Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond

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CHAPTER IV PROCEDURAL ASPECTS OF OBJECTIVE JUSTIFICATION*

1 INTRODUCTION

The proof of the pudding is in the eating. Believe it or not, but making pudding and establishing an abuse of dominance have something in common. Despite careful preparation both can be shaky and vulnerable to collapse. The proof of Article 102 TFEU is not in the eating, however, but in its operation in practice. This calls for an analysis of procedural elements that are crucial to the operation of any legal prohibition – namely the applicable burden of proof, evidentiary burden and standard of proof.

As was made clear in the previous chapter, the EU courts have repeatedly confirmed that an objective justification plea is available.[686] Although this case law has triggered a debate about the substantive scope and meaning of objective justification,[687] the procedural issues have often been overlooked. This chapter discusses key procedural concept and their significance in the context of an objective justification plea. Paragraph 2 examines the legal burden of proof and the evidentiary burden that apply if an undertaking invokes an objective justification. Paragraph 3 discusses the applicable standard of proof. Paragraph 4 analyses the private law dimensions of the burden and standard. Paragraph 5 offers a short conclusion.

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[686] See e.g. Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189 and Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paras 85-87.

[687] See e.g. A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 CMLRev 1727.

2 THE BURDEN OF PROOF

2.1 Introduction

The burden of proof is an important procedural matter. It focuses on the question which of the litigating parties is required to prove a submission in order to satisfy the applicable standard of proof (the standard of proof is examined in paragraph 3).[688] The basic rule is that the party alleging an infringement of the law bears the burden of proof and must thus adduce sufficient evidence. Within a public competition enforcement procedure the *legal* burden of proof is borne by the competent competition authority – in the EU context, the European Commission – and cannot shift to the defendant.[689] The legal burden reflects the principle that undertakings are presumed to be innocent. The State may only impose a punitive sanction if it adduces sufficient evidence that meets the requisite standard of proof – a key value in countries governed by the rule of law.[690]

[688] See e.g. C. Graham, 'Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK', in: O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen 2009), p. 244. See also E. Paulis, 'The Burden of Proof in Article 82 Cases' in: B. Hawk (ed.), *Fordham Competition Law Institute: International Antitrust Law and Policy 2006* (Juris Publishing: New York 2007).

[689] See e.g. the speech of 16 September 2006 at the Fordham Conference by E. Paulis, available at http://ec.europa.eu/competition/speeches/text/sp2006_014_en.pdf. The UK Competition Appeal Tribunal ('CAT') confirmed that, just like in EU law, the allocation of the legal burden of proof does not 'necessarily prevent the operation of certain evidential presumptions', see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, para 95. The CAT gives the example that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory. Cf. the Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and 396/96 P *Compagnie maritime belge v Commission* [2000] ECR I-1442, para 127. See also D. Bailey, 'Presumptions in EU competition law', (2010) 31 ECLR 362.

[690] See, for example, the CAT judgment in *JJB and Allsports v OFT* [2004] CAT 17, para 204: 'the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking is entitled'. The same standard is relevant as regards abuse of dominance cases, see *Burgess v OFT* [2005] CAT 25, paras 115-116.

The legal burden must be distinguished from the *evidentiary burden*, which is more flexible in nature.[691] In essence the evidentiary burden demands that he who makes an assertion must provide proof thereof.[692] The evidentiary burden may thus be borne by any of the litigating parties depending on what they have asserted. A flexible allocation of the evidentiary burden contributes to the expediency of a trial. It requires proof from the party best positioned to provide it, and makes it unattractive for a party to make assertions that it cannot substantiate.

2.2 The establishment of a *prima facie* abuse

Within the context of EU competition law, Article 2 of Regulation 1/2003 confirms that the legal burden rests on the party or authority alleging an infringement. This means that the Commission bears the legal burden to adduce sufficient evidence for the finding of a *prima facie* Article 102 TFEU infringement. In practice it is often a difficult hurdle to establish such a *prima facie* abuse.[693] The level of difficulty to discharge the legal burden will depend largely on the conduct's impact and the context of the market dynamics under review.

For instance, fidelity rebates by a super-dominant firm will satisfy the threshold for a *prima facie* abuse more easily compared to discounts that have a more benign effect on competition.[694] In *British Airways*, the ECJ observed that the Commission must show that a system of (non-fidelity) discounts can produce

[691] See e.g. P. Hellström, 'A Uniform Standard of Proof in EU Competition Proceedings', in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing: Oxford and Portland, Oregon 2011), p. 147; P. Lowe, 'Taking Sound Decisions on the Basis of Available Evidence', in: Ehlermann and Marquis 2011 (*ibid*.), p. 163; A. Ó Caoimh, 'Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of Court of Justice of the European Union', in: Ehlermann and Marquis 2011 (*ibid*.), p. 276.

[692] For a clear description of the burden of proof and the evidentiary burden, see e.g. *The Racecourse Association v Office of Fair Trading* [2005] CAT 29, paras 130-134.

[693] Sometimes evidential presumptions will facilitate the Commission to establish a *prima facie* abuse, such as in the event that a dominant firm charges prices below average variable costs.

[694] Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 334. See also Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, paras 107-109.

exclusionary effects.[695] In terms of price discrimination, Article 102(2)(c) TFEU explicitly states that there can only be a *prima facie* abuse if the conduct leads to a 'competitive disadvantage'. In the *Michelin I* ruling the ECJ suggested that such a disadvantage follows from the application of unequal criteria, in which similar cases are treated in a dissimilar way.[696] Similarly, in *Post Danmark*, the ECJ held that it must be assessed whether a dominant firm's pricing policy produces an actual or likely exclusionary effect to the detriment of competition and consumers.[697] The more Article 102 TFEU is interpreted as working towards consumer welfare, the stronger a *prima facie* abuse must be couched in terms that the conduct has consequences harmful to consumer welfare.[698]

2.3 Responding to the establishment of a *prima facie* abuse

As soon as the Commission has put forward its case indicating a *prima facie* abuse the dominant firm can raise two different shields, namely by (i) questioning the establishment of a *prima facie* abuse or by (ii) invoking an objective justification.

As to the first shield, the dominant firm is likely to target the evidence used and the inferences the Commission has drawn from it. In essence this argument contends that the Commission has not discharged its legal burden, as it has failed to adduce sufficient evidence to meet the applicable standard of proof. According to AG Kokott a dominant firm can successfully make such a claim if it is able to 'show in detail why the information used by the Commission is inaccurate, why it has no probative value […] or why the conclusions drawn by the Commission are unsound'.[699] Kokott opines that this requirement does not reverse the legal burden, but simply reflects 'the normal operation of the respective burdens of adducing evidence'.[700] Paragraph 3.3 discusses this subject in more detail.

