# Proving it

## The standard and burden of proof in article 82 cases

*by **David Wood****

Article 82 is the blunderbuss of EU competition law. It has a pervasive influence over the lives of many businesses and their management, and breach of its terms can result in huge fines and far-reaching requirements. It has an uncomfortable interface with intellectual property rights and an uneasy co-existence with equivalent provisions in other jurisdictions – not to mention the problematic and often ignored friction with the EC Merger Regulation.

DG Competition has not provided clear and coherent guidance on many of the issues relating to article 82 but did publish a discussion paper on exclusionary abuse in December 2005 (the Discussion Paper). One of the more problematic aspects of the Discussion Paper is its treatment of the burden of proof in relation to the efficiencies defence.

### The US perspective

The US applies a rule-of-reason analysis in relation to monopolisation claims under section 2 of the Sherman Act, the closest equivalent to article 82. The rule-of-reason analysis under US law provide a useful point of comparison for the application of article 82. In the part of its opinion dealing with the section 2 monopolisation claim against Microsoft, the US Court of Appeals for the District of Columbia Circuit set out the basic steps in a rule-of-reason analysis: (1) the plaintiff must show that the seller's conduct had an anticompetitive effect; (2) if the plaintiff establishes a prima facie case, the seller must offer procompetitive justifications for their conduct; (3) if the seller establishes procompetitive justifications, the burden shifts back to the plaintiff to rebut the claim; and (4) if the plaintiff is unable to rebut the asserted justifications, they must show that the anticompetitive harm of the conduct outweighs the procompetitive benefit.

### Burden of proof in EU antitrust cases

It is well established that when the Commission accuses undertakings of infringing Community competition rules, it bears the burden of proving the infringement. The standard of proof is, on the whole, reasonable likelihood and the means of proof include direct evidence as well as circumstantial evidence and even rebuttable presumptions (such as those for predatory pricing). There are degrees of reasonable likelihood, so the less plausible that something will come to pass, the greater the burden of showing a reasonable likelihood that it will in fact do so.

Article 2 of Regulation 1/2003 provides that in any national or Community proceedings for the application of articles 81 and 82 of the EC treaty: (1) the burden of proving an infringement of article 81(1) or article 82 rests on the party or the authority alleging the infringement; and (2) the burden of proving that the conditions of article 81(3) are fulfilled rests on the undertaking claiming the benefit of that provision.

The precise impact of this is surprisingly unclear. It is arguable that if the undertaking establishes a prima facie case that article 81(3) applies, it is up to the Commission or the relevant national competition authority to investigate the facts further. If that investigation does not produce a clear result, the matter should be decided in favour of the undertaking. This view is strengthened by the risk of (quasi-criminal) administrative fines in respect of arrangements to which article 81(1) but not 81(3) applies – and the possibility that this gives rise to a legal presumption of innocence. On the other hand, if article 81(3) is a *defence* to an infringement of article 81(1), then it would seem to follow that there is a more substantial burden of proof on the undertaking. This would be even more likely where the breach of article 81(1) is clear-cut or admitted.

A twist to this is that there is no need to study efficiencies under article 81(3) if the underlying arrangement is not restrictive of competition in the first place. Although this may seem obvious, it has recently been confirmed in the *O2/T-Mobile* case by the European Court of First Instance.

In the *O2* judgment, the CFI dismissed once again the applicability of the rule-of-reason test under EC competition law. The CFI also clearly set out the economic test for the appraisal of the anticompetitive effects of agreements. The counterfactual methodology is the one to apply and consists in comparing the degree of market competition in the future both with and in the absence of the agreement.

Such a finding has clear implications in terms of the conditions that can be applied to an exemption as compared to the freedom of commercial action implied by a finding that the arrangement does not restrict competition in the first place. It may also, as discussed below, have implications for the application of article 82.

This type of methodology is also applied in the field of horizontal mergers where the burden of proof has also come under judicial review. In *GE/Honeywell*, the CFI overturned one of the grounds on which the Commission decided to prohibit the proposed merger because the Commission had failed to prove that a merged entity would not only have the ability to harm competition, but that it would actually act anticompetitively because it had the appropriate incentives so to do. The CFI expressly stated that the Commission had made an error of law in failing to take into account the deterrent effect that article 82 might have had on the merged entity.

