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## Evidence in Competition Law Proceedings: A Comparative Perspective

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

Nigel Parr  
Ashurst LLP

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UCL Faculty of Laws, London

AUSTRALIA BELGIUM CHINA FRANCE GERMANY HONG KONG SAR INDONESIA (ASSOCIATED OFFICE)  
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## Overview

- Distinction between burden and standard of proof
- Standard of proof in antitrust cases
- Cogency of evidence
- Standard of review by courts
- Economic analysis and evidence
- Experience in the *Tobacco* case

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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
- *“within the civil standard, the more serious the allegation, the more cogent should be the evidence before the court concludes that the allegation is established on the preponderance of probability” (Napp v OFT)*
- *“the quality and weight of the evidence needs to be stronger than it would need to be if the allegations were less serious” (JJB v OFT)*

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## Standard of review by courts

- Standard of review – degree of scrutiny of primary decision-maker on appeal
- “Full merits” appeal?
  - e.g. appeal of OFT CA98 decision to the CAT
  - full scrutiny of underlying facts
- Or “judicial review” basis?
  - e.g. appeal of merger decision to the CAT; appeal of European Commission decision to the General Court
  - NB: broader JR basis for EU cases compared to CAT proceedings?
  - more limited scope for reviewing underlying facts
- “Deference” of EU General Court? - “forgotten paragraph” 39 of *Tetra Laval*
- 2013 Budget – proposal to “neuter” the CAT by removing full merits appeal? (para 2.237)

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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 dimly discernible, uncertain and difficult to establish...the quality of the evidence...is particularly important”
  - *Rehman* (HL, Lord Hoffman): “Some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian”
  - *Racecourse Association v OFT*: “[The OFT’s] conclusion was founded upon speculation as to what might have happened in a world that never was”

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## Economic analysis/evidence

- Direct evidence (e.g. witness statements, documents) more often the starting point for competition cases
- Economic analysis can provide useful focus and framework within which facts are analysed
- Often crucial to establishing the theory of harm
- Empirical v theoretical
- Not an alternative to fact-finding
- “Judicial threshold”: “... *I have never listened to evidence in any court for an hour and understood so little of it... those who are asking the court to rely on this must be under no illusions that this is all washing over my head...The reason why evidence is adduced is so the court can take it on board and evaluate it. I am terribly sorry, I cannot evaluate this evidence. I do not understand it.*” (Ferris J, Restrictive Practices Court, Premier League case)

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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
  - Expert reports from
    - Ernst & Young
    - RBB
    - Professor Luke Froeb
  - Empirical analysis based on 36 million price data points
  - Empirical evidence showed significant market/brand share shifts and lower price increases during alleged infringement period than afterwards
- Economic analysis was key to understanding OFT’s case and overturning it

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## Experience in the *Tobacco case*

- OFT's case clearly defined for the first time in its defence/skeleton (July 2011) in response to ITL skeleton
- Key elements of infringement based on Prof. Shaffer's earlier "advisory report" containing economic model
- OFT accepted that theory of harm was:
  - a. if the retail price of Gallaher's brand increases, then the retail price of ITL's rival brand must also increase
  - b. if the retail price of ITL's brand increases, then the retail price of Gallaher's rival brand must also increase
  - c. if the retail price of ITL's brand decreases, then the retail price of Gallaher's rival price must also decrease
  - d. if the retail price of Gallaher's brand decreases, then the retail price of ITL's brand must also decrease
- Theory of harm unsupported by any witnesses on cross/re-examination

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## Lessons from the *Tobacco case*

- The facts matter
- Documentary review should not be abstract
- Witness evidence and context is key
- Theory of harm should be clearly articulated

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