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[695] *British Airways*, *supra* note 686, para 68. This rule applies if the discount system cannot be seen as fidelity rebates within the meaning of Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

[696] Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 90. Here the ECJ refers to the possibility to invoke 'legitimate commercial reasons' for a *prima facie* discriminatory practice.

[697] Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR not yet published, para 44.

[698] O. Odudu, 'Annotation of Case C-95/04 P, British Airways plc v. Commission, judgment of the Court of Justice (Third Chamber) of 15 March 2007', (2007) 44 CML Rev 1781, at 1809.

[699] Opinion of AG Kokott in Case C-105/04 P *FEG v Commission* [2006] ECR I-8725, para 74.

[700] *Ibid*.

If a dominant firm wishes to rely on the second shield, the question arises which party bears the (initial) evidentiary burden to provide proof: is it the Commission (to show the absence of objective justification) or the dominant undertaking (to show the applicability of objective justification)? Some have argued that Article 2 of Regulation 1/2003 requires the Commission to prove the absence of an objective justification, as only in that case there will be an infringement of Article 102 TFEU.[701] The following paragraph challenges the view that the initial evidentiary burden related to objective justification is borne by the Commission.

2.4 Proving (the absence of) an objective justification

Regulation 1/2003 contains a preamble that offers guidance as to its interpretation. Recital 5 of the preamble of Regulation 1/2003 provides that: 'It should be for the undertaking […] invoking the benefit of a defence against a finding of an infringement to demonstrate […] that the conditions for applying such defence are satisfied.'

At a first glance it appears to confirm that the dominant firm should demonstrate the applicability of an objective justification. A possible counter-argument is that objective justification should not be considered a 'defence' within the meaning of Regulation 1/2003. According to this line of reasoning the acceptance of an objective justification means that there was no abuse to begin with – thus removing the need for an undertaking to provide a defence. In my view, this argument erroneously ignores the fact that there is only a need to raise an objective justification if the Commission succeeds in providing ample proof of a *prima facie* abuse. In addition, the mere fact that an undertaking must provide a 'defence' does not necessarily cast a negative subjective spell on its conduct. By comparison, in merger control an efficiency plea is also referred as a 'defence', even though it is clear that completing an efficient merger is in no way legally or morally reprehensible.

[701] P. -J. Loewenthal, 'The Defence of "objective justification" in the application of Article 82 EC', (2005) 28 World Competition 455. See, similarly, R. Nazzini, 'The wood began to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases', (2006) 31 ELRe*v* 520, 522. Albors-Llorens 2007, *supra* note 687, at 1747. Albors-Llorens argues that Article 102 TFEU requires a one-step analysis which requires the Commission to consider potential justifications within that analysis.

Leaving this semantic issue aside, ECJ case law clearly requires the dominant firm to produce evidence supporting an objective justification claim. Several early case law examples emanate from the field of pricing abuses. In cases such as *Metro, Tournier* and *Aéroports de Paris* the ECJ expected the dominant firm to provide evidence in order to justify a *prima facie* abusive pricing practice.[702] More recent judgments – such as *TeliaSonera*, *British Airways* and *France Télécom* – show that the dominant undertaking ought to demonstrate that a rebate system, notwithstanding its exclusionary effect, can be 'economically' justified.[703] Yet it is the *Microsoft* ruling by the General Court that offers perhaps the clearest evocation that the dominant firm bears the evidentiary burden as to objective justification:

> 'Although the burden of proof of the existence of the circumstances that constitute an infringement of [Article 102 TFEU] is borne by the Commission, *it is for the dominant undertaking concerned* […] *to raise any plea of objective justification and to support it with arguments and evidence*. It then falls to the Commission […] to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted [italics added by author]'.[704]

In sum, the Commission bears the burden to prove the existence of a *prima facie* infringement. The dominant firm may raise an objective justification plea and bears the (initial) evidentiary burden to provide the necessary arguments and proof.[705] If the dominant firm is unable to provide sufficient

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[702] Case 78/70 *Metro* [1971] ECR 487, para 19 and Case C-395/87 *Ministère Public v Tournier* [1989] ECR 2521, para 38. See also Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paras 201-202 (upheld by Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297). See, similarly, Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, para 52.

[703] Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, para 75; *British Airways*, *supra* note 686, paras 69 and 86; Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369*,* para 111. See also Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 334 and *Michelin II* (General Court), *supra* note 694, para 107-109. See, similarly, Case E-15/10 *Posten Norge v ESA* [2012] EFTA Ct. Rep 246, para 206, in which the EFTA Court held that: 'it is for the applicant to demonstrate that its conduct is objectively necessary or produces efficiencies.'

[704] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 688 and 1144.

[705] In *Microsoft* (*ibid*.) the General Court states that it expects the objective justification plea to be invoked 'before the end of the administrative procedure'. This suggests that firms cannot invoke a justification in court that was not raised during the administrative procedure. This seems to be a different approach than was taken by the CAT

evidence, the ECJ may be satisfied that the *prima facie* abuse cannot be objectively justified, and thus constitutes an infringement of Article 102 TFEU.[706] However, if the dominant firm does succeed in proving that its conduct can be objectively justified, the evidentiary burden shifts to the Commission. The Commission must then provide ample proof countering the firm's objective justification claims.

2.5 Examining the ECJ's approach

In my view, the ECJ has a perfectly sensible approach towards evidence related to objective justification. As the UK Competition Appeal Tribunal ('CAT') held in *Genzyme*, it would be overly burdensome to require competition authorities to comprehensively examine every conceivable justification and to ask them to prove a negative.[707] The ECJ's allocation of the burden ensures a focused debate on the types of objective justification that really matter – resulting in a more effective and less intrusive procedure.

In addition, the success of an objective justification plea will often depend on evidence that, by its very nature, is only available to the dominant firm. The ECJ appears to take due account of such circumstances. In *AstraZeneca* the General Court observed that: 'the undertaking concerned is alone aware of [the] objective justification or is naturally better placed than the Commission to disclose its existence and demonstrate its relevance.'[708]

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in *Genzyme*, suggesting that the dominant firm may raise 'further' pleas of objective justification during the appeal stage even though these have not been raised earlier. See *Genzyme v Office of Fair Trading* [2004] CAT 4, para 578.

[706] Cf. Nazzini 2006, *supra* note 701, at 534.

