dalloz, 2006; I.H. Dennis, *The law of evidence*, Sweet & Maxwell, 2007 (UK); *Phipson on evidence* (fifteenth edition), Sweet & Maxwell, 2000.

[5] This argument has lead the Commission for a long time to deny the protection of certain fundamental rights such as the rights protecting immunity of homes but the case-law from the European Court of Human Rights has enlarged the scope of application of these rights primarily on the basis of the quasi-criminal nature of the sanctions that the Commission can inflict upon undertakings.

– rules concerning illegitimately obtained proof

– the protection of privacy and of the person

– protection of the rights of defence.

These limits stem from fundamental general principles of law: the principle of legality, the fundamental human right of the protection of the person, the right to a fair trial and the rights of defence following from that.[6]

In a system of regulated proof, existing in different degrees, there is typically a formal hierarchy whereby the law recognizes superior value to some forms of proof and does not allow just any proof to be used.[7]

One could qualify competition law, at least at the EC level, as a system of free proof. In principle, the Courts have accepted that all imaginable types of evidence can be used by the Commission to prove an infringement of competition law. There is no formal hierarchy and there are no limits to the type of evidence the Commission can use, other than the ones following from general principles of law mentioned above. The large discretion that the Commission has in terms of collecting proof shall be mitigated by the standard of proof, that is discussed below.

Finally, it is clear that rules of proof shall often be decisive for the outcome of a case. Sometimes, this makes law enforcement incomprehensible for the general public and lawyers seem out of touch with reality. The typical example from criminal law is the criminal against whom the evidence is indisputable but who is not punished because irregularities occurred during the investigation. Such cases should definitely be exceptional because they do not stimulate the social acceptance of justice.

However, normally, in such cases lawyers would feel that the result of the case is perhaps regrettable (in the individual case) but justified for the sake of the protection of general principles that are fundamental to the legal system. There is a particular quote that seems useful here in this respect: procedural rules prescribe a framework whose justification is not necessarily economic but within that framework economic logic may operate.[8]

1.3 Burden of proof

The burden of proof concerns the question which party must prove what. At first sight this is a fairly obvious concept: it is either one party or the other. Questions arise mostly when it is appropriate that the burden of proof shifts from one party to the other during the course of proceedings. In that respect, the use of presumptions is important and relevant in the context of competition law. This shall be discussed further below.

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[6] J. Bourgeois and T. Baumé, *Decentralisation of EC competition law enforcement and general principles of Community law*, Research papers College of Europe, 4/2004, available at www.coleurope.be; more general: T. Tridimas, *General principles of EC law*, Oxford University Press, 1999; K. Lenaerts and P. van Nuffel, *Constitutional law of the EU*, 2005, p. 711-739.

[7] For example, in family law and property law in some jurisdictions ownership can only be proven in a limited number of ways, for example by an act drawn up by a notary.

[8] R. Cooter and T. Ulen, *Law & Economics*, Pearson Education Ltd. International edition, 2004, p. 433. In the same chapter the examples to illustrate how the burden of proof and standard of proof work also offer a interesting perspective.

As far as known, in principle in most jurisdictions the rule "actori incumbit probatio" prevails: the claimant bears the burden of proof. In the context of public enforcement of criminal law but also in competition law (see hereinafter) this shall mean that the authority bears the burden of proof of the infringement. In cases where an investigation is initiated by a complaint by a competitor for example, this is not different: the more substantiated the complaint is the better for the authority but it is solely responsible for proving the infringement, the complainant is not a party to the procedure.

1.4 Standard of proof

The standard of proof can be defined as the level of certainty that proof must achieve and that has to be attained for a jurisdiction to establish whether or not the law has been infringed and/or measures have to be taken.

It is generally assumed that in common law countries there are two standards of proof: "preponderance of evidence" in civil cases and "beyond reasonable doubt" in criminal cases. Another standard that is often referred to in comments about EC competition law recently is the "balance of probabilities" which is equivalent to the preponderance of evidence.

In most civil law countries the concept of standard of proof as such is not so well known and certainly not defined by law. This is important in this context given the fact that the vast majority of the member states of the European Union are probably to be considered as belonging rather to the civil law tradition.

There is a strong correlation between the standard of proof and the standard of review. The latter is the scope of review that a court upon appeal shall exercise when dealing with an appeal against for example a decision of a competition authority. The two extreme forms seem to be full review (the court places itself in the position of the authority and entirely repeats the analysis of facts and law) and on the other hand, marginal review. The latter is commonly thought to be the form of review in administrative law where the courts upon appeal leave a great margin of discretion to the public authorities. Although the focus in this paper is rather on the standard of proof, it is clear that standard of proof and standard of review are two aspects of a single control system.

2 Rules on proof in EC cartel cases

This paper is primarily focused on Article 81 EC Treaty and in particular cartels. For the purpose of this paper the term "cartel" means any infringement of Article 81 EC Treaty or its national equivalents in the form of a horizontal agreement having as its object and/or effect the restriction of competition.[9]

A second introductory remark to be made is that the focus is on the application of Article 81 EC Treaty at an EC level. It is the purpose of this paper however to highlight mainly the common features workable rules on proof and in particular the burden of proof and the

[9] It has to be said that most of the paper shall also be relevant for vertical agreements that fall within the scope of application of Article 81 EC but these agreements nowadays are rarely, if ever, the subject of decisions of competition authorities and therefore of litigation in review courts. However, vertical agreements are often the subject of private litigation, usually in the context of contractual disputes. The law governing issues of proof shall then be that applicable to such disputes in a particular jurisdiction.

standard of proof should have in Article 81 EC cases, regardless of where the prohibition is enforced.

A last remark is that the present analysis is limited to the application of the prohibition of Article 81 (1) EC and the exception of Article 81 (3) as such. Another interesting subject that would however lead too far in this paper, is proof in the context of the sanctions that can be imposed when an infringement is established.

2.1 The specifics of EC law

When discussing proof issues in competition law, the specific context of EC law should not be underestimated. As is well known competition law as it is applied and enforced now throughout the member states, is largely based on EC law. For most jurisdictions this was a new area of law and EC competition law was integrated into the legal system just as other areas of material law such as the free movement of goods, even with less difficulty because there was often less conflict between (usually non existent) pre existing national law and EC law.

When EC material law is applied in the member states, this is done in the context of national procedures on the basis of the principle of *procedural autonomy* of the member states. The treaties do not contain a body of procedural rules. EC law does not have rules on proof and evidence. Member states amongst each other have different traditions of procedural law and certainly rules on proof. As competition law developed and companies were sanctioned in an increasingly severe way, the European courts started to develop jurisprudence on procedure, drawing from different sources of law, each judge with a different background and the European convention on human rights being an important source of inspiration.

Nevertheless, there has been great impact on national procedural law for at least three reasons: spontaneous harmonisation occurred because of the substantial harmonisation of competition law and the decentralisation process instigated by Reg. 1/2003.[10] The harmonisation affects the procedural rules that national authorities and courts apply when they apply EC competition law but given the fact that most national competition acts are also based on EC law, naturally harmonisation touches procedural competition law, regardless of whether only Article 81 EC is applied or also or only its national equivalent.