In another merger case – *Tetra/Sidel* – the ECJ implicitly endorsed the CFI's requirement that the Commission provide "convincing evidence" in cases concerning allegations of conglomerate effects, with two apparent consequences:

- to shift the burden of proof from the applicant, who must show that the Commission has committed a manifest error, to the Commission, which must show "convincing evidence" of anticompetitive effects; and

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- to raise the standard of proof that the Commission must satisfy when prohibiting a merger on grounds of conglomerate effects by eroding the Commission's margin of discretion.

This balance in applying the burden of proof has been described by president of the CFI, Bo Vesterdorf, as follows:

> "The Commission, under judicial control of the Courts, would have to decide that it was satisfied at a high degree whether the concentration would be likely to result in significant anticompetitive effects and would have to prove that its conclusion was based on a body of solid, cogent and convincing evidence and not vitiated by any errors of fact, law or manifest errors of appreciation… [The standard required] would appear to be something more than a pure balance of probabilities standard, but most certainly something less than a criminal standard."

In relation to mergers, according to the Commission's horizontal merger guidelines, the Commission will not prohibit a concentration if "the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act procompetitively for the benefits of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have."

For the Commission to take account of efficiency claims, the efficiencies have to (1) benefit consumers; (2) be merger-specific; and (3) be verifiable. The burden of demonstrating this is on the parties asserting the efficiencies and they must present sufficient evidence to show that the likely effect of the efficiencies will be procompetitive.

Thus, it seems reasonably clear that in both article 81 and in EU merger cases there should be a clear counterfactual analysis carried out to determine what the competitive situation would be in the absence of the agreement. The burden of doing this falls on the party asserting the (significant) anticompetitive effects and needs to take into account not only negative effects, but also positive ones. The standard of proof is reasonable likelihood, which is higher than balance of probabilities but below beyond reasonable doubt.

Once that has been done, the burden of proving that the agreement or arrangement is saved by "efficiencies" falls on the party asserting those efficiencies.

## Burden of proof in article 82 cases

In relation to article 82, the situation is less clear than with article 81 because of the integrated nature of article 82 and, in particular, the absence of any possibility for exemption (as well as the silence of article 2 of Regulation 1/2003 in this respect). It is also arguable that the presence of dominance makes it more difficult to distinguish between competition on the merits and anticompetitive conduct.

In the Discussion Paper (at paras 77 and 79), the Commission suggests that once a likely market-distorting foreclosure effect is established, the burden of proof should shift to the dominant company to prove the existence of efficiencies that outweigh the likely negative effects of the alleged abusive exclusionary conduct on competition.

The Commission has sought to justify this approach on the grounds that article 81 contains an explicit rule of reason in the structure of article 81(1) and 81(3), and that article 82 contains an implicit rule of reason requiring equally an assessment of procompetitive and anticompetitive effects of unilateral conduct. In this framework, the burden of proof for the negative effects (capacity of foreclosure, likelihood of foreclosure on the market) lies with the authority/plaintiff alleging an abuse. However, once the authority has proven likely anticompetitive effects, the dominant firm has the burden of proof of the likely positive effects.

The Commission does not appear to accept the argument that the structure of article 82, having no explicit exemption provision, implies a global integrated assessment of both negative and positive effects of a given conduct of a dominant firm. On the contrary, it considers that any countervailing factor such as objective justifications or efficiencies which render article 82 inapplicable can qualify as a defence, for which the burden of proof normally has to be on the person invoking such defence.

In practice, this means that the dominant firm not only has to prove the existence of efficiencies but also that they are sufficient to outweigh the likely negative effects. Once it has advanced its evidence on positive effects, the authority can only decide that there is an abuse to the extent it can prove that the efficiencies advanced by the defendant are not outweighing or at least neutralising the demonstrated negative effects.

The Commission has put forward three policy reasons for this approach: (1) the person who invokes a fact or defence has the greater means and incentive to prove it; (2) the knowledge about justifications and efficiencies is normally in the hands of the dominant firm, which is therefore best placed to demonstrate their existence and sufficiency; and (3) the proof of the absence of objective justification or of the absence of sufficient countervailing efficiencies would be an impossibly difficult task for an authority or plaintiff.

At the very least, the Commission considers there is an evidentiary burden on the party making a specific assertion in rebuttal. But it also considers that if this evidentiary burden is only an obligation to produce some evidence and not an obligation to produce sufficient plausible evidence to outweigh the demonstrated negative effects, then the administrative procedure remains inefficient. The onus of proof should only shift back to the authority or plaintiff who demonstrated negative effects when the evidence of positive effects is sufficient to outweigh, or at least neutralise, the negative effects under the standard of proof of balance of probabilities.