[707] Cf. *Genzyme, supra* note 705, para 577. The CAT expects the OFT at the decision stage 'to consider the issue of objective justification, and in particular any arguments put forward by the dominant undertaking' (*ibid*.). See also E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Alphen aan den Rijn: Kluwer Law International, 2010), p.246-247. See also P. Akman, 'To abuse, or not to abuse: discrimination between consumers', (2007) 32 ELRev 492, at 497. Akman notes that to prove a negative is against the general rules on the burden of proof, referring to Case T-117/89 *Sens v Commission* [1990] ECR II-198, para 20.

[708] Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para 686. The ECJ has put forward similar observations in Article 101 TFEU cases, see e.g. Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361, para 30 and Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P *Aalborg Portland v Commission* [2004] ECR I-123, para 79.

I believe this approach is the right one, and shall give two hypothetical examples demonstrating why the dominant firm is often better equipped to show certain justifications. The first example concerns a possible efficiency plea. A dominant firm may wish to show quantitative proof that certain conduct creates a wealth of efficiencies, even though it risks excluding a third party at the same time. Although such documents are not necessarily sufficient, they may be able to persuade a court. This is consistent with merger control practice, where the party bears the evidentiary burden to successfully invoke efficiency benefits arising from the proposed transaction.[709]

The second example relates to an objective justification based on public interest. Just imagine that a dominant wholesaler of goods refuses to deal with certain distribution companies. The Commission may consider the refusal to be a *prima facie* abuse. The dominant firm could then invoke an objective justification, for instance by stating that the refusal only applies to road haulers that do not make use of environmentally friendly lorries. The Commission could respond by noting that the blanket refusal is unnecessary for the professed goal, possibly because legislation already adequately addresses this issue.[710] The dominant firm could subsequently perhaps refer to the lax government enforcement as to the compliance with environmental rules, triggering the need for the firm to step up its own conditions. Such a dialectic process[711] could prove lengthy, but provides the most appropriate manner to properly examine a plea based on objective justification.

3 STANDARD OF PROOF

3.1 Introduction

Apart from the issue *which* of the litigating parties bears the burden of proof, it is also relevant to know *how high* the evidentiary threshold is. The standard of proof consists of the requirements that must be

[709] The general principles governing the burden of proof are largely identical in antitrust and merger cases (Lowe 2011, see *supra* note 691, p.165).

[710] Cf. Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, para 118.

[711] See also the Opinion of AG Colomer in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-7139, para. 70.

satisfied for facts to be regarded as proven.[712] EU law provides no clear framework as to the applicable standard of proof.[713] This is in line with the continental European legal tradition, in which no formal standard of proof exists[714] – often to the great unease of common lawyers.[715] Basically the party bearing the legal or the evidentiary burden must simply be able to persuade the court; connoting that the judge's personal conviction (also referred to as '*intime conviction*') is key.[716] It should be noted, however, that the focus on the judge's personal conviction may, in practice, not be all that different compared to a common law approach. In the English *Purple Parking* case, a private claim alleging abuse of dominance by Heathrow Airport, Mann J observed that '[a]t the end of the day the question is whether I am satisfied or not that the relevant matters have been proved'.[717]

Notwithstanding the absence of a formal standard of proof in EU law, the ECJ has provided a number of principles that indicate the level of the evidentiary threshold. The analysis below will examine these principles. It will also touch upon the standard of judicial review exercised by the EU courts, as this is closely interlinked with the applicable standard of proof.[718] The higher the standard of judicial review

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[712] Hellström 2011, see *supra* note 691, p. 147. See also *supra* note 64 of the Opinion by AG Kokott in Case C-97/08 *Akzo Nobel v Commission* [2009] I-8237.

[713] See, generally, H. Legal, 'Standards of Proof and Standards of Judicial Review in EU Competition Law' in B. Hawk (ed), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute 2005* (Juris Publishing: New York 2006).

[714] Gippini-Fournier warns that this concept must be used with great caution, as it involves the use of 'categories which lose much of their sense outside the common law'. See E. Gippini-Fournier, 'The Elusive Standard of Proof in EU Competition Cases' in Ehlermann & Marquis 2011 (see *supra* note 691), p. 296.

[715] See also I. Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"', in Ehlermann & Marquis 2011 (see *supra* note 691), p. 419.

[716] See e.g. Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, para 47 and Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, para 43. In the latter judgment the Court held: 'it is necessary to ascertain whether the Commission gathered sufficiently precise and consistent evidence to give grounds for a *firm conviction* that the alleged infringement took place [italics added by author]'. See also Gippini-Fournier 2011, *supra* note 714, p. 297-298.

[717] *Purple Parking* [2011] EWHC 987 (Ch), at 185.

[718] See e.g. Graham 2011, *supra* note 688, p. 245 and Hellström 2011, *supra* note 691, p. 149. See also A. Gerbrandy, *Convergentie in het mededingingsrecht* [*Convergence in Competition Law*] (Boom Juridische Uitgevers: The Hague 2009), Ch.4.

vis-à-vis a finding of an infringement, the more difficult it will be for the party alleging that infringement to provide sufficient evidence in order to meet the standard of proof.[719] As the standard of proof and the standard of judicial review function much like two communicating vessels, they shall both be discussed.

3.2 The standard of proof & judicial review

Primary EU law provides the legal basis for judicial review by the ECJ. Article 261 TFEU provides the ECJ with 'unlimited jurisdiction' in its assessment of penalties such as those imposed under Regulation 1/2003.[720] More broadly, Article 263 TFEU provides that the ECJ may review the legality of Commission decisions. A legality review implies a degree of deference to the Commission decision and, accordingly, is not as comprehensive as a full appeal on the merits. In particular, the ECJ shows deference to so-called 'complex economic assessments' made by the Commission.[721] At the same time, even where the Commission has a certain margin of discretion, the Court must still carry out an in-depth review of the law and of the facts.[722]

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[719] The standard of judicial review is the standard 'a reviewing tribunal or appellate court applies when reviewing the legality of a decision or an administrative body or lower tribunal' (see Hellström 2011, *supra* note 691, p. 149). See also B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 European Competition Journal 7. For a critical analysis of this topic, see D. Geradin & N. Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', TILEC Discussion Paper No. 2011-008.

[720] As implemented by Article 31 of Regulation 1/2003, which reads as follows: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment'. It is unclear from this provision whether unlimited jurisdiction refers mainly to the power to adjust the fine or should also entail the possibility to examine afresh all the underlying merits.

[721] *Ibid*. See also *Aalborg Portland*, *supra* note 708, para 279. See also Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 88.