Also, the EC courts case-law on equivalence and effectiveness has definitely resulted in a certain unifying effect on procedural law.[11] However, where proof is concerned, this should not be overestimated. Harmonisation of procedural law in competition cases has mainly taken place in the area of the rights of defence in a broad sense of the world, for example leading to the protection against self incrimination and the right to access to a file as well as the protection of legal privilege. It is not surprising that spontaneous harmonisation of these aspects of the procedure could occur because it is largely based on rights that are based on general principles of law, laid down also in the ECHR. General principles of law are in fact playing a key role in the construction of a unified set of procedural rules for competition cases.

[10] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82, OJ (2003) L 1 p. 1.
[11] For an overview: K. Lenaerts, D. Arts and I. Maselis, *Procedural law of the EU*, Sweet & Maxwell, 2006, chapter 3.

Until recently, there was very little case law on proof or evidence. This is changing now, as will be discussed below. It is important to keep in mind when studying the recent cases in relation to proof, that there is little common ground that this jurisprudence can be based because legal traditions in the member states show many differences in the actual rules on proof. The well known difference between common law and civil law systems is one of the factors. The EC courts when dealing with issues of proof are in fact construing new law, in the absence of EC legislation. They have to attempt to draw common principles from the legal systems of the 27 member states. In doing so, the Courts can base themselves on general principles of law common to all members states (for example the presumption of innocence). But where the national laws differ greatly, the Courts have to look for a sui generis set of rules, based on the specifics of competition law.

The sui generis character of the jurisprudence and developments concerning proof at the EC level, should perhaps make us careful in trying to apply certain concepts such as "burden of proof" and "standard of proof".[12] We should at least realize that these concepts are not clearly defined and that they do not have the same meaning in all member states, if at all they exist. In fact, the few EC judgments show that the Community Courts are clearly reluctant themselves to use a number of the concepts used in doctrine such as burden of proof and standard of proof.

Keeping this in mind however, it seems efficient to use these terms that are widely known also outside the legal community, even though they are certainly common law concepts. Also the majority of doctrine that is studying these issues since the emergence of case-law about proof, has also generally used these concepts. Finally and not unimportantly, the Community legislator and the Commission use both "burden of proof" as well as "standard of proof in important competition texts such Reg. 1/2003.

2.2 The specifics of cartel cases

2.2.1 Sources of law for proof in cartel cases

Until fairly recently there were not many legal provisions at the EC level that dealt with rules on proof in competition matters and none that dealt with the burden of proof or the standard of proof. Reg. 17 that governed Commission investigations for more than 40 years, contained provisions on the investigatory powers that the Commission could exercise, and regulated to some extent which proof could be used.[13]

[12] A L. Sibony and Barbier de La Serre, *Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective*, RTD Eur. 43 (2) avr. juin 2007, p. 205 251. Also from the French perspective but not opposing the use of these terms: H. Legal, *Standards of proof and standards of judicial review in EU competition law*, Annual Proceedings of the Fordham Corporate law Institute: International Antitrust and Policy, Juris Publishing, 2006, p. 107-116.

[13] J. Joshua, Proof in contested competition cases, a comparison with the rules of evidence in common law, ELRev. (1987), 12 (5), p. 315-353; A. Walker-Smith, *Collusion, its detection and investigation*, ECLR (1992), p. 71-81; M. Guerrin and G. Kyriazis, *Cartels: proof and procedural issues*, Annual Proceedings of the Fordham Corporate law Institute: International Antitrust and Policy, Juris Publishing, 1993, p. 773-843; G. van der Wal and L. Parret, *Bewijs in het Europese mededingingsregime, een overzicht*, in: Europees Bewijsrecht: een verkenning, S. Prechal, L. Hancher (ed.), Kluwer, 2001; more general: C.S. Kerse and N. Khan, *EC Antitrust Procedure*, Sweet & Maxwell, 2005 and M. Siragusa and C. Rizza (ed.), *EU Competition Law, volume III Cartel law, restrictive agreements and practices between competitors*, Claeys & Casteels, 2007.

Reg. 1/2003 that replaced the mentioned regulation as of 1 May 2004 now contains a clear rule on the burden of proof in Article 2: "*In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81 (1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81 (3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled*." In other words, this is the rule "actori incumbit probatio" mentioned above.[14]

It appears clearly from the preamble of Reg. 1/2003 that the Community legislator is careful not to interfere with national law: "*This regulation neither affects national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of the case provided that such rules and obligations are compatible with general principles of Community law*."[15]

Proof and evidence is an area where the case-law, due to the lack of legislative sources, has been the most important source of law. The case-law, even though limited in the number of subjects it has dealt with, has also typically been much inspired by the European Convention on Human Rights, other international treaties and (unwritten) general principles of law, most of them more or less common to the legal traditions of the member states.

What are these general principles of law that can be relevant when it comes to proof in cartel cases? There are at least two important ones that can have their impact on proof. The first one is the protection of the rights of defence and the right to a fair trial, the second the presumption of innocence and the principle of the benefit of doubt (in dubio pro reo) that follows from that.[16] This last principle is a central element in the constructing of rules of proof in cartel cases and it will come back in the analysis later on.[17] Other principles that may play a role are the principles of equality and proportionality. Where proportionality is concerned, it most frequently plays a role in the context of the determination of the sanctions, but it seems entirely possible that proportionality should intervene, for example in the burden of proof and the shift thereof. There is case-law of the Community courts stating that no greater burden should be imposed on individuals than is reasonably necessary to attain the policy aim intended.[18] In the context of the investigation by the competition authority regard should also be had for the right to good administration.[19]

It is very important from a legal perspective that the preamble of Reg. 1/2003 clearly subjects national rules on proof to the general principles of Community law. This means that both the

[14] Furthermore, Reg. 1/2003 describes the investigation procedure of the Commission, including again rules related to the collection of proof during the investigation and inspections. As it was said before, this is not the focus of this paper.
[15] Paragraph 5.
[16] The rights of defence shall mostly have an impact on the question what proof can be used. For the purpose of this paper which shall focus more on burden of proof and standard of proof, the presumption of innocence shall be more important.
[17] It is less certain that this is also true for merger control. In any case, it would work differently. The benefit of the doubt would not require the authority to refrain from taking an (infringement) decision such as is the case for cartels but it would then arguably oblige the authority to approve the merger.
[18] For example: ECJ 24 October 1973, case 9/73, ECR (1973) p. 1135.
[19] This is not an exhaustive list of all general principles that can be relevant. The purpose in this paper is to highlight however that general principles play an important role in the area of competition procedure and that this is increasingly so. Also that there are interesting "side effects" of this trend such as the harmonising effect it has on the law in the member states.

Commission at an EC level as well as national authorities and courts are subject to the same general principles of law and if necessary, national instances have to put aside their rules of proof should they feel they are not compatible with these principles. It underlines again the great importance of these general principles in the procedural framework of competition law as it exists today.

2.2.2 Some essential characteristics of cartel cases

There are a number of characteristics that differentiate cartel procedures from other legal procedures and also from other competition procedures (mergers and abuse cases).

The type of legal analysis that needs to be carried out by authorities and judges is fundamentally different than in abuse or in merger cases. First of all, the time dimension of the analysis is very different. The analysis is focused on the past. Rather rare are those cartel cases where the alleged cartel is ongoing at the time of the scrutiny. In abuse cases this can often be different. For example, a refusal to supply leaves the complainant of the abuse without supplies and this is usually an ongoing situation which shall only be remedied by an order by the authority or judge or else by voluntary compliance by the dominant undertaking with a decision qualifying a certain behaviour as abusive. The situation is obviously even more different in merger cases. In that scenario the (usually) competition authority has to take a prospective approach (ex ante) approach, contrary to the ex post analysis in cartel cases.