## Practical applications of this approach

It is no secret that the most important recent case on article 82 is the *Microsoft* decision, and that the need to avoid any position inconsistent with the Commission's approach in that case has been a huge influence over the Commission's application of article 82 in other cases and in the preparation of the Discussion Paper. It is therefore worth reviewing the approach towards efficiencies in the Commission's *Microsoft* decision.

The Commission argued (see paras 712, 729 and 783 of the decision) in response to the justifications and efficiencies put forward by Microsoft that:

- Microsoft's refusal cannot be objectively justified merely by the fact that it constitutes a refusal to license IP;

- it is dubious whether an order to supply in this case would have any negative impact on Microsoft's incentives to innovate; and
- on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft).

In making these findings (and in the intervening paragraphs), the Commission concluded (1) that the mere assertion of an intellectual property right is insufficient to justify a refusal to supply; and (2) the harm to the owner's incentives to innovate must be balanced against the overall benefit to innovation resulting from the compulsory licence.

This approach of the Commission in adopting the incentives balance is a major step forward from the "emergence of a secondary product" test or the essential facilities doctrine. It could be summed up by saying that whenever a compulsory licence is ordered, the decrease in the incentives of the dominant firm to innovate needs to be outweighed by increases in the incentives of rivals to innovate.

Clearly such an analysis needs to include predictable means of determining the terms of the compulsory licence, since this will affect the incentives of all parties concerned. This is absent from the Commission's analysis. Moreover, it is not entirely clear what standard of proof the Commission has applied in the decision but it appears to have been significantly lower than the standard in merger cases and at times also seems to have been lower than the balance of probabilities standard.

For example:

- The Commission sees a "potential to foreclose competition" (see para 842), refers to a "serious risk" of foreclosing competition and takes the view that Microsoft's competitive advantage is "liable to have a harmful effect on the structure of competition" (see para 878).
- The Commission argues that "it cannot be excluded that in the future there will be companies challenging Microsoft's dominant position in the client PC operating system market" (see para 769).
- The Commission bases its conclusion that "it is dubious whether an order to supply in this case would have any negative impact on Microsoft's incentives to innovate" (see para 729) at least in part on the need of Microsoft to react to the additional competition, which would result from a compulsory licence. Thus, all parties including Microsoft would more strongly compete to innovate.
- In relation to the efficiency claims put forward by Microsoft for tying Windows Media Player (WMP) and concluded that the alleged procompetitive effects that arose from tying WMP to Windows were outweighed by the possible anticompetitive effects of so doing. The Commission stated (at para 963) that "Microsoft has failed to supply evidence that tying of WMP is indispensable for the alleged procompetitive effects to come into effect".

On appeal, the CFI broadly followed the Commission's approach and noted (at para 688) that:

> "...although the burden of proof of the existence of the circumstances that constitute an infringement of article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted."

For example, on the facts, the CFI found that Microsoft had not sufficiently established that if it were required to disclose the interoperability information, that would have a significant negative impact on its incentives to innovate.

## Conclusions

Antitrust enforcement in the EU is backward looking. Its main aim is to prohibit past or continuing infringements of the competition rules. It is only forward looking insofar as successful enforcement is intended to have a deterrent effect. Thus, in order to enforce articles 81 and 82, it is necessary to put forward evidence of sufficient probative value that an alleged restriction of competition or instance of abusive behaviour meets all the conditions required by those articles.

The importance of this principle is that, for an infringement finding to be possible, it is necessary to analyse the market and to identify the harm that is taking place. It should also be borne in mind that article 81 and 82 infringement findings are usually accompanied by what is known as a "cease and desist" order. Such a provision requires two things: compliance with any prohibition and that the parties do not engage in any behaviour etc having the same or a similar effect.

The allocation of the burden of proof affects the trade-off between false positives and false negatives. Imposing the burden on the authorities to show that any competitive harm outweighs efficiencies will lead to a greater risk of false negatives and smaller risk of false positives, compared to a system where the burden is on the party subject to investigation to show that any efficiencies outweigh possible competitive harm. On top of this, it is generally accepted that neither the Commission nor the dominant firm should be subject to a burden of proof which is impossible to achieve.

Under the US rule-of-reason test described above, once the defendant puts forward a plausible argument on objective justifications and efficiencies, the burden shifts back to the plaintiff to show either that these justifications are merely pre-textual or that they are outweighed by the anticompetitive effects of the tying arrangement. In contrast, the EU's current approach requires the defendant not only to establish the existence of efficiencies, but to show that they outweigh any anticompetitive harm.

## References


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