[722] See Case C-272/09 P *KME Germany AG v European Commission* [2011] ECR nyr. See also A. Meij, 'Judicial Review in the EC Courts: *Tetra Laval* and Beyond' in: O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen 2009), p. 15. See, similarly, the EFTA Court judgment in *Posten Norge, supra* note 703, para 99. The EFTA Court held that the evidence relied on, even of an economic nature, must be accurate, reliable, and complete, and support the conclusions drawn from it.

Turning to the standard of proof, the ECJ has often held that the Commission needs to demonstrate its case 'according to the requisite legal standard'.[723] The ECJ has used different types of wording to express its expectations vis-à-vis the quality of evidence, namely that it ought to be 'sufficiently precise and coherent',[724] 'sufficiently precise and consistent',[725] 'sufficiently cogent and consistent',[726] 'convergent and consistent',[727] 'convincing',[728] 'consistent'[729] or 'cogent'.[730] In other words, the ECJ assesses whether the body of evidence, taken as a whole, is sufficiently plausible to meet the requisite standard.[731] The standard expressed by the ECJ thus seems to be relatively strict, even though it falls short of the 'beyond reasonable doubt' standard familiar from criminal law in common law jurisdictions.[732]

3.3 The ECHR perspective

For a long time now, commentators have debated whether the intensity by which the EU courts review Commission decisions complies with Article 6 of the European Convention of Human Rights ('ECHR').[733,]

[723] Hellström 2011, *supra* note 691, p. 151. See also Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8471, para 58.

[724] Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, para 20.

[725] Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paras 43 and 72; Joined Cases T-67/00, T-68/00, T71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para 179.

[726] Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375, para 228.

[727] Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, para 97.

[728] Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission* [2004] ECR II-3495, para 118-119.

[729] Case C-89/85 *Ahlström v Commission* ('*Woodpulp II*') [1993] ECR I-1307, para 127.

[730] Case T-305/94 *Limburgse Vinyl Maatschappij a.o. v Commission* [1999] ECR II-931, para 644.

[731] *JFE Engineering*, *supra* note 725, para 180.

[732] Case T-53/03 *BPB v Commission* [2008] ECR II-1333, para 64.

[733] Article 6(3) of the Treaty on European Union provides that fundamental rights, as protected by the ECHR, constitute general principles of EU law. According to Article 52(3) of the Charter of Fundamental Rights, the Charter rights corresponding to those in the ECHR will have at least the meaning and scope of those rights under the ECHR. See, also, ECJ case law dating back to the 1970s that already confirms that the EU is bound by fundamental rights. See e.g. Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 36/75 *Rutili* [1975] ECR 1219. Currently, the EU is negotiating to become a contracting party to the ECHR. The relevant legal bases are Protocol 14 to the ECHR and Article 6(2) TEU respectively. See e.g. the document of 10 June 2013 at

[734] This provision requires a fair and public hearing by an independent and impartial tribunal if a person – natural or legal – is subject to a 'criminal charge'. Such a tribunal must also have full jurisdiction to examine all matters of law and fact relevant to the case before it;[735] seemingly requiring more than a legality review.

But how does Article 6 ECHR relate to the field of competition law? The ECJ has suggested, on the basis of ECtHR case law, that competition proceedings are 'criminal' for the purposes of Article 6 ECHR.[736] Indeed, in *Jussila*, the European Court of Human Rights ('ECtHR') explicitly referred to competition law as one of the areas in which fines may fall under the scope of a criminal charge.[737] However, the ECtHR did add the important nuance that the guarantees of Article 6 ECHR do not apply in its full stringency to sanctions that do not carry any significant degree of stigma, as opposed to so-called hard-core criminal law cases.

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http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf. There is still a long way to go: the ECJ still has to give its opinion, and the Council of the EU as well as the Council of Europe representatives will have to ratify the final agreement.

[734] See e.g. M. Bronckers & A. Vallery, 'Fair and effective competition policy in the EU: which role for authorities and which role for the courts after *Menarini*', (2012) 8 European Competition Journal 283; J. Venit, 'Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82', in Ehlermann & Marquis 2011 (*supra* note 691), p. 241.

[735] See e.g. *Menarini*, *infra* note 738, paras 59 and 61. ECtHR judgment of 13 February 2003, *Chevrol v France* (appl. no. 49636/99), para 77.

[736] See e.g. Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4575, paras 175 and 176. The judgment considers the presumption of innocence to be applicable, as found in Article 6(2) ECHR. Note that this provision only applies to cases that involve a 'criminal offence'.

[737] ECtHR judgment of 23 November 2006, *Jussila v Finland* (appl. no. 73053/01). The mere fact that Article 23(5) of Regulation 1/2003 states that fining decisions 'shall not be of a criminal law nature' is not decisive for the purposes of the ECHR, as the notion of 'criminal charge' is an autonomous concept under the ECHR. See e.g. ECtHR judgment of 21 February 1984, *Öztürk v Germany* (appl. no. 8544/79), para. 49-50. See also B. Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?', (2011) 28 ECLR 573. At 574, he notes that in *Hüls* the ECJ came very close to admitting that the proceedings and sanctions under EU competition law are of a criminal law nature. See Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, para. 150, referring to 'the nature of the infringements in question and the nature and degree of severity of the ensuing penalties'.

In the *Menarini* case, the ECtHR held that a fine imposed by the Italian competition authority amounted to a criminal charge.[738] The ECtHR reiterated standing case law that an administrative authority may impose such a fine, as long as it is subject to the review by a court with full jurisdiction – on matters of law and on the facts.[739] In this case, the ECtHR found that the Italian administrative appeal system was adequate in terms of the requirements of Article 6 ECHR.[740]

Although I agree with the outcome of the *Menarini* case, I believe that the majority of the ECtHR placed too much emphasis on the *system* of administrative review exercised by the Council of State, instead of focusing primarily on what the Council of State had actually done in this particular case. I agree with the concurring opinion of Judge Sajó, in which he finds that the Council had, in this case, sufficiently reviewed the merits of the case to comply with Article 6(1) ECHR.[741] He aptly shows that the most important thing is to examine what the court is actually doing in its review – rather than to focus on its use of terminology indicating either a full review or a legality test.

I believe that the competition community should move beyond the abstract question whether the current EU competition law enforcement system is, as such, compliant with the ECHR or not. Only a case-by-case analysis can show if the Commission and the subsequent review by the ECJ have – in that particular case – complied with the ECHR.[742] In my view the crucial matter is not what the ECJ says it's doing when reviewing a Commission decision, but what it actually does. Indeed, even though the EU

[738] ECtHR judgment of 27 September 2011, *Menarini v Italy* (appl. no. 43509/08), para 28-45. See, similarly EFTA Court, *Posten Norge*, *supra* note 703, para. 90.