Furthermore, there is also something one might call the "proof paradox" in cartel cases. The paradox is that in fact, certainly nowadays at the EC level and in jurisdictions with a mature system of enforcement, the most serious cartels that the authorities want to discover and end, are those that are usually the most difficult to find and to prove. If the goal is to have effective competition law enforcement, this paradox should lead to a cautious approach towards rules on proof that can make it even more difficult for authorities but there shall be a clear tension with the protection of the rights of parties which has to be resolved.

The difficulty to discover the most serious infringements of competition law is also one of the reasons why leniency has become such an essential part of current antitrust practice.

It is a common feature of all leniency programs that they require applicants to provide the authority with evidence of the cartel they claim having been part of. In short, the importance of leniency programs has a great impact on fact finding and evidence for two main reasons. The first is that an applicant for leniency has a great interest in "beefing up" the evidence: the more convincing it seems, the higher the reward will be. It goes without saying that the authority will verify all claims brought forward. Nevertheless, there is a risk that a certain amount of exaggeration takes place, for example when naming all the undertakings implicated in a cartel. Second, there might be more reliance on oral statements in leniency cases. This is changing the methods that competition authorities are using in dealing with proof.

There are a number of other reasons why cartel cases are different, that have their importance when it comes to proof.

The legal dispute shall usually be limited de facto to a certain number of the conditions of application of the cartel prohibition.[20] In many cases the undertakings concerned shall, at least partly, recognize the existence of a cartel, certainly in the case of leniency.

There are then two types of arguments that are increasingly central: the first are arguments relating to the impact on the market (appreciability of the restriction and the effects in the market). These arguments are increasingly important because of the more economic approach discussed below. It must also be said that in hard-core cartel cases there is usually not much need for economic analysis because it is still established case-law that these agreements are considered having the restriction of competition as their object and therefore the effects on the market need not be proven. Nevertheless the impression is that this line of case-law is perhaps not everlasting.[21]

The other categories are the arguments that concentrate on procedural aspects and individual accountability for the infringement or even only the calculation of the fines and the existence of aggravating and attenuating circumstances.

In other words, this means that questions of proof shall not always concern all the constituent elements of the cartel prohibition that need to be proven. It can be assumed that when facts or legal points are not in dispute, the Commission is discharged from its burden of proof in that respect.[22]

3 Recent developments having an impact on proof

This paper wants to highlight developments in recent competition practice that bear great relevance for issues of proof.

A so-called more economic approach has been introduced: for vertical restrictions safe harbours were created for firms with low market share and only a limited number of hard-core restrictions are still considered detrimental for the economy.[23] The well known recent judgment of the U.S. Supreme Court in the Leegan case, is quite striking in this respect and goes substantially further again.[24] The Supreme Court decided that it was time to let go the per se rule for vertical resale price maintenance. This restriction was one of the few remaining hard core restriction to which U.S. antitrust law did not apply the rule of reason. For the moment, under EC competition law, vertical resale price maintenance is blacklisted.[25] Although it is unsure at this stage if this will have an impact on the EC policy towards vertical restraints, it shall at the very least be a crucial element in the evaluation of the regulations on vertical agreements that are due to start in the near future. The result might be that the list of hard core restrictions in vertical agreements shall be limited further.

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[20] For example: in many cases the condition that the parties must be undertakings within the meaning of Article 81 EC or the existence of an agreement shall not be in dispute.

[21] See below about the increasing pressure on authorities to substantiate their claims and on the other hand the decreasing number of hard core restrictions that remain; CFI 27 September 2006, case T-168/01, GSK, not yet published.

[22] See Sibony and Barbier de La Serre, above note 12.

[23] The reform of the policy towards vertical agreements led to a new group exemption, Reg. 2790/1999, OJ (1999) L 336, p. 21. The regulation has to be reevaluated by 2010. Also: guidelines on vertical restraints, OJ (2000) C 291, p. 1.

[24] Judgment Leegin Creative Leather Products/PSKS; see first comments by P. Lugard, in Markt & Mededinging, 2007, nr. 5/6.

[25] Article 4 of Reg. 2790/1999, above note 23.

For horizontal agreements, the Commission adopted guidelines allowing for more flexibility for certain types of agreements that can have pro-competitive effects, such as joint production and research and development agreements.[26] The keyword is now self-assessment: companies are required to assess themselves on a case-to-case basis whether their agreements are compatible with Article 81 EC Treaty.

Even in hard-core cartels[27] there seems to be mounting pressure on the competition authorities to have sufficient consideration for economic reality and impact on the market. This pressure is coming from the courts upon review: there are some signs of that at the EC level, mainly from the Court of First Instance but also tentatively from some national jurisdictions.[28]

The pressure is the result of a growing attention for issues of proof and evidence that we can observe during the previous few years in several areas of competition law. Community courts are requiring the Commission to substantiate adequately its findings of infringement of competition law by demonstrating adverse effect on the market place. Similar requirements are imposed by courts when it comes to justifying the sanctions that are imposed by authorities. This stricter approach towards proof is, at least partly, inspired by the seriousness of the sanctions that are imposed on companies. Sanctions require rights of defence and rules on proof and evidence to be respected.

More specifically at least two trends can be observed. The first took place mainly in merger cases where the Court of First Instance was strict on the Commission in terms of the market analysis that is necessary to evaluate whether or not certain effects on the market might reasonably be foreseen in the future as the result of the merger. The Courts require accuracy, a convincing file and a well motivated decision which clarifies the information on which the market analysis is based.[29] They demonstrated willingness to perform a thorough review of the Commission's case, causing some surprise. This recent case-law was the start of a discussion in doctrine on the standard of proof, which was until then not a much discussed subject at all. There are clear indications that the Courts see little or no reason to conduct limited review in cases under Article 81 or 82 EC, much on the contrary.[30]

The second trend is somewhat similar but takes place in Article 81 EC cases and goes a step further. In recent case-law the Court of First Instance seems to be challenging the quasi automatic application of Article 81 EC to certain restrictive practice such as measures against parallel trade.[31] Until recently such practices received a "per se" treatment by the Commission

[26] Commission Guidelines on the applicability of Article 81 to horizontal co-operation agreements, OJ (2001) C 3, p. 2.
[27] Generally the following list is mentioned: price fixing, production quota, market sharing and clients sharing; see also the introduction of the new Commission Leniency Notice, OJ (2006) C 298, p. 17.
[28] This is clear in the Netherlands: much commented judgment of College van Beroep voor het Bedrijfsleven (highest court in administrative affairs), G Star Secon Group, 7 December 2005.
[29] See famous judgments Airtours, CFI 6 June 2002; case T-342/99, ECR (2002) p.II-2585; Tetra Laval, ECJ 15 February 2005, case C-13/03 P. According to some, the general wordings of the ECJ's judgment in Tetra Laval, makes the considerations on proof in that judgment also applicable in other than merger cases, see H. Legal, above note 12.
[30] Interesting comments in case T-170/06, CFI 11 July 2007, Alrosa, § 108; the CFI's judgment in Microsoft could be considered an example of thorough review, case T-201/04, judgment of 17 September 2007, not yet published.
[31] See GSK, above note 18.

because they were seen as very detrimental from the viewpoint of the internal market.[32] The Court now seems to be saying that it might be time for a new approach and requires the Commission to show, even in such cases, that negative effects on the market can be assumed and that the consumer can be harmed. In other words, again there is an emphasis on the burden of proof of the Commission and on the importance to achieve an adequate standard of proof on a case-to-case basis.[33]

4 Workable rules on proof

As said before, this paper focuses mainly on the burden of proof and the standard of proof. The purpose is to formulate some considerations and thoughts about proof issues, that should be useful for cases involving Article 81 EC Treaty, regardless of where the case is brought because they are based on general principles of law that apply both at a Community level as well as at the level of the different member states.

