



Evidence in Competition Law Proceedings: A Comparative Perspective

How much is enough? Standard of proof and cogency of evidence in competition law

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Overview

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Distinction between burden and standard of proof

- Burden of proof
 - which party bears the primary responsibility for putting forward evidence meeting the requisite standard?
 - tactical burden
 - evidential burden
- Standard of proof
 - threshold that must be met before an adjudicator decides that a point is proven in law
 - e.g. “on balance of probabilities”; “beyond reasonable doubt”
- Further distinction between standard of proof and standard of review (although also important inter-relationship)



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Standard of proof in antitrust cases – EU

- EU courts often refer to the probative value of the evidence needing to meet the “requisite legal standard”
- Standard not expressly defined in terms of degree of probability
- “Sufficiently precise and consistent evidence to support the firm conviction that the infringement was committed”
- Is there an “alternative plausible explanation”
- Higher standard of proof in merger cases? (“Sufficiently cogent and consistent body of evidence”, *Kali & Salz*; *Tetra Laval*)
- Lower standard of evidential quality permitted in secret cartel cases?



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Standard of proof in antitrust cases - UK

- OFT is required to prove the infringement to civil standard of proof – balance of probabilities
- Higher civil standard than normal?
 - Quasi-criminal nature of infringement finding
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Cogency of Evidence

- The more speculative the theory of harm, the greater the degree of evidential cogency required to establish underlying facts from which the finding is drawn
 - *Tetra Laval*: “[where] the claims of cause and effect are



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Experience in the Tobacco case

- Tobacco case offers useful illustration of importance of economic evidence, factual evidence and cross/re-examination
- 2 essential issues:
 - was the “obvious consequence” of the conduct alleged by the OFT such to warrant classification as an “object” infringement?
 - did the factual matrix set out in the decision and upon which infringement finding was based actually exist as a question of fact?
- Economic analysis provided essential framework within which facts were analysed, even though infringement was by “object” rather than “effects”
- OFT’s case collapsed before the experts were cross-examined



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Experience in the Tobacco case

- OFT’s evidence:
 - Key correspondence
 - Corporate leniency statements
 - Witness statement from Sainsburys buyer
 - Expert report from Prof. Greg Shaffer
- ITL’s evidence:
 - 12 witness statements from 9 factual witnesses
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