[739] *Menarini* (*ibid*.), para 59. An appeal was open to an administrative court, and subsequently to the Italian Council of State ('Consiglio di Stato').

[740] This position seems to be mirrored by EU case law. See e.g. Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875, paras 55-65 and Case T-156/94 *Aristain v Commission* [1999] ECR II-645, paras 27-30. See also Opinion of AG Sharpston in *KME*, *supra* note 722. See, however, the dissenting opinion by Judge Pinto de Albuquerque in *Menarini* (*ibid*.), arguing that there had indeed been a violation of Article 6(1) ECHR.

[741] Concurring opinion by Judge Sajó in *Menarini* (*ibid*.), para 6.

[742] See also the Opinion of AG Sharpston in *KME*, *supra* note 722, para 73-83. Advocate General Sharpston also emphasised the importance of what kind of review the Court has conducted in actual fact, rather than what type of reviw the Courts says it has conducted.

courts frequently refer to the Commission's margin of discretion, they normally still carry out an in-depth review of the law and the facts.[743] This entails an analysis of whether 'the evidence relied on is factually accurate, reliable and consistent' and also 'whether that evidence contains all the [necessary] information […] and whether it is capable of substantiating the conclusions drawn from it'.[744] In my view, as long as these principles are genuinely upheld, the ECJ's review does not infringe the requirements set by the ECtHR in *Menarini*.

Returning once more to the standard of proof, it is by no means evident that the ECtHR requires use of the 'beyond reasonable doubt' standard in competition cases.[745] Indeed, in *Napp*, the UK Competition Appeals Tribunal ('CAT') made clear why the use of the civil standard is ECHR compliant.[746] The civil standard calls for a balance of probabilities, implying that it is more probable than not that the infringement has occurred. Considering the seriousness of competition law penalties, however, the CAT does require 'strong and convincing' evidence.[747] I think that this approach is sound and ECHR compliant,[748] as long as the courts comply are genuinely critical in their assessment of evidence and go beyond a mere legality review.[749]

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[743] M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', (2011) 2 Journal of European Competition Law & Practice 295.

[744] Case T-210/01 *General Electric v Commission* [2005] ECR II- 5575, paras 62 and 63; Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39 and Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 87, 88 and 89.

[745] See, by implication, *Jussila* (*supra* note 737).

[746] *Napp v Director General of Fair Trading* [2002] CAT 1, paras 102 and 104.

[747] *Ibid*., paras 108-110. The CAT also refers to the same standard as 'strong and compelling evidence'. The CAT adds that it is unlikely that the use of the criminal standard would lead to different results in competition cases. In a private enforcement action setting, see the judgment by Rimer J in *Chester City Council v Arriva* [2007] UKCLR 1582, para. 10.

[748] In my view, this conclusion is not altered by the EFTA Court's judgment in *Posten Norge* that it had 'no doubt' that there was an abuse. In my reading, the EFTA Court was simply convinced of an infringement based on the facts of the case, but that does not mean it had upheld a 'beyond reasonable doubt' standard. See *Posten Norge, supra* note 703, paras 162 and 180. This is confirmed by the fact that although the applicant invokes the 'beyond reasonable doubt' standard, it is not referred to in the Court's own findings.

[749] In the word of the *KME* judgment, if the court engages into an in-depth review of the law and of the facts. See *KME*, *supra* note 722, para. 102.

3.4 Responding to the Commission establishing a *prima facie* abuse

An applicant has two main options to challenge a Commission infringement decision. It may (i) counter the establishment of a *prima facie* abuse and/or (ii) invoke an objective justification. As to the first possibility, the applicant is required 'to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence […] to demonstrate that its objections are well founded'.[750] The defendant must cast sufficient doubt on the Commission's body of evidence to the extent that it no longer satisfies the requisite standard of proof.[751] If the Commission's evidence is particularly consistent and convincing, it will thus be commensurately more difficult for the dominant firm to set aside a finding of a *prima facie* infringement.[752] The following paragraph discusses the second possibility, examining how difficult it will be for a dominant firm to successfully invoke an objective justification.

3.5 The standard of proof related to the various types of objective justification

3.5.1 Introduction

There is little basis to conclude that the standard of proof pertaining to objective justification should, as a matter of principle, be different from the standard applicable to a finding of a *prima facie* abuse. The Commission's 2009 guidance paper suggests that an objective justification plea requires evidence that possesses 'a sufficient degree of probability' and is equally based on 'verifiable evidence'.[753] In terms of case law, the ECJ held in *Solvay* that if the dominant firm must produce sufficiently 'firm evidence',[754]

[750] Case C-386/10 P *Chalkor v Commission* [2011] nyr, para 65.

[751] See also *Chalkor* (*ibid*.), para 64. The ECJ held that 'it is for the applicant to raise pleas in law against [the Commission's] decision and to adduce evidence in support of those pleas.'

[752] Ó Caoimh 2011, *supra* note 691, p. 273.

[753] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 30.

[754] Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 334. See also *Portugal v Commission*, *supra* note 702, para 56. In *Michelin II* the General Court held that the evidence provided by the applicant was insufficiently specific. See *Michelin II* (General Court), *supra* note 694, paras 107-108,

which must be assessed 'on the basis of all the circumstances of the case.'[755] Evidence is unlikely to meet this standard if it is inconsistent with the facts, and thus appears to be solely an *ex post facto* attempt by the dominant firm to justify its conduct.[756] Another judgment of note is *GlaxoSmithKline Services*. The General Court held, and the ECJ confirmed, that the examination should focus on whether it is more likely or not than the alleged advantages would be achieved.[757]

Although *GlaxoSmithKline Services* concerned alleged benefits that would arise in the future (thus requiring a 'prospective analysis'), I do think that the same reasoning can be transposed to Article 102 TFEU. This would mean that the dominant firm will have to show that it is more probable than not that an objective justification applies. In practice, the difficulty in establishing an objective justification plea will vary depending on the conduct's effects and on the type of objective justification that the dominant firm wishes to invoke. As I have argued in the previous Chapter, objective justification pleas can roughly be subdivided in three main categories. They can be based on considerations of (i) legitimate business behaviour, (ii) efficiency or (iii) public interest. The following paragraphs examine how the difficulty to meet the standard of proof may differ depending on these three categories.