4.1 Burden of proof

As it was said before, Article 2 Reg. 1/2003 contains the principle that the burden of proof of an infringement of Articles 81 or 82 EC rests upon the Commission or, in court proceedings, on the party alleging the infringement. When a party claims the benefit of the exception of Article 81 (3) it shall bear the burden of proof.

This principle applies to the Commission when it applies Article 81 EC to a cartel and the correct application of the principle shall be subject of judicial review by the Court of First Instance. As it will be discussed further on, the rule is less simple in practice as it might appear.

The rule on burden of proof laid down in Article 2 Reg. 1/2003 also applies to national proceedings in which Article 81 or 82 are applied, be it before a competition authority or a court in civil proceedings. There is clearly no room for a different distribution of the burden of proof in national law. Contrary to the standard of proof, no reference is made to the national procedural autonomy in this respect. More so, one can assume that Article 2 Reg. 1/2003 also regulates the burden of proof in proceedings where only the national cartel prohibition shall be applied. In national cases where Article 81 or 82 EC is applied, the actual distribution of the burden of proof and the shift from one party to another, shall have to respect the principles of equivalence and effectiveness: the procedural framework cannot be such as to make it too difficult to invoke and enforce EC law provisions.[34]

It is appropriate here to recall a specific feature of the burden of proof in cartel cases that was briefly mentioned before. The Commission is discharged form its burden of proof when certain relevant legal or factual elements are recognized by the party in question. This also implies that the same party cannot successfully attack the Commission's infringement

[32] Many Art. 81 decisions of the Commission in the last years were still related to issues of parallel trade and restriction of import and export is still listed as one of the most serious infringements by the Commission.

[33] There are clear signs in national jurisdictions such as the Netherlands that courts are taking a similar approach, G Star Secon Group, mentioned above note 28. However, the author realizes this is still somewhat speculative because there has not been a judgment from the ECJ and the GSK is subject to different interpretations.

[34] There is quite a lot of case-law on the burden of proof in national cases, outside of competition law: for example ECJ 17 July 1997, case C-242/95, GT Link, ECR (1997) p. I-4449; for an overview of the impact of EC law on national procedural law and sanctions, Lenaerts, Arts and Maselis, *Procedural law of the EU*, above note 11.

decision on inadequate proof for a point where there had previously been recognition on behalf of the concerned undertaking.

4.1.1. Legal burden and evidential burden

A distinction is generally made between persuasive or legal burden of proof and the evidential burden of proof. Another term sometimes used is the tactical burden of proof.

The party required to prove his case and to persuade the decision-maker, bears the burden of proof. This is the persuasive or legal burden of proof. When the Commission is op the opinion that an undertaking has infringed Article 81 EC Treaty by entering into a price-fixing cartel, the Commission shall have to prove that infringement. The evidential burden of proof is the need to bring the actual sufficient evidence.[35]

This is more than just a theoretical distinction, it helps understanding and defining how the burden of proof works and should work in practice, more specifically how the burden of proof can seemingly shift from one party to the other but actually stay with the same. This is clarified by using the distinction between legal burden of proof and evidential burden of proof. An example might clarify this distinction.

> Example: two competitors have made an agreement to work together to develop the technology for a new chip. They are the two major players in the market. The Commission considers that their R&D agreement is problematic and fulfills the conditions of Article 81 EC Treaty. The parties invoke the exception of Article 81 (3) EC Treaty stating, amongst other things, that the agreements shall create major technological progress. They have the burden of proof for the conditions of the exception of Article 81 (3). If plausible scientific evidence is brought about the consequences of their agreement, but the Commission is not convinced, it will have to substantiate its argument. Even though the legal burden of proof is still with the undertakings concerned, the evidential burden of proof will have shifted.

4.1.2. Article 81 (1) EC Treaty

The situation is in fact more complicated than the seemingly simple rule of Article 2 of Reg. 1/2003 would indicate, also for another reason. In the current state of competition law, there are many types of cases where there is also a balancing exercise taking place under Article 81 (1) EC. Although the Community courts have refused to recognize that a rule of reason, similar to the U.S. system exists, in EC law, there is a well developed body of case-law in which at the very least, a similar exercise occurs.

First there are the cases where pro's and con's of agreements are weighed and certain restrictions are left outside the scope of Article 81 (1) EC because non-economic considerations outweigh the restriction of competition. The case-law on sport and on restrictions in the market of professional services ar the most well known.[36]

Secondly, the so-called more economic approach has led to a policy where certain agreements are considered to stay outside the scope of application if the parties stay under a certain

[35] D. Bailey, *Standard of proof in EC merger proceedings* : a common law perspective, CMLR (2003) 40 p. 845-888.

[36] For example ECJ 18 July 2006, case C-519/04 P, Meca Medina, not yet published and ECJ 19 February 2002, case C-309/99, Wouters, E.C.R. (2002) p. I- 1577.

market share threshold.[37] This also brings the use of presumptions into the picture (see hereinafter).

Therefore the rule that the Commission bears the burden of proof for the infringement (or the claimant in civil proceedings) oversimplifies the proof issues at stake.

> Example:
>
> Article 81 (1): legal and evidential burden of proof on Commission: (a) undertakings, (b) agreement or concerted practice, (c) appreciable (d) restriction of competition, (e) appreciable (f) effect on trade between member states
>
> Undertakings:
>
> Strategy One: contest individual conditions a, b, c, d, e and/or f
>
> And/or
>
> Strategy Two: acknowledge the restrictive nature of an agreement but claim the agreements escapes from the scope of application of Article 81 for one of the reasons mentioned above.[38]

The undertakings shall have to substantiate their claims, they shall have the evidential burden of proof. If they prove in Strategy One that one condition is not met, this shall be sufficient since the conditions are cumulative. If the arguments are contested, the evidential burden of proof shall shift again. However, at that point there is an important change: the party who has the legal burden of proof has been shown not to have sufficient proof. At such a point, the principle of in dubio pro reo (benefit of the doubt) can come into play, certainly in court proceedings.[39] Doubt has been created: for the evidential burden to shift a second time to the undertakings shall require strong evidence from the Commission.

If they prove in Strategy Two that, for example, the restrictions of the agreements are inherent to the justified non economic goal it pursues, the agreement shall fall outside the scope of Article 81 (1) and recourse to Article 81 (3) will not even be necessary any more. It is understandable that when the evidential burden of proof is upon the undertakings in this respect, that more proof shall be required because a restriction of competition is established and yet it is not forbidden. This can be based on the general principle that exceptions to general prohibitions are interpreted restrictively.

4.1.3. Article 81 (3) EC Treaty

Where Article 81 (3) EC Treaty is concerned, Article 2 Reg. 1/2003 provides that the burden of proof rests upon the party claiming the benefit of the exception. Here the cumulative nature of the four conditions that the provision contains[40], works the other way. The undertaking or

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[37] The Guidelines in horizontal agreements are a good example, see for example joint distribution agreements and joint production, above note 26.

[38] It is not always so clear cut: staying below a market share threshold can also be the non fulfillment of the condition of the existence of an appreciable effect on competition.

[39] There is no doubt this principle applies in competition procedures, see ECJ 8 July 1999, case-199/92 P, Hüls, ECR (1999) p.I-4287 as well as in front of national authorities and courts applying the EC provisions, ECJ 13 July 1989, case 5/88, Wachauf, ECR (1989) p. 2609; being general principles of EC law as well as fundamental rights protected by international treaties, there is no need member states are bound.

[40] The four conditions are: (1) contribute to improving the production or distribution of goods or to promoting the technical or economical progress, (2) allowing consumers a fair share of the resulting benefit, (3) not

association of undertakings brings proof for all four conditions. The evidential burden of proof then shifts if the Commission contests this proof. If it can show for only one condition that in fact the necessary proof is not available, this shall be sufficient. Nevertheless it is remarkable that the Commission will generally motivate her stand on all four conditions in an infringement decision, preferring to explain why the exception does not apply.[41] In most cases also it shall make sure to argue that more than one condition is not fulfilled. The same tendency will exist at the national level: authorities and courts shall prefer to be cautious and are, in any case, under a duty to adequately motivate their decisions. However, strictly speaking, the non-fulfilment of one condition of Article 81 (3) is sufficient and the Commission must not examine in detail further arguments under Article 81 (3) as soon as one condition is not fulfilled.

For Article 81 (3) an interesting question on the shift of the burden of proof is whether in general the attitude towards proof should also be severe because it constitutes an exception to a general rule such as was described above for the case-law under Article 81 (1) EC that allows for certain agreements to escape from the scope of application of the prohibition (above). In other words: when the Commission casts doubt on the arguments of a party (for example on the existence of an improvement of the production), does this mean that a severe attitude is necessary when the evidential burden of proof is shifted back to the undertaking?

On the basis of EC law and the structure of the Treaty, this seems plausible. However, it is submitted that it is doubtful. First, the Treaty itself has provided for the possibility of certain restrictive agreements to be exempted because they present advantages, predominantly of an economic nature, that outweigh the restrictions of competition. This is important: the idea is that by nature these agreements have a neutral effect on competition in the market. Secondly, there is no justification for allowing the rule of the "benefit of the doubt" to play in favour of the authority that is enforcing the law against the undertaking. In other words, the counterarguments of the Commission should not make it more difficult for the undertaking to bring additional elements to prove why the conditions of Article 81 (3) EC are met. Even though the roles are reversed under Article 81 (3) EC, the undertaking is still in the position of the defendant and should have full respect of the rights or defence.

4.1.4 Shifting the burden: some additional remarks

Flexibility in terms of the shifting burden of proof is a good thing, but the difficulty is of course in some cases at which point the evidential burden is shifted. When is there enough "likeliness", for the other party to have to show that it is "unlikely"? It helps to always keep in mind who bears the initial legal burden of proof, to determine at which point the evidential burden can shift. It also helps to keep in mind the structure of Article 81 EC and its logic. Furthermore, the examples above show that an indefinite number of shifts of the evidential burden of proof is unlikely and that after a party has successfully contested the arguments of the Commission bearing the legal burden of proof, the standard shall change because doubt is created: reasons for a second change in the burden of proof shall not be assumed so readily.

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imposing restriction which are not indispensable to the attainment of these objectives and (4) not have the possibility to eliminate competition in respect of a substantial part of the products in question.

[41] A careful attitude of authorities and courts (in anticipation of review) when examining the conditions of Article 81 (3) EC is justified: the CFI was very critical on this point in GSK, above note 21.

This shows to what extent the burden of proof and the standard of proof are linked. It also shows how this means inevitably that the authority or judge shall have to make several decisions in terms of the burden of proof throughout one the procedure of one single cartel case.

The importance of general principles of law has become clear when discussing how the distribution of the burden of proof should work in practice. The presumption of innocence and the rights of defence protect the defendant undertakings and can sometimes lead to mitigating the burden of proof in their favour.

However, it must be underlined that these principles do not put into question the distribution of the legal burden of proof. Nor does it mean that the burden of proof of undertakings when invoking the exception of Article 81 (3) EC is more easily shifted back to the Commission or the national authority than in cases of an infringement of Article 81 (1) EC: this is a widespread misconception amongst lawyers who still tend to give less importance to proof under Article 81 (3) EC than under Article 81 (1) EC.[42]

4.1.5. Presumptions

In order to have a workable system of proof in competition law and certainly for cartels, it is necessary to work with (rebutable) presumptions. It is submitted that the more economic approach in competition law has increased the importance of presumptions but has also changed their nature.

– Thresholds

The first type of presumptions usually take the form of thresholds expressed in market share of the parties of turnover and works as follows: as long as a particular threshold is not met, it is assumed that there is no appreciable effect on competition in the common market. Such thresholds in fact exist already since the first De Minimis Notice of the Commission in 1970 that introduced the idea that Article 81 EC should not apply to agreements having only a negligeable effect on competition.[43] The use of thresholds has increased substantially in all areas of competition law, mainly as a result of the modernisation of competition law. A more economical approach includes creating more and more safe harbours under certain thresholds. It is assumed that under those thresholds of (usually) market share no adverse effect on competition is to be expected.

From the point of view of proof different types of these threshold- presumptions can be distinguished mainly according to their legal basis. Such presumptions can be found mostly in group exemptions and in Commission notices and guidelines. The degree of legal certainty is not equal in both cases.

The first kind (mostly group exemptions) give the highest degree of legal security to undertakings and lays the burden of proof entirely upon the authority because the

[42] Although it has to be said that this has partly to do with the fact that for many years the Commission hardly motivated its decisions when it came to the fulfilment of the conditions of Article 81 (3). But since the introduction of the legal exception by Reg. 1/2003, this exception shall be dealt with mostly in national proceedings and before national courts who might be more worried both about the burden of proof as well as by adequately motivating why an exception to a fundamental rule of the EC Treaty is accepted. Guidance on the interpretation of the cumulative conditions in the Commission guidelines on 81 (3), OJ (2004) C 101 p. 97.
[43] Current De Minimis Notice of the Commission, OJ (2001) C 149 p. 18.

undertakings no longer have to prove that their agreement fulfills the conditions of Article 81 (3). The example is the safe harbour for vertical agreements that stay below a market share threshold of 30 %. An agreement fulfilling the conditions of Reg. 2790/1999 is exempted from Article 81 (1); neither the Commission nor a court could consider the agreements nevertheless infringes Article 81 (1) EC Treaty.[44] The only element of proof undertakings have to have available concerns of course the factual basis for the calculation of their market share but otherwise they can be sure to benefit from the exemption.[45]

For the sake of clarity, it is important to emphasize that these presumptions do not work in two directions: in case of the threshold for vertical agreements mentioned above, the agreements shall not be assumed illegal once the threshold is exceeded. Another example from the guidelines on horizontal agreements: it is generally assumed that joint purchase agreements shall not fall under Article 81 (1) EC if parties stay under the market threshold of 15 % market share. This does not mean of course that when this threshold is exceeded an agreement is presumed restrictive under 81 (1) EC. In a certain sense, presumptions replace the evidential burden of proof that rests on a party but as soon as they do not apply anymore, the normal distribution of the burden of proof is revived. However, the legal burden of proof does not shift.

The use of thresholds is generally seen as a good instrument to allow competition law to take into account the economic reality whilst providing for some legal security for the undertakings. In terms of the burden of proof it clearly alleviates the burden of proof for companies: under Article 81 (1) EC many presumptions in group exemptions or guidelines now permit the undertaking to counter any argument of the authority or a claimant to substantiate why their agreements do not fulfil the conditions of application of Article 81 (1) EC, usually because it can be assumed they have no adverse effect on competition in the market. Where Article 81 (3) EC is concerned the use of presumptions with market shares will generally discharge the undertaking entirely of his burden of proof.

Finally, the use of these presumptions based on thresholds has one major advantage where proof is concerned, which is again related to the recent developments in competition law: their use limits the number of cases in which actual effect on competition in the market has to really be measured and proven. This advantage should not be underestimated especially considering the growing pressure to have sufficient attention for market analysis and to prove concrete effects in the market that was briefly mentioned above.

– Legal presumptions

A second type of presumptions can be found in case-law and concern more the legal evaluation of the proof or evidence that is put forward. It would be beyond the scope of this

[44] The only possibility is the exceptional situation where the benefit of the exemption can be revoked because in a certain territory the cumulative effect of similar agreements leads to an unacceptable restriction of competition. Such an action on behalf of the Commission or a national competition authority shall not have retroactive effect (Articles 6 and 7 Reg. 2790/1999).

[45] Some jurisdictions have non rebuttable presumptions for SME undertakings: as long as they stay under a certain market share threshold their agreements can never be considered contrary to the cartel prohibition, even if they contain hard core restrictions, see for example Article 7 of the Dutch Competition Act. This goes further then the safe harbour for vertical agreements which makes the exemption conditional to the absence of hard core restrictions.

article to enumerate all the presumptions that seem to be established case-law so far.[46] Some examples are given to illustrate again how important the use of presumptions is. The most important legal presumptions of this kind concern the constituent conditions of Article 81 (1) EC. They allow the authority to qualify factual elements into the concepts laid down in that provision (see the example under 4.1.1 above).

The clearest example is perhaps the condition of the existence of an "agreement or concerted practice".

> Example: Companies A, B and C are suspected to have exchanged information during a meeting in Z at time Y with the purpose to coordinate their market behaviour.
>
> The authority will have to prove that e.g. :
>
> - the meeting occurred between these persons at the given time and place
> - that information was exchanged and that there is some link between this exchange and the market behaviour of the parties.

Where the first element is concerned, the authority will have to adduce positive evidence: one cannot ask the undertakings concerned to prove that they were not present.[47] Where the second element is concerned, presumptions can come into play: it can be assumed that if companies exchange information that they use this to determine their market behaviour.[48] Therefore parallel behaviour may be assumed to be related to this exchange of information and thus the result of collusion. The presumption has to be rebuttable: a plausible alternative explanation for the parallel behaviour by the undertakings has to be possible but in that case the burden of proof is shifted to the undertakings. Such an alternative explanation shall have to be credible and convincing if the authorities had gathered a substantial amount of circumstantial evidence but shall be possible by any means the party sees fit to use.

Another important example of the use of presumptions relates to the individual accountability of undertakings to a cartel. In the example above, the authority is allowed to presume that A, B and C participated in the cartel once it is established that they were present at the meeting where information was exchanged. Each one of them could be considered individually responsible for its role in this cartel. If A now claims that even though he was there, he did not participate but on the contrary he tried to convince the others not to exchange certain information, he will have to prove that this is the case. In other words, the evidential burden of proof shifts again. His burden of proof will require proving for example by whatever way that he distanced himself from the other participants in an explicit way during the meeting.[49]

4.2 Standard of proof

4.2.1 Definition: where do we stand?

The standard of proof concerns the level of certainty the proof has to achieve. The standard of proof has to be attained by the party bearing the burden of proof.

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[46] See Siragusa and Rizza (ed.), chapter 1 and chapter 5, above note 13 for some more examples.
[47] See ECJ 8 July 1999, case C-49/92, Anic, ECR (1999), p.I-4125.
[48] T. Wessely, case note to Polypropylene judgments, CMLR (2001) p. 739-765.
[49] The ECJ in Hüls, above note 39.

It appears from the legal framework described above that there are no rules on proof in EC law in general and that legislation in the area of competition law only the recently adopted general rule on the burden of proof. Also, it was mentioned that Reg. 1/2003 seems to deliberately leave the definition of the standard of proof at a national level to the law of the member states. However, in reality, there is quite some useful case-law in which the relevant factors to determine the standard of proof can be found. As it was said above, in the absence of legislation the Courts are construing the rules on proof in competition cases on the basis of the inherent characteristics of EC law, the specifics of competition law and the respect of general principles common to both the Community legal order and the national legal systems of the member states. The standard of proof is the best example of this development which bears relevance for all cases in which competition law is applied, both at the EC as well as at the national level.

The Community courts have made reference to what is called the "requisite legal standard".[50] On this basis the Courts have been willing to annul important merger decisions by the Commission in recent years, but without quite saying what that standard is.

Quite some frustration has been expressed in legal doctrine after the famous merger cases in which the Courts where very strict on the Commission.[51] The criticism was multiple but one of the main points was that there was no clear choice for a particular standard of proof.[52] The Courts indeed refused the use the concepts of standard of proof that are known in other legal disciplines such as "beyond reasonable doubt" and "the balance of probabilities" (see above under 1.4). It is likely that the lack of common tradition in the different member states, also describes above, plays a role in the Courts reluctance. However, it seems quite clear that in merger cases, the standard resembles most the balance of probabilities. As expressed recently by Advocate General Kokott, "it is a prospective analysis which makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them is *more likely*".[53]However, even in merger control, there is no single standard because in the first phase one might consider the standard of reasonable doubt to apply: only serious doubts about the compatibility with the common market can lead to not clearing the merger within the short time limits of the first phase.

In the ECJ's judgment in *Tetra Laval* (§39) the Court refers to the requirement that the evidence be "*accurate, reliable and consistent*" and also that it should contain "*all the information which must be taken into account in order to assess a complex situation and whether evidence can substantiate the conclusions drawn from it*". According to some authors, this is drafted in such a general way that it applies also outside of merger cases. Even without opening that debate, it is submitted that this important guideline on proof from the ECJ, is compatible with the standard of proof that is discussed below for cartel cases.

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[50] The preamble of Reg. 1/2003 also mentions this "the requisite legal standard" without defining it. For a general overview: Siragusa and Rizza (ed.), above note 13, chapter 5.

[51] Airtours, Tetra Laval, above note 29.

[52] Y. Botteman, *Mergers, standard of proof and expert economic evidence*, Journal of Competition Law and Economics, 2006, p. 71-100; D. Bailey, *Standard of proof in EC merger proceedings*, CMLR (2003) p. 845-888; B. Louveaux and P. Gilbert, *The standard of proof under the Competition Act*, ECLR (2005), nr. 3, p. 173-177.

[53] Conclusion of Advocate General Kokott of 13 December 2007 in case C-413/06 P, Bertelsmann AG and Sony Corp, not yet published, § 208 and following.

This paper defends that in any event, in Article 81 EC cases, there are enough guidelines in the case-law as a basis for a workable standard of proof.

In a particularly illustrative judgment for this matter, *JFE Engineering*, the CFI first reminds us of the key importance of the principle of the presumption of innocence which means that if there is doubt, the benefit of that doubt should always be given to the undertakings accused. This might lead to believe that the standard of proof resembles the criminal standard of "reasonable doubt". But in fact the CFI then continues and refers to what has become the more or less standard way of the defining which standard proof should achieve in cartel cases. The Commission must produce:

"*sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place*".[54]

We should add: "and that the infringement can be attributed to the undertaking accused" to reflect the individual accountability of undertakings which can then, in turn, lead to sanctions.