3.5.2 Legitimate business behaviour

The plea based on legitimate business behaviour can be divided in 'objective necessity' and 'competition on the merits'. In the context of 'objective necessity' the dominant firm ought to show it had no alternative way to act. This will not be easy to prove, as alternatives courses of action will often be imaginable.[758] The standard will be easily satisfied, however, if the lack of alternatives follows clearly

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[755] *TeliaSonera, supra* note 703, para 76. Although the ECJ refers to *Michelin I* as a precedent, that ruling appears to refer to the assessment of the abuse as a whole rather than the assessment of a justification as such. See Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 73.

[756] Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 150.

[757] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission* [2009] ECR I-9291, para 94.

[758] See e.g. Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, upholding the General Court ruling in Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477. Although this case concerned a highly regulated (wholesale) market, Deutsche Telekom was still in the position to avoid the margin squeeze under review, for instance by raising the relevant downstream price.

from the available evidence – for instance that the dominant firm's conduct was prescribed by law. Under these circumstances the undertaking's actions should be considered to be legitimate.[759]

A plea based on competition on the merits will often be less straightforward and will require an intricate balancing test. In the refusal to deal *CBEM* case the ECJ mentioned the possibility to invoke 'technical [and] commercial requirements' relating to the nature of the market on which the dominant position was held.[760] The ECJ subsumed this plea under the heading of 'objective necessity'.[761] However, substantively it appears to reflect the notion that a dominant firm can justify its conduct not because it has no alternatives, but because it has sound business reasons for its conduct. Such reasoning also appears in *United Brands*, which suggests that a dominant firm has – in principle – a relatively wide margin on what type of activity it engages in to protect its commercial interests.[762] The defendant's main challenge will be to show that its conduct was proportionate to protect its interests.[763] In my view this approach is perfectly reasonable. The starting point of competition law should be that even dominant undertakings may fully take part in the competitive process: despite the 'special responsibility' incumbent upon such undertakings, regulatory intervention should still be the exception rather than the rule.

By way of example, consider an airline company that is dominant on a particular route. An efficient low-cost airline enters the market and introduces very low fares. The dominant firm immediately drops its prices to match those of its competitor – to a level below its costs. It then slashes its costs in a

[759] If the objective necessity refers to compulsion by the State, such conduct is only legitimate if the domestic legislation itself is not contrary to EU competition law, see e.g. Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* ('*CIF*') [2003] I-8055.

[760] Case 311/84 *CBEM v CLT* ('*Télémarketing')* [1985] ECR 3261, para 26.

[761] *Ibid.*, para 27.

[762] Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189.

[763] See e.g. *United Brands* (ibid.), para 190. See also *British Airways, supra* note 686, para 86. For an example outside of Article 102 TFEU, see Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* ('*TACA'*) [2003] ECR II-3298, para 1120. Here, the General Court examined the proportionality of the alleged need invoked by the parties to ensure equality between shippers and to improve administrative efficiency.

comprehensive three-month restructuring of its business, lowering its average total costs to below its new fares.

Assuming a potential exclusionary effect, competition law may view such pricing behaviour (before the completion of the restructuring) as a *prima facie* abuse on the basis of predation.[764] However, the dominant firm's response is exactly the type of conduct that competition law seeks to promote; resulting in lower prices and more choice for consumers. In my view, it's not particularly relevant that a dominant firm has charged below-cost prices for a short period of time – especially if the exclusionary effect remains theoretical and does not lead to an exit of the new entrant. Indeed, the *rationale* of the abuse prohibition is underpinned by the belief that firms with market power are usually inefficient and therefore have high costs. It should be applauded that a price maverick forces a dominant firm to be more efficient. It is fully consistent with the overall purpose of competition law to consider such competition on the merits to be justified. Finally, the example above shows that competition on the merits will normally involve conduct that is strongly associated with efficient behaviour, and could thus also be considered under an efficiency plea. In my view, however, I think that the conduct is so clearly within the realm of pro-competitive behaviour that there is no need to enter into the balancing test that an efficiency plea would require.

3.5.3 Efficiency

EU case law allows the dominant firm to provide evidence that the exclusionary effects arising from an exclusionary pricing practice are counterbalanced, or outweighed, by advantages in terms of efficiency that also benefit the consumer.[765] In practice the standard seems difficult to meet due to the assumption that a *prima facie* abuse of dominance entails harmful welfare effects.[766] The greater the anti-competitive effects of the conduct, the more difficult it will be to meet the requisite standard. By contrast low-impact conduct will meet the standard much more easily.

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[764] *AKZO, supra* note 693, para 146. If a dominant firm charges prices between average variable costs and average total costs, the Commission must be able to show anti-competitive intent.

[765] *British Airways, supra* note 686, para 86; *TeliaSonera*, *supra* note 703, para 76.

[766] This is partly because the very presence of a dominant firm already restricts competition, which is a key *rationale* for the 'special responsibility' incumbent upon such firms. See e.g. Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 57 and *BPB, supra* note 732, para 67.

An underlying requirement is that the evidence invoked by the dominant firm must be sufficiently precise. In *Michelin II,* the ECJ declined to uphold that a loyalty-inducing rebate system was justified, as Michelin's plea was 'too general' and 'insufficient to provide economic reasons to explain specifically the discount rates chosen'.[767] Thus the dominant firm cannot rely on a general reference to pro-competitive effects, but must establish *inter alia* that its quantity rebates are based on 'actual cost savings'.[768]

In *British Airways* and *TeliaSonera* the ECJ held that the exclusionary effect must bear a relation to the stated benefits and may not go beyond what it necessary to attain such advantages.[769] This suggests that the anti-competitive effects must be an unavoidable result of the conduct that has a net pro-competitive effect. In *Post Danmark* the ECJ introduced an additional criterion, namely that the conduct in question may not eliminate effective competition.[770] The introduction of this requirement suggests that the ECJ is bringing the interpretation of objective justification under Article 102 TFEU more into line with Article 101(3) TFEU where this criterion is also one of the necessary elements.[771]

Not only must the beneficial effects be sufficiently great to offset any disadvantageous effects, they must also be sufficiently certain to materialize.[772] In *Post Danmark* the ECJ held that the relevant gains either *must have been*, or *are likely to be*, brought about as a result of the conduct under review.[773] Any pro- and anti-competitive effects 'likely' to result from the conduct under examination must accordingly

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[767] *Michelin II* (General Court), *supra* note 694, para 109. See also *Portugal v Commission*, *supra* note 702, para 56. In the latter case, the Court attached great importance to the context of the case, which involved airports with a natural monopoly for most of their activities. The Court took this high level of dominance into account when it ruled that the rebates under investigation were *prima facie* abusive and could not be justified.

[768] See e.g. the Opinion of AG Mischo in *Portugal v Commission, supra* note 702, para 118. According to the AG, the applicant failed to show that 'the discounts in question represent genuinely and specifically lower costs for the airports' operator'.

[769] *British Airways, supra* note 686, para 86; *TeliaSonera, supra* note 703, para 76.

[770] *Post Danmark, supra* note 697, para 42.

[771] An earlier guidance document by the Commission clearly aims to do the same, see the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 30.

[772] *Ibid*., para 30. The guidance states that the evidence must possess 'a sufficient degree of probability'.

[773] *Post Danmark*, *supra* note 697, para 42.

be balanced out with each other.[774] In my view the case law thus leaves room for a combined analysis of the extent of the effects and the likelihood with which they are thought to arise. This enables a balanced approach which could allow small but certain effects to outweigh effects that may be larger but much more doubtful to arise.

By way of example of an efficiency plea, consider a telecoms company that has a 51% market share in the market for fibre optic connections to household consumers. The firm starts construction only if a sufficient percentage of a group of households opts for such a connection. The telecoms company chooses the construction company performing the works and passes on the construction costs as a lump sum payment to the newly connected households. This may be seen as a form of tying, as the consumer cannot opt for any other construction firm if it chooses the fibre optic connection from the dominant firm. However, the choice to only deal with a single construction company is likely to have overall efficient effects, with benefits trickling down to consumers, as fixed costs are spread out over a larger number of customers.

3.5.4 Public interest

A public interest plea requires a balancing test of various norms that normally cannot be easily quantified.[775] It requires a qualitative assessment of why the practice is beneficial to a stated public interest and why the interest at stake should trump the application of Article 102 TFEU. The *Hilti* and *Tetra Pak II* rulings give little insight in the way the ECJ would weigh potential public interest benefits with anti-competitive effects.[776] However, if the ECJ does engage in a balancing exercise it would logically follow that the slighter the anti-competitive effects of the conduct and the higher the perceived value of the public interest norm, the easier it is to condone the behaviour under examination.

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[774] *Ibid*.

[775] An exception is the *CECED* case, concerning an agreement by producers to phase out less efficient washing machines. In *CECED* the Commission considered not only the benefits for individual consumers (partly due to lower electricity bills), but also attempted to quantify the added value arising from environmental protection. See the Commission decision of 24 January 1999, [2000] OJ L 187/47. It could be questioned, however, to what extent this precedent is still relevant, as the *CECED* approach has not been followed in any recent Commission decisions.

[776] See the rulings in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439 (upheld on appeal in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667) and Case T-83/91 *Tetra Pak International v Commission* (‘*Tetra Pak II*’) [1994] ECR II-755 (upheld on appeal in Case C-333/94 P *Tetra Pak International v Commission* (‘*Tetra Pak II*’) [1996] ECR I-5951).

For instance, imagine that a company that is dominant in the wholesale procurement of furniture. It wishes to purchase wooden chairs only from suppliers that do not make use of child labour. Under the assumption that the refusal does not entail great harm to consumer welfare, while it does serve a key public interest, such conduct should be objectively justified.

4 THE BURDEN AND STANDARD OF PROOF IN A PRIVATE LAW CONTEXT

4.1 Introduction

The analysis above dealt with the burden and standard of proof within the framework of an administrative procedure. However, competition law litigation may also take place between two private parties, which equally raises questions as to the applicable burden and standard of proof. Litigation between private parties based on Article 102 TFEU may involve e.g. an injunction to require a dominant firm to supply a third party or to alter its wholesale prices in order to prevent a margin squeeze. It could also include an action for damages. For instance, a firm may have lost sales if it has procured an input from a dominant undertaking at a price that later transpires to be excessive.

The ECJ has made clear that aggrieved parties are entitled to a damages claim following a violation of the EU competition rules.[777] Such litigation inevitably takes place in the arena of domestic private law courts. National rules of procedure thus primarily determine the burden and standard of proof in a private law action.[778] EU law does require, however, that such domestic rules may not impinge on the

[777] See the 'trinity' of key cases on private enforcement of EU competition law: Case C-344/98 *Masterfoods* [2000] ECR I-11369; Case C-453/99 *Courage v Crehan* [2001] ECR I-6297 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619. Also note that the Commission has proposed a Directive to facilitate private enforcement actions, see COM(2013) 404, proposal of 11 June 2013.

[778] As to the standard of proof, see e.g. recital 5 of the preamble of Regulation 1/2003, which clearly states that the Regulation affects neither 'national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case'.

effet utile of the private enforcement rights bestowed upon litigants.[779] The following paragraphs examine the implications for follow-on and stand-alone private actions respectively.

4.2 Follow-on private action

The applicable burden and standard of proof seem to be relatively straightforward in an action following on a Commission infringement decision. In such a case Article 16 of Regulation 1/2003 provides that a national court judgment cannot run counter to the Commission decision.[780] In principle, national courts are thus expected to follow the Commission's finding of an infringement. A private claimant will be able to satisfy the burden and standard of proof by showing how the Commission decision feeds into the domestic requirements for civil liability.

Of course the defendant has an incentive to show why the infringement decision of Article 102 TFEU should not lead to any civil liability. However, in my view there is little room for an objective justification plea in a follow-on action. The Commission decision (if upheld by the EU courts) presupposes that no objective justification applies; otherwise there would have been no abuse.

An effective line of defense is thus more likely to focus on the non-applicability of the *domestic* conditions for civil liability. For instance, domestic private law may require that the damage incurred was a foreseeable consequence of the defendant's conduct. As the foreseeability criterion is not a constituent part of Article 102 TFEU, a defendant is still free to argue that this condition has not been met. In addition, a Commission decision does not normally include an elaborate quantum of damages analysis suffered by private parties. A claimant thus needs to show the extent of the damages it has suffered,[781] as well as causation between these damages and the dominant firm's wrongful act.

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[779] See the *Masterfoods*, *Courage* and *Manfredi* rulings mentioned above in *supra* note 777. The relevance of the *effet utile* doctrine is also apparent from Case C-126/97 *Eco Swiss* [1999] I-3055, para 37.

[780] See also *Masterfoods, supra* note 777, para 60. Domestic competition law may set specific rules on the effects of decisions by the NCA. For example, in the UK, claimants may rely on a finding of infringement by the OFT. In Germany, claimants may even rely on a finding of infringement by other NCAs in the EU.