As it appears there are two components in this standard, they reflect the two dimensions of proof mentioned in the beginning of this paper (production and persuasion):

- the value of the evidence (sufficiently precise *and* consistent)
- the capacity to convince the authority or judge (a *firm* conviction).

As it was mentioned before, there are no restrictions on the type of evidence that the Commission can use and there is no hierarchy.[55]

It is also established case-law that proof need not meet this standard for every element of the infringement but what counts is the overall assessment of the evidence. The CFI: "*In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules*."[56]

In other words, indirect and circumstantial evidence may be used: its actual value shall be the contribution it can or cannot make to the firm conviction mentioned above.

4.2.2. The X factor

There is a particularity to mention in relation to proof and that is the human factor, referred to here as the X factor. It is perhaps somewhat audacious to mention this explicitly in times where the impression is created that competition law is a question of application of a set of pre-established rules to the market situation, with the help of advanced economic analysis. There are two dimensions to this X factor.

The first dimension relates to the traditional abstraction that is made of the person of the decision-maker. The model is that the decision-maker, be it an official of an administrative body or a judge is presupposed to be a "clean slate" whose conviction is to grow as he

[54] CFI 8 July 2004, case T-67 and 68/00 and T-71/00 and 78/00, JFE Engineering and others, ECR (2004) p.II-2501.

[55] However, it is clear of course that in practice certain types of evidence shall have more value than others: the "age" of the evidence shall also play a role: the obvious example is evidence dating from before the start of an investigation which shall usually be considered more valuable than evidence of a more recent date. As a general rule written evidence shall be higher regarded than oral evidence but this is a subject of rapid evolution.

[56] ECJ 21 September 2006, case C-105/04 P, Dutch Electrotechnical fittings, not yet published.

acquaints himself with the file and the proof that is collected. There is no reason in principle to suspect that any person in a decision-making position would let his personal views prevail, impartiality is protected by general principle of law.[57]However, in terms of evaluating proof, it is not realistic to deny the personal dimension. This can be illustrated in two ways.

First of all, by referring to the famous example in doctrine about the lion in the park. If a party alleges that he has seen a lion in the city park, any person would be sceptical. More sceptical in any case than if the party were to claim he had seen a dog. Therefore, even though the standard of proof will obviously have to be the same, one can easily understand that the party in question shall have to be more convincing in the case of the lion. The decision-maker will find it hard to believe that there was really a lion in the park.[58] This can be applied to numerous subjects in competition law: the substitution of one product by another for the definition of a relevant market or the alternative explanation for market behaviour. The personal knowledge and experience of the decision-maker and the relation to the particular market or conduct that is at stake, can play a role. In the example given, perhaps the decision-maker knew that a lion had escaped from the park a day earlier. Analysing products that all consumers know (bread or milk or Microsoft Windows..) will also not be the same in terms of convincing a decision-maker as complex or intermediate products such as chemical products or microchips. Except of course if the particular person has some particular knowledge in this area.

These remarks about the personal dimension should be well understood: the proposition is not at all that the X factor will make a difference in the end result of the decision, nor in the procedure as it is followed or the guarantees parties will rightfully claim. Nor would it be justified to modulate the legal burden of proof or the standard of proof. However the X factor should not be denied and can, in some cases, play a role in the mechanisms of proof (such as shifting the evidential burden), especially in the element of persuasion.

The second dimension of the X factor might be referred to as the quest for justice. In competition law, as in any other area of law, the ultimate goal is or should be to reach fair decisions. It would lead to far to discuss the relation of this objective to the more economic goals of competition policy and consumer protection.[59] However, most lawyers will have no trouble acknowledging that decisions should be fair and just, whilst at the same time having to admit that it is shere impossible to define what justice or fairness means. To illustrate that this certainly plays a role for proof in competition cases, a quote from J. Joshua: "*The object of any system of proof in adjucatory proceedings must be to reconcile the limitations inherent in the method devised with the search for the truth and to arrive at a fair decision*."[60] This quote implicitly recognizes that justice considerations might intervene with the normal course of the procedure and might have an impact on the final decision and possible sanction. It is submitted that this often happens in competition through the application of two general principles of law: the first being the benefit of the doubt already cited before, and the second

[57] If this were the case, the legal system will provide for mechanisms to protect the parties and ensure impartiality.
[58] Also cited by Sibony and Barbier de La Serre, above note 12.
[59] This is subject of another paper in progress, *The objectives of competition law, do we still know who and what we are protecting*.
[60] J. Joshua, cited above note 13, p. 316.

the principle of proportionality which is increasingly important in competition law.[61] Another remarkable quote in this respect from H. Legal, Judge on the Court of First Instance; in commenting a recent CFI judgment (British Airways) and the judicial review exercised in that case, he observes "*The Commission actually retains considerable leeway, as long as it approaches a competition case in a way that is unprejudiced, fair and scrupulous*."[62]

4.2.3. Flexibility and differentiation

It was argued above that the standard of proof which has now been expressed frequently by the Community courts is sufficient basis for a workable system in cartel cases. It is recalled here: "*sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place"*.

This standard allows taking into account a number of relevant factors such as the gravity and nature of the infringement and the type of proof or evidence that is brought forward. If competition law is a system of free proof and all types proof in principle accepted, it makes sense to have standard of proof which is sufficiently flexible to allow a global view on all proof in the case. The fact that proof is more and more difficult to find should also play a role. These are the specifics of cartel cases mentioned above.

The requirements of "sufficiently precise" and especially "consistent" shall make sure the value of the evidence is adequate. For example: if there are contradictory statements of representatives of the participating undertakings in the file, it is clear that supplementary evidence shall be necessary to corroborate either the one or the other version. If not, it is possible that the statements will not be proof given they are not consistent. Precise means that the evidence must concern all the relevant elements of the infringement: for example the evidence must allow the duration of the infringement to be determined. The Commission cannot consider that once the existence of the agreement is proven that this is sufficient and then require the parties to prove that they have ended their agreement.[63]

The flexibility in terms of the value of proof (production) is counterbalanced by the requirement that proof should lead to a "firm" conviction (persuasion). This should be seen together with the fundamental general principles of law that have been shown to play a key role in proof matters.

The standard has been qualified as somewhere half way between "reasonable doubt" and the balance of probabilities" but this paper contends it is not useful to try to qualify it in that way because the standard is deliberately flexible to allow for it to work in both ways in practice. It then has the advantage of applying in all matters of competition law, whilst allowing to be differentiated in practice on a case-to-case basis according to a number of factors.

One of these factors is the seriousness of the infringement and the sanctions that the applicable law provides. This can be illustrated by a quote from the UK Competition Appeal Tribunal: "*The more serious the allegations, the more cogent should be the evidence.. In particular this applies to cases involving the disqualification of directors which is now one of*

[61] The principle of proportionality shall often play in the phase of determining the sanction for a cartel: the sanction should be fair (and this proportionate) taking into account the size of the undertaking compared to others, its role etc. In leniency cases this is an issue of attention for the future because there can be some tension between proportionality and the reductions given on the basis of leniency programs.
[62] H. Legal, above note 12.
[63] CFI "Steamless" tubes cases, above note 53.

the possible consequences of a finding of an infringement of the Competition Act."[64] This is particularly relevant given the tendency in a growing number of countries to introduce criminal sanctions. There is little doubt that the standard should be differentiated in such cases, in other words be higher. Where sanctions are concerned, it would certainly be preferable that sanctions not differ to much according to the jurisdiction which is applying the law. This would require harmonisation of procedure and sanctions throughout the EU.

As it was also mentioned when discussing the specifics of cartel cases, the analysis in such cases is usually different from abuse and merger cases. A strict and uniform standard of proof is not possible because of the difference between an ex post and an ex ante analysis. The standard which is defended here has the advantage of being sufficiently flexible for use in both types of situations but again, should be differentiated.

It also seems uncontroversial that the standard of proof should be differentiated according to whether the proof concerns facts or qualifying the facts to apply the law. Rather, it is the combination of the standard of proof and the standard of review that comes into the picture here. In competition cases, generally a certain discretionary power is left to the Commission when it comes to establishing the (economic) facts or more specifically the economic analysis of those facts. The standard of proof should be the same but the review shall be more marginal when it comes to the economic analysis of facts than when the court is looking into the legal qualification thereof. This difference is also justified by the respective role of the administration and of the judiciary.[65]

4.2.4 Duty to state reasons

The duty to state reasons is laid down in Article 253 of the EC Treaty and can also be found in Article 41 of the Charter on Fundamental rights: the obligation for the administration to give reasons for its decisions. Where the courts and tribunals are concerned, there is no explicit legal basis in the treaties for the duty to motivate judgments at a EU level but there is clearly consensus about the fact that adequate reasoning is a fundamental part of the role of the judiciairy.

There are some interesting aspects of the duty to state reasons that deserve to be briefly mentioned here.

First, it seems useful to draw attention to the scope of this duty and its purpose, as defined by the Court of Justice: "*the duty to state reasons does not merely take formal considerations into account but seeks to give an opportunity to the parties defending their rights, to the Court of exercising its supervisory functions and to member states and to all interested nationals of ascertaining the circumstances in which the institution has applied the Treaty*".[66] This quote summarizes well the importance of adequate reasoning in terms of rights of the parties and

[64] JJB Sports Plc v OFT 2004, CAT 17, as cited by Louveaux and Gilbert, above note 52.
[65] Interesting on this point very recently the CFI 12 October 2007, case T-474/04, § 77-78. According to Adv. Gen. Kokott, there seems to be a three step system: the court on review should verify the factual basis of the decision in detail, then give leeway for the economic analysis of those facts but exercise full review afterwards as to the legal consequences of that analysis, Conclusion above note 53.
[66] ECJ 4 July 1963, case 24/62, Germany/Commission, ECR (1963) p. 137.

judicial and democratic control. In competition cases, where sanctions are imposed, this is particularly important.[67]

Secondly, it is argued also for another reason that the duty to state reasons is particularly relevant in cartel cases given the developments described in this paper. According to the case-law adequate reasoning shall be of even more fundamental importance when the Commission has discretion or power of appraisal. This is because the Courts on review have to be able to verify if the factual and legal elements on which such a discretion can be based, are present in the particular case.[68] This line of case-law seems very relevant here: upon analyzing the judgments in the merger cases mentioned above[69] one realizes that the Courts criticize not so much the choices the Commission had made in terms of economic theory or market analysis but rather lack of sufficient reasoning. In other words, whilst leaving the actual economic appraisal in complex competition cases to the authority, the Courts feels that in such cases, the Commission has all the more duty to construct a well motivated decision.[70]

In terms of proof in a case involving the application of Article 81 EC Treaty for some factual and elements little doubt shall exist ad to their existence and parties shall even be in agreement. When it comes however to those elements where more economics come in (relevant market, effect on the market, effect on interstate trade, impact on the market to taken into account for the fine, benefit obtained by participants etc..), the situation is increasingly complex.

Where the production of proof is concerned, there might not be much material available and if it is, often there will be contradictory interpretations, usually placing lawyers in a difficult position of evaluating economic evidence. Where persuasion is concerned, the authority or court having to reach a "firm conviction" shall often have to make choices judging the "likeliness" of certain market effects. This is more so in merger cases, but also relevant in cartel cases because not only actual effects on the market but also potential effects have to be taken into account.[71] For these reasons it is argued here that the duty to state reasons is an essential requirement and that it deserves more attention than the focus on the definition of a standard of proof.

5 So how to reconcile a more economics based competition law with rules on proof ?

This paper attempts to answer this question on the basis of three main ideas that summarize the above.

First of all, it is proposed that there is in fact no contradiction between a system of economics based competition law and a coherent set of rules on proof. In fact, the development towards a more economic approach was one of the factors that triggered the growing attention for rules of proof and modern competition law requires these rules more than ever.

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[67] A parallel is made with the case-law of the ECJ in which it was emphasized that the extent of the requirement to state reasons is influenced by the type of instrument which is used, see Lenaerts and van Nuffel, above note 6, p. 760.

[68] ECJ 21 November 1991, case C-269/90, Technische Universität München, ECR (1991) p. I- 5469.

[69] See note 29.

[70] On the duty to state reasons, particularly interesting comments in the Conclusion of Advocate General Kokott, above note 53, §§ 97 and following; also §§ 174 on the requirements for a decision in terms of description of the factual basis.

[71] This is true both for the appreciable effect on competition as well as for the effect on trade between member states.

As it was shown above, as economics of competition law become more advanced and increasingly introduced into law enforcement, the evolution is towards a more and more case-to-case type of approach in competition law. There are less hard core restrictions and market analysis is to play a more important role. Experience these last years has shown that economic insights in market behaviour and its desirability, greatly differs according to the theory that is applied or the person who is applying it. Whether or not this is right, it is the perception of many lawyers in the area of competition law. Therefore, rules on proof shall often have to be decisive in individual cases as a kind of arbitrating factor. Also, as the law becomes more insecure and its application less predictable, legal security becomes a greater concern.

Secondly, flexible and variable rules of proof are not a threat to the traditional legal concepts underlying our legal systems and the general principles of law on which they are based and at the same time should limit the number of cases where the application of the rules achieves a result far from economic reality. Lawyers must acknowledge the specific nature of competition law that requires less rigid rules. It is submitted that the definition of the standard of proof is not a priority.

Such flexible and variable rules on proof require confidence in what was called above the X factor. They also require an institutional structure allowing a review court more than only marginal review. The courts on review should generally be restrained when it comes to economic appraisal but exercise full review when it comes to legal and procedural points. Whilst exercising that control, it is of course necessary that they apply the rules of proof as adapted to the specific competition law context as discussed above.

Finally, the duty to motivate and to provide adequate reasoning are perhaps more relevant than the traditional concepts of burden of proof and standard of proof. This finding is also partly based on the introduction of more economics into competition law. In the current state of competition law, there are difficult choices to be made in every case. Motivation of a decision is the basis for the accountability of an authority to the undertakings concerned, to the policymakers and the legislator. It is also essential to permit adequate review on appeal.

A pragmatic approach with workable rules and sufficient attention for adequate reasoning should allow efficient enforcement of competition. This paper defends that this requires the legal community and the doctrine, to take some distance from the need for strict definitions and a strict procedural framework in which the decision-maker has little room for taking a global view on the proof and evidence available. It also requires economists to accept procedural rules are important because they often express general principles of law that are at the basis of our legal system, this is certainly true for rules on proof. Also, the importance of adequate reasoning has to be recognized if competition enforcement is to be credible and socially and politically acceptable, especially in the light of increasingly severe sanctions.