[781] In order to help national courts to assess the quantum of damages, the Commission has issued a draft guidance paper named 'Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty', available at http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html.

Still, objective justification is not completely irrelevant for a defendant in a follow-on action. An infringement decision cannot fully be detached from the context in which it was taken. This means that an objective justification might still be available insofar the domestic situation can be differentiated from the context assessed by the Commission. For instance, it may be that a practice had no net beneficial welfare effect at the EU level (comparing the benefits and harm in all relevant Member States), but did have a net pro-competitive effect in one particular Member State. This could happen if the market circumstances in one Member State are markedly different from those in other Member States. In such a case, an efficiency plea may fail during the administrative proceedings at the EU level, but may be able to succeed in the civil courts at the domestic level.

4.3 Stand-alone private action

A more complex situation arises in the context of a 'stand-alone' private law action. There is little lucidity on how national courts would allocate the evidentiary burden on objective justification in such cases. In my view, a flexible approach by the courts will be paramount to ensure effective private enforcement of competition law considering the (often) wide information asymmetries between litigants.[782]

National courts must allocate the burden of proof and the evidentiary burden in such a way that safeguards the *effet utile* of private enforcement. As key evidence will often be in the sole possession of the defendant, domestic courts should use the full extent of available domestic rules in order to require the disclosure of such documents. Flexibility is also warranted in terms of how the evidentiary burden is laid down. Some legal regimes explicitly allow for such flexibility. For example, Article 150 of the Dutch Code on Civil Procedure ('*Wetboek van Burgerlijke Rechtsvordering*') states that although the party invoking a fact must provide the necessary proof, the evidentiary burden may be reversed on grounds of fairness or equity.

[782] A. Komninos*, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing: Oxford and Portland, Oregon 2008), p. 224. Also note that national law bestows certain powers on public authorities to acquire information, whereas the powers of private claimants are usually much more limited.

The success of a defendant's attempt to stave off civil liability is likely to hinge on the type of objective justification that it wishes to invoke. Civil courts may have little trouble to entertain a plea based on objective necessity, where the dominant firm had no alternative way to act. For instance, if the State sets the prices for a product sold by the dominant firm, the pricing behaviour is unlikely be imputable to the dominant firm, in which case its conduct will normally not lead to an award of a damages claim.

It will be more difficult, however, for a defendant to justify a *prima facie* abuse based on efficiency or public interest grounds. A civil court is normally used (or even required) to focus solely on the dispute brought before it – and not enter into an examination of the wider ramifications of the conduct under review. Consequently a court may not be willing or able to take into account whether the conduct has lead to wider efficiency gains or has promoted certain public interest goals.

Another difficulty for a domestic court in applying an objective justification may arise from EU law itself. Article 6 of Regulation 1/2003 unequivocally states that national courts have the competence to apply Article 102 TFEU. This suggests that domestic courts may issue, *inter alia*, a declaration that conduct is objectively justified and hence not an abuse of dominance. But how should this be reconciled with the recent *Tele2 Polska* ruling? In that judgment the ECJ held that 'the Commission alone is empowered to make a finding that there has been no breach of Article 102 TFEU',[783] suggesting that domestic courts are *not* allowed to determine that a *prima facie* abuse is objectively justified.

I submit that this would be an erroneous reading of the case. The *Tele2 Polska* ruling should be read as an account of the relationship between the European Commission and national competition authorities; and *not* between the European Commission and national courts. Indeed, in *Tele2 Polska* the ECJ emphasized that Article 5 of Regulation 1/2003 limits the powers bestowed upon national competition authorities, whereas the Regulation contains no such restriction for domestic courts.[784] Additionally, if domestic courts would be impeded from applying an objective justification in a private law action, this would run counter to the notion that public enforcement is not hierarchically superior to private enforcement, as recently confirmed in *Pfleiderer*.[785]

[783] Case C-375/09 *Tele2 Polska* [2011] ECR I-3055, paras 28 and 29.

[784] *Ibid*., paras 22 and 23.

[785] Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161.

Be that as it may, the uncertainty left by *Tele2 Polska* could impede domestic courts to declare that certain conduct is objectively justified and, as a consequence, not abusive under Article 102 TFEU. Time will tell to what extent civil courts are prepared to explore the outer rims of domestic and EU law by entertaining pleas based on objective justification.

5 CONCLUSION

The burden of proof, the evidentiary burden and the standard of proof are key issues in competition litigation. This chapter examines how these concepts relate to the objective justification plea in cases based on Article 102 TFEU. The Commission and NCAs clearly bear the burden of proof in order to prove an infringement of Article 102 TFEU. However, the evidentiary burden on objective justification will initially be borne by the dominant firm. The evidentiary burden is then able to shift back and forth depending on whether one of the parties has discharged its burden.

It is submitted that the difficulty in meeting the standard of proof will vary according to the circumstances of the case. The lower the impact of the firm's conduct, the easier it will be to meet the required standard for an objective justification plea. In my view, the difficulty in meeting the requisite standard will also depend to a large extent on the type of objective justification that the dominant firm wishes to invoke.

It appears that the standard of proof will be relatively difficult to meet in a plea based on efficiency or public interest. These types of justification require a difficult balancing test that cannot be taken lightly – the loss in competition should be compensated either by clear efficiency gains or benefits to a public interest goal. The standard of proof ought to be easier to meet if it concerns a plea based on legitimate business conduct. This is especially clear if there is firm evidence that the conduct arises from objective necessity, in the sense that the dominant firm had no alternative way to act. This makes perfect sense: competition law should not require firms to do the impossible. In addition, dominant firms have the possibility to show that their conduct should be considered to be legitimate even if it harms their competitors. The defendant's main challenge will be to show that its conduct was proportionate to protect its interests.

Matters become more complex in a private law context. In a stand-alone action, the regular rules on burden and standard of proof apply, even though these may not be interpreted in such a way that would disable the *effet utile* of the private enforcement of EU competition law. In a follow-on action, a dominant firm will in principle no longer be able to invoke an objective justification. Its best chance to escape civil liability is by invoking domestic legal conditions that are not part of the objective justification plea, such as a lack of foreseeability. The only exception is where an objective justification applies in the domestic context as it can be differentiated from the context in which the Commission took its decision.

This chapter has attempted to provide guidance as to the burden and standard of proof vis-à-vis objective justification. Unfortunately no academic work can substitute for the law in action. The real proof is in actual practice, just like the proof of the pudding is in